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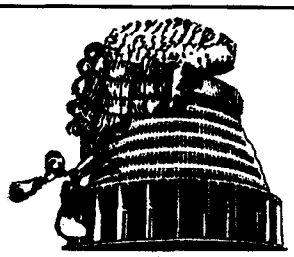


NEW ZEALAND LAW CONFERENCE
MARCH 1993

Change again

There is likely to be change in 1993. To say that is merely to state the obvious. In any event it is not only in New Zealand that the legal profession is faced with the probability of change. Over the last few years there has been considerable change in England and it is inevitable that there will be a ripple effect felt here. In Australia, at the beginning of December, it was announced that the Government of New South Wales had decided to abolish the office of Queen's Counsel. The excuse given was that this would lead to senior practitioners charging smaller fees. This is highly improbable to say the least. After all, the appellation of Queen's Counsel was merely a public acknowledgement of the seniority and (forensic) skill, as well as their knowledge of the law, of some outstanding Barristers.

Since Lord Mackay became Lord Chancellor there has been a remarkable degree of change within the legal profession in England. The question of solicitors having rights of audience in the Higher Courts is, of course, only the most obvious of the issues. In the *Law Society's Gazette* for 25 November 1992 the President of the Law Society, Mark Sheldon, reflected on the changes facing members of the profession in England. What he has to say may not be of immediate, direct concern to the profession in New Zealand, but in the long term it is likely we will have to face the same issues.

Mark Sheldon begins by quoting from the satire on University politics *Microcosmographia Academica* by Francis Cornford published in 1908. What Cornford had to say can be applied to lawyers as much as to academics. The two passages quoted read as follows:

> Any public action which is not customary, either is wrong, or, if it is right, is a dangerous precedent. It follows that nothing should ever be done for the first time .... Nothing is ever done until everyone is convinced that it ought to be done, and has been convinced for so long that it is now time to do something else.

There are those who would say that in New Zealand the legal profession, if anything, has adopted the opposite attitude and has sought to make changes before there was ever any real need to do so just in order to stay ahead of what was expected might be political pressure. The other impetus for change that the profession has suffered over a period of years now is the desire to be more commercial. The effects of that have not always been for the best as was noted by Tony Holland, an English solicitor and former President of the Law Society, in an article republished in the *New Zealand Law Journal* in September at [1992] NZLJ 318. Tony Holland remarked on the fall in income of the legal profession running parallel to the increasing complexity of the law particularly in the area of conveyancing. He then went on to say:

> And yet, at the same time as this complexity has increased the profession has been indulging in insane competition so that now the conveyancing on a £50,000 property in the average provincial town will be done for a fee of probably between £100 and £150 or, if we are really lucky, £200. So when we read that "conveyancing claims" now account for almost half the negligence claims against the Indemnity Fund we know the explanation. We have been the victims of those siren voices that told us that conveyancing was merely a clerical exercise ... if solicitors want to compete to drive the fee down to almost nothing, then so be it. The end result will be an increase in the number of claims on the Indemnity Fund to the point that those who are doing the work properly cannot sustain it. This is the result of market forces. Clearly something has gone seriously wrong.

In his piece in November the present President, Mark Sheldon, lists some of the main areas of likely change which he considers will probably have profound effects on the profession in England over the next few years. Those he lists are economic pressures; quality and standards; civil dispute resolutions; criminal justice; and legal aid. These are all issues which are likely to continue to be at the heart of professional practice in New Zealand for the foreseeable future.

One of the comments he makes about economic pressures is that in England the legal profession continues to grow. This means that the economic pressures are reinforced. Mark Sheldon does not see the economic pressures coming to an end, even when the recession does. He adds somewhat sadly "whenever that may be". He thinks that there will be various forms of what he calls client control over costs as a continuing pressure on the legal profession.

As far as quality and standards of the profession are concerned Mark Sheldon sees these as also being influenced by the economics of competition. In addition he thinks that clients and the Legal Aid Board will

increasingly look to the profession to work to stated standards in order to assess whether solicitors are delivering value for money. He is concerned that the profession itself should determine the standards for solicitors rather than having a multiplicity of standards laid down by outside groups. Related to the question of quality and standards he thinks is the likelihood that more and more solicitors will feel the need to specialise.

The settling of civil disputes outside the Court structure seems now to be an insistent demand. Various forms of alternative dispute resolution have been suggested and Mark Sheldon talks of solicitors being trained as mediators and conciliators. The question of course will still remain as to whether, in fact, mediation and conciliation are really resolutions of disputes or merely forms of pretending to avoid them. In the final analysis whatever forms of dispute resolution are adopted there is no final alternative to a Court Order that can be enforced eventually by sequestration or imprisonment.

As far as criminal justice is concerned Mark Sheldon is of the opinion that the adversarial character of the system is likely to remain basically unaltered. On the other hand he thinks that there will be radical changes in that both prosecution and defence will be required to put their cards on the table. He also thinks that there will be an open and formalised process of plea bargaining. In this respect he expects that the number of cases going to trial might well be substantially reduced. As far as Legal Aid is concerned, he expresses the opinion that the overall long-term implication is that there will be, at least to some degree, financial constraints imposed by the Treasury. This expectation is strengthened by the concerns expressed by the Lord Chancellor and his repeated statement that he is determined to secure an affordable, efficient, and value for money service. In Mark Sheldon's view this is going to mean a radical review of the way that publicly funded legal services are provided in England.

As we enter 1993 it would be unrealistic to pretend that these same areas of concern will not be there to trouble us. The immediate problems of the Fidelity Fund should not make us lose sight of the more long-term fundamental changes that are likely, although not necessarily for the good of society or the profession. Mark Sheldon concluded his remarks with a statement that the New Zealand Law Society and the profession as a whole needs to bear in mind to the effect that we should aim to control the changes that might be inevitable lest they control us.

P J Downey

Books

Barton's Executorship Law and Accounts

H R Halley (ed)

9th edition, Butterworths, Wellington, 1991. ISBN 0 409 7900 52

Reviewed by Linda M Going, Senior Associate, Phillips Fox, Barristers and Solicitors, Wellington

Barton's Executorship Law and Accounts is a useful reference guide for those practising in the area of Estate Administration.

The first edition of *Barton's Executorship Law and Accounts* was published in 1940, the ninth edition was published in 1991. Earlier editions were revised by the late Professor J H Barton of Victoria University of Wellington. The ninth and latest edition has been edited by Mr H R Halley the chief accountant of the Public Trust Office.

The preface states that the book "is intended to be of assistance to practitioners both in accounting and law who are involved in the administration of or accounting for estates and trusts". It is also intended as a text for law and accountancy students.

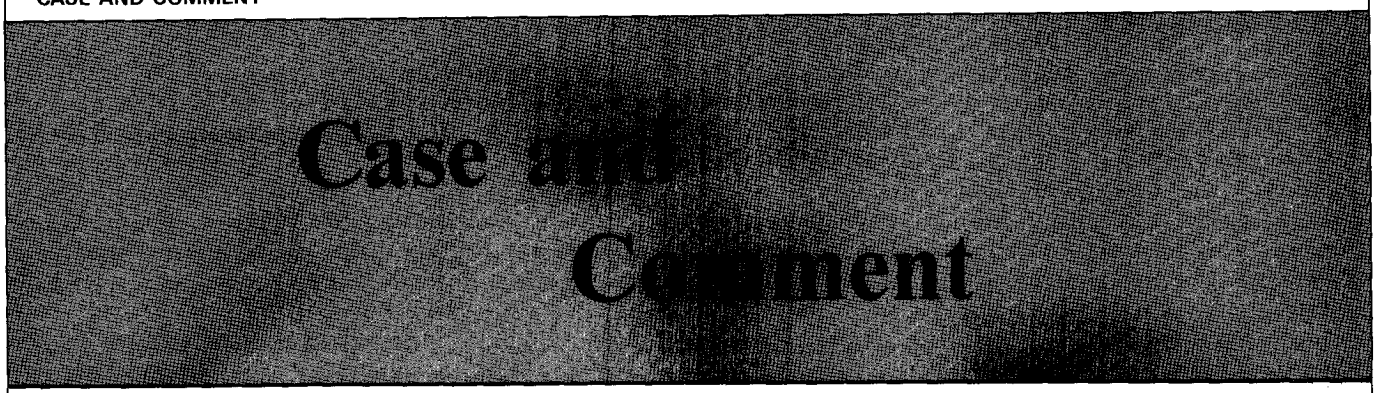
As a result of the changes in the area of trustee investment arising from the Trustee Amendment Act 1988 the chapter on investment of trust funds has been substantially updated. The chapter dealing with the taxation of estates and trusts has also been updated. Additional chapters dealing specifically with GST and resident withholding tax have been added.

For those not familiar with earlier editions it pays to note that this is a work prepared by an accountant and therefore a substantial part of the text deals with the correct preparation of accounts. The use of examples is frequent to show both correct accounting methods and also to illustrate the assessment of estate duty, and the valuation of life interests and successions.

For a practitioner not trained in accounting practices the accounting illustrations may appear overly complex; this is probably because the text illustrates the "double entry" system of keeping accounts as opposed to the "cash system" which is more likely to be used in most practices. The chapters dealing with preparation of estate duty accounts and the assessment and payment of estate duty are invaluable as a reference when dealing with a dutiable estate. The text also covers the administration of intestate estates, and the distribution of estates generally, particularly such issues as the abatement of legacies, interest on legacies and apportionment in the division of capital and income between a life tenant and remaindermen.

The chapters on GST and resident withholding tax are very brief overviews of the legislation as it applies to estates and trusts. There is a more comprehensive chapter on the taxation of estates and trusts which provides useful comments for those unfamiliar with the preparation of estate tax returns.

Useful appendices include Tables A, B C and D of the Second Schedule of the Estate and Gift Duties Act, along with the Trustee Act 1956 and a glossary of terms in common use. □



Company liquidation — Failure to keep proper accounts

Pacific Wools Limited (In Receivership); G C J Crott v Touche Ross & Co and P J Nancarrow [1992] BCL 874.

The outcome of this case will no doubt cause a collective sigh of relief to run through the ranks of professionals who act as company secretaries. Following the introduction of the 1980 amendment to the Companies Act 1955, many resigned as company secretaries, considering the responsibilities and potential liability imposed by ss 151 and 319 to be too onerous.

Section 151 requires accounting records to be kept for every company. The word "kept" is not defined but, among other things, it includes obligations to record and explain the transactions of the company correctly (s 151(1)(a)) and, at any time, enable the financial position of the company to be determined with reasonable accuracy (s 151(1)(b)). Failure to comply with s 151 may mean any officer is liable, on conviction, to a fine of $1,000 or, in the case of a wilful breach, a term of imprisonment not exceeding twelve months (s 151(7)). Section 319 states that if a company is wound up insolvent and has failed to comply with s 151, then the Court may declare one or more of the officers of the company personally liable for the debts of the company.

Pacific Wools Limited ("the company") traded in wool. As it grew, the business became a wool exchange, where buyers and sellers were matched in back-to-back transactions, with contemporaneous settlement. In addition the company bought some stock in advance and from 1986 began trading unsuccessfully in wool futures. When the company was placed in receivership in 1987, it was revealed that the accumulated debt was far higher than either the principal shareholder, Mr Nancarrow, or the company's accountants Touche Ross, had thought. Both the stock and cost of sales figures were higher than shown in the Touche Ross accounts. The disparity in the figures led to the action by the liquidator alleging there had been a failure to keep proper accounting records.

Investigations showed the discrepancy arose because invoices payable or to be paid, although kept by Mr Nancarrow, were not given to Touche Ross for preparation of the annual accounts. Because the cashbook, which showed actual receipts and payments, was given to Touche Ross and because the business was supposed to operate with contemporaneous settlements, there was nothing to alert Touche Ross to the accumulating debt. However, because the company was unable to match sales with some purchases made, invoices for the purchaser were sometimes paid late with interest. In addition sometimes the company was forced to take the wool into stock because there was no on-sale. Mr Nancarrow did not realise the significance of the accumulating debt and the necessity to show this in the accounts and Touche Ross, despite the interest payments appearing in the cash book, did not inquire further. The question therefore became whether these circumstances meant there had been a failure to keep accounting records as required by s 151.

In his judgment Ellis J examined the cases on the section and also quoted extensively from the New Zealand Society of Accountants Guidance Notes on Accounting Records under section 151. He said the essential test was whether the records in question met the general and specific requirements of s 151. He also emphasised a distinction should be made between keeping the records themselves as required by the section, and a failure to take heed of the information contained in them. Ellis J compared the facts of this case with *Re Bennett Keane and White* (1988) 4 NZCLC 64.318 where Eichelbaum J said the volume of small invoices was significant enough to make it difficult, without a prepared list, to tell how much the company owed. Here though Ellis J found it would have taken very little time at any moment to determine the sum of creditors' claims. To the argument by counsel for the liquidator that the term "accounting records" meant there should be a monthly schedule of accounts payable prepared, the Judge said this would have been of no advantage, since the crucial mistake made was that the accounts payable were never added up, not that the invoices kept did not enable the creditors' position to be determined at any time. Ellis J therefore held the requirements of s 151 had been fulfilled.

In the final part of the judgment, Ellis J considered what would have been the consequences if there had been a failure to keep proper accounting records and in particular whether there would have been personal liability under s 319 here. He found any suggested failure did not impede the orderly winding up of the company (subs 319(1)(b)(i)). He did not consider it necessary to make the respondents personally responsible for the debts of the company (subs 319(1)(b)(ii)) since the main reason for the collapse was the large amount of accumulated debt in the company and the losses made in wool futures.

The final question concerned the extent of Mr Nancarrow's drawings. It was argued by the liquidator he should repay them because he was "knowingly a party to the carrying on of the business of the company in a reckless manner". Although Ellis J considered Mr Nancarrow careless in not adding up creditors' invoices, he considered this case could be distinguished from cases

such as *Thompson v Innes* (1985) 2NZCLC 99.463 and *Bennett & Keane* (supra) because here Mr Nancarrow did not have actual knowledge of the company's true position. He was therefore not required to repay the drawings.

The crucial point made in the judgment, which was again emphasised by Ellis J in his summary, was that s 151 does not require accounting records which show the financial position of a company at any time, but only records which enable it to be determined at any time. The fact that the disadvantageous position of the company was not determined earlier was unfortunate, but it was not a breach of s 151.

Susan Pahl
University of Auckland

Unconsciousness and s 23(1)(b) of the Bill of Rights

On the face of it, *Smith v Ministry of Transport* (High Court, Auckland, 92/2134) is a straightforward case relating to the exclusion of evidence obtained from a suspect without informing him of his rights in terms of s 23(1)(b) of the Bill of Rights Act 1990. In this case an appeal was lodged against a conviction under s 58(1)(C) of the Transport Act 1962. The conviction was based on the results of analysis of a blood specimen taken from the appellant by a doctor at the request of the arresting officer. It was argued for the appellant that the failure of the arresting officer to inform him of his s 23(1)(b) rights prior to the taking of the specimen rendered the results of the analysis inadmissible. Anderson J agreed with this submission, finding that because the appellant had not had an opportunity to contact a lawyer the evidence should be excluded and the conviction overturned.

But the case raises deeper issues, discussed obiter by Anderson J, relating to the need to comply with the Bill of Rights Act where a suspect is *unable* to exercise his or her rights. During the course of his judgment, Anderson J rejected a finding in the Court *a quo* that because s 58D(1) permits the taking of a blood specimen without consent and indeed makes it an offence to refuse consent, the irrelevance of consent means that the Bill of Rights Act is of no application. As Anderson J pointed out, there will be many occasions – detention and arrest being prime examples – where a suspect does not consent to an exercise of power by a public authority, and there is no logical reason to conclude as a general principle that on those occasions rights protected by the Bill of Rights are lost. But might a different conclusion be reached in the specific circumstances of s 58D(1) when a suspect is *incapable* of exercising his s 23(1)(b) rights, as when he is unconscious? The problem in such cases is of course that it is impossible to predict when an unconscious suspect will be able to be informed of his rights, and the progressive diminution of alcohol in the suspect's system means that the taking of a specimen cannot be delayed.

This issue arose in *R v Clarke* (High Court, Hamilton T 12/92, unreported), in which the defence challenged the admissibility of an analysis of a blood sample taken from the accused while unconscious. In determining whether s 23(1)(b) was applicable Doogue J referred to a statement by Le Dain J in *R v Thomsen* (1988) 40 CCC (3d) 411 that

> In its use of the word "detention", s 10 of the Charter is directed to a restraint of liberty other than arrest in which a person may reasonably require the assistance of counsel but might be prevented or impeded from retaining and instructing counsel without delay but for the constitutional guarantee.

On this basis Doogue J found that there was no "restraint of liberty" or detention because the accused's unconsciousness meant that he was incapable of exercising his rights, including that of contacting or receiving advice from a lawyer. Because there was no "detention" s 23(1)(b) was not applicable. But is this correct? Had the suspect suddenly regained consciousness as the specimen was about to be taken, could it be denied that his liberty was being restrained in the sense that at that instant the doctor was not treating him but was exercising authority over him in terms of the Transport Act? If one does agree that the suspect would have been "detained" for purposes of s 23(1)(b) had he been conscious, should it have made any difference that he was unconscious? In referring to *Clarke's* case, Anderson J, held that it cannot be that arrest or detention ends or that rights are suspended during sleep or unconsciousness. Indeed the rights to life and security of the person protected by Part II of the Bill of Rights are as important to a person who is awake as one who is not. Anderson J therefore interpreted Doogue J's finding in *Clarke* as meaning that the Bill of Rights must be applied "realistically for the benefit of the subject and not flagged in a merely fanciful way as a perceived technical objection to due process", and said that "the rights protected by s 23 of the Bill of Rights are intended to be ensured in circumstances where there might reasonably be some benefit from according them". In other words, Anderson J's approach was that instead of saying that the suspect has not been detained, the Court should simply say that the evidence obtained in contravention of s 23(1)(b) is admissible, on the basis that the suspect was not disadvantaged by the contravention as he was in any event incapable of exercising the rights he was supposedly denied. But surely a suspect *has* been disadvantaged if a police officer requires a specimen to be taken from him while he is unable to be informed of his rights instead of waiting for him to wake up?

There are, I submit, two arguments which avoid the difficulties discussed above and which could be used to justify the taking of a specimen from an unconscious subject: It could be said that *in the case of unconscious suspects* s 58D(1) is inconsistent with s 23(1)(b) in that the former would be rendered inoperative were police officers to wait before obtaining evidence in terms of that section. Section 23(1)(b) must accordingly be held to be overridden by virtue of s 4 of the Bill of Rights. The other line of reasoning, which Doogue J adopted as an alternative to his finding on whether an unconscious suspect is "detained", is to say that where s 23(1)(b) is infringed by the taking of a sample from an unconscious suspect, that infringement is justified under s 5 of the Bill of Rights, it being a reasonable limitation on rights to take a specimen from an

unconscious suspect even though the suspect cannot be informed of his right to contact a lawyer, given the impossibility of proving statutory intoxication in the absence of a specimen and the importance of the objectives sought to be achieved by the Transport Act. This accords with the finding in *Ministry of Transport v Noort* [1992] 3 NZLR 260 at 274, that the delay in taking a specimen in order to allow a lawyer to be contacted is limited and must be reasonable, and should not be prolonged to an unreasonable length if a lawyer cannot be contacted. Finally, it should be noted that the same s 5 argument could also be used to justify the infringement of the right to refuse to undergo medical treatment (protected by s 11) which is occasioned by the taking of a blood specimen from an unconscious suspect.

Bede Harris
University of Waikato

International Academy of Trial Lawyers' visit to New Zealand

By Stuart Ennor, Barrister, of Auckland

Led by Foster D Arnett, the President of the International Academy of Trial Lawyers, some 56 American and Canadian members of the Academy visited the South Island of New Zealand for four days recently and met with a number of the New Zealand Fellows of the Academy at a dinner on the Saturday evening in the Park Royal, Christchurch.

The visitors were enthusiastic about their visit to New Zealand and seemed particularly pleased at the opportunity of contracting New Zealand Fellows, only one of whom (Mr Justice Thomas) had previously been able to attend an Academy meeting in the United States.

The Academy is limited to some 500 American trial lawyers together with 100 international Fellows from 39 countries including Canada, Australia, the United Kingdom and New Zealand.

The New Zealand Fellows who attended the function were

Sir Thomas Eichelbaum, Chief Justice of New Zealand
Mr Justice McKay of the Court of Appeal
Mr Justice Henry
Mr Justice Thomas
Mr Justice Williams of the High Court,
and the author.

Wallace J and Colin Nicholson QC, the other New Zealand Fellows, could not be present.

The purpose of the Academy, which was chartered in 1954, is to cultivate the science of jurisprudence, promote reforms in the law, facilitate the administration of justice, elevate the standards of integrity, honour and purpose in the legal profession and cherish the spirit of brotherhood among the members.

Matters of particular interest to New Zealand Fellows were:

- The enthusiasm with which we were welcomed by the Academy delegation;

- The almost universal interest in and surprise at our having adopted no fault accident compensation. Many of the Academy members seem to be involved in trial work for personal injury claims;

- The extraordinary expense involved in preparation for major personal injury litigation and the claimed justification for the receipt of substantial contingency fees, having regard to the large outlay that practitioners have to make, especially with plaintiff clients, who can mostly not afford to make substantial up-front payments;

- Of interest also from discussions with three Canadian silks was the fact that in Canada, as readers will know, barristers who remain in firms are eligible for appointments as QCs. I met with two from Toronto, partners in the same firm, each involved in personal injury litigation and with general practitioners also as partners. Most of the American fellows are partners in established legal firms.

Of interest also was the hierarchy of Courts in the United States and the relationship between State and Federal Courts and the selective role of the Supreme Court in the United States, selective in the sense of the Court itself deciding what cases it would wish to hear.

The delegation was very interested in the after-dinner address by Mr Justice Williams (who was admitted as a Fellow of the Academy at this meeting) as he explained the New Zealand political and judicial setup and the organisation of the profession in this country. □

Questioning the proposed questioning regime — does New Zealand need it?

By Gary L Turkington, Barrister of Wellington

The decision of the Court of Appeal in R v Goodwin *has caused some surprise and concern for many members of the profession. That decision however is part of the larger question of police questioning, with issues of principle and practicality. In this article Mr Gary Turkington looks at some of these issues and comments incidentally on the* Goodwin *decision.*

In its recent discussion paper No 21, "Police Questioning", the Law Commission proposed that clearly defined and specific provision be made to allow the police to question suspects after arrest and before charge. Where the police have good cause to suspect that a person has committed an offence they will be able to arrest the person in order to ask questions about the person's alleged involvement in the offence for a defined period. The initial period suggested is for a maximum of four hours, with an extension by a commissioned officer of police to extend that period by four hours, and on application to a District Court Judge, a further and final extension for 24 hours.

A number of safeguards are proposed by the Commission once this occurs:

i A notification of the reason for questioning.
ii A caution on the right to remain silent.
iii A right to consult and instruct a lawyer.
iv A right of access to a friend or relative.
v A right to an interpreter.
vi A right to consular assistance.

Rightly, in my view, the Law Commission:

> considers that effective access to legal advice is an essential component of the proposed questioning regime, to the extent that, in the absence of such access, we would not recommend that provision be made to enable the questioning of suspects after arrest and before charge. (Para 105, p 167 of the Law Commission Paper.)

I have three concerns in this area. First, whether the provision of advice is at all practical in a country with a population spread such as ours. Second, the quality of advice likely to be offered. Third, whether in fact the safeguards are no more than window dressing for carrying out an interrogation where persons seldom seek advice. Ultimately I make a plea for clarity and simplicity in the law.

As to the first. The Commission observes;

> The most obvious way of addressing these concerns is to extend the duty solicitor scheme to provide for legal assistance at police stations on a 24 hour basis. Such a scheme exists in England and Wales . . . . (para 100, p 165 of the Law Commission Paper.)

I do not accept that a scheme which may well work satisfactorily, even in the hills of Neath will work on Friday night in Alfredton Road, Eketahuna or for that matter in many other areas where the sheep to person ratio is more evenly balanced. We simply do not have the resources to mount an effective scheme. In Ikamatua on the West Coast an inquiry at the only pub (that was Ikamatua) a fortnight ago revealed that nobody had the faintest idea where or who they would go to for legal advice and in any event, the local cop, ("Jug Price") if he needed to turn up, usually sorted it out any way.

Even in those areas which attract a solicitor or two is the quality of advice likely to be given at the cutting edge by a practitioner skilled in forensic science?

This then touches on the second concern that I have. The quality of advice raises two issues. Funding and the persons who would man any roster.

The New Zealand experience to date has had its baptism from *Noort and Curran* [1992] 3 NZLR 260, the celebrated breath/alcohol case in which the Court of Appeal suggested that such a roster be developed to give advice under the provisions of the New Zealand Bill of Rights Act 1990. The New Zealand Law Society I know remains committed to the concept but if the funding is to come from the Legal Services Board, it presently has no statutory brief to do so and the scheme wallows, supported currently by those on a voluntary basis; with some only anxious to secure some midnight brief in the hope that the client may pay next week's rent. Moreover even the prospect of at least picking up a legal aid assignment has been dimmed by Registrars refusing

to allocate the assignment to the advisor but to some other "next on the list". I am aware of bleary eyed practitioners wondering why they bothered to get out of bed. Of course it does not prevent a person ringing their own practitioner rather than one on the roster and consultation may be by phone. (A certain officer in charge had great delight in ringing me at exactly 4 am two months ago with a client alongside because as the client explained his wife had refused to talk to him (again), his mother-in-law had just given him some advice too, but none of it seemed to explain how some traffic lights at the corner of Courtenay Place and Tory Street had moved in his direction just as he passed by. And of course none of it was under the Bill of Rights Act so far, no matter how practical some of it may have been.)

The fact of the matter is that funding is a serious issue and the track record to date in the light of *Noort and Curran* abysmal. Can we image a Government using it as an election issue? Is the legal profession not fated at this time with the "gold plated Cadillac" reputation of those who abuse legal aid funds for unmeritorious legal defences (pace the Hon Mr Banks) and the dreadful fallout from the thefts from the public by Renshaw Edwards and others. If that is being pessimistic I hope I at least sound cheerful when I say it.

The quality of advice and those being placed on the roster is another issue again. The old adage of paying peanuts and attracting monkeys is as true in this area as in many others. The duty solicitor scheme I accept has worked tolerably well during normal Court sitting hours. But different factors come into play when volunteers are required for midnight hours. Experience with rosters to date has shown that invariably the young and inexperienced and little known practitioners are involved. I cannot recount a horror story where someone has been wrongfully convicted as a result of advice given. However, if Dr Jacqueline Hodson of the University of Warwick is to be believed the English experience is less than encouraging. Writing in the *Law Society's Gazette* No 31 as recently as 2 September 1992 at p 2 she remarked (after acknowledging the fundamental right to the provision of advice under the Police and Criminal Evidence Act 1984 which encompasses a detention regime for questioning):

> However, the empirical reality is that suspects rarely receive anything which might be termed "advice" and improper questioning continues despite the presence of a defence adviser. Although under the Legal Advice and Assistance Regulations 1989 a representative may attend the police station in place of a solicitor, this does not happen as the result of work being delegated. On the contrary, in most firms of solicitors there is no mechanism to vet cases or to match the competence of the adviser with the complexity or gravity of the case. Instead work is routinely allocated to non-qualified and inexperienced staff.
>
> It is never contemplated that anybody other than the clerk, former police officer or outside agency will attend. We found that less than 25% of suspects in our sample were attended by solicitors, with many of those in their capacity as duty solicitor only where delegation to a qualified representative is permitted. What is lacking is any degree of quality control over the provision of custodial legal advice. With such a division of labour within the office, the ideals of providing legal advice and empowering the suspect are almost impossible to attain.

Obviously, those comments reflect the machinations of the multipartner firm in the UK.

What chance then has our suspect Fred in Eketahuna or the barmaid at Ikamatua? Remember the Court of Appeal in *Noort and Curran* required the police to make reasonable efforts only to secure advice and were not required to wait indefinitely if none could be obtained. A similar escape valve is proposed in the Law Commission Paper under Rule 5(3) at p 226 which provides:

> If the person who wishes to consult a lawyer is unable to do so or if a lawyer who has agreed to attend at a police station to advise the person is unable to do so within a reasonable time (which ordinarily shall not be less than two hours), the police officer need not on that account defer questioning the person any further . . .

The rule goes on to require the person to be recautioned in that event in accordance with Rule 4.

That then brings me to my third concern.

I have been provided with statistics by the New Zealand Law Society drawn from rosters kept in South Auckland, Wanganui and Christchurch. Only approximately seven percent of arrestees availed themselves of the opportunity to take legal advice when advised of their rights under the NZ Bill of Rights Act 1990. Why is this? I don't know and the short statistics provided do not give the answer. What I am concerned about though is that too many persons may feel coerced under the detention regime to provide information despite the best will in the world to provide legal assistance. Just let me refer again to the many reasons why the provision of advice is so often necessary lest some too readily react by saying what difference does it make, provided persons have had their opportunity for legal advice. Para 27, p 17 of the Law Commission Paper recognised the following reasons why the right to remain silent may be important:

- With respect to suspects undergoing police interrogation.
- They may not be fully aware of the circumstances which have led to their being questioned.
- They may be in an emotional and highly suggestible state of mind.
- They may be confused and liable to make mistakes which could be interpreted at trial as deliberate lies.
- They may forget important details which it would have been to their advantage to have remembered.
- They may use loose expressions, unaware of the possible adverse interpretations which could be placed upon them at trial.

- They may have misheard or misunderstood what the police interviewer said.
- They may feel guilty when in fact (or at least in law) they have not committed the offence.
- They may be ignorant of some vital fact which explains away otherwise suspicious circumstances.
- They may wish to protect others.
- They may be hesitant to admit to having done something discreditable but not illegal.
- They may feel forced to protect the true perpetrators of the crime because of the fear of the consequences of being labelled an informant.
- They may be reluctant to speak because they fear the truth will not be believed.
- They may rely on the existence of the right of silence. Advised or already aware, that there is a purported right of silence, an innocent person may deliberately claim the right as, in effect, a political act in response to what he or she may view as an unwarranted intrusion into his or her private (and guilt free) life.

Let there be no misunderstanding, coercive pressures will be present if such a regime is to be introduced. That was readily understood by the Commission. Indeed ". . . any questioning of a person by the police will have coercive aspects; *R v Edwards* (1992) 7 CRNZ 528, citing *Oregon v Mathiason* 429 US 492." : (Para 62, p 152 of the Law Commission Paper).

The Commission proposes that the safeguards be introduced when:

- A person is formally arrested or could lawfully be arrested (ie when the police officer has good cause to suspect)
- A police officer has grounds to suspect that a person has committed an offence and that person
- is at a police station, or
- has reasonable grounds to believe that he or she is being detained. (para 76 p 158 of the Law Commission Paper.)

The Commission also considered in paragraph 92 that a person being questioned by the police in any of the above situations but where no arrest was contemplated should be given a "free to leave" warning to ensure that the co-operation was in fact voluntary.

What is the reality of consent by any person being detained under the suggested regime? Is any formula giving access to legal advice sufficient when there is evidence which at the very least suggests that consent in practice

> encompasses a range of states which include agreement, unwilling acquiescence, submission, and co-operation or compliance ignorant of the possibility of acting differently. (Dixon, Coleman, Bottomley, "Consent and the legal regulation of policing" 17 *Journal of Law and Society* pp 345-62 referred to by the same authors in "PACE in practice" *New Law Journal* November 22 1991, 1586, 1587.)

In the light of the evidence of persons infrequently seeking advice under the New Zealand Bill of Rights Act 1990 is the proposal simply opening the door to the reception of unreliable admissions? Are we still not left with the situation of an interrogator skilfully laying a groundwork of questioning which perhaps may show no reasonable grounds for arrest but because he knows the psychology of the interviewee or other subtle pressures outside the interview situation, (not apparent in the starkness of the transcript of an interview produced in the Court of Appeal) is able to produce the "goods" before the questioning safeguards apply or even regardless?

In the circumstances there may be a case for harking back to the days of yore which prohibited the admission of any such oral evidence in Court unless obtained before some independent judicial authority (of the Continental inquisitorial system).

I acknowledge history is probably against such a step. The Judges Rules were designed to set guidelines; s 20 of the Evidence Act 1908 proscribed circumstances in which despite threats, promises or other forms of inducement a statement may still be admitted if the means would not have obtained an untrue admission of guilt; and the New Zealand Bill of Rights Act 1990 was a legislative hint for the Court to tidy up the loose ends.

The result has been a debacle for Judges and practitioners alike. The *Goodwin* case (CA 460/91, 25 November 1992) has shown just how uncertain the matter now is.

In so far as is relevant s 23 of the New Zealand Bill of Rights Act 1990 provides:

(1) Everyone who is arrested or who is detained under any enactment
. . .
(b) Shall have the right to consult and instruct a lawyer without delay and to be informed of that right;
. . .

In *Goodwin* the majority of the Court of Appeal concluded that although the accused had been detained in fact at a police station where he had made damaging admissions, no right to advice arose under s 23(1)(b) of the New Zealand Bill of Rights Act 1990 because he was not under arrest and no grounds existed in fact for this to occur beforehand. The police had made it clear to the accused this was so. Arrest only arose where such a formal step was contemplated for the purpose of bringing a charge under statute (Richardson and Gault JJ) or at the very least, included some overt act by the police (Hardie Boys J) or in fact amounted to the person not being free to go provided the police were acting under "legal authority" (Casey J). By detaining him in fact the police were not acting under any legal authority at all so he was not being detained "under any enactment" (s 23(1)) for s 23 rights to apply either, although arguably Rule 3 of the Judges Rules (requiring a caution that anything subsequently said may be used in evidence against the suspect when "in custody") could apply to such a situation. Those fateful words had been included almost as a sidewind in the final form of the Bill when the Justice Department reported that without them, detention in

itself might be seen as conferring legitimacy on detention without arrest. For that reason the assistance of cases under the Canadian Charter of Rights and Freedoms were of limited assistance as they concerned detention without any such qualification. But for the addition of those words at least Casey J thought s 23 rights could have been invoked. Cooke P, in the minority, held that detention was synonymous with arrest and concluded that s 23 rights should have been applied once the accused was not free to go.

The *Evening Post* editorial of Friday 27 November 1992, in my opinion, highlighted responsible public opinion when it remarked "Police and the Courts appear to have extraordinary difficulty with the Bill of Rights in some significant areas" and after discussing *Goodwin* and the point at which rights under the NZ Bill of Rights Act 1990 should be accorded to an accused concludes: "The law, the police and the Courts must be synchronised in letter and approach on this important point."

The danger is that the Commission's proposal is adding just another set of rules to an already confused situation.

If we are to have a point at all at which fundamental rights are to be addressed is it not at the point of detention whether it be under "an enactment" or otherwise. Is that not the point at which in an instant or by degree along a continuum of interrogation, long experience from other jurisdictions has shown that rights ought to be invoked?

Is there some advantage in adopting a single test for detention which the public, the police, lawyers and Judges readily understand will at least involve the right to advice? Surely it should mean that, judged objectively, a person is not free to go. For authority see *Murray v Ministry of Defence* [1988] 2 All ER 521, 526 per Lord Griffiths referred to in *Goodwin*. Cannot the difficulty with *Goodwin* (the die may be cast judicially) be solved by legislative amendment to rid us of those dreadful words, "under any enactment" and perhaps include such a definition. Do we really want a situation which produces a caution under the Judges' rules followed by perhaps an invocation of s 23 (1)(b) rights a little later depending on whether that person is to be arrested? Do we wait for the formula to arrive through the back door when the Court of Appeal considers an argument under s 22 of the New Zealand Bill of Rights Act 1990 which provides that "everyone has the right not to be arbitrarily arrested or detained" but invokes no right to advice under the arrest and detention provisions of s 23. This argument has yet to be considered in *Goodwin* as the appeal is only part heard.

After advice, if a person wishes to volunteer a statement subsequently there is no reason why that cannot be received subject to any change in circumstances from when the advice was first administered. Already experience has shown that under the New Zealand Bill of Rights Act 1990 the right to a lawyer has been given at various stages of an interview by the police as circumstances change. Until *Goodwin* such a message was finding the mark. Moreover, experience has shown that such advice had not produced any delay in the prosecution of serious crime and has in many instances led to confessions as part of a plea bargaining process. That is a view in England; "PACE in Practice", Dixon Coleman and Bottomley, *New Law Journal,* November 29 1991, 1639, at 1640 and is doubtless the view of many experienced trial lawyers in this country.

Once rights are accorded why cannot an interview continue? Why do the police need extra time before bringing an accused to Court if, as proclaimed, every effort is being made to accord rights to legal advice and due process to the affected citizen. Why cannot the interview continue after the Court appearance or at some later date as presently occurs? Or indeed before Court. What evidence is there which demonstrates a compelling requirement to prevent an individual going about his business, that any restriction of freedom is required above existing practice? None, that I am aware.

Surely many of the problems of detention and the holding of a person before and after arrest are solved by the provision of legal advice. The proposed holding regime does not advance the police position one iota if a person chooses not to answer.

What difference does it make to hold someone in custody, to detain them, when they wish to go? The only answer must be the wish to apply coercion.

I have strong doubts that it complies with covenant 9(3) of The International Covenant on Civil and Political Rights which provides:

> Anyone arrested or detained on a criminal charge shall be brought promptly before a Judge of other officer authorised by law to exercise judicial power

which is echoed in s 23(3) of the New Zealand Bill of Rights Act 1990.

As lawyers we have a responsibility and a duty to speak with clarity and simplicity so that citizens are clearly able to know where they stand. □

Political Party Manifestos?

We expect immortal satisfactions from mortal conditions, and lasting and perfect happiness in the midst of universal change. To encourage this expectation, to persuade mankind that the ideal is realisable in this world, after a few preliminary changes in external conditions, is the distinguishing mark of all charlatans, whether in thought or action. In the middle of the eighteenth century Johnson wrote: "We will not endeavour to fix the destiny of kingdoms: it is our business to consider what beings like us may perform". A little later Rousseau wrote: "Man is born free, and is everywhere in chains." Johnson's sober truth kindled no one, Rousseau's seductive lie founded the secular religion which in various forms has dominated Europe since Rousseau's death.

Hugh Kingsmill
The Poisoned Crown (1944)

From *Goodwin* to good law

By Don Mathias, Barrister of Auckland

The case of R v Goodwin *has occasioned considerable comment — see for instance [1992] NZLJ 409. In this article Dr Mathias contends that on careful analysis the decision is not as important in the sense of making new law as it initially appeared. He argues that the case is not in fact authority for detention without arrest. Any such detention would be still unlawful at common law.*

A real possibility of injustice must inspire disgust in any Judge. No Judge could deliberately exercise his or her discretion so as to create the real possibility of a miscarriage of justice. Whether a discretion to exclude relevant evidence is being exercised in a statutory or common law context should make no difference to a Court's intolerance of unfairness.

With those thoughts in mind it is possible to discern in *R v Goodwin* (CA 460/91, 25 November 1992) a surprising level of agreement among the five members of the Court. Broadly, there were two issues: the meaning of "arrest" in s 23 of the New Zealand Bill of Rights Act 1990, and the question of what remedy was appropriate in the event of a breach of that section. It is convenient to consider the latter issue first, and then it will be seen (surprisingly) that the first is of relatively little importance.

Apparent differences

On the issue of remedy Richardson and Hardie Boys JJ applied the approach in *R v Kirifi* [1992] 2 NZLR 8, (1991) 7 CRNZ 427, and by referring to *MOT v Noort, Police v Curran* (1992) 8 CRNZ 114 Cooke P effectively agreed. Casey J did not discuss the (obiter) question of remedy. Gault J, as is explained below, modified the view he had earlier expressed in *R v Butcher* [1992] 2 NZLR 257, (1991) 7 CRNZ 407. How, if at all, do the views on remedy differ? When they are considered against the axioms concerning fairness it becomes clear that there is no practical difference in meaning between the formulations as to remedy.

This is not to deny that there are apparent differences, and that *Kirifi* did *appear* to change the law. The *Kirifi* approach was summarised by Richardson J as "a *prima facie* rule of exclusion to be displaced where it would be fair and right to admit the evidence". By way of contrast which is more apparent than real Gault J said he

> would prefer to avoid fashioning additional remedies as to the admissibility of evidence where rules already exist . . . Merely because the underlying rights long recognised and protected by these rules are affirmed is no justification for adopting a whole new band of rules as to admissibility.

It is respectfully submitted that Gault J is correct, and further that the *Kirifi* approach is, upon analysis, and in effect, the same as that under the pre-existing rules. This is not self-evident until one considers the practicalities of arguing the issue. Generally, it necessarily falls upon the party objecting that admission of the evidence would be unfair to establish a foundation for the objection by pointing to evidence which raises a reasonable possibility that to admit the evidence would be unfair. This applies if the objection is based on breach of the Judges' Rules or on general circumstances of unfairness.

What *Kirifi* says is that a breach of the Bill of Rights will prima facie equate with unfairness. It theoretically saves the defence the task of adducing additional evidence, apart from the breach, to show unfairness, but this seeming advantage disappears as soon as the prosecution puts forward a basis for its case that there is no unfairness. There is then a conflict in the usual sense and the result turns on whether at the end of the voir dire there remains a reasonable possibility of unfairness. In the light of these practical realities, the *Kirifi* rule fails to alter the ultimate position that the prosecution can have the evidence admitted if the reasonable possibility of unfairness can be overcome.

Burden of proof

Another illustration of a shift in the burden of proof having little practical effect arises under s 6(5) of the Misuse of Drugs Act 1975. Here, upon proof that D has possession of more that a certain quantity of drug the burden shifts to D to prove he did not have it for the purpose of dealing.

From a practical point of view, once it is established that he had possession of that quantity of drug, D is certainly faced with the task of giving an explanation to rebut the natural inference of purpose, irrespective of the requirements of s 6(5). The real importance of that subsection is to establish a new standard of proof: the balance of probabilities (*R v Phillips* [1991] 3 NZLR 175). Similarly, the objects of the Bill of Rights under discussion will best be met through the standard of proof — requiring exclusion of any real possibility of unfairness — rather than through rules as to which party has the burden of proof.

Spectrum model

The more serious the breach, the harder will it be to exclude any real possibility of unfairness. This, and the similarity of the common law position to the *Kirifi* rule, can be seen from the spectrum model outlined in "Discretionary exclusion of evidence" [1990] NZLJ 25. According to that model, there is a spectrum of circumstances which can now be described as follows: at

one extreme, misconduct by officials, next the wrongful invocation of obligations to provide evidence, then breaches which are more than merely technical (these three bands of the spectrum are on the "inadmissible" side), then breaches which are merely technical, followed by breaches which for other reasons do not require exclusion of the evidence.

There are two points of this model for present purposes. Firstly, breaches of the kinds on the "inadmissible" side will, since the spectrum reflects precedent, tend to give rise to a "prima facie inadmissible" conclusion, requiring the prosecution to exclude unfairness. Secondly, the further the circumstances of a given case fall from the zone of admissibility, the greater the difficulty of establishing that admission of the evidence would not be unfair.

Although that model pre-dated the Bill of Rights, breaches of the Bill will be able to be placed at appropriate positions. It would be wrong to think that this model introduces more complications. It is simply a conceptual aid which can be applied (in less than a second!) to particular facts. The seriousness of any breach will depend on circumstances such as whether it was deliberate or unintentional. In *Goodwin* Gault J did not accept that a breach of s 23 *necessarily* required extraordinary excusing circumstances, but implied that those would be required where the breach was deliberate.

Possibility of unfairness

What factors are relevant to whether there is a reasonable possibility of unfairness? Identification of these is important because they define the ways in which the parties contest the issue against the background of the standard of proof. Gault J expressed dislike for the Canadian concept of repute of the administration of justice, finding it "nebulous". Richardson J, on the other hand, did not have this problem. It is, after all, only a description of a class of considerations which are more specific, and which are drawn from the judgment of Lamer J in *R v Collins* (1987) 56 CR (3d) 193.

It is fair to say that there was a large measure of agreement among Cooke P, Richardson and Hardie Boys JJ about what considerations might be relevant, and it is unlikely that Gault J was intending that any different result might be reached in a particular case through his own preference for a general balancing of the breached right with competing community rights. Criticism of Gault J's approach would centre on its unhelpful vagueness in this respect, but of course this whole topic was merely obiter and did not require detailed consideration.

To summarise: although the *Kirifi* rule at first glance appears to depart from the traditional approach to this sort of discretionary exclusion of evidence, once the practical exigencies of legal combat are taken into account the basic issue is, as always, whether admitting the evidence would carry a reasonable possibility of unfairness.

Question one of interrelationship

It can now be seen why the first issue in *Goodwin*, the meaning of "arrest" in s 23 of the Bill of Rights, was not as important as it no doubt initially appeared. The whole case, in a general sense, is about the interrelationship between the Bill of Rights and the common law, but because of the way it was argued, the ratio focuses on interpretation of the Bill of Rights.

Richardson J emphasised that common law challenges to admissibility survive the enactment of the Bill. Casey J pointed to the continuing application of the Judges' Rules. Gault J's emphasis on the common law has already been mentioned. Cooke P would have excused the breach here, but for the overbearing cross-examination which was "quite alien to the spirit of past New Zealand jurisprudence". He also noted that the common law recognises wider rights than exist under the Bill, as where, in appropriate circumstances (*R v Webster* [1989] 2 NZLR 129) a suspect who requests a lawyer should be allowed to contact one.

The majority in *Goodwin* decided that a narrow meaning was to be given to "arrest" in s 23. Accordingly, a suspect who reasonably (but wrongly) believed he was under arrest, was not within s 23. Such a person would, nevertheless, continue to have the protection of the common law considerations relating to avoidance of unfairness. The difference is that it will, generally speaking, be easier for the prosecution to exclude the reasonable possibility of unfairness when there is no breach of the statute. That is because of the weight which must be given to the rights protected by the Bill, as is reflected in Cooke P's favouring of a generous interpretation of a Bill of Rights and Gault J's expectation that there will only be rare occasions when there will be any sufficient reason not to exclude incriminating statements made by a person arrested and not properly informed of his or her rights.

The survival of common law rights and the narrowness of the ratio of *Goodwin* mean that the police act unlawfully if they detain a suspect for questioning, and the case is not authority for detention without arrest.

Conclusion

In conclusion, the ostensibly differing formulations of the remedy of exclusion of evidence obtained in breach of the Bill of Rights can, from a practical perspective, be seen to be fundamentally similar. The critical standard against which admissibility is measured is the exclusion of any reasonable possibility that unfairness — in the sense of a miscarriage of justice — would result from the admission of the challenged evidence.

It will be only rarely that the prosecution will be able to satisfy the Court that admission of evidence obtained by breach of the Bill of Rights can be admitted. Examples of such occasions have been identified (for example as listed in Cooke P's judgment): waiver, inconsequentiality, emergency, and triviality of the breach.

Careful assessment of the issue requires elucidation of the meaning of fairness and some assistance has been obtained in this from the Canadian jurisprudence on prevention of disrepute to the administration of justice. Because the Bill of Rights does not require idiosyncratic treatment of the question of remedy, the approach which evolves in relation to breaches of the Bill will also be applicable at common law in relation to instances of alleged unfairness unconnected with the statute. □

War crimes prosecution: An Australian update

By Justice Michael Kirby AC, CMG, President of the Court of Appeal of New South Wales

At the time of sending this article for printing it had been reported in the news media that a report to the Attorney-General on special retrospective war crimes legislation in New Zealand was not recommended. Whichever way the political decision goes the experience in Australia in this area is instructive. In this article Mr Justice Kirby reports on what has so far happened in Australia.

New Australian war crimes legislation

A realisation of the urgency and legitimacy of pursuing the remaining war criminals of the Second World War led to new legislative provisions and fresh prosecutorial initiatives in a number of countries of the Commonwealth of Nations during the 1980s.

The legislative initiatives and consequent prosecutions arose out of inquiries which, in turn, followed pressure upon governments, particularly by groups representing survivors of the Holocaust which engulfed millions of Jews and other persecuted people during the Second World War. In Canada, the legal developments followed the Deschenes report (*Commission of Inquiry on War Criminals,* 1986). In Australia, they followed a report prepared for the Federal Government by Mr Andrew Menzies (*Review of Materials Relating to the Entry of Suspected War Criminals into Australia* (1986)). The purpose of this note is to provide an update on the developments in Australia. After an initial burst of legislative enthusiasm and the prosecution of a number of notable cases, the enthusiasm has waned. This update explains how that position came about.

After the *Menzies Report,* the Australian Federal Parliament enacted the War Crimes Amendment Act 1988 (Cth). That measure came into force in 1989, almost entirely repealing and replacing the War Crimes Act 1945 (Cth). That statute was enacted following the Second World War. It had provided the statutory basis for the participation by Australia, immediately after the War, in war crimes trials affecting Australians and directed, virtually exclusively, at the conduct of Japanese combatants and their collaborators in the Asia/Pacific theatres of the war.

As amended in 1988, the Australian Act contained a new preamble reciting concern which had arisen "that a significant number of persons who committed serious war crimes in Europe during World War II may since have entered Australia and became Australian citizens or residents"; a determination that it was appropriate that such persons should be brought to trial "in the ordinary criminal Courts in Australia"; and the acceptance that:

> [I]t is also essential in the interests of justice that persons so accused be given a fair trial with all the safeguards for accused persons in trials in those Courts, having particular regard to matters such as the gravity of the allegations and the lapse of time since the alleged crimes.

Following the passage of the foregoing amendments to the War Crimes Act, the first prosecution was initiated. It involved Mr Ivan Polyukhovich, an Australian citizen and a resident of South Australia. It was alleged that between 1942 and 1943 he had committed war crimes in the Ukraine, then part of the Soviet Union under German occupation. Mr Polyukhovich was charged on 25 January 1990 with nine offences under the amendment Act. Subsequently, the criminal information was amended and a total of thirteen charges were laid. They alleged the commission of war crimes involving the wilful killing of approximately twenty-five people, some being Jewish and others Ukrainian. Most of the victims came from the village of Serniki in the Ukraine. Others came from a nearby village of Alexandrove. Mr Polyukhovich was also charged with war crimes, alleging that he was knowingly concerned in the wilful killing of approximately 850 people known as "the Jews of Serniki".

Virtually immediately upon receipt of the charges Mr Polyukhovich brought proceedings in the High Court of Australia (the highest Court in Australia) claiming a declaration, binding on the Federal authorities, that the War Crimes Amendment Act 1988 (Cth) was invalid or that specified provisions of the 1945 Act were invalid, as amended. The Chief Justice of Australia (Mason CJ) referred to the Full Court of the High Court of Australia the question whether the Act, as amended, was invalid in its application to the information laid against Mr Polyukhovich.

New war crimes legislation upheld

On 14 August 1991, in a decision of very considerable constitutional importance for Australia beyond the issues of war crimes, the High Court of Australia upheld the constitutional validity of the amended Federal legislation. See *Polyukhovich v The Commonwealth of Australia & Anor* (1990). The majority (Mason

CJ, Deane, Dawson, Gaudron and McHugh JJ) held that, to the extent that the amending legislation operated upon conduct which took place outside Australia and at a time when Australian legislation was not in force as later enacted, making such conduct a criminal offence in Australia at the time it was charged, the law was nonetheless one with *respect to Australia's "external* affairs". Under s 51 (xxix) of the Australian Constitution the Federal Parliament may make laws with respect to "external affairs". The majority held that the fact that the law operated on the past conduct of persons who, at the time of the commission of that conduct had no connection with Australia, did not in any way detract from its character as a law with respect to Australia's "external affairs" at the time it was enacted. Various arguments were rejected by differing combinations of Judges of the Court. Thus, the argument that the amendment usurped the exercise of the judicial power of the Commonwealth was dismissed. So too was the argument that the retrospectivity of its operation rendered the amendment unconstitutional. Nevertheless, the Judges warned that the separation of powers inherent in the Australian Constitution would invalidate a law which inflicted punishment upon specified persons without a judicial trial, because such a law would involve the usurpation by Parliament of the judicial power reserved to the Courts.

In a short note such as this, it is impossible to do justice to the complexity of the arguments and issues raised by Mr Polyukhovich in objection to the legislation under which he was charged. It is sufficient to note that (with Brennan J alone dissenting) the Act, as amended, was held to be valid. Accordingly, the prosecution of Mr Polyukhovich, and later other persons charged, went ahead.

Three prosecutions under the Act

Committal proceedings against Mr Polyukhovich commenced in the Adelaide Magistrates' Court in South Australia on 28 October 1991. The taking of evidence concluded on 20 May 1992. During the hearing, a total of forty-seven witnesses were called by the prosecution to give evidence. Of these, thirty-six came from overseas countries including the Ukraine, Israel, the United States, Canada, Germany, Russia and Czechoslovakia.

Following completion of the evidence, the prosecution further amended a number of its charges. With respect to five charges as laid, the prosecution no longer sought committal because relevant witnesses had been unable to attend. Some of them had died after the commencement of the proceedings. Some were too ill to travel the long distance to Adelaide. In one instance, the sole witness gave evidence significantly inconsistent with the statement which he had previously given to the Federal Director of Public Prosecutions. These charges were dropped.

Upon the remaining charges, on 5 June 1992, the Magistrate in Adelaide committed Mr Polyukhovich to stand trial but only upon two counts. Those counts alleged the killing of a total of six persons. On the remaining charges, except for one, Mr Polyukhovich was discharged. Those charges included the charges alleging his complicity in the murder of the Jews of Serniki. With regard to the remaining charge, the Magistrate made no orders of committal. This was a charge in the alternative to the individual charges on which orders had been made committing the accused to stand his trial.

On 5 July 1992, the Federal Director of Public Prosecutions, as he is entitled to do under his statute, filed an *ex officio* indictment in the Supreme Court of South Australia. Notwithstanding the committal by the Magistrate, the indictment alleged five counts against Mr Polyukhovich and required that he be brought to trial upon those counts. They included the two counts on which he was committed and added counts alleging his complicity in the murder of the Jews of Serniki.

On 27 July 1992, Mr Polyukhovich was arraigned before the Supreme Court of South Australia. He pleaded not guilty to all five counts of the indictment presented against him. However, the conduct of the trial was delayed because Mr Polyukhovich instituted proceedings in the Supreme Court of South Australia to have the indictment quashed and the proceedings permanently stayed as an abuse of process. His application in that regard has been set down for hearing in that Court on 30 November 1992.

The prosecutions and their outcome

Two other persons have been prosecuted under the amended war crimes legislation. Mr Mikolay Berezowski, also a resident of South Australia, was arrested and charged on 5 September 1991 with a war crime alleging that he was knowingly concerned in the wilful killing of approximately 102 Jewish people described as the "Jews of Gnivan". Gnivan is a town in the Ukraine. It was alleged that Mr Berezowski's offences occurred between 1 March 1942 and 31 July 1942. The committal proceedings concerning him commenced in the Adelaide Magistrates' Court on 22 June 1992. They concluded a month later. The Magistrate discharged Mr Berezowski. A total of twenty-five witnesses were called by the prosecution to give evidence. Twenty-two of them came from overseas countries, including the Ukraine and the United Kingdom. It is open to the Director of Public Prosecutions, notwithstanding the order of discharge, to file an *ex officio* indictment requiring that Mr Berezowski be brought to trial. That right has been upheld by the High Court of Australia! However, it does not appear that such an *ex officio* indictment will be laid. The Berezowski case appears to be closed.

The third prosecution in the series involves a Mr Heinrich Wagner, again a resident of South Australia. He was arrested and charged in September 1991. His offences were alleged to have been committed between May and July 1942 and to have involved the wilful killing of approximately 104 Jewish adults and the further wilful killing of approximately 19 Jewish children. The victims came from the village of Izraylovka in the Ukraine. Mr Wagner was further charged with a war crime involving the murder of a Ukrainian construction worker. This was alleged to have occurred near the village of Ustinovka in the Ukraine in 1943.

The committal proceedings concerning Mr Wagner commenced in the Adelaide Magistrates' Court in June 1992. Proceedings have continued over many months. They

have involved the calling of thirty-seven witnesses of whom twenty-seven came from overseas countries including the Ukraine, the United States, the United Kingdom, Germany, Austria, France and Russia. The evidence of one overseas prosecution witness, an historian, was given by way of satellite link between Australia and the United States. The proceedings concerning Mr Wagner are part-heard at the time of this note. Thus, after massive litigation, reaching to the highest Courts, only two persons are presently under active prosecution. One has been arraigned to stand trial. The other is still before the committal inquiry.

The right to fair trial upheld

Australia has no constitutional guarantee of a speedy trial of criminal charges. Nevertheless, the common law provides certain guarantees against delay in the prosecution of alleged criminal offences. The issue of whether the common law stepped into the silences of the constitution and statutes to provide an effective right to speedy trial was considered by the Court of Appeal of New South Wales in *Jago v The District Court of New South Wales & Ors* (1988) 12 NSWLR 558 (CA). By majority (Samuels JA and myself) it was held that there was no common law right to a speedy trial, although there was a common law right to a fair trial. Fairness would itself include consideration of any undue delay in a prosecution. One of the Judges of the Court (McHugh JA), who was later elevated to the High Court of Australia, held that the common law did provide, in Australia, a right to a speedy trial.

The decision in *Jago* went on appeal to the High Court of Australia. That Court in *Jago v The District Court of New South Wales & Ors* (1989) 168 CLR 23 laid down the rule now binding in Australia. Although expressed in terms of New South Wales circumstances, the State from which the appeal came, the principle would appear to apply throughout the Commonwealth. The High Court held that there was no common law right to the speedy trial of a criminal charge separate from the right to a fair trial, which is protected by such remedies as relief against abuse of process.

All of the Justices of the High Court of Australia emphasised the high significance of delay in bringing a criminal charge to trial, in determining whether the trial would, or would not be, fair. The Court reaffirmed the power of the judicial branch of government, in defence of the integrity of its own processes, to provide a permanent stay where a belated prosecution would amount to an abuse of legal process. In short, whilst the executive branch of government, in the form of the Director of Public Prosecutions or otherwise, might, in the name of the Crown, prosecute offenders, the judicial branch reserves to itself the inherent right to stay such prosecutions if they could not take place without relevant unfairness to the person accused. Obviously, long delay, the loss of vital witnesses, lapse of memory and other such considerations pertinent to war crimes prosecutions would be relevant to the determination of a stay application. Clearly, the decision in *Jago* will be at the forefront of the pending application in South Australia to have a permanent stay provided against the prosecution of Mr Polyukhovich in 1992 for offences in which he was allegedly involved fifty years earlier and of which he was not charged for another forty-eight years. In December 1992, the South Australian Supreme Court dismissed the application and ordered the trial to proceed.

The abandonment of further prosecutions

Australia, like Canada and other countries, is going through a period of severe economic difficulty. Pressure is exerted upon governments at every level to cut expenditures deemed inessential. In June 1992, it was publicly announced that the Federal Attorney-General (Mr Michael Duffy) had decided to close down the War Crimes Special Investigation Unit as from 30 June 1992. From that date, approximately twenty of the original fifty staff members of the Unit were transferred to a so-called War Crimes Prosecutions Support Unit. The Federal Director of Public Prosecutions in Australia understands that the responsibility of this smaller unit is to provide the support necessary for the conclusion of the war crimes prosecutions presently being conducted, viz those against Mr Polyukhovich and Mr Wagner. The unit, so diminished, is not to have an investigative role. In accordance with public announcements, the current prosecutions will be concluded but no further prosecutions will be initiated.

This announcement has been the subject of public criticism most especially by, but not confined to, representatives of the Jewish community in Australia. The former Director of the War Crimes Unit, Mr R Greenwood QC, accused the Australian Government of "political hypocrisy" for refusing to grant funds for the continuation of the Unit's inquiries. The President of the Executive Council of Australian Jewry, Mr Leslie Caplan, stated that the Jewish community was distressed by the move not to override the magistrate's decision discharging Mr Mikolay Berezowski and directing that the charges against him proceed to trial. Mr Caplan said that he could not understand why it had been decided to grant "a free pardon" to a man in regard to whom there was, in his opinion, evidence to justify a prosecution. The Government's action was described as "pulling the plug". Mr Greenwood was reported as stating: "I can only think it is because there are no votes in it . . . . A tremendous amount of money and resources is being thrown away. The Government is guilty of waste by not bringing it to a satisfactory conclusion. The decision will upset any civilised human being who believes we should take steps to prevent genocide in the future by understanding the messages of the past". Another Jewish leader in Australia, Mr Isi Leibler, accused the Federal authorities in Australia of "political expediency and moral bankruptcy" in deciding to drop the investigations. Even more controversial was the decision of the Federal Government not to proceed with a fourth war crimes prosecution. It was reported in the media that the Federal Opposition had called for a full explanation as to why this, the largest case in the series, was dropped given the evidence of involvement of the accused "in crimes against humanity

on a huge scale".

Editorial opinion in the Australian media was divided on the issue. The *Sunday Herald-Sun* of 6 September 1992 expressed the view that the decision to abandon the fourth prosecution (of an eighty-year-old Melbourne man alleged to have killed hundreds of Jews in the second World War) "would seem appropriate in the circumstances". It stated that "it would be exceedingly difficult to prosecute a fifty-year-old Australian murder case because of such doubts and limitations – and no less a standard should be applied to war crimes". On the other hand, the *Canberra Times* of 7 September 1992 expressed the opinion:

> [Once] the state put its reputation, locally and internationally, on the line on the matter, it was morally bound to carry it to a conclusion – certainly in cases in which proper grounds for indictment lay.

The *Sydney Morning Herald* of 8 September 1992 expressed the opinion:

> The decision not to pursue further cases does not mean the original decision to prosecute the crimes was wrong. Nor would it be correct to see the decision as forced by lack of success in the prosecutions mounted so far. . . . In the three cases so far brought, the accused (sic) had been dealt with fairly, and no differently from others, under our criminal justice system.

But the director of the Simon Wiesenthal Centre in Jerusalem, Mr Efraim Zuroff was not satisfied. He said:

> Canada was embarrassed into action and Australia was embarrassed before. If that's what it takes . . . it's important enough that every effort be made to change [the Australian Government's] policy. . . . We are appalled by [the] decision. It basically means that the Australian government's efforts to date were simply aimed at alleviating the pressure of public opinion and not to solving the issue which is the presence in Australia of Nazi war criminals.[2].

War crimes and evidence problems

In late August, the US Court of Appeals in Cincinnati gave a fresh twist to the tangled case of John Demjanjuk, the Ukrainian-born auto mechanic who was denaturalized in 1981, and sentenced to death in Israel in 1988 for war crimes. The verdict in Jerusalem, that he was "Ivan the Terrible" – the gas-chamber operator at the Treblinka death camp in Poland during the Second World War – is now under appeal. But there has been growing concern about the evidence leading to Demjanjuk's extradition to Israel in 1986, and the US appellate court, after sifting through 750 pages of documents received from the Department of Justice, has ordered the four US prosecutors in his 1981 denaturalization case to be questioned under oath. The hearings before Federal Judge Thomas Wiseman appointed "special master", will be held in Nashville, Tennessee, on October 15-16, and other officials of the Office for Special Investigations of the Justice Department (OSI) are expected to be called in November.

According to Judge Gilbert Merritt, chief of the Appeals Court panel, the US Department of Justice, prior to the extradition proceedings, had failed to disclose documents suggesting that another Ukrainian, Ivan Marchenko, had, in fact, been "Ivan the Terrible". The "bedrock question" for the court now, he said, was to decide whether the failure of the prosecutors to disclose this potentially exculpatory information constituted prosecutorial misconduct and fraud, misleading the court into ordering Demjanjuk's extradition.

The New York Review
8 October 1992

Despite these editorial comments and local and overseas criticism of the decision, it would appear that the resolve not to proceed with further prosecutions under the amended Australian war crimes legislation is irreversible, at least during the life of the present Australian Government.

Conclusion and a question

In a sense the decision reflects the particular difficulty in a democracy governed by the rule of law of pursuing, so belatedly, such major war crimes prosecutions. Consistently with modern perceptions of procedural fairness, it is incumbent upon such a society itself to provide the best possible legal assistance to those accused. It is necessary to bring witnesses, at very considerable expense, from distant corners of the world. Alternatively, it is necessary to establish expensive telecommunications links. The array of counsel in cases up to the highest Court of the country and in protracted committal and interlocutory proceedings illustrates the special problem of bringing such proceedings to an easy, successful conclusion. In the end, the large unit of staff members, the very small number of identified offenders, the great costs and the apparently limited success convinced the politicians in government in Australia that there were, on balance, more important targets for the scarce resources available to them.

The war crimes saga has not concluded in Australia. Even the legal principles resulting from the prosecutions may be still further elaborated. But a further five years on from the legislative changes, not a single war criminal has been convicted under Australia's amended legislation. Huge public funds have been expended. A large unit of prosecuting lawyers and support staff has been kept very busy. Witnesses have flown a million miles and more. Public attention has gradually eroded.

There are some who will say that the rule of law has been vindicated by these proceedings. Important constitutional decisions have been

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Films Videos and Publications Classification Bill

By Donald Dugdale, of Auckland

In this article Mr Dugdale expresses concern that the Films Videos and Publications Classification Bill presently before Parliament goes too far in the restrictions it imposes. He acknowledges that censorship always raises difficult problems. However, he analyses certain clauses in the Bill and expresses the opinion that the Bill tilts the balance too far towards illiberal repression.

The almost universal reaction to the exploitation of young children for sexual purposes, to sexual violence, to torture and to the depiction of such activities is one of aversion. Coprophilia, bestiality and sexual conduct involving the use of urine or excrement gratify only a minority.

Publicity surrounding the introduction of the Films Videos and Publications Classification Bill might lead casual observers to assume that its provisions were targeted only at the activities mentioned. The first reading debate offered scarcely more than the always unattractive spectacle of politicians vying to

> *Compound for sins they are inclin'd to*
> *By damning those they have no mind to.*

It is important to understand that the Bill is not just about kiddy porn and other esoteric nastinesses and that kiddy porn and the rest are being used to justify the setting in place of a censorship apparatus affecting films, videos, books, sound recordings and other publications that deserves very close scrutiny indeed by those who value freedom of expression.

The new word replacing *obscene* and the later *indecent* is *objectionable.*

> A publication is objectionable if it describes, depicts, expresses or otherwise deals with matters of sex, horror, crime, cruelty or violence in such a manner that the availability of the publication is likely to be injurious to the public good. (Clause 3(1)).

The rest of cl 3 provides guidelines. Under sub-cl 2 promotion or support of the exploitation of children for sexual purposes and the other unattractive behaviour mentioned at the beginning of this note makes a publication objectionable. For cases not falling within sub-cl (2) sub-cl (3) sets out matters to which particular weight must be given and sub-cl (4) matters (literary merit and so on) telling against a classification as objectionable.

The classifying is to be done by a Chief Censor, a Deputy Chief Censor and a Classification Office with an appeal to a Film and Literary Board of Review comprising a President and eight others. There is a further appeal to the High Court on points of law.

Matters of concern include the following:

1 The Indecent Publications Act 1963 requires the Chairman of the Indecent Publications Tribunal to be legally qualified, and two of the four members to have "special qualifications in the field of literature or education". Under the Bill no special qualifications are required of members of the Board of Review.

2 Clause 4 reads as follows:

> Whether publication objectionable a matter of expert judgment — The question whether or not a publication is objectionable is a matter for the expert judgment of the person or body authorised or required, by or pursuant to this Act, to determine it, and evidence as to, or proof of, any of the matters or particulars that the person or body is required to consider in determining that question is not essential to its determination.

This clause is described as an attempt to codify the decision of a Full Court in a case under the Indecent Publications Act *Comptroller of Customs v Gordon & Gotch* [1987] 2 NZLR 80. But the decision of each of the three Judges in that case turned on the expertise required by that statute of the Tribunal members, an expertise no longer required by the present Bill.

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laid down. A principle has been upheld for the future. War criminals are beyond immunity and cannot escape vindicating justice. Others will say that it would have been better to have spent the money on the famine victims in Somalia or perhaps built a hospital in the Ukraine to help the children who are victims of Chernobyl as a more enduring memorial to those who suffered in war crimes. Each reader must decide. □

1 See Director of Public Prosecutions Act 1983 (Cth), s 6(2D) and s 6(2E). See also *Kolalich v Director of Public Prosecutions (NSW)* (1991) 66 ALJR 25 (HC), 27; *R v Duffield & Dellapatrona,* Court of Criminal Appeal (NSW), (unreported, 1 October 1992) where the adverse comment on this practice, as it has developed in Canada, was noted. See editorial "Indictment" (1986) 28 Cr L Q 129, 130.

2 As reported in the *Sydney Morning Herald,* 8 September 1992. See also *Australian/Israel Review,* vol 17, no 17 (8-21 September 1992) p 7.

So we have a situation under the present Bill where a Board of Review made up of persons who may be completely lacking in any relevant professional qualifications is empowered to determine such questions as likely injury to the public good and literary educational or scientific merit unassisted by any evidence whatsoever.

3 The Censor, Chief Censor and members of the Film and Literature Board of Review are to be appointed by the Minister of Internal Affairs acting with the concurrence of the Minister of Women's Affairs and the Minister of Justice. Given the fundamentalist Christian beliefs of which the present Minister of Internal Affairs makes no secret one may welcome the requirement of the concurrence of the Minister of Justice, but what is the Minister of Women's Affairs doing there?

It is true that battlers for women's rights in the 1960s and 1970s pointed out with some justice that many depictions of female bodies treated women as mere sex objects. It is true that this sentiment led to a curious alliance between puritans and feminists. But it all seems rather old hat in an era which saw the coining of the term "toy boy". The contemporary feminist attitude seems to be not to ban the pinup, but to match cheesecake with beefcake. The sentiment is precisely captured by poetess Bub Bridger's avowing "I want a Whetton for Christmas".

The working of the new regime depends on who is appointed to the various key positions and there would be more confidence that we will be spared zealots if the Ministry of Women's Affairs were left out of the appointment process.

4 The problems referred to may be illustrated by reference to cl 3(3)(c) which requires that there be given in the classification processes particular weight to whether a publication "degrades or dehumanises any person". Old-fashioned feminists tended to the sincere belief that depictions of human nudity and sexual intercourse do degrade and dehumanise. The very words of the Bill betray an origin in feminist propaganda. If it is the intention of those who framed the legislation that publication of depictions of nudity and intercourse is to be forbidden in New Zealand it would be more candid to say so. Even if that is not the intention it is plain that the wording of the Bill makes it possible for this result to be brought about by extremist appointees.

5 There are to be Inspectors of Publications with functions almost precisely equivalent to those of the religious police in countries like Saudi Arabia.

6 There will be extreme cases where it will be possible accurately to forecast a classification of the particular publication as objectionable. Except in those cases, because the decisions of the Classification Office and of the Film and Literature Board of Review require a weighing up of various factors defined in the statute in very broad terms there will be no certainty as to how a book or other publication will be classified until it is.

Yet cl 121 makes it an offence to have in one's possession an objectionable publication and (sub-cl 3) it is no defence to such a charge "that the defendant had no knowledge or no reasonable cause to believe that the publication to which the charge relates was objectionable".

So to avoid the risk of committing a criminal offence under this section a New Zealander must burn any book in his or her possession that *might* strike the Classification Office or the Film and Literature Board of Review as objectionable. To hell with that.

Problems of censorship are always difficult. It is important not to exaggerate the possible ill-effects of the new Bill. The writer's clear view however is that the Bill tilts the balance towards illiberal repression in a way that the average New Zealander, were he or even she to study the matter, would resent. □

Books

Family Law Policy in New Zealand

Mark Henaghan and Bill Atkin (eds)
Oxford University Press, Auckland (1992). Price $49.95.

Reviewed by G W Austin, Lecturer in Law, Victoria University of Wellington

The word "policy" in this the title of this impressive collection of essays edited by Henaghan and Atkin might be taken to suggest that New Zealand family law has one. Key messages from this book, however, are that no single policy binds New Zealand family law together and that a vast range of policy influences and *ad hoc* political compromises contribute to its current shape. In subject matter and in the various approaches of the individual authors, Henaghan and Atkin's book reflects this diversity.

Mark Henaghan's two essays, *Legally Defining the Family* (co-authored with Pauline Tapp) and *Legally Rearranging Families* are comprehensive surveys of the relationship between law and families, the latter focusing specifically on child placement problems. They draw upon empirical research, traditional legal reasoning and even a little critical theory. In *Reallocation of Property after Marriage Breakdown* Caroline Bridge presents a detailed

survey of judicial interpretation of the Matrimonial Property Act 1976, together with important suggestions for reform. Analysis of a vast number of cases provides the basis for Bridge's central conclusion – that financial contribution maintained its mesmerising influence on judicial thinking in matrimonial property decisions, despite the 1976 reforms. Unlike matrimonial property law, the inevitable line of cases to be decided under the Child Support Act 1991 has only just begun. Bill Atkin's piece on the new Act, *The Bureaucratization of Personal Responsibility,* addresses the legislation as part of the general issue of financial provision for children, a problem being faced in various ways by many nations. Atkin draws usefully upon ground-breaking work in the United States such as Leonore Weitzman's *The Divorce Revolution* (Free Press, 1985), in his discussion of the various social and political agenda responsible for the shape of New Zealand child support legislation. Of all the essays, Tapp, David Geddes and Nicola Taylor's challenging discussion of domestic violence perhaps highlights most clearly the social, emotional and physical costs of New Zealand's piecemeal approach to family law – arguing that pain and suffering, particularly of children, can be the all too real results of policy enthusiasms and political battles. The book concludes with a timely piece on assisted reproduction and the law by John Caldwell and Ken Daniels. Their analysis not only surveys issues arising from the current law, it also addresses the more general problem of forging legislative solutions to difficult ethical issues.

Mention has not yet been made of the second essay in the collection, *Kua Tutu Te Puehu, Kia Mau: Maori Aspirations and Family Law* by leading anthropologist, Dame Joan Metge and lawyer, Donna Durie-Hall. This is the first sustained analysis of key family law statutes in the light of Maori aspirations concerning family life that has been prepared for general circulation. The chapter compares the obligations of mainstream law with those of tikanga Maori and concludes that Maori people have been seriously disadvantaged by family law in New Zealand. Building upon previous work in the Report of the Royal Commission on Social Policy and in the 1986 report on practices and policies of the Department of Social Welfare, *Puao-Te-Ata-Tu,* the chapter presents a systematic critique of current regulation of marriage, child placement and domestic violence and is crucial reading for all involved in family and welfare law.

It will be apparent that Henaghan and Atkin's book does not adopt a black-letter approach to New Zealand family law. Practitioners are already well served in that respect by Butterworths and Brookers' family law services and by recent texts such as Atkin's *Living Together Without Marriage* (Butterworths 1991). It should not be thought, however, that this new book contains mere academic reveries. In family law, no clear dividing line exists between practice and theory. Some aspects of New Zealand family law are intensely pragmatic, in that the principal aim is to solve specific problems in ways suited to the individual parties. Solutions to individual problems are not, however, achieved in a vacuum. Inevitably, competing polices will affect the solutions that are forged for many of New Zealand family law's clients. Judicial interest in parental rights, for instance, is impacting on ways that Courts deal with individual disputes over matters such as custody and access (eg: *Tozer v Newcomb* [1992] NZFLR 551). There has been a dearth of New Zealand academic writing that has approached family law from a policy perspective and Henaghan and Atkin's collection is particularly welcome.

The summary of the contents of the book indicates that it achieves vast coverage. There is an unfortunate gap, however, in the area of children's rights. Though a number of the essays touch on the area, a sustained piece devoted to the growing jurisprudence on children's rights would have been useful. A recent edition of the *International Journal of Law and the Family* devoted an entire issue to children's rights (1992 vol 6) – reflecting an increasing international concern.

Though many of the essays in this collection achieve comprehensive coverage of the issues at stake, this collection is by no means the last word on family law policy in New Zealand. Henaghan and Atkin have provided an excellent foundation for continued discussions and analysis. □

Statute Law in New Zealand

By J F Burrows

Butterworths of New Zealand Ltd, 1992. ISBN 0-409-78844-9. Price $99 (incl GST)

Reviewed by J G Fogarty, QC

Parliament can enact anything, or can it? It may be assumed that there is no need, let alone any basis, for a systematic study of statute law. That is not so. Statutes emerge from a process. The contents of statutes are constrained by a number of factors. Statutes have structure. They are rational, if not always reasonable depending on one's political point of view.

In 1971 Professor John Ryan introduced a legislation course at Canterbury. Professor John Burrows took it over in 1974 and it has been taught as a subject at that law school since then. This book is the fruit of twenty years experience of teaching the subject, and shows it. In his preface, Professor Burrows says, modestly, the book is intended primarily as a student text but that he has written it with a wider audience in mind, hoping that legal practitioners and others whose business involves working with statutes will find something useful in its pages.

The first two chapters of the book deal with the constitutional character of legislation. Chapter 1 is a very informative factual piece on the early statute laws in New Zealand,

including the Provincial Ordinances and the incorporation into New Zealand law of United Kingdom imperial statutes.

Statutes and fundamental rights

The second chapter deals with the constitutional status of Acts of Parliament. The discussion is orthodox and so brief. There is reference to the controversial view of Sir Robin Cooke expressed in *Taylor & NZ Poultry Board* [1984] 1 NZLR 394, 398 and other cases to the effect that "some common law rights presumably lie so deep that even parliament could not override them". But Professor Burrows cites to the contrary the decision of the New South Wales Court of Appeal in *BLF v Minister Industrial Relations* [1986] 7 NSWLR 372, where the issue was directly and fully argued. Kirby P argues forcefully that it is contrary to democratic principles and dangerous to develop a doctrine of fundamental rights. The judgments of this Court are well worth reading. Professor Burrows also argues that the New Zealand Bill of Rights Act 1990, by providing that rights it declares can be overridden by inconsistent legislation, adds weight to the view that legislation is omnipotent.

Yet the issue will not go away. It is embedded in the role of the Courts. It is accepted that the Courts hold the power to construe statutes restrictively to protect fundamental values. That suggests the Courts have the inherent authority to protect fundamental rights when recognising materials before it as laws. Such authority is not inconsistent with democratic principles which acknowledge the need to protect minority and individual rights. Is there a true distinction between the power to deliberately restrict the effect of a statute by construction, and a power to declare a statute as not to be a law, when both are to protect fundamental rights?

Fortunately because of the constraints on the process and content of legislation it is a practical impossibility, even if it is a theoretical possibility, for a New Zealand parliament to produce statutes grossly inconsistent with fundamental rights. If statute law presents as being manifestly unjust or absurd, it is likely that the Courts will recognise that as one interpretation and find a way to render that view ineffective. "Often judges do surgery to legislation in order to ensure its consistency with basic constitutional assumptions". (Kirby P, supra 405-6)

Included in the second chapter on constitutional questions is a discussion on whether or not anyone can waive the advantage of a right conferred on him or her by Act of Parliament. For example, it may be that a party to contract can waive the right that cancellation of the contract be made known to the contract breaker. It is pieces like this which elevate the book from being merely a student text to a very valuable resource for the practitioner.

The process and its abuse

Part II deals with the preparation and presentation of legislation.

The chapter on the legislative process is perhaps the most controversial in the book. It is well worth reading by anyone who has an interest in good law. *Capital Letter* recently highlighted the following extract from the last report of the Parliamentary Counsel office:

> The average quantity of legislation enacted in the years 1987, 1988 and 1990 was approximately 42% greater than the quantity enacted in the years 1983, 1985 and 1986.

During these years, and not confined to these years, the legislative process and legislative drafting has been under considerable pressure. It has opened the legislative process up to some sustained criticism.

Professor Burrows identifies the sources of legislation as law reform bodies, special committees and commissions, committees of Members of Parliament, and government departments, Cabinet, individual Members of Parliament, individuals and interest groups. He notes that it is impossible to over estimate the role of government departments in the legislation-making process. It is not commonly understood that the bulk of the total legislative output has its source in initiatives from government departments, whatever party is in government.

Professor Burrows usefully explains the process by which priorities are allocated to proposals by the Cabinet Legislation Committee. The power of the Cabinet Legislation Committee is immense and not commonly understood. Ultimately it dictates the work of the legislature. Once a department has been allocated an order of priority the department has a self-interest in keeping its place in that order of priority no matter what deficiencies are shown up in the bill as it goes through the legislative process.

Considerable effort is made to establish checking procedures before a bill is introduced into the House by the Cabinet Legislation Committee's requirements, Parliamentary Counsel, and publications such as the Legislation Advisory Committee's work *Legislative Change*. Unfortunately, this oversight does not ensure that bills will be of appropriate quality. Professor Burrows notes the Legislation Advisory Committee has suggested seven questions should be asked :

1 Does the legislation implement the policy of its proponent?

2 How does the legislation relate to the general body of law?

3 Does the legislation comply with the basic principles of our legal and constitutional system?

4 Is the legislation as understandable or accessible as practicable. Is the expression and content as simple as practicable?

5 Does the legislation have the necessary financial approval?

6 Does the legislation comply with the Treaty of Waitangi and Bill of Rights?

7 Does the legislation comply with relevant international obligations and standards?

(The 1991 edition adds reference to the need to have regard to the Ombudsman and Official Information legislation.)

The LAC also suggests these follow from the critical first question: Is legislation needed in order to implement the policy? If these questions are addressed, most bills will be of an appropriate quality.

The same chapter also has a useful description of the process of

the bill through the House. The most interesting development in this area in recent years has been that substantial changes have been made to bills as a result of submissions to select committees.

All this leads on to an assessment of the parliamentary process. In four meaty pages, Professor Burrows deals with matters of concern. He numbers these as first, abuse of the practice of a government taking urgency, secondly, taking a bill at committee stage part by part rather than clause by clause, thirdly, law reform miscellaneous provisions bills presenting a number of quite unconnected reforms, and fourthly, presenting reforms piecemeal rather than coherently. Professor Burrows then notes that these practices or "lapses" might be excused if there was proper and democratic effective consultation outside the House, particularly at the select committee stage. He notes that sometimes not enough time is allowed for adequate consultation at select committee stage. Sometimes the select committee process has been pre-empted by the government announcing changes to bills from the form that they are in at select committees. Here he refers to the dangerous practice of adding substantial new clauses to a bill at committee after select committee, using supplementary order papers.

Professor Burrows concludes that too many lapses of this kind make us fear for the integrity of our democratic process. He records that the New Zealand Law Society has recently expressed its strong concern at what its President has described as a major deterioration of the legislative process.

Explanatory notes are most important aids to the legislative process. Mr Walter Iles QC, the Chief Parliamentary Counsel, has noted they vary in quality, but are regarded in New Zealand as indispensable. ("Legislative Drafting in New Zealand" (1990) *Statute LR* 16, 23). Unfortunately they are another aspect of the process that can suffer when it is overloaded. I think more attention should be given to them. There ought to be a principle that the Opposition and the public are entitled to be fully informed on the purpose and likely effect of the bill's provisions. This principle could be written into the Standing Orders of the House of Representatives.

It is obvious that a lot of the problems emerged during the massive surge in the quantity of legislation through the House during the last three years of the Labour government. But it would be a mistake to infer from that that it was an abuse by the Labour politicians in government at the time. Rather it is an outcome of the absence of checks and balances sufficiently locked into the legislative process itself. Abuses are inevitable when Cabinet unleashes an enormous bulk of legislation onto the agenda of the House of Representatives, whatever the political hue of government. Some of these lapses have occurred under the present government. The Budget night legislation of 1990 could be used to give examples.

The problem has been exacerbated by the workload of Parliamentary Counsel. In recent years they have not been able always to take control of the drafting of legislation at an early stage. Private law firms and department solicitors can have a client mentality when it comes to drafting bills. They can be more concerned with giving the department the law it wants and less concerned as to its place in the legal system. The New Zealand Law Society Legislation Committee regularly presents submissions against provisions which do violence to basic principles of natural justice and established public law principles of arrest, seizure of property and the like. The Legislation Advisory Committee has a similar experience, often in drafts of bills not before the House. Such failure to address the sort of questions that the Legislation Advisory Committee has set out is frequent but the reasons why are complex. The demands of the client is only part of the reason. Sometimes there appears to be a lack of understanding of basic principles of public law, natural justice and constitutional conventions (outside the Parliamentary Counsel Office).

Blame does not rest with the lawyers concerned. It is a matter of concern that bureaucrats in government departments can sometimes regard the parliamentary process as just another hurdle in which the goal is to get the policy through with the least violence to it, using whatever stratagems are available, and see that as part of their duty of serving the executive. I think this is due to a pervasive absence of a "constitutional" set of values.

Drafting

The Parliamentary Counsel Office follows the "detailed" approach to drafting. Mr Iles describes it in this way:

> Under this approach the Act specifies the application of the law in particular circumstances The purpose of this approach is to avoid uncertainty. The risk in this approach is that the principles of an Act may be buried in a mass of detail. ("Legislative Drafting Practices in New Zealand", op cit, 19.)

The Law Commission was given as one of its tasks to propose ways of making legislation as understandable and accessible as practicable. It is a proponent of a style known as "Plain English". This style is not general as opposed to detail, but is less particular than the detailed approach. There tend to be fewer qualifications and conditions. The obvious is not spelt out at length.

Professor Burrows explores the strengths and weaknesses of both approaches in his chapter on Drafting. He comes down on the side of the Plain English style. He refers to the present approach as an "addiction to detail". His judgment reflects, I think, a common opinion among practising lawyers. But it is not shared by Parliamentary Counsel, nor by at least some parliamentarians.

From my experience some parliamentarians are aware of the nature of the detailed approach. They like it. They see Parliament as passing legislation which provides for everything specifically. They want to be the law makers. They distrust lawyers and include in that distrust the Courts. Their contemporary views reflect history. Detailed drafting grew out of a parliamentary dissatisfaction with the construction of general statutes.

Ironically when detailed drafting produces problems of interpretation, they are usually

resolved by first re-expressing the purport of sections into plain English. When a reader is familiar with a statute it is possible to read a technical provision and "know" in plain English the proposition the draftsman was both setting down, and trying to lock into place. It is the second aspect of the exercise that is often the reason for too much detail.

Interpretation

The bulk of the book is on interpretation. Professor Burrows has written a number of articles on statutory interpretation. It is interesting to see him discuss the subject fully. It is useful to have a recent text. The current editions of Maxwell (1976) and Craies (1971) are now out of date. The discussion of the principles of statutory interpretation runs to about 200 pages. It contains everything that one needs.

As one would expect these days, it is built around the purposive approach. Professor Burrows begins by a general discussion of the purposive approach, the relevance of context and a general discussion as to the meaning of the statutory text. He does not discuss at any length the recent prevalence of statutes containing purpose clauses. Mr Iles regards this new practice as experimental. ("Legislative Drafting Practices in New Zealand", op cit 23.) I would have been interested in a more extended analysis of this practice, discussing whether such clauses are desirable and whether they justify a more robust approach to the provisions of detail.

These days all the talk is about the purpose of statutes and that is entirely right. But I think to some extent modern authorities have lost sight of the advantage of the mischief rule that statutes be construed to cure the mischief which led to their being enacted. As Professor Burrows notes, the mischief rule is in accord with the modern purposive approach. The mischief rule emphasises consideration of the reason for the litigation. Professor Burrows deals with this in his discussion of context and notes "the abstract words of legislation can often take on a new clarity when one discovers the exact situation which the legislators were addressing".

But he appears to confine the utility of the mischief rule to cases where it is relevant to ascertain past problems of narrow concern. Much of the content of legislation is concerned with ever present problems. If the problem as such is studied, the abstract words of legislation often take on a new clarity. Such words often reflect the problem as much as the policy adopted for dealing with it.

A good example of this is the Resource Management Act 1991. Read without an appreciation of the problems of land, water and resource uses in an industrial society, the Act is daunting. Read with an appreciation of the problems, the structure of the statute makes sense. Apparently discursive and conflicting opening principles fall into place, (at least to some extent!).

Appreciation of the problems can also lead to evaluation of the deficiencies of a statute. Too often politicians try to solve problems by redefining them. That cannot be done. The Resource Management Act is another good example. As a bill, it was launched to pursue a simple policy of sustainable resource management. That goal was too simple for the problems thrown up by competing land and other uses. For example, the juxtaposition of land uses require restraints to control effects on neighbours. Much of the delay and anguish that went into the enactment of that statute was due to the government of the day and its advisers being reluctant to accept that the complexities of the problems had to be reflected in the criteria for resolution.

In this sense, Parliament's ability to make law is constrained fundamentally by the problems to which it addresses itself. And by the same token when the reader has mastered the problem, statutes are seen for what they are – predictable outcomes of addressing the problem, and that much easier to understand.

After discussing Interpretation as a General Topic, Professor Burrows has four chapters on specific topics. The topics include the function of schedules, provisos, deeming provisions, definitions, and consolidation statutes. He steps briefly into public law with a discussion on statutes conferring discretions. There is an introductory general discussion of the relationship between Common Law and Statute. There are chapters on time problems, retrospectively, repeal and amendment. Much of the discussion in these specific topics is of little general interest to practitioners. But it is likely to be of use from time to time as a resource for preparation of argument, particularly the discussion of common phrases.

Among these specific topics is a chapter on the common problem of inconsistency. Professor Burrows has given this topic full treatment and the result is a boon for the practitioner.

Bill of Rights

The final part of the book is a chapter on the New Zealand Bill of Rights Act 1990. Again this is a basic discussion for the student, but nonetheless a useful overview of the Act's history and current importance. It is now generally appreciated that the Act is having more effect than its opponents thought it would. When enacted many thought it had been effectively neutralised because it did not give the Courts power to hold invalid legislation which contravened it. But it is assuming a growing importance. Section 6 requires that all statutes be interpreted consistent with the Bill of Rights whenever possible.

Conclusion

As we have come to expect of him, Professor Burrows has produced another authoritative and lucid text. Perhaps it will encourage the North Island law schools to teach a course on legislation. (Otago and Canterbury are the only law schools to offer legislation as a course.) But the text will also be useful for students studying any subject which contains statute law. Most do these days. It would be a particularly useful companion text for all public law subjects. I suspect the text has already found a place in most law firm libraries. I took my review copy as an aid in a recent hearing, thinking I might be ahead of my colleagues, but they all had it with them. □

Remedying New Zealand's Constitution in Crisis: Is MMP part of the answer?

By Mai Chen, LLB (Hons) (Otago), LLM (Harvard), Senior Lecturer in Law, Victoria University of Wellington.

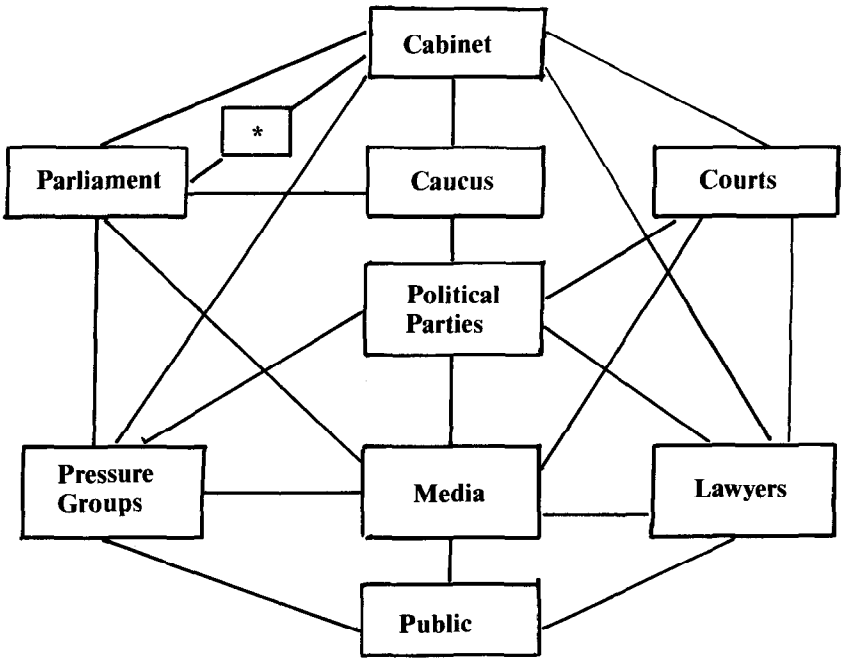
This year, 1993, can be expected to be one of very considerable constitutional significance with the possible adoption of a new electoral system if this is approved in the referendum to be held towards the end of the year. In this article Mai Chen discusses many of the beneficial constitutional consequences that she maintains can be expected to result from the adoption of an MMP system of proportional representation. The full implications may be surprising to many people. Mai Chen anticipates that many of the views she expresses in this article may be disputed and hopes that the article will be the beginning of a spirited discussion of the issues among lawyers. The seriousness of the constitutional change deserves no less.

[This article is published in full despite its length, and the excessive number of footnotes contrary to the normal style of the New Zealand Law Journal. This has been done because of the marked implications of a possible major constitutional change now that the draft legislation has been introduced into Parliament. Future articles will be shorter and in accordance with normal editorial style. — Ed.]

Part I Introduction

This article considers the likely impact of the introduction of the Mixed Member Proportional representation system (MMP) on New Zealand's system of government. This system of electing MPs could be operating in New Zealand by 1996, or earlier if the results of the 1993 binding referendum are as overwhelming as the 1992 indicative referendum on electoral reform. An unequivocal vote for MMP may cause the government voted in under First Past the Post (FPP) in 1993 to call an early election due to a perceived lack of a mandate to govern.

MMP will cause the current distribution of power within New Zealand's constitution, depicted in the diagram, to change.



* Government departments and agencies.

Fig 1: The New Zealand Constitutional System under FPP (based on Professor Sir Geoffrey Palmer's diagram in *New Zealand's Constitution in Crisis: Reforming our Political System* (McIndoe, 1992) p 9.)

At the apex of New Zealand's constitutional system is Cabinet, a part of the executive branch of government. The overlap of membership between the executive and Parliament, all Ministers being Members of Parliament (MPs), and the inadequacy of other constitutional checks, results in what Downey calls "a dangerously centralised concentration of power in the Cabinet." (P J Downey "Constitutional Arrangements" [1990] NZLJ 341-342.) That, together with strong party discipline over MPs through Caucus allows Cabinet to push almost any law through Parliament.[1] Lawyers and pressure groups thus lobby political parties as well as the Cabinet and government departments and agencies to get policies beneficial to them, or their clients, adopted. They may use the media to put pressure on political parties and the executive. They can also use select committees and parliamentary remedies to get their desired result. If they fail, and legislation contrary to their interests is enacted, they can contest the implementation of these policies and laws in the Courts. The public may be the beneficiaries of the actions of pressure groups and lawyers, and the public can made submissions to parliamentary select committees on their own behalf. The public also check executive power by their ability to vote governments out, but the strength of this check depends on the ability of the electoral system to translate the will of the people.

This article assesses whether the changes MMP will bring in the balance of power between the players in the constitution will remedy the crisis some commentators have identified in New Zealand's constitution. (For example, see G Palmer *New Zealand's Constitution in Crisis,* as above.) The crisis arises from a constitutional arrangement which gives Cabinet powers akin to an "elective dictatorship". Too much can be changed too fast by Cabinet with very little public input.[2] In determining whether to vote for MMP or the status quo at the next binding referendum in 1993, and on what form of MMP to favour, we must consider what would best solve New Zealand's constitution in crisis as well as which system is best able to produce a Parliament which is more proportional to party support and more representative of New Zealand society. Electoral reform must be seen as a partial remedy to the wider political crisis to which the current electoral system has contributed. The question is whether there will be a redistribution of power under MMP away from Cabinet to other players in the constitution (including the Governor-General, who does not appear in the diagram as no real power resides there at present) so that the executive will be more accountable and less dictatorial.

This article also determines how these changes to the constitution will affect the ways lawyers operate in the constitutional system.

The changes MMP is likely to bring to the constitution will make it even more imperative for lawyers to understand how decisions are made and the different strategies they may have to adopt to influence policies and decision-makers. Parliamentary remedies are also likely to be more effective under MMP, and new avenues of redress will open up.

The effect of MMP will depend on a number of factors including: the form of MMP adopted (for example, whether party lists are closed or open, the ratio of constituent seats to party seats, whether a minimum vote-threshold is imposed on which parties can benefit from party lists); behavioural factors, and the influence of political traditions in New Zealand.[3] As Taagepera and Shugart state, when a new electoral system is introduced, "[p]arties, candidates, and voters have to learn new strategies while passing through a period of enhanced surprise, disappointment, and frustration." (Rein Taagepera and Matthew Soberg Shugart *Seats and Votes: The Effects and Determinants of Electoral Systems* (Yale University Press, 1989) 218.) Thus, what happens in the short term may differ from effects in the long term.[4] The article is therefore necessarily speculative on some issues. The experiences of other countries who have adopted MMP, like Germany, are not necessarily directly transferrable to New Zealand. (Unlike New Zealand, Germany is a federal state with two chambers in the legislature and a civil law system. Its political traditions are very different to New Zealand's.) In trying to give an overview of the changes MMP may cause to our constitutional system, the article is also limited, in some areas, to raising key issues for further thought, discussion and debate. It does not necessarily resolve them.

Part II MMP's Effect on the Distribution of Power Under the Constitution

MMP will redistribute power away from Cabinet towards Parliament, minor parties and the public. It will also give the Governor-General more opportunities to exercise control over the incumbent government. This will strengthen checks on Cabinet and may bring its "elective dictatorship" to an end. It will also revitalise Parliament, making select committee representations more effective and encouraging the restoration of meaningful debate to the Chamber. Furthermore, if MMP results in greater regulation of political parties in candidate selection, the allocation of broadcasting time and in the seeking of funds for elections, the ability of parties to act as they please in these areas will be curbed by judicial review. Strict party discipline may also be undermined as individual MPs feel freer to speak out. The cost of dissent would be lower under MMP because of the greater chances minor parties have of winning seats.

Although MMP does not preclude one-party government, it may be more difficult to achieve.[5] In New Zealand, no government has secured more than 50 per cent of the vote since 1951.[6] This redistribution of power under MMP will be most tangible in an increased likelihood of coalition governments or minority governments.[7] Under such arrangements, Cabinet may no longer have automatic control of Parliament. Minor parties in the coalition, or opposition parties under a minority government, could always withdraw their support. This may have a checking effect on executive dictatorship akin to a greater separation of powers without actually having to shift Cabinet out of Parliament as some have recommended. (Palmer, *New Zealand's Constitution in Crisis,* p 171 ff.) It would also restore Parliament's power to "unmake governments."

A. Shift of power to Parliament

1 Why is Parliament dysfunctional?
Cabinet has sapped Parliament of much of its real power. The unanimity element of the collective responsibility of Cabinet requires ministers to be unanimous in their public support of Cabinet decisions and to vote accordingly when legislation implementing that decision is put through Parliament.[8] Cabinet then takes its decisions to Caucus, whose purpose includes enforcing tight party discipline in Parliament. Backbenchers concerned with their prospects of re-election will generally be unwilling to support policies they expect to be unpopular. However, once Cabinet has decided on a certain policy, it is likely that they will get a Caucus majority in support of their decision.[9] Select committees can, and do, change provisions in bills; however, they rarely reverse major policies implemented in the legislation.

Labour Party MPs are pledged to vote in Parliament in accordance with Caucus decisions. While the National Party has no such requirement, the difference in practice may be more apparent than real. Consequently, although there is some debate of policy in select committees, much of the real debate goes on behind the closed doors of Cabinet and Caucus, and this detracts from most of the functions that Parliament is supposed to perform — the enactment of legislation, the holding of the executive to account, the making and unmaking of governments, and the provision of a forum for national debate.[10]

2 Restoring Parliament's power to "unmake" governments
The confidence element of collective responsibility requires that Cabinet must collectively enjoy the confidence of the House of Representatives in order to continue in office. If a governing party loses a vote of no-confidence (including a vote it declares to be a matter of confidence or a vote involving supply) then it must resign. Under the FPP system, which usually produces a single party government, a governing party in New Zealand has not lost a vote of confidence since 1928. The closest modern New Zealand government has come to a loss of confidence was in 1984 and that was a doubtful case.[11] Consequently, many now dispute the ability of Parliament to fulfil one of its traditional roles of "unmaking" governments.

Even under a coalition government, there will be incentives for the parties which form it to ensure that the government continues to have the confidence of the House. Each party would be represented on the executive and would be likely to have some of their policies implemented. If one party's support is withdrawn, the other party (parties) could seek a new coalition partner or go back to the public and seek a wider mandate through a new election. The fear of being abandoned by the public at the next election would be a sanction against withdrawal of support as a form of grandstanding by smaller political factions in the coalition. (For example, the experience in New Zealand with Social Credit after the Clyde Dam affair in 1982.) And it would be in the interests of the other coalition parties to expose to the public any inappropriate manipulation by one particular party. However, there may be more circumstances under MMP than under FPP in which parties will find it advantageous to withdraw their support, and undermine Cabinet's enjoyment of the confidence of the House, rather than continuing in coalition government. This may restore Parliament's power to unmake governments, albeit subject to the will of the people.[12]

3 Enacting legislation under Coalition and minority governments
Under a coalition or a minority government, the legislative process will be far more protracted and uncertain. Cabinet will need to consult and negotiate with minor parties whose support is needed to get legislation through. These minor parties will, therefore, have a much greater ability to influence legislation directly than under FPP. There would have to be tradeoffs both in the shape of current bills and of future legislative packages. Minor parties may demand support of private Member's Bills in exchange for supporting government bills. Thus, lawyers and pressure groups may find it beneficial to lobby MPs to sponsor a private Member's Bill favourable to them or their clients, and have a greater chance than they currently do of having it passed. Lawyers may also find the government more amenable to changing bills. As legislation will be more openly seen and accepted as the result of negotiation between differing party interests, modifications of bills, even significant ones, may no longer be viewed as backdowns by the government.

In Australia, another proportional representation voting system is used for electing the Australian Senate and for electing the lower house of Parliament in Tasmania. Single-Transferable Vote System (STV) is also more likely to result in coalition and minority government than FPP. (The STV voting system is explained in Part III of this article.) The experience of coalition governments there is that non-government parties do not make a commitment to a piece of legislation until the committee of the whole House stage, or remain open to persuasion. Consequently, bills are often substantially altered on the floor of the House. If minor parties behave similarly in New Zealand under MMP, then there will be important repercussions. First, the Government would have to invest more time and effort into getting bills through than it currently does. It would have to ensure that a Minister, or Ministers, were present in the chamber at all times,[13] and that something more than a brief and derisory response to select committee recommendations was made. (See Palmer *New Zealand's Constitution in Crisis*, p 117.) It would also be in Ministers' interests "to respond to genuine questions or points made during the introduction debate or in the committee of the whole House" since getting the bill passed may depend on it.[14]

Secondly, if bills are substantially altered late in the process, then it becomes even more imperative to amend the Standing Orders of the House of Representatives to allow bills so altered to be referred back to select committee.[15] Such referral would ensure that the public get a chance to comment on any significant change to the legislation

after a bill has already gone to select committee. It also ensures that the technical quality of the legislation does not suffer as a consequence of any substantial last minute changes.

4 Changing the two-party orientation of parliamentary process

Substantial alterations to bills after select committee is not the only area where Standing Orders need to be changed. The whole parliamentary process needs to be revamped since it is currently organised around a two-party system. If MMP produces a multi-party legislature, a whole series of questions will need to be explored: How should the Speaker of the House be elected? How will the speaking rights be allocated? How will the membership of select committees be comprised?[16] Who will chair them?[17] If a government MP continues to chair all select committees except for the Regulations Review Committee, then how will the various committees be allocated when there is a coalition government? Will it matter that some factions of the coalition government only get to chair the Transport Committee when other factions get to chair the Finance and Expenditure Committee or the Justice and Law Reform Committee? Changes to the standing orders in response to MMP may make it more difficult for a single party to dominate the proceedings of Parliament in coalition and minority governments, and may strengthen the rights of the opposition as did the new standing orders adopted by the German Bundestag in 1980.[18]

5 More women and Maori MPs

(a) Closed Party Lists

The types of rules which MPs will adopt for the running of their House of Representatives under MMP will depend on the MPs themselves. Thus, it is important that they are representative of the community as a whole. Systems like MMP are known to increase significantly the numbers of women parliamentarians.[19] MMP is also likely to ensure a greater number of ethnic minorities and indigenous people are voted into Parliament. (Enid Lakeman *Power to Elect: The Case for Proportional Representation* (Heineman, London, 1982) Chapter 8 on "Women and Blacks," especially p 139.) This is due to the greater success of minor parties under MMP (some of whom may specifically represent women and minority interests[20]) and to the closed party list systems. Closed party lists are compiled by the party and rank candidates. Depending on the number of votes the party attracts, those candidates who are ranked near the top then win seats in Parliament.

As Sir Kenneth Keith stated, "[t]he party will want to attract support from swinging voters by having a strong, balanced list of candidates reflecting society's elements."[21] Under a closed list system, once women and minorities are highly ranked on the party list, they cannot be relegated to a lower rank by voters. This may allow more women and minorities to win seats than under an electorate seat system.[22] It is a benefit of closed party lists which must be taken into account in weighing this option against open party lists.

(b) Open Party Lists

Open party lists may allow voters to determine the ranking of candidates on the party list, and may even allow voters to write the name of some candidates twice on the ballot paper while removing the names of others. This happens in Switzerland, for example. (J Steiner *European Democracies* (Longman, 1986) 97.) This would give parties less control over candidate selection. However, as voters could move women and minorities upwards or downwards in rank depending on their views of such groups, it is much less certain under an open party list whether more women and minorities will get into Parliament. Other disadvantages to open party lists are discussed in Part III of this article.

It is more obvious in a party list situation (open and closed) when women and minorities are not represented in high numbers. Overseas, this has resulted in de facto quotas for women and minorities (Eva Kolinsky "Political Participation and Parliamentary Careers: Women's Quotas in West Germany" (1991) 14 *West European Politics* 56.) and it appears likely to happen in New Zealand. In urging the Labour Party to adopt MMP as official party policy, the Hon Mr R Prebble wrote

> Labour will go further and ensure that its party list fairly and accurately represents New Zealand's ethnic diversity, its gender balances, its regional needs and the requirement of the country for top-calibre people to be in Parliament. (*The New Zealand Herald,* 12 October 1992, p 5 cf the statement of Hon Mr R Prebble in *NZPD* on the Electoral Referendum Bill, 17 December 1991, p 6317 ff.)

As long as women and minorities are ranked highly enough in the list, there will be a critical mass of women and minority MPs who may feel more able to speak out and challenge time honoured traditions and less compelled to accept assimilation into the prevailing culture.

Possessing a womb, or a certain pigment in a person's skin, does not automatically guarantee that these people will behave differently from their white male counterparts, but it is likely that a greater variety of views would be aired in Parliament. In particular, those MPs from women's parties or racial minority parties may be more committed to the passage of laws which are consistent with the Treaty of Waitangi and the rights and freedoms protected under the Bill of Rights Act. They would be more supportive of legislation like the Human Rights Commission Amendment Bill 1992 extending the grounds of non-discrimination to disability among others, and be more sympathetic to lobbying on behalf of human rights and equity concerns.

6 Undermining strict party discipline

Under FPP, expulsion from the party for voicing contrary views usually means political suicide because of the difficulty minor parties have in winning seats in Parliament. Since, under MMP, minor parties have a greater chance of winning seats in Parliament, the stakes are lower for speaking out. MPs can always set up in competition if they are expelled from their party.[23] Discipline is also

harder to enforce in coalition governments which contain MPs from many different parties.[24] It should be noted though, that disobeying the whip and defections have been rare in the German Bundestag. (Tony Burkett "Developments in the West German Bundestag 1969-80" in (1981) 34 *Parliamentary Affairs* 291, 302.)

Any tendency towards excessive and destabilising splintering of parties can be prevented by implementing the recommendation of the Royal Commission on the Electoral System in New Zealand that there should be a threshold of four percent of valid list votes, or success in at least one constituency, before a party is eligible to receive any list seats.[25] A similar threshold (five per cent) in Germany has resulted in concentrating support for major parties and thus reducing the number of parties represented in the Bundestag to three. The share of the vote obtained by the two largest parties at each election has tended to increase, and some of the minor parties have been absorbed by the bigger parties due to splinterings, or decline in membership or financial resources.[26] At the same time, the New Zealand Royal Commission rejected the German precedent of a five percent threshold in favour of a four per cent one to ensure that there was not "too great a obstacle to the development of new and emerging political forces."[27]

7 Increasing the number of MPs

Parliament would be further rejuvenated if the Royal Commission's recommendation to increase the number of MPs from 97 to 120 is implemented. The Royal Commission stated that an increased number of MPs would be

- better able to represent their constituents,
- more representative of the nation as a whole,
- there would be more effective government due to a greater talent pool and more MPs to undertake ministerial functions, and
- there would be more MPs to staff select committees scrutinising legislation and the actions of the executive. (*Report of the Royal Commission* as above, Chapter 4, p 117 ff)

Increasing the number of MPs would further break down party discipline since it will be more difficult for Cabinet to dominate Caucus and for the whips to keep MPs in line. This would return some spontaneity to the floor of the House.

These effects arising from an increase in the number of MPs would occur whether or not the electoral system is reformed,[28] and the unpopularity of increasing the number of MPs with the voting public makes the Royal Commission's insistence on such an increase for MMP to "work," a valuable weapon in the hands of MMP opponents. (See *The Dominion*, 28 October 1992, p 2.) However, MMP would probably provide the best incentive for the public to support an increase in the number of MPs since it would then be part of implementing a radically new electoral system. The public may like MMP more than they dislike the idea of more MPs.

The Royal Commission specifically stated that "[i]f this recommendation [to increase the number of MPs to 120] is not accepted, we do not consider MMP should be introduced in New Zealand as the number of constituency seats would be too low for the system to operate satisfactorily." (*Report of the Royal Commission*, para 2.116, p 43.) However, this article makes an argument for MMP operating satisfactorily even without an increase in the number of MPs. The Royal Commission stressed that determining the necessary number of MPs should be assessed in relation to the various individual and collective functions of MPs and the House of Representatives to represent constituents, to represent the nation as a whole, to provide an effective government, to enact legislation and to scrutinise the actions of the executive. (*Report of the Royal Commission*, para 4.3, p 117.)

(a) Representing constituents

It may be more difficult under MMP for the current number of MPs to represent their constituents if there were to be 50 per cent constituent seats and 50 per cent party list seats, since electorates would have to double in size. However, the ratio could be varied to a 60/40 or 70/30 per cent constituent seat to party list seat breakdown so that electorates would remain small enough for MPs to represent their constituents' concerns well. Although the Royal Commission concluded that it was possible to maintain proportionality while retaining a greater number of constituency seats than list seats, it rejected this option. (*Report of the Royal Commission*, para 2.189, p 66.)

Catt, Harris and Roberts point out that New Zealand's electorates are not particularly large, especially in terms of population, and that electorate MPs under an MMP system would have far fewer constituents than an MP in the United States or Britain, or even in a country with a relatively small population like Australia. (H Catt, P Harris and N Roberts *Voter's Choice: Electoral Change in New Zealand?* (Dunmore Press, 1992) 74.) Constituents, lobby groups and lawyers will also find a new source of help under MMP since they could seek intervention to remedy a problem directly from list MPs if they find their electorate MP unhelpful.[29] The "no poaching" agreement which currently makes neighbouring MPs reluctant to help in such circumstances under FPP is unlikely to operate under MMP. (H Catt, P Harris and N Roberts *Voter's Choice: Electoral Change in New Zealand?* as above, 75.)

(b) MPs more representative of the community

The Royal Commission stated that an enlarged Parliament may provide greater variety and diversity of opinion and occupational background amongst the MPs.

> One of the collective functions of the House is to be representative of the nation in the sense of expressing and reflecting the various characteristics, values and opinions in the community. In terms of their own characteristics of gender, age and social background, New Zealand MPs are untypical and "unrepresentative" of the community as a whole. The supporters of minor political parties are also under-represented. (*Report of the Royal Commission*, para 4.10, p 119.)

As stated earlier MMP will increase the percentage of female and minority MPs among the 97 MPs we currently have but, it may not necessarily increase the diversity of occupational backgrounds amongst MPs. Burkett states that the German Bundestag is evolving into a Parliament of the professional middle class. (Tony Burkett "Developments in the West German Bundestag 1969-80" in (1981) 34 *Parliamentary Affairs* 291, 306.)

> The tendency for the parties to recruit experts to parliament — usually through the Land list . . . — is a longstanding practice and has resulted in an overweighted representation of the Republic's middle classes, the civil servants on leave from both federal and Land bureaucracies, managers, professional men and party functionaries. More than a third of the present membership of the Bundestag holds doctorates. (Burkett, supra at 291.)

If the New Zealand Parliament evolves in a similar way under MMP, increasing the number of MPs may not necessarily redress the problem.

(c) Increasing the effectiveness of government

The Royal Commission concluded that the pressure of work on some Ministers, especially senior Ministers, was too high and left them with insufficient time to concentrate on their major policy-making and executive functions. Many Ministers also carried a number of portfolios which divided their time and energy and they spent time standing in for other Ministers. Increasing the number of MPs would alleviate these time constraints by allowing the appointment of a larger number of Ministers outside Cabinet. However, it will not change the fact that senior Ministers would continue to carry an excessive load. MMP should improve the intellectual ability and skills of MPs so there is more talent in the same size pool from which to select Ministers for the reasons stated below.

(d) Better calibre Ministers

The two-vote system under MMP means that people can vote for a good candidate even though they do not like the candidate's party. Furthermore, party lists allow the protection of valuable MPs who might otherwise be voted out in marginal seats, and meritorious candidates with useful expertise who may lack voter appeal. Party lists may also attract talented candidates who like the ability to concentrate on policy formulation, and the more consensual and less adversarial style of politics MMP will bring. This could translate into better laws and more inquiring scrutiny of executive actions. In Germany under MMP, the intake of younger, professional graduate MPs has increased the demands on the resources for parliamentary research and reference departments since 1969 by almost 200 per cent. As Burkett states, "[o]ne is forced to the conclusion that the present generation of members is the most professional and least docile group of parliamentarians Germany has yet produced." (Burkett, supra, at 304-305.) MMP also allows the preservation of experience and expertise from returning party list MPs which provides some stability and depth in Parliament.

(e) Improving the performance of select committees

The work performed by select committees in reviewing and hearing written and oral submissions from the public and recommending amendments to bills is some of the most productive work Parliament undertakes. However, the select committee system is very ambitious. (There are currently 13 subjective select committees plus the Regulations Review Committee, the Standing Orders Committee and the Privileges Committee. Most comprise seven members, three opposition and four government members.) It has been argued that inadequate numbers of MPs are available to operate the system effectively given that Ministers and office holders do not sit on committees. The result is that MPs often sit on more than one committee, and a very high rate of substitutions goes on as MPs juggle their other commitments, many of which may appear more important to MPs since they gain more press coverage than their committee work.[30]

As Professor Sir Geoffrey Palmer states, "[t]he trouble in the Parliament at present is that the weight of legislative work is so heavy that not enough of the other functions select committees are empowered to perform get done." (*New Zealand's Constitution in Crisis,* p 114.) Select committees spend most of their time scrutinising legislation, but the inquiry work of committees is gradually increasing in importance.[31]

Increasing the number of MPs will allow select committees to give more attention to their other function of monitoring and conducting special investigations into the policy, administration and expenditure of government agencies. These can be very effective tools of executive scrutiny. The enhancement of select committees would undermine the need for a separate Upper House, since one of the major functions of such an institution would be to scrutinise legislation.

Nevertheless, it is arguable that more MPs are not necessary to make MMP "work." Select committees should have less legislation to scrutinise under MMP since governments will have to spend more time negotiating the legislation's content and passage with minor parties. With less time spent on scrutinising legislation, the committees could direct more attention to reviewing the actions of the executive. Secondly, list MPs will be able to spend more time on select committee work since they will not be so heavily burdened with constituency work, and not all of them will be Ministers in Cabinet. More experts will be elected under party lists whose special expertise and technical competence in legislation and policy matters should expedite the scrutiny of bills. Finally, the current trend of using smaller subcommittees of three or four members to undertake inquiries and for examination of department estimates or financial outturns would be encouraged. Operating by subcommittee for scrutinising bills could also be investigated.

8 A revitalised Parliament

The combination of the different power dynamics under coalition and minority governments in passing laws, the greater representativeness and the likelihood of improved

intellectual ability and skills of MPs under MMP, together with an undermining of party discipline, and the more favourable climate for minor parties, may encourage the sort of independence which would restore real and meaningful debate to the floor of the House. (It is the sort of independence of which Edmund Burke spoke when he said "Your representative owes you, not his industry only, but his judgment", A M D Hughes *Edmund Burke Selection* (1921) 65.) MPs may be less willing to accept the regimentation imposed by party caucuses on how they will vote and what they will say and when they will speak. There may be more spontaneous speeches rather than the pre-set debates where members can only speak when their number comes up.[32]

In response to the changed behaviour of MPs, the Parliamentary press gallery might take their reporting of events in the House more seriously and focus on substantive matters rather than sensational "infotainment" stories, which give readers little idea of what really goes on in Parliament. (See criticisms of the Parliamentary Press Gallery by D McGee, *Report of the Clerk of the House of Representatives* as above, p 7 and Palmer, *New Zealand's Constitution in Crisis,* "The Media and Politics, p 214 ff.) This in turn might provide MPs with more incentive to work harder at their parliamentary functions since they are likely to gain significant press coverage. It will also provide lawyers, as well as the public, with better information about what is going on in Parliament, and thus enhance the accountability of MPs. Improved information will foster better democracy.

MPs may also be freed to act independently in select committees. Currently, the custom is that select committee chairpersons take advice from caucus before reporting recommendations back to the House on issues with "political" implications. Since all select committees except one are chaired by a government member, and the government always has the majority of members on select committees, this custom can severely undermine their operation, as recently happened with the Finance and Expenditure Select Committee.[33] The Regulations Review Committee, which is the only committee chaired by an opposition member, might become an even more potent weapon against harsh and oppressive regulations and the Regulations (Disallowance) Act 1989 may be used more. (A notice of motion to disallow regulations has only been used once on the Civil Aviation Charges Regulations in 1990.) Public participation in the select committee process may increase as people see that their contribution can affect the way legislation is made. The changed balance of power in the House under MMP may also make it more difficult for governments to try and close down inquiries held by select committees.[34]

9 Maori seats

The Royal Commission recommended that there should be no Maori seats, but that, on the basis of well-reasoned arguments, the "best means of providing effective Maori representation" is by adopting MMP.[35] Maori representation should also be enhanced by waiving the four per cent threshold for Maori political parties. (*Report of the Royal Commission,* para 3.75, p 101. Note, however, that defining what is a "Maori political party" may be a very difficult task.) This is consistent with the Crown's obligations under the Treaty of Waitangi since Maori may otherwise have difficulty utilising the political process. And ensuring the indigenous people of an effective voice in Parliament can be seen as active protection of maori taonga. For example, Maori political parties could lobby for policies requiring the public television station to run Te Reo Maori programmes in prime time. In this way, the survival of their language, which is a taonga, may be enhanced.

The Treaty of Waitangi probably distinguishes Maori from all other groups who may also be deserving of greater help. However, the Royal Commission stated that "[t]here may also in time come to be a case for the 4% threshold to be waived for parties primarily representing other significant minority ethnic groups within the community." (*Report of the Royal Commission,* para 3.75, p 101.) This recommendation will trigger all the issues affirmative action proposals usually raise such as which other groups — women? other minorities? Disabled people? Gays and lesbians? These groups also have difficulty accessing the political process.[36] Should considerations of representativeness be tied to those groups who are protected from discrimination under the Human Rights Commission Act 1977 or the Bill of Rights Act 1990?[37]

"Floodgates" problems would have to be overcome. The criteria for groups to be exempted will be difficult to determine. (See M Chen "Developing a Discrimination Jurisprudence for New Zealand: New Grounds and Exceptions" in *Reforming New Zealand's Anti-Discrimination Law* (forthcoming).) It may be appropriate to use the characteristics of "discrete and insular minorities" derived from United States equal protection jurisprudence[38] to determine which groups should be exempted from the four per cent vote-threshold. The rationale for protecting such groups is that prejudice against them curtails the operation of those political processes ordinarily relied upon to protect such minorities, and that their downtrodden position prevents them from accessing the political process to protect their rights for themselves.[39] This issue also raises the questions of stereotypes of those groups who are traditionally seen as needing help (for example, Polynesians) and those groups who are not (for example, Asians).

B. Shift of Power to Minor Parties

1 Effect on Government

A greater propensity for coalition and minority governments under MMP will redistribute power among a larger number of parties. It will be much harder for any one party, or a group of parties, to exercise dictatorial powers. The extent of power redistribution will depend on the number of parties forming the coalition government, the number of seats held by each party and how the portfolios and offices are allocated. It will also depend on the conventions Cabinet and Caucus adopt for decision-making. If it is by unanimous consent, then smaller parties will have greater clout than under majority decision-making where they may be constantly

outvoted. Under the latter scenario, minor parties could always threaten to leave the coalition, or refuse to join it in the first place. (Minor parties would only do this if they were motivated by the desire to further policy objectives. They may not do so if they are solely motivated by the rewards of office. See Ian Budge and M Laver "Office Seeking and Policy Pursuit in Coalition Theory" (1986) 11 *Legislative Studies Quarterly* 485, 490 ff.) If the government was a minority one, then negotiations would be concerned with whether the party supporting the government should have the right of access to the formal papers of the Cabinet and its committees, or to papers prepared for decision-making by ministers in their departments; and to observer status, if not participation, for the leader of that party at decision-making meetings. (See Robin Wendt "Decision-making in Central and Local Government in the Absence of Political Majority" (1986) 64 *Public Administration* p 731, 783.)

Collective responsibility, which is fundamental to the effective functioning of government, will be more difficult to sustain. There would be increased chances of leaks to party colleagues outside Cabinet, both of decisions and of stances taken by Ministers within Cabinet concerning certain policies. The Prime Minister would find it difficult to sack Ministers representing coalition factions in the Cabinet for leaking information to their own parties. Ministers will also be keen to publicise their own great performance and the failure of other parties' Ministers, which would undermine Cabinet solidarity.

The Business Round Table argue that MMP hinders "strong government," or the ability of the executive to get its own way quickly and decisively. Brook Cowen et al argue in their report for the Business Round Table that:[40]

> . . . New Zealand is likely to continue to face significant exogenous shocks, and that it will benefit from a system of government that enables rapid responses to such shocks. Indeed, we argue that a Westminster system is likely to work best in a small, open economy vulnerable to shocks — and that New Zealand would be less well served by a system of government that made substantial policy changes difficult.

It is difficult to predict how coalition Cabinets might behave.[41] However, policy formulation and the determination of the shape of legislation will take more time, and it may be costlier. There may even need to be a Minister appointed to coordinate government policies between the various factions as happens in the Australian federal Senate. Trade-offs may need to be made to get consensus in Cabinet and in Caucus. (P Brook Cowen, T Cowen and A Tabarrok *An Analysis of Proposals for Constitutional Change in New Zealand* as above, para 2.6, p 2.22), and there may be less flexibility in changing such a policy if it does not go according to plan. But on the other hand, there should be less need for U-turns since policies should be better thought out. In other words, policies may be more effective in the long run and there may be less need for this brand of "strong government" in future. The Royal Commission concluded that "governments remain at least as effective, and possibly more so if proportionality results in the adoption of more consistent, consultative and broadly supported policies." (*Report of the Royal Commission,* para 2.182, p 64.)

There are unlikely to be the absolute and abrupt changes in policies which can sometimes occur under FPP, where a major party takes power eager to repeal its predecessor's legislation. As Temple stated:

> MMP in Germany has encouraged a "centripetal" effect in politics (a tendency towards the centre, towards moderation) rather than "centrifugal" politics, flying out to extremes.[42]

There should be more stability in our constitutional system. Governments may not necessarily respond more slowly to exogenous shocks since it is not in the political interests of any party to be seen by the public to hold up an urgent decision when the country is in crisis.

Criticism has also been levelled at the political horse-trading that will go on between the factions in a coalition government. This already happens now between intra-party factions of single party Cabinets. MMP would bring that out into the open and allow the public to give a mandate to those deals.

2 Effect on the bureaucracy

There will also be less need for public servants to negotiate deals concerning policy direction behind closed doors under MMP since most of the deal-making should be done prior to elections when parties work out their coalition options. But public servants will have more to do with minor parties in coalition and minority governments than under the current system where their contact with minor parties is virtually only in select committee. For example, they are likely to meet with minor parties in the coalition government in joint caucus committees, and in meetings of the full caucus of all the governing parties. Even where there is a minority government, major policy issues will have to be negotiated with the supporting minor party(ies) with the help of the bureaucracy. (Robin Wendt "Decision-Making in Central and Local Government in the Absence of Political Majority" (1986) 64 *Public Administration* p 371, 382.) There are also many other ways in which MMP will impact on public servants and on the system of advice.

MMP will continue the process of change in the public service which is already taking place as a consequence of the bureaucratic restructuring by the Fourth Labour Government. There will be increased competition and contestability of advice as each political faction in the coalition will want private staff to advise them.[43] This is already happening now, for as Martin states, "Recourse is increasingly had to advisers from outside the departmental structure — task forces and consultants play a major role in the policy process." (John Martin, "The Role of the State in Administration", Winter Series, University of Auckland, 16 June 1992, p 5.) This will protect against the capture of Ministers by self-seeking mandarins. It should also increase the standard of advice the public service gives and decrease its size.

Ministers may, however, be more dependent on the central agencies – Treasury, the State Services Commission and the Department of the Prime Minister and Cabinet – for advice. The advice of these central agencies balances the considerations of pure policy, the factions within government and the public views on issues. MMP will make the balancing of these considerations more difficult, resulting in the greater reliance of Ministers on these central agencies to undertake it for them.

The role of Treasury under MMP is particularly problematic since it is such a superior advice agency, in terms of the quality of advice it gives, that any faction of the government coalition which has Treasury advising it will be advantaged. If the Prime Minister is not the Minister of Finance, then whichever political faction holds the finance portfolio will have superior advice to the Prime Minister and his or her political group. If Treasury is merged with the Department of the Prime Minister and Cabinet, then the Prime Minister, by convention the leader of the largest faction in the coalition, will have the best quality advice. This may not please the other coalition parties; however, it is unlikely that the best solution to the above problem is to break Treasury up.

MMP will also continue the trend of increasing the visibility of public servants started by the Official Information Act and the publication of Department briefing statements to Ministers. Public servants will increasingly be required to front up before select committees to answer for policies they support, especially if that policy differs from the one being advocated by Ministers' own private staff. Any agendas public agencies have will be brought out into the open. Public servants will also have to take the blame for their own incompetence, unlike the United Kingdom where Ministers have frequently resigned even if they had no knowledge of the mistake or incompetency of the public servant and did not authorise it. No distinction is drawn between personal and primary responsibility or vicarious responsibility in terms of what a Minister resigns for. In New Zealand, Ministers only resign for mistakes and incompetencies for which they have primary responsibility. Improprietous actions should also result in resignation.[44]

This is a good development. Otherwise, talented Ministers who are performing well in their portfolios could be forced to resign because staff, whom they do not even hire, have been incompetent. Under the State Sector Act 1988, it is the Chief Executive of the Government agency who is responsible for the management of the implementation of policy and for the hiring of staff. Chief Executives can be fired for failing to fulfil their performance contracts with the Minister, or the public servant who has been incompetent can be fired. These developments give more visibility to the central role the bureaucracy play in New Zealand's constitution. The greater correlation with reality is healthy.

Finally, new rules as to how civil servants are to behave will have to be developed to cope with the new situations that will arise under MMP. For example, what happens under a coalition government when a public servant may be accountable to two Ministers from different parties, and is privy to information from a caucus committee meeting of one party which the other Minister will not have? Can the other Minister oblige a public servant to disclose information learned about the workings of another party? Either way, this could undermine the relationship of confidence and trust between Ministers and their advisers. Thus, new rules must include how to deal with politicians from different coalition factions, what requests for information have to be complied with and new rules of confidentiality. (See Robin Wendt "Decision-Making in Central and Local Government in the Absence of Political Majority" (1986) 64 *Public Administration* p 371, 381.)

3 Influencing policies

Under coalition government, lawyers and lobbyists will have to adopt new strategies to influence policies. If they want to stop a policy being adopted, they will only need to persuade one part of the coalition of the policy's faults if decisions are made by unanimous vote. Convincing all of the coalition partners that a policy proposal should go ahead will be more difficult than under a single-party government. Lawyers and lobbyists will also need to lobby the Minister's private staff as well as government departments to ensure their preferred policy outcome is achieved. The increased visibility of public servants will make it easier to know who to target.

4 A new style and tone of politics

Frequently, adversary politics dominates a plurality electoral system. It is a mode of argument which assumes that political questions can best be resolved if expressed in terms of two, and only two, alternatives. Johnson argues that it encourages persistent irresponsible competition and too much over-simplification. There is the government view, and the negation of the views of the government by the opposition.

> Where conflict does not exist, adversary politics manufactures it; where genuine conflict is present, adversary politics exacerbates it, and yet may frustrate its resolution; and where the clash of opinions and interests is many-sided and complex, adversary politics offers little hope of creating that basis of consensus which is indispensable if there is to be effective political authority. (N Johnson "Adversary Politics and Electoral Reform: Need We Be Afraid?" in Finer (ed) *Adversary Politics and Electoral Reform* (Anthony Wigram, London, 1975) 71, 76.)

Under, MMP adversarial behaviour would be restrained by the knowledge that one may have to form a government with the parties one is currently competing with in elections, and even when in government, that one might some day want to form a different kind of coalition which may include members of the current opposition. As Campbell states, "the arithmetic of coalitions makes the ethos of 'we are the masters now' somewhat out of place." (P W Campbell, "European Experience: Electoral Systems and Coalition Governments" in Finer *Adversary Politics and Electoral Reform* as above, 143, 151.) Consequently, political comment would have to

become more cautious, more qualified and better informed, taking more account of differing viewpoints, and the concerns of not just the majority cultures and races, but also the minority ones, in negotiating what policies and laws will be implemented. The media will have to develop more sophisticated reporting of the compromises being struck instead of over-simplifying the political arguments as "for" or "against." Under MMP, the overall result would be a whole new style and tone of politics which would improve the quality and sophistication of political debate and thus the operation of our democracy.

C. Shift of power to the public

1 The public's ability to vote governments out

One of the checks against elective dictatorship our constitutional system does have is the public's ability to vote governments out. (Public opinion obviously also influences policy decisions between elections.) A key cause of discontent with the FPP system is its inability to translate clearly the will of the people in this regard. The public showed, by the election result in 1990, that they want politicians to keep election promises. They do not want far-reaching policy reforms to be pushed through without regard to their views on those changes.[45] However FPP makes it difficult for them to bring governments to heel due to lack of appropriate incentives.[46] Under FPP, only the two major parties have a realistic chance of winning enough seats to form the government. Thus, the public's ability to vote out a government that was breaking election promises and pushing through major reforms in disregard of public opinion, may only have the effect of putting into government the other major party who can then proceed to do the same thing. The only way for voters to show their discontent is to vote for third parties, or not to vote at all. But neither of these actions could change the fact that either National or Labour would become the government since minor parties have little chance of winning seats in Parliament. (For example, Social Credit won 16 per cent of the vote in 1978 and 20 per cent at the 1981 elections. Yet it only got one and two seats respectively.)

This frustration has been compounded by the interpretation politicians place on voting results under FPP. The distorting effects of FPP allowed parties to sweep into power with significant majorities and to claim a mandate from the people for their policies even though there had only been a relatively small swing towards them in terms of actual votes. (Professor Richard Mulgan writes that "the larger the parliamentary majority, the stronger the mandate or the greater the right of the Government to impose its own policy on the community as a whole." R G Mulgan, "The Concept of Mandate in New Zealand Politics (1978) 30 *Political Science* 88, 89.) For example in the 1990 elections, National won 47.82 per cent of the votes and 69 per cent of the seats whereas Labour won 35 per cent of the votes and 30 per cent of the seats. The Greens won 6.85 per cent of the votes and no seats at all while New Labour won 5.16 per cent of the votes and only one seat. Far-reaching changes in policy have been undertaken when there has really only been a modest change in political attitudes within the community, or no change in community attitudes at all. In both 1978 and 1981, the National Party won power even though it actually won fewer votes than Labour.

2 Strengthening the electoral constraint

MMP may strengthen the electoral constraint for a number of reasons. First, it translates the public's will more clearly. Poor performance will directly affect a party's proportion of the vote and thus the number of seats they win at the next election. Thus, voters can express their displeasure at parties which break pre-election promises or fail to set out their policy platforms if they became a single-party government (remember Labour in 1987!) and their coalition options if they had to share power. (The experience overseas is that parties that fail to set out their coalition options do not attract voter support. Philip Temple *Making Your Vote Count: A Guide to Electoral Reform* (McIndoe, 1992) 21.) Secondly, even if both of the major parties continue to break election promises, minor parties may not, and they have a much greater chance of winning seats under MMP. Thirdly, promise breaking is also less likely in coalition governments. No party in the coalition will want the blame for broken promises. Thus, they might leak to the media which party it is that is wanting to do the breaking, or they may withdraw their support if a promise is about to be broken so as not to be implicated. It would be difficult for parties to justify breaking promises because of the need to form a coalition government when they have already set out their coalition options in their manifestos. Parties who move too far away from these coalition options would lose credibility with voters.

By providing strong and direct sanctions, the adoption of MMP may then resuscitate the convention that politicians will keep election promises once they get into power.[47] It may also force parties to be more realistic in setting election policies.

Adopting a market analogy, FPP can be likened to a system of protectionism for the two major parties. It is as if these parties have been given special subsidies (disproportionate number of seats to percentage of votes) so that even if they do go about the business of running the country badly, they rarely go out of business. On the other hand, although other parties can enter the market, the size of the subsidy granted to the two major parties prevents any other parties from being successful at the business of governing the country. It is a zero-sum game; what one side wins the other loses. MMP, on the other hand, removes these subsidies and requires the major parties to compete in the market place on equal terms. If they carry out their business incompetently, they will go out of business and be voted out of government. Even if they do not go out of business, they may lose market share if they cannot show that their product is better. They may have to form coalition governments. The presence of more competition under MMP should provide greater incentive to the two major parties to improve their performance. There will be greater sanctions for misrepresenting what they will do if elected or for promising consultation when they do not intend to give it. They may

have to find new ways of doing things (more consensual politics). In this changed climate, if they cannot outperform their competitors, they will go under. MMP produces a level playing field for all who can get above a four per cent threshold of popular support, if such a threshold is adopted.

MMP could enhance our democracy by strengthening one of the checks on executive dictatorship and thereby encouraging people to vote. For lawyers and lobby groups, influencing public opinion may become more important as that has a greater effect on the shape of policies adopted by the government.

D. Shift of power to the Governor-General

1 Deciding when and how to choose "Responsible Advisers"

Under convention, the Governor-General exercises the powers of the sovereign, on Her Majesty's behalf, on the advice of her responsible advisers. Under clause VIII of the Letters Patent 1983, "responsible advisers" are defined as members of the Executive Council or Ministers. Ministers must be MPs. Under FPP it is generally clear who the Ministers are, since one party usually wins the most seats on election night. Even if it takes some time to confirm the final vote, s 6 of the Constitution Act 1986 allows a person who is not a member of Parliament to hold office as a Minister of the Crown

> if that person was a candidate for election at the general election of members of the House of Representatives held immediately preceding that person's appointment . . . as a Minister of the Crown, but shall vacate office at the expiration of the period of 40 days . . . unless, within that period, that person becomes a member of Parliament.

Under MMP, the situation may not be so clear since a single party is less likely to win more than 50 per cent of the seats. Thus, the Governor-General may be left in some doubt about who is his or her responsible advisers and may have to exercise reserve powers, powers which have not been exercised in New Zealand in modern times. If there is one party which has more seats than the others (but still less than 50 percent of the seats in Parliament) the Governor-General could be guided by convention, asking that party to form a coalition government. If they fail, then the party with the second greatest number of seats is asked to attempt to form a government and so on down the line. In the event that no government is able to be formed, a "caretaker" government is created. (D Austen-Smith and J Banks "Elections, Coalitions, and Legislative Outcomes" (1988) 82 *American Political Science Review* 405, 407.) However, who should the Governor-General ask to form the government when the two major parties have the same number of seats, both under 50 percent, with minor parties holding the balance of the seats (G Palmer *Unbridled Power* (2nd ed, 1987), 29-30.) Should the Governor-General continue to treat the incumbent government as responsible advisers? There may also be other situations where the Governor-General has to decide when to choose a new team of advisers and how best to do that.[48]

There are several issues that coalition and minority governments under MMP raise concerning the Governor-General. One that will not be explored in this article is whether the role of inviting a party to form the government should remain with the Governor-General, or whether New Zealand should adopt the Danish approach of giving this role to the Speaker of the House.[49]

2 Exercising reserve powers

If the function of inviting a party to form the Government remains with the Governor-General, then there should be some written rules about how reserve powers will be exercised to remove uncertainty in situations of political crisis. It will be even more important to adopt Professor Quentin-Baxter's suggestion that the exercise of the reserve powers should be redefined by resolution of the House along the following lines:

> The Prime Minister shares with the Governor-General the responsibility of ensuring that the Crown is never without ministerial advisers; and that, except where Parliament is dissolved in preparation for a general election, ministers must be those who have the confidence of Parliament. If the Governor-General believes that a change of ministers may become necessary, and that he has therefore a duty to inform himself about the parliamentary situation, he may, with the Prime Minister's knowledge, consult other members of Parliament, whether or not supporters of the present government, receiving in confidence information and opinions offered upon that basis, but not expressing views or intentions other than those of which the Prime Minister has notice.
>
> A Prime Minister has a duty to tender his resignation if the government of which he is the leader loses its parliamentary majority in a general election; or if he is no longer the leader of the government party or coalition; or if, after being commissioned to form a government, he fails to obtain the confidence of Parliament. In other circumstances, a Prime Minister who has lost the confidence of Parliament has a duty either to tender his resignation or to advise a dissolution of Parliament.
>
> The bond of mutual confidence between the Governor-General and the Prime Minister requires that each should bring to the attention of the other any circumstances which he believes may lead to a departure from constitutional principle, or to a situation of crisis or emergency; and that each should inform the other of any development in his knowledge or assessment of the position. The Prime Minister has a duty to ensure that information available to the government is at the Governor-General's disposal.
>
> If the Governor-General is of the opinion that a course of action, proposed by the government and opposed by segments of public and parliamentary opinion, raises a question of constitutional principle and is not merely a matter of policy to be determined from time to time by the government in power; that the proposed course of action was not, before the most recent

> general election, a normal or foreseeable consequence of the present government's assumption of office; and that these considerations are not outweighed by the present or pending emergency; he may so inform the Prime Minister. In that case, it shall be the duty of the Prime Minister either to defer or modify the proposed course of action in conformity with the Governor-General's opinion, or to tender his resignation, or to advise a dissolution of Parliament. . . . (R Q Quentin-Baxter, "The Governor-General's Constitutional Discretions: An Essay Towards a Re-definition (1980) 10 VUWLR 289, 314-315.)

3 An active guardian of the New Zealand Constitution

Spelling out how reserve powers should be exercised is obviously relevant in any form of representative and responsible government. However, MMP may require reserve powers to be used more often. This will give the Governor-General more opportunities to exercise control over the government. Regardless of how ready the Governor-General currently is to exercise her reserve powers, there have been no opportunities in modern times for her to act as a genuine guardian of New Zealand's constitution.

Greater measures will have to be taken to ensure that party-partisan appointments to this office are not made[50] and to secure the Governor-General against dismissal for being too effective in safeguarding the constitution.[51]

Part III Political parties and the Courts

A. Increase in party power?

In the 1992 electoral referendum, some voters who supported proportional representation preferred the Single Transferable Vote system (STV) to MMP because STV does not give political parties as much power. STV has multi-member electorates, with voting from open party lists, and it is not designed to distribute seats to each party in proportion to its share of the vote across all constituencies. (*Report of the Royal Commission,* para 2.121 p 46.) There are drawbacks with STV that MMP does not have, however, and the power of parties under MMP can arguably be curbed.[52]

Under MMP, half of the MPs would be voted in under a party list. And if a closed list system is adopted, it will be political parties which will have the responsibility for placing candidates in order of priority on this list. The fear is that "[s]ome MPs would be selected . . . by the party hierarchy as a reward for party deeds, not elected by the people for what they could do for the country." (Dr Ross Armstrong, convener of the First-Past-the-Post campaign. *The Dominion*, September 10 1992). Also, it will be difficult to get rid of an unpopular candidate if that person has the backing of the party hierarchy. This difficulty would be compounded if dual candidacy was allowed whereby a candidate could stand for an electorate seat and also be ranked on the party list. Thus, candidates who lost their local electorate seat would still have an insurance policy in the form of a guranteed list seat if they can get near the top of their party list. However, the Royal Commission concluded that dual candidacy should be allowed in New Zealand because the creation of two rigidly distinct types of candidates would be likely to contribute to party disunity and because dual candidacy allows parties to protect valuable MPs in marginal seats and reward meritorious candidates in unwinnable seats. The Commission stated that "[b]anning dual candidacies would . . . be of particular harm to small parties who are unlikely to be assured of any constituency seats but who may nonetheless wish to have their high-profile members contest such seats." (*Report of the Royal Commission,* as above, para 2.206, pp 69-70.)

B. Regulating candidate selection

Under FPP, the nomination of candidates for safe seats held by the party means that parties effectively appoint more than 60 per cent of the MPs. (*The Dominion,* 17 September 1992, p 10. Among them are more than 25 rural seats held by National, more than 20 Labour-held city seats, and the four Maori seats held by Labour.) Any over-enhancement of the power of political parties could be checked by implementing the recommendation of the Royal Commission that:

> the law should specifically require that anyone who stands as a candidate for a particular political party should be selected according to procedures which allow any member of the party, either directly or through representatives themselves elected by members of the party, to participate in the selection of candidates for whom they are eligible to vote, such procedures to be adopted by an Annual General Meeting of the Party. (*Report of the Royal Commission,* p 240.)[53]

The rules setting out the procedure could be challenged as inappropriate before a newly created Electoral Commission by any party member,[54] and the decisions of the Electoral Commission would be subject to appeal to the High Court. It is arguable that party members already "participate" directly or indirectly in the selection of candidates in the two major parties. The Labour Party selects candidates by committees made up of representatives of the Party Council and by members of the local electorate committee. Party members do have a voice in which candidate is selected. (How much of a voice depends on how many members the local electorate has. Also members have a straw poll at the meeting after the aspiring candidates' speeches which counts as one vote.) National Party candidates are chosen by local members subject to the approval of the National Party organisation. Would the new laws governing candidate selection require a greater degree of party member participation? How could participation be given while still ensuring that enough female and minority candidates were represented in the party list, and that different regional interests were adequately represented? What if a candidate lacks appeal to the local party members, but the person has qualities and skills which the party officials think would be useful in Cabinet?

Adopting the Royal Commission's recommendations would increase the accountability of political parties. However, adequate limits need to be placed on the scope of outside interference. First, there is currently no equivalent of an independent Electoral Commission

which can scrutinise the merits of the parties' candidate procedures. However, the new Electoral Commission's ability to determine whether the rules are "appropriate" will need to be carefully defined. (*Report of the Royal Commission,* para 9.28, p 240.)

Secondly, Courts are currently able to review the actions of officers and committees of political parties under common law,[55] for failure to adhere to the rules of the organisation in dealing with their members, those for whose benefit the organisation exists, and those voluntarily bringing themselves within its jurisdiction.[56] Although the Courts will intervene for error of law for interpreting rules (*Abbott v Sullivan* [1952] 1 KB 189 and *Attorney-General of New South Wales v Grant* (1976) 135 CLR 587), breach of rules including failure to consider relevant factors and considering irrelevant factors, and breach of principles *implied by the rules* such as natural justice (*Dawkins v Antrobus* (1881) 17 Ch D 615 (CA)) and unreasonableness (*Caddigan v Grigg* [1958] NZLR 708), the weight of precedent is against the Courts invalidating party rules because *the rules themselves* are unreasonable. (G D S Taylor *Judicial Review* (Butterworths, 1991) para 1.17, p 14.) Thus, the substance of the party rules is almost totally in the hands of political parties. The only limitations appear to be the inability to oust the jurisdiction of the Courts to examine the rules' validity (*Scott v Avery* (1856) 5 H L Cas 811), and the requirement that the procedure comply with the rules of natural justice. (*Enderby Town Football Club Ltd v The Football Assn Ltd* [1971] Ch 591, 606. See also *Nagle v Feilden* [1966] 2 QB 633.) Under new laws that might be enacted, Courts would be able to intervene where the rules fail to comply with statutory requirements for party member participation in candidate selection.

C. Greater regulation of political parties

The regulation of the rules of candidate selection is part of a wider set of recommendations by the Royal Commission which recognise and facilitate the essential role political parties play in modern representative democracies. (*Report of the Royal Commission,* para 2.1, p 12.) The Commission stated that parties "have a critical public function"[57] in formulating and articulating policies and in providing representation for people. Yet the laws New Zealand currently has for political parties "still reflect 19th century conditions when elections were largely contests between individual candidates and not between competing political parties." (*Report of the Royal Commission,* para 8.33, p 192.)

The Royal Commission recommended that political parties be registered to ensure that they have a clear and officially recognised existence in endorsing candidates, seeking broadcasting time and seeking funds for elections. With a shift to MMP, there will also need to be some system of formal recognition of parties as we move to a system of casting votes for political parties as well as specific candidates. Only registered parties would be entitled to have party lists of candidates included in the ballot paper. The Commission also recommended "[d]irect state funding of registered parties and independent candidates" (*Report of the Royal Commission,* recommendation 40, p 229) to ensure that parties are more than electoral machines but are also "vehicles through which ideas may be discussed and sound policies developed and to encourage new and emerging parties. (*Report of the Royal Commission,* paras 8.122 and 8.123, p 217 respectively.) Furthermore, the Royal Commission recommended the extension of the current legal controls on disclosure of political income and expenditure, and on paid advertising to ensure that the electoral process is seen to be fair and to ensure that voters may make informed judgments.[58]

Regulation of the games political parties may engage in under MMP to maximise their advantage during election campaigns, and when they form the government, may also be warranted. For example, in Germany, arrangements have been made between a major party (say Party A) and its smaller ally (say Party C) that a few safe constituency seats be vacated by the larger party in favour of the smaller. Party C then manages to elect three candidates directly, winning a total of 2 per cent of Bundestag seats. Suppose Parties A and B win 49 per cent of the seats each at the general election. Then Party C together with Party A will form a Government coalition with 51 percent of the seats. (G K Roberts "The Federal Republic of Germany" in SE Finer *Adversary Politics and Electoral Reform* as above, 203, at 217. See further, J Banks "Elections, Coalitions, and Legislative Outcomes" (1988) 82 *American Political Science Review* 405.) If some games are not prohibited, voters might find it impossible to work out a voting strategy which takes account of these party games to achieve the policy and legislative outcomes they most want. (See Ian Budge and M Laver, "Office Seeking and Policy Pursuit in Coalition Theory" (1986) 11 *Legislative Studies Quarterly* 485, 495 ff.) Further research needs to be undertaken into these issues since this could be a significant disadvantage of moving to MMP.

Implementing even some of these recommendations for greater regulation will increase the ability of Courts (and an independent Electoral Commission, if such a body is created) to review the decisions of parties on endorsing candidates, seeking broadcasting time and seeking funds for elections. The ability of political parties to act as they wish will be curtailed. This is appropriate since political parties have public functions which may significantly affect the lives of New Zealand people and they receive some state assistance. (Parties get free time on radio and television at election time under ss 71-80 of the Broadcasting Amendment Act (No 2) 1991. For example, the commercial value of the six hours of television time provided was $1,886,400 and the radio time was worth $430,000. *Report of the Royal Commission,* para 8.75 ff, p 203. The parties in Parliament get even more extensive support to that mentioned above.) Thus, implementing the Royal Commission's recommendations will bring our laws into line with the reality of how our constitution is operating. It also gives the fundamental constitutional role of political parties more visibility.

Part IV Conclusion

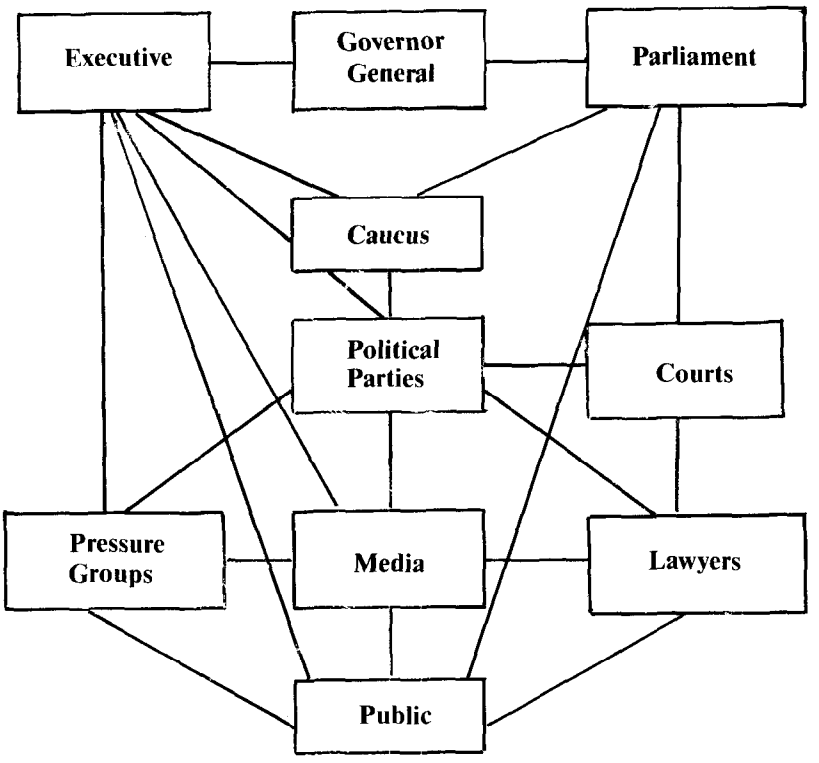
MMP will redistribute power in our constitutional system so that the relationship of the parts of the constitution to one another no longer looks like Figure 1, set out in the introduction, but rather like Figure 2. Note the flat power structure at the top of the diagram.

Power will shift from Cabinet to Parliament, minor parties, and the public making these parts of the constitution better able to check against the "elective dictatorship" of Cabinet. Cabinet will be more accountable for their actions to Parliament, minor parties, and the public. There will be more opportunities for the Governor-General to exercise control over coalition and minority governments. The Governor-General will become a more active guardian of the constitution.

Parliament will be rejuvenated under MMP by the greater difficulty coalition and minority governments will have in getting laws passed, by the greater representativeness and the improved intellectual ability and skills of MPs under closed party lists, together with an undermining of party discipline in the more favourable climate for minor parties. Parliament will once again be able to "unmake" governments and MPs may be encouraged to act with the sort of independence which would restore meaningful debate to the House. Increasing the number of MPs to 120 would be desirable primarily to enhance the operation of the select committee system. The better operation of these already effective committees would further undermine the need for a separate Upper House. However, as argued above, more MPs are not necessary to make MMP "work."

MMP would redistribute power among more political parties making it harder for any one party to exercise dictatorial powers. This should change the tone and style of politics since the parties will be restrained from adversarial behaviour by the knowledge that they will have to work with each other to get their policies through. Coalition and minority government will make collective responsibility more difficult to sustain, leaks of decisions to party colleagues outside Cabinet will become more common.

Fig 2: The New Zealand Constitutional System under MMP



Policies will take longer to negotiate, but they should be longer lasting once determined. The advantage should be fewer abrupt changes in policy and greater openness about the deals that are made.

The effect of MMP on the public service may not cumulatively make the bureaucracy less powerful, but it will make them, and any agendas they have, more visible and more accountable for any incompetence they perpetuate. This continues the process of change in the public sector already taking place under the bureaucratic restructuring of the Fourth Labour Government. There will be increased competition and contestability of advice between public servants and the private staff of political factions, and public servants will increasingly be required to answer for the policies they are advocating before select committees. If they are incompetent, then the Minister has to answer to Parliament, but the public servant gets the blame.

The correlation of seats to the proportion of votes won under MMP means that parties have to work harder at being more responsive to the voter. This may provide greater incentives for parties to keep election promises, or the coalition options set out in party manifestos. Finally, excessive party power under closed party lists could be curbed by decreasing the number of party list seats to 40 or even 30 per cent, the rest being constituent seats. And by enacting laws which mandate party member participation in candidate selection. MMP would also require the registration of political parties and may lead to the greater regulation of political parties in other areas such as political income and expenditure. This will also give visibility to the centrality of political parties to the operation of our constitution, and subject more aspects of their behaviour to judicial (and maybe Electoral Commission) scrutiny. There has not been the space to canvass the effects of MMP on the judiciary, but possible impacts may be increased pressure from various factions in coalition governments to decide cases with high policy content or significant

political ramifications in a certain way, and the need for different rules concerning how Judges are appointed to preserve their independence from government.[59]

Other players in the constitution, such as lawyers and lobbyists, will find that different strategies are needed under MMP to influence the executive to adopt policies beneficial to them and their clients. Lawyers and lobbyists will probably be able to influence policy more than under FPP, but whether that is a good thing, or requires the development of mechanisms to curb it, will require further investigation. The revitalisation of Parliament will make parliamentary remedies more effective and thus elevate the priority of seeking such remedies over others. New avenues of redress, like approaching party list candidates for help, may be created. Constitutional lawyers will also need to ponder how the Governor-General should exercise reserve powers to cope with the greater likelihood of situations where it is unclear who are her or his responsible advisers under MMP.

In conclusion, MMP would go some way to remedying New Zealand's constitution in crisis, and should be supported over the present FPP system for its ability to do so. MMP is not the whole answer, however, and a further exploration of other reform proposals will need to be undertaken. Suffice to say, for now, that the proposal to create an upper house and the enactment of a citizen's initiated referenda Act do not appear to be where the solution to New Zealand's constitution in crisis lies. □

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1 Temple states that New Zealand has the most extreme majority system in the world. We have both the most centralised form of government and the one which gives most power to an executive cabinet modelled on the United Kingdom. Philip Temple *Making Your Vote Count: A Guide to Electoral Reform* (McIndoe, 1992) 9-10. The difference is that, unlike the United Kingdom, New Zealand does not have an Upper House, and our Parliament is much smaller, lending itself to stricter party discipline than can be enforced in the British Parliament. See Professor S E Finer's exposition of the unqualified power governments enjoy under the FPP system in *Adversary Politics and Electoral Reform* (Anthony Wigram, London, 1975) 4.

2 Some question whether New Zealand's constitution is really in crisis, or whether the discontentment with the system is primarily due to tough economic times or people's frustration with economic policies which have resulted in financial distress and unemployment. The electoral system is just the scapegoat. P Brook Cowen, T Cowen and A Tabarrok *An Analysis of Proposals for Constitutional Change in New Zealand* (Business Round Table, 1992) para 6.1.

3 Bogdanor states that "If there is one central conclusion which clearly emerges, it is the extent to which the working of the electoral system is influenced by the political traditions of the countries in which they operate. The same electoral system can have quite dissimilar effects in different countries; or even in the same country at different periods of its history." Vernon Bogdanor and David Butler (eds) *Democracy and Elections: Electoral Systems and Political Consequences* (Cambridge University Press, 1983) 251.

4 For example, political parties in Germany have gone through three periods of development under MMP. From 1949, when MMP was first adopted, to 1961, there were a large number of parties. However, after a while, there was a general trend towards the concentration of the party system. From 1961-1983, there was a stable three-party system, and from 1983 till the present, a new period has started with the successful entry into the Bundestag of a fourth party, the Greens. See Franz Urban Pappi "The West German Party System" (1984) 7 *West European Politics* 7, 8.

5 Professor Arend Lijphart concluded that the establishment of proportional representation in New Zealand "would probably result in a multiparty system and a break in the long-standing pattern of one-party majority Cabinets." B Grofman and A Lijphart (eds) *Electoral Laws and Their Political Consequences* (Agathon Press, New York, 1986) 121.

6 Note that there was not a single party with a majority from 1928-35. The low point was in 1981, when the government was elected with only 38.8 per cent of the vote. There have only been four elections out of the 23 between 1919 and 1987 when any political party has won 50 percent or more of the votes. These were in 1938 for Labour, and 1946, 1949 and 1951 for National.

7 The latter occur when other parties agree to vote with the government, who has less than 50% of the seats in Parliament, on confidence issues, but reserve the right to defeat the government on other matters. If New Zealand moves towards MMP, the parties may initially opt for minority government since they are used to a single party forming the government.

8 The convention of collective responsibility concerns the way Cabinet as a collective entity makes decisions and is linked to Parliament. Professor Marshall defines the key elements of collective responsibility as confidence, unanimity and confidentiality. G Marshall *Constitutional Conventions: The Rules and Forms of Political Accountability* (Rev ed, Oxford: Clarendon Press, 1986) 55; and G Marshall, "Introduction" in *Ministerial Responsibility* G Marshall (ed) (Oxford: Clarendon Press, 1989) 3.

9 Professor Mulgan states that "in New Zealand the cabinet is easily able to dominate caucus and that backbenchers are relatively powerless. Moreover, like any other similar group, caucus is likely to take its lead from its more senior and experienced members, almost all of whom will have found their way into the cabinet." R Mulgan *Democracy and Power: A Study of New Zealand Politics* (2 ed, Oxford University Press, 1989) 70.

10 Dr McLeay writes that "[t]he behavioral norm of the legislature is conformity; the degree of permissible divergence is interpreted as being that which takes place in caucus. Disagreement is a family affair, best dealt with by the family. . . . Cohesive legislative behaviour has been a feature of the New Zealand Parliament since the establishment of the Labour/National two-party system. Cross-voting is very unusual and speaking out against the party line or deliberately abstaining from a vote is also rare." EM McLeay "Selection Versus Election: Choosing Cabinets in New Zealand" in Harold D Clarke and Moshe M Czudnowski *Political Elites in Anglo-American Democracies: Changes in Stable Regimes* (Northern Illinois University Press, 1987) 279, 283, 284.

11 The National Government only had a majority of one, and one of its MPs, Marilyn Waring, withdrew from the government caucus. Although Waring undertook to vote with the government except on the issues of nuclear arms, defence and rape, the Prime Minister, Sir Robert Muldoon, cited this as the reason for calling an early general election.

12 See Part C of this article on the public's ability to vote governments out. Note that in Germany in 1969 and in 1982, when the Free Democratic Party switched coalition partners resulting in the creation of a new national government, the government went to the people reasonably soon thereafter to get a validation of the new coalition.

13 A criticism made by the Clerk of the House is that often there is not even one Minister in the House while it is sitting. *Report of the Clerk of the House of Representatives to the Speaker of the House of Representatives on Parliamentary Reform*, 20 July 1992, p 6.

14 The Clerk of the House, Mr David McGee, stated that: "One noticeable change in recent years has been the fact that many Ministers do not necessarily respond to genuine questions or points made during the introduction debate or in the committee of the whole House. Indeed, members generally no longer seem to expect this. I consider that it is essential if real debate is to be carried on in the House that Ministers do answer points raised at these times and that it be the normal expectation that they do so." *Report of the Clerk of the House of Representatives to the Speaker of the House of Representatives on Parliamentary Reform*, 20 July 1992, p 3.

15 The 1992 Report of the Standing Orders Committee made it clear that substantial as opposed to technical amendments should not be introduced into bills without the opportunity for select committee scrutiny, although this has not resulted in any direct amendments to the Standing Orders. This may be due to the difficulties of defining "technical" and "substantial" or "substantive" changes to bills. *Report of the Standing Orders Committee on the Review of the Operation of the Standing Orders* (1992) Appendices to the Journal of the House of Representatives (AJHR) I.18B, "Legislation" pp 15-16.

16 In Germany, seats on committees are allocated to the party groups by employing the same greatest average formula of d'Hondt which is used at federal and Land elections to allocate seats to parties in the Diets. Who actually fills these seats is decided by the Parliamentary wings of the political parties or the Fraktionen. See Tony Burkett "Developments in the West Germany Bundestag 1969-80" in (1981) 34 *Parliamentary Affairs* 291, 300.

17 In Germany, committee chairs are decided by the Council of Elders, or the equivalent of the Committee on Privileges in the United Kingdom House of Commons.

18 The new standing orders extended the opportunities for the opposition to speak in plenary sessions, to table questions and for debating committee reports as well as guaranteeing full participation within the committees themselves. Tony Burkett "Developments in the West German Bundestag 1969-80" in (1981) 34 *Parliamentary Affairs* 291, 296.

19 Dr Elisabeth M McLeay, "Electoral Systems and the Representation of Women" paper prepared for the Ministry of Women's Affairs, 1992, p 2, states that "Party-list/proportional systems of representation (including MMP and STV) are more favourable for women's representation than single-member electorates, whether the latter require a plurality (First-Past-The-Post) or a majority vote (as under Preferential Voting) for the winning candidate. The socio-economic position of women, the overall political culture of a society, and the beliefs and practices of the political parties are all important in the legislative representation of women, but the single most significant factor is the electoral system." See further, Pippa Norris, "Women's Legislative Participation in Western Europe" (1985) 8 *West European Politics,* 90 and Wilma Rule," "Electoral Systems, Contextual Factors and Women's Opportunities for Election to Parliament in Twenty-Three Democracies" (1987) 40 *Western Political Quarterly* 477. Currently, 84 per cent of MPs in the New Zealand Parliament are male and only 16 per cent are female. Yet it has been nearly sixty years since the first woman MP was elected. See further, Vernon Bogdanor, David Butler (eds) *Democracy and Elections: Electoral Systems and Political Consequences* (Cambridge University Press, 1983) 249; and R Darcy, S Welch and J Clark, *Women, Elections and Representation* (New York and London, Longman, 1987). Roberta Hills and Nigel S Roberts, "Success, Swing and Gender: the Performance of Women Candidates for Parliament in New Zealand, 1948-87" 25 *Politics* (1990) pp 52-80. Joni Lovenduski and Pippa Norris "Selecting Women Candidates: Obstacles to the Feminisation of the House of Commons", *European Journal of Political Research,* 17 (1989) pp 533-562. Donley T Studlar and Ian McAllister, "Political Recruitment in the Australian Legislature: Towards an Explanation of Women's Electoral Disadvantage", *Western Political Quarterly,* 44 (1991), pp 466-485. H Valen, "Norway: Decentralization and Group Representation" in Michael Gallagher, ed, *Candidate Selection in Comparative Perspective: The Secret Garden of Politics* (London, Sage, 1988).

20 Mary Varnham speaks of a women's political alliance which was established in Iceland under its system of proportional representation. In its first election in 1983, the Alliance secured three seats out of 63, and in the second election, the women's party won six seats and was invited to become part of a coalition government, an offer they declined because of policy disagreements. (*The Dominion,* 6 August 1992.)

21 *The Dominion*, 17 September 1992, p 10. Dr Elisabeth M McLeay, "Electoral Systems and the Representation of Women" paper prepared for the Ministry of Women's Affairs, 1992, p 2, states that "Where parties are trying to gain women's support it rapidly becomes imperative in a party-list system for all parties to place women in a significant number of high list positions; the omission of women is more obvious than in single-member constituency electoral systems." Also see, Enid Lakeman *Power to Elect: The Case for Proportional Representation* (Heinemann, London, 1982) 136 and Vernon Bogdanor *What is Proportional Representation?* (Martin Robertson, Oxford, 1984) 115.

22 Rule's research in the early 1980s showed that 4% of the single-member constituencies returned women members of the Bundestag, but 16% of women were returned from the party list. W Rule, "Electoral Systems, Contextual Factors and Women's Opportunity for Election to Parliament in Twenty Three Democracies," 40 *Western Political Quarterly*, 477 at 489.

23 CF Trotter who states: "Under MMP, a similar incentive to conform will be provided by the party lists. Moving on from being an electorate MP to being a highly-ranked list MP will become the fastest route to job security and Cabinet ranking. The junior electorate MPs' chances of making that transition will not be assisted by earning a reputation for rebelliousness." Chris Trotter, "You, Me & MMP" *Political Review,* August 1992, p 16, p 21.

24 Caucuses for MPs of each party are likely to continue and some form of joint committee of all the parliamentary factions may need to be formed. For example, in Germany, there used to be occasional meetings of a "parliamentary roundtable" comprised of leaders from all the parliamentary factions forming the government. Klaus von Beyme "Coalition government in Western Germany" in Vernon Bogdanor (ed) *Coalition Government in Western Europe* (Heinemann, Great Britain, 1983) 16, 33.

25 *Report of the Royal Commission on the Electoral System: Towards a Better Democracy* (1986) 66-67. One of the reasons why the Royal Commission chose the MMP system of proportional representation was because of its ability to give proportionality as well as stability. The development of the MMP system in Germany was in direct response to deep concerns about political stability. GK Roberts "The Federal Republic of Germany" in SE Finer *Adversary Politics and Electoral Reform* as above, 205-206.

26 GK Roberts "The Federal Republic of Germany" in SE Finer *Adversary Politics and Electoral Reform* (Anthony Wigram, 1975) 215. Note that Italy and France adopted proportional representation since it was seen as a means of promoting the development of the political parties into better organised and more cohesive bodies. PW Campbell, "European Experience: Electoral Systems and Coalition Governments" in Finer *Adversary Politics and Electoral Reform* as above, 145. At pages 150-151, Campbell stated that six conclusions could be made of the normal experience of the European states using proportional representation from 1946-1975: including 1. The number of parties in the legislature has tended to be less than six; and that 2. The number of parties on which governments have been based tends to be two or three.

27 *Report of the Royal Commission* as above, para 2.192, p 67. A lower threshold also results in greater proportionality of votes to seats since those parties who achieve less than four per cent will miss out on party list seats, their "share" being given to other parties which cross the four percent threshold.

28 *Report of the Royal Commission* as above, para 4.30, p 126. "We have reached this conclusion independently of our consideration of the electoral system in general, and we support an increase in the number of MPs whether or not the present plurality system remains."

29 List MPs are likely to take some interest in constituency work since successful list candidates often contest constituency seats. Thus, they tend to nurse those seats between elections. For example, in 1965, 197 of the 248 candidates elected from party lists in Germany had also unsuccessfully fought a constituency seat. Bernhard Vogel et al *Wahlen in Deutschland* (Walter de Gruyter, 1971) 200. List MPs also lose touch with constituent concerns at their political peril.

30 From January to May 1989, for example, the substitution rate was 1.2 per meeting. *Report of the Business Committee on the Committee's Review of the Inquiry Function of the Subject Select Committees 1989* (1987-1990) AJHR Vol XVII I.14B.

31 Statistics in 1989 Report of the Business Committee of the House suggest that on average the select committees spend two-thirds of their meeting time considering legislation. See also, G Skene *New Zealand Parliamentary Committees: An Analysis* (Institute of Policy Studies, Victoria University of Wellington, 1990) Table Two: Select Committee time devoted to Legislation", p 13.

32 Leach and Stewart say of hung local authorities where no party has a majority of seats on the council, "The rights of minority parties have been taken seriously (for all parties are minor parties!); the meetings of council and committees have taken on a sharpness and significance reflecting the fact that their outcomes are no longer predictable; majorities have to be fought for and won, rather than taken for granted, and in this process argument and debate has often played a significant part; and the conduct of council business has become more open and accessible." Steve Leach and John Stewart "The Politics and Management of Hung Authorities" (1988) 66 *Public Administration* 35, 41-42.

33 This Committee was reviewing the Taxation Reform Bill (No 5) and unanimously wanted to recommend that the complex regime set out in the bill for the consolidation of group company accounts for tax purposes should not proceed. However, when the Chairperson brought the matter to the Government Caucus, the Finance Minister, Ruth Richardson, made it clear that she wanted this regime to go

through and convinced a majority of Caucus to vote in favour of this. Consequently, when the Chairperson reported back to the House, no recommendation was made to remove the regimes for consolidating group company accounts for tax purposes.

34 The first attempt by a government to close down an inquiry was one into the devaluation of the dollar in 1984. The Hon David Caygill stated that more recent inquiries, such as that of the Finance and Expenditure Committee into the Public Finance Act and that of the Commerce and Marketing Committee into electricity pricing, have addressed difficult issues in a more bi-partisan manner. Hon David Caygill, MP "Functions and Powers of Parliamentary Committees: A New Zealand Perspective" (Paper Delivered to a Conference in Brisbane, May 1992) para 1.10.

35 *Report of the Royal Commission* as above, p 106. See paras 3.37-3.48, pp 90-93, for the inadequacies of the Maori seats under the current FPP system, and the way these problems would be redressed under MMP, paras 3.74-3.79, pp 101-103. See further, A Lijphart, "Proportionality by Non-PR Methods: Ethnic Representation in Belgium, Cyprus, Lebanon, New Zealand, West Germany, and Zimbabwe" who comes to the same conclusion as the Royal Commission on the issue of race-specific seats. In B Grofman and A Lijphart (eds) *Electoral Laws and Their Political Consequences* (Agathon Press, 1986) Chapter 6.

36 Under the repealed Employment Equity Act 1990, equal opportunity programmes were required for "designated groups" defined under s 2 as any group of women, Maori, Pacific Island People, or workers who have a physical or mental disability, or any group of workers designated by the Commissioner for the purposes of this definition.

37 Currently, these Acts concern discrimination on the basis of race, sex, marital status or religious or ethical belief. See Part II of the Human Rights Commission Act, the Race Relations Act 1971 and s 19 of the Bill of Rights Act. However, that may be extended to include six new grounds including disability and AIDS status under the Human Rights Bill 1992 currently before select committee.

38 This jurisprudence is developed by the United States Courts under the Fourteenth Amendment (applicable to States) and the Fifth Amendment (applicable to the Federal Government) of the United States Constitution.

39 See *United States v Carolene Products Co* 304 US 144, 152, n 4; 58 SCt 778, 783; 82 LED 1234, 1241 (1938). Such groups are characterised by (i) a long history of discrimination, (ii) characteristics that bear no relation to ability to perform or contribute to society, (iii) a group marked by a badge of distinction, and (iv) relegated to the position of political powerlessness; and (v) possessing an immutable characteristic that is either inherent or uncontrollable. See W Sadurski "Judicial Protection of Minorities: The Lessons of Footnote Four" (1988) 17 *Anglo-Am LR* 163.

40 P Brook Cowen, T Cowen and A Tabarrok *An Analysis of Proposals for Constitutional Change in New Zealand* (Business Round Table, 1992) para 6.2.1, p 6.4. Chris Trotter states that "Though most business leaders may feel relatively comfortable with the economic policies of the present National administration, their mood would almost certainly change should Jim Anderton's Alliance win the next election. With the powers inherent in our constitution, Anderton could socialise the New Zealand economy literally overnight. Acting with perfect legal propriety an Alliance Government could renationalise Telecom and the BNZ, raise taxes, and reintroduce compulsory unionism and the award system. The business community would have no legal recourse — except to wait three years and attempt to vote the Government out of office." Chris Trotter, "You, Me & MMP" *Political Review*, August 1992, p 16, p 24.

41 This is one of the areas where more research will have to be done. See W Riker *The Theory of Political Coalitions* (New Haven, Conn: Yale University Press, 1962); M Laver and K A Shepsle "Coalitions and Cabinet Government" (1990) 84 *American Political Science Review*, 873; M Laver and K A Shepsle "Government Coalitions and Intraparty Politics" (1990) *20 British J of Intraparty Political Science*, 489; and Vernon Bogdanor (ed) *Coalition Government in Western Europe* (Heinemann, Great Britain, 1983).

42 Philip Temple *Making Your Vote Count: A Guide to Electoral Reform* (McIndoe, 1992) 38. As Professor Sir Geoffrey Palmer has stated, "It can . . . ensure that broader consensus exists in the community and among political representatives of the community before full scale policy changes are undertaken. This would have an impact in the area of economic policy and it might make policies once adopted more stable because they would be easier to pursue over time." G Palmer, "Electoral Reform in New Zealand" Unpublished paper, 1992, p 3.

43 Consideration will have to be given to whether political staff should be subject to greater constitutional accountability since the reality is that they do, and will, wield increasingly large amounts of political power. This power is at least as great as bureaucrats who are subject to accountability mechanisms.

44 Under MMP, it is less likely that collective responsibility in coalition Cabinets will be used to shield an individual Minister from having to accept the blame for a personal blunder. It is in the interest of the individual parties which form the coalition Cabinet to dissociate themselves from the incompetence of an individual Minister who may not be from their party. A Minister could, however, blame incompetence arising from policy matters on compromises forced upon him or her by other coalition partners. For further exposition of collective and individual ministerial responsibility, see M Palmer, "The Conventional Wisdom of Ministerial Responsibility in New Zealand" (1992) Unpublished Paper, reproduced in M Chen and G Palmer *Public Law in New Zealand: Cases and Materials* (Oxford University Press, 1993, forthcoming).

45 This is consistent with the constitutional view propounded by Professor K J Scott that "Parliament should not make any major constitutional change of which notice was not given to the electors by the government party." K J Scott *The New Zealand Constitution* (Oxford, Clarendon Press, 1962) 52. Consequently, Professor Quentin-Baxter argues that if the government proposes a course of action that was not "a normal or foreseeable consequence of the present government's assumption of office . . ., " the Governor-General should inform the Prime Minister who then has a duty to modify the proposed course of action or to tender his or her resignation or advise a dissolution of Parliament. RQ Quentin-Baxter, "The Governor-General's Constitutional Discretions: An Essay Towards a Re-definition" (1980) 10 VUWLR 289, 315. See Section D "A Shift Of Power to the Governor-General" below.

46 Matthew Palmer likens the Westminster model of single party majority governments to a franchise bidding scheme for regulating a natural monopoly in the commercial context, and states: "Once an election has been held, the successful party is effectively entitled to exercise power as it sees fit, subject only to the incentives provided by the prospect of another electoral competition. In fact, the winner of the Westminster franchise isn't even legally bound to the explicit and implicit conditions of the franchise. Electors must rely on the incentives of future competition and the value of the political reputation to induce a government to keep its promises." Matthew S R Palmer, "The Economics of Organisation and Ministerial Responsibility: Towards a Framework of Analysis for Westminster Government." Paper presented at the Graduate School of International Relations and Pacific Studies, University of California, San Diego, June 1992, 10.

47 For a description of this convention, see R Mulgan, "The Changing Electoral Mandate" in M Holland and J Boston (eds) *The Fourth Labour Government — Politics and Policy in New Zealand* (Oxford University Press, Auckland, 1990) 11 ff. Professor Sir Geoffrey Palmer argues that this convention is now dead citing major breaches of the election manifestos by both National and Labour over the last 8 years. Palmer *New Zealand's Constitution in Crisis*, as above, 10-11.

48 Unfortunately, the German experience is unhelpful since its Head of State, the President has never really exercised reserve powers, which German constitutional lawyers think that the President may possess. In 1961, Heinrich Lubke did intervene to persuade the FDP to renew their coalition with CDU/CSU when the FDP initially refused to serve under Adenauer. Lubke intervened again in 1965 when Erhard's Chancellorship foundered, to press for the formation of a Grand Coalition. See WE Paterson and D Southern *Governing Germany* (Basil Blackwell, 1991) 89-90. However, as Edinger states, "[a]s yet untested provisions of the Basic Law might allow a President so inclined to play a more independent and decisive role in a conflict between government and legislature by using his rather limited power to dissolve the lower house or support a minority government." Lewis J Edinger *Politics in West Germany* (2 ed, Little, Brown and Co, 1977) 19-20. There has only been one incident when the Bundestag, or the federal lower chamber of the Legislature, did not run its full term. However, that was not due to the President's exercise of reserve powers.

49 Once the Speaker has been elected by the majority of Parliament, he or she resigns his or her seat in the House since the Speaker's office is an independent one. Tasks such as inviting a party to form a government then fall to the Speaker. Erik Damgaard "Crisis Politics in Denmark 1974-1987" in E Damgaard, P Gerlich and JJ Richardson (eds) *The Politics of Economic Crisis, Lessons from Western Europe* (Aldershot, Avebury, 1989) and Erik Damgaard and Palle Svensson "Who Governs? Parties and Policies in Denmark" (1989) 17 *European Journal of Political Research* 731. The Speaker sounds out MPs and parties to ascertain the best person to be Prime Minister, that is, the person who would carry most support. Governments are then formed around the Prime Minister. Problems of justice being seen to be done, as well as actually being done, may arise, especially in a House of Representatives as small as New Zealand's. Regardless of the Speaker's newly independent state, he or she was, up until recently, a candidate representing one of the political parties.

50 Currently, there is a convention that Governors-General should be people who can be relied upon to carry out their duties impartially. There is also a developing practice that the Prime Minister must consult with the Leader of the Opposition before the Governor-General's appointment is finally recommended to the Queen. However, these conventions have been broken in the past. For example, Sir Keith Holyoake, a previous National Party Prime Minister, was appointed to the office in 1977. T Black stated in "An Office Apart" [1977] NZLJ 113, that the great public debate and controversy this generated was due to the public's resentment of "the all-pervading influence of the Cabinet . . . insinuating itself openly into the one office that should remain apolitical." See further, A Quentin-Baxter *A Review of the Letters Patent 1917 Constituting the Office of the Governor-General of New Zealand* (Wellington, 1980).

51 Governors-General currently hold their appointments "at pleasure" under clause II of the Letters Patent and Ministers may advise the Queen to recall him or her at any time. However, the government is answerable to the public, thus they are unlikely to fire the Governor-General if there is a lot of popular support for his or her actions. The Governor-General can also dismiss the Ministers first under clause X of the Letters Patent. But if those Ministers then win the subsequent election, the first act of the government will be to recall the Governor-General. Professor Quentin-Baxter stated that it would not "seem to be any solution to the Governor-General's position of weakness to grant him security of tenure for a fixed term: there might be an overwhelming inducement for a Prime Minister to choose someone whom he believed would always identify his own party's interests with those of the State." RQ Quentin-Baxter "Within These Walls" *The New Zealand Listener,* 9 April 1977, 15.

52 An open list situation under STV could mean that a given candidate loses his or her seat to a more popular candidate on the same party list. Thus, a candidate's main adversaries are other candidates within his or her own party which could seriously weaken party unity and the collective responsibility of the party to the electorate. Rein Taagepera and Matthew Soberg Shugart *Seats and Votes* p 215. There would also be logistical problems with open party lists. Temple states that open list ballot papers under MMP allowing re-ordering would be excessively long since they would have to include both dual candidates and those the party thought might get through on the list alone. Philip Temple *Making Your Vote Count: A Guide to Electoral Reform* (McIndoe, 1992) 36. Each party may have as many as 60 candidates on its list to fill the 60 list seats, although this would be shorter if there was a lower percentage of party list seats. The Royal Commission accepted that open lists could work on a regional basis with fewer names for voters to choose from. The Hon Michael Cullen has argued in favour of an open list chosen on a regional basis "to safeguard representation for provincial areas, especially for the South Island." *The New Zealand Herald,* 22 September 1992, p 9. Dr Cullen represents a Dunedin seat. He further stated "If you have a national list there is the problem that parliament could become dominated by the three large urban centres." Regional lists would also decrease the power of the Party hierarchy by decentralising power. The Royal Commission, however, opted for a national list since parties could equally ensure balanced representation between regions as well as between ethnic groups, men, women and special interest groups. Second, since New Zealand does not have clearly defined regions and is not a federal state it may be unnecessary and unwise to artificially create such divisions. Third, with regional lists, but each party's entitlement determined nationally, there is no obvious correlation between list position and likelihood of election. Fourth, in order to make it clear that the list vote is a choice between parties and their leaders, all voters should have the same key names in front of them. The strongest argument in favour of a national list, however, is that a regional lists may lead MPs and electors to concentrate unduly on local or regional issues to the detriment of national issues. And there are already 60 electorate seats which will ensure that regional issues are taken account of.

53 In Germany, the law requires that candidates must be elected either directly by the party membership of a particular area, or by an assembly of delegates (usually at Land level) elected by party members. Philip Temple *Making Your Vote Count: A Guide to Electoral Reform* (McIndoe, 1992) 36.

54 The Royal Commission recommended that an independent Electoral Commission should be created consisting of a President appointed by the Governor-General from a list of three judicial officers nominated by the Chief Justice, the Electoral Commissioner appointed by the Governor-General, the Secretary for Maori Affairs, and the Secretary for Justice. The Commission would have the duty of carrying the electoral law into effect, keeping the whole electoral system under review, reporting annually to Parliament and advising the relevant Parliamentary select committee and the Minister. *Report of the Royal Commission*, as above, recommendation 62, p 274.

55 As political parties are usually private unincorporated bodies, they fall outside those bodies who can be subject to the statutory right of judicial review under s 4 of the Judicature Amendment Act 1972 — generally, public statutory bodies and incorporated bodies. See s 3 of the same Act.

56 See, for example, *Lewis v Heffer* [1978] 1 WLR 1061. Political parties are private law organisations and for such organisations, the Courts can intervene for error of law for interpreting rules (*Abbott v Sullivan* [1952] 1 KB 189 and *Attorney-General of New South Wales v Grant* (1976) 135 CLR 587), breach of rules (*Enderby Town Football Coub Ltd v The Football Assn Ltd* [1971] Ch 591), including failure to consider relevant factors and considering irrelevant factors, and breach of principles implied by the rules such as natural justice (*Finnigan v New Zealand Rugby Football Union Inc* [1985] 2 NZLR 159) and unreasonableness (*Caddigan v Grigg* [1958] NZLR 708).

57 *Report of the Royal Commission*, as above, para 9,103, p 267. Sir Kenneth Keith recently wrote that "[t]he central role of the parties may have little recognition in the formal statutory and prerogative sources of the constitution but it is real nonetheless." Sir Kenneth Keith "On the Constitution of New Zealand" (1992) 44 *Political Science* 28, 31.

58 Currently, under s 139 of the Electoral Act 1956, individual candidates are limited to expenditure of $5000 on goods and services related to "(i) Advertising and Radio or television broadcasting: (ii) Publishing, issuing, distributing and displaying addresses, notices, posters, pamphlets, handbills, billboards, and cards" and used within three months prior to an election. Secondly, s 147A of the same Act requires advertising which promotes a candidate(s) to be authorised by the candidate(s) or the party to which they belong. And thirdly, the Broadcasting Corporation places controls of its own on the use of television and radio advertising for political purposes. The Royal Commission's recommendations are found in *Report of the Royal Commission,* pp 200-202.

59 The Judges of the High Court and Court of Appeal in New Zealand are currently appointed by the Governor-General on the nomination of the Attorney-General. The custom is that the Attorney-General mentions these appointments after he or she has determined them at Cabinet but they are not discussed or approved there. The Attorney-General usually consults with the President of the Law Society, the Chief Justice, the President of the Court of Appeal and the Solicitor-General. The process is informal. There is no formal screening mechanism. Sometimes inquiries will be made of people who may know prospective appointees better than the group mentioned. See further, M Chen and G Palmer *Public Law in New Zealand: Cases and Materials* (Oxford University Press, 1993 forthcoming) Chapter 6 on the "Independence of the Judiciary." In Germany, judges have to be confirmed by a two-thirds majority of the Bundestag or of the relevant committee in the Bundesrat. Gordon Smith *Democracy in Western Germany: Parties & Politics in the Federal Republic* (Heinemann, London, 1979) 193.

Just a friendly little letter

By Arnold B Kanter, a consultant in Evanston, Illinois, and author of The Handbook of Law Firm Mismanagement

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There was a time when law firms and their clients trusted one another. At the end of a major transaction, the senior partner would send a bill to the client listing just a single item — "For legal services rendered" — and the client would pay. No more.

Now the two sides negotiate an "engagement letter". I advise law firms to adopt this easily personalized form:

Dear —,

Nice to see you/Sorry I missed you [choose one] the other day. I'm so glad that we were able to reach agreement so easily. Rather than come up with a big, formal contract, I thought we could use this friendly little letter.

Definition of Terms

As used in this agreement, the following terms shall have the meanings ascribed to them below, to wit:

"You" shall mean the XYZ Corporation, any subsidiary thereof, any successor thereto by merger, consolidation, assignment or otherwise, any officer or director thereof and generally anybody else who might possibly be considered a You, it being intended that the word "You" be construed as broadly as humanly and legally possible.

"We" shall mean the Fairweather, Winters & Sommers law firm, defined so as to maximise said firm's rights and to limit said firm's liabilities.

"Them" shall mean everybody but You and We.

Scope of Representation

We shall represent You in the Whole Deal.

"Whole Deal" means everything to do with the acquisition of the QRS Corporation, from Soup to Nuts.

"Soup" means the investigation, negotiation and drafting of the agreement to acquire QRS.

"Nuts" means the closing or blow-up and litigation of the Whole Deal.

Though this definition may seem overly broad, the complex way in which We will document the transaction will require that You retain We forever to help You try to understand what happened to You.

Fee Estimate

You have asked We to estimate the fees that may be involved in the Whole Deal. We have informed You that this is impossible.

You have informed We that that's no excuse and You want a fee estimate.

Subject to the following caveats, then, it is our estimate that the fees for the Whole Deal will be in the general neighbourhood of quite-a-bit-but-not-too-much-considering-what's involved.

In arriving at the foregoing estimate, we have assumed that:

- Them will be extremely accommodating and will accept our purchase agreement form without change.
- You will do your part in timely fashion, and will not make any unreasonable demands upon We.
- No *force majeur* or *force mineur* will mess things up.

You acknowledge this fee estimate is inherently improbable, unreliable and unenforceable. Nevertheless, You agree to pay We fees calculated as provided below.

Calculation of Fees

In general We will bill You on the basis of each person's hourly rates. You will not be informed of those hourly rates since they are top secret and none of your business, anyway.

Even if We did inform You of the hourly rates, they would not be of much use since We change the hourly rates at time intervals best described as "whenever We feel like it".

We may deviate from the hourly rate to charge You a premium if the result We achieve is better than We expected.

Since We tend to be very conservative and pessimistic in our expectations, You should expect that our results will be better than We expected more often than You expect.

The results may be better than We expected even when We lose, since We may lose by less than We expected.

Billing

You will pay We a retainer each month plus the amount of our hourly billing and our expenses.

The retainer is not because We don't trust You, but because that's the way We always do it.

If You do not pay these bills promptly, We will either put our firm administrator, Lieut Col Clinton Hargraves, on the matter, or sue your rear end.

Expenses

In incurring expenses, We shall adhere to the standard of the reasonably frugal billionaire.

When We are working on the Whole Deal, We will not go out to dinner at expensive restaurants. Instead, to save time, We will order dinner in from those restaurants and bill You for our eating time, as well as the food.

If You want to quibble about expenses, You may do so, but frankly We find that distasteful.

Audit

If You are dissatisfied with any bill, You may choose to call for an audit by any certified public accountant You choose, provided that such public accountant is satisfactory to We and the fees billed are paid by You. The only public accountant satisfactory to We is Clinton (Little Clint) Hargraves Jr.

We trust that this letter will meet with your complete approval and that You will indicate such by signing and returning a copy of this letter.

Hope this little note finds You and your family well.

Sincerely,

Stanley J Fairweather
Fairweather, Winters & Sommers