



A Tale of Two Houses: Does MMP mean New Zealand doesn't need an upper house?

INTRODUCTION

New Zealand, and my home state of Queensland, have something very important in common. Unlike the other states of Australasia, New Zealand and Queensland have only one house of parliament, both having abolished their Legislative Councils earlier in the Twentieth century.

Before MMP was introduced in New Zealand, both systems of government displayed four important, similar characteristics. *First*, the absence of an upper house meant that the only political forum in which the people of each polity were represented was a single chamber (the House of Representatives or Legislative Assembly) and that institution's ability to represent the diversity of the groups, shades of opinion and various regions and localities of both states, depended on the electoral system. Noting that both places used a system of single-member electorates in which First Past the Post or a Single Transferable Vote system prevailed, the consequence was that a single party could secure a majority in the parliament and form government with less than 50 percent of the popular vote—often substantially less than a majority of voters—at times even less than 40 percent.¹

The *second* important implication, related to the first, was that in both places the absence of an upper house meant that the opportunity for vibrant public debate and genuine deliberation over policy matters was confined to a single house

of parliament which was effectively controlled by the one dominant, governing party. Both states witnessed a degradation of public discourse contributed to by the single chamber or unicameral systems under which they were governed. The contempt for the media displayed by long-standing Queensland National Party Premier Joh Bjelke-Petersen was legendary, but the capacity of Queensland Governments to manipulate the media has persisted under Labor administrations since the 1990s. I venture similar observations might be made about New Zealand Governments especially prior to MMP; whether we think of Robert Muldoon's hold on the Prime Ministership through the 1970s and 80s, or the market-oriented reforms that occurred under the Fourth Labour Government.

Thirdly, even though the conventions of parliamentary responsible government (what we call the Westminster system) operated in both Queensland and New Zealand, and therefore the government was in each place theoretically accountable to the parliament, because the governing party by definition held a majority of seats in the parliament, the capacity of the parliament to hold the government to account was prejudiced in the extreme. How could a parliament dominated by the executive government hold that government to account? Again, it was only through civil institutions, like the media, operating *outside* of

[†]Professor Nicholas Aroney is Professor of Constitutional Law and ARC Future Fellow, Centre for Public, International and Constitutional Law, TC Beirne School of Law, The University of Queensland. This paper is the text of a public lecture sponsored by Maxim Institute, the University of Auckland's Faculty of Law, and the Institute for Policy Studies, Victoria University of Wellington. Delivered on 18 April, 2011 at Old Government House, The University of Auckland; and 19 April 2011 at Institute for Policy Studies, Victoria University of Wellington.



parliament that governments were most effectively scrutinised and, on occasion, challenged. In both places, once a party gained power, it tended to hold on to power for long periods of time—until popular forces against it became so great that they could no longer be resisted (or manipulated).

Fourthly, the absence of a second house of parliament in both places meant that the executive government was in a position to have its legislative programme enacted into law without any substantial input or scrutiny by parliament. And if the government so wished, it was able to have its legislation enacted very quickly. Sir Geoffrey Palmer famously once said that New Zealand's Parliament was able to enact "the fastest law in the West."² He could have said exactly the same thing about the Queensland Parliament, with its infamous late night sittings and guillotined debates.

Alas, these problems continue in Queensland down to this day. But at least the Queensland Government has to operate within a federal system, and federal systems divide and limit power. This is not true of New Zealand, and thus the concentration of executive and legislative power in New Zealand was even more extreme than that which existed in Queensland—until that is, the advent of MMP.

As I understand it, MMP was introduced in New Zealand as a solution to the kinds of problems I have just identified: lack of effective representation, lack of democratic deliberation, lack of executive government accountability, and lack of proper, deliberate scrutiny of legislation prior to its enactment into law.

Steps have been taken in Queensland to try to enhance the quality of question time, to improve the effectiveness of the parliamentary committees, and to give Leaders of the Opposition sufficient resources to do their job effectively. Indeed, a Review Committee of the Queensland Parliament recently came to these shores to try to understand and learn from your parliamentary committee system, with a view to taking lessons home to Queensland. Some real progress has been made in Queensland as a result. But there are limits to how much has been achieved, or can be achieved, while the Queensland Government, effectively controlled by a single party, dominates our unicameral Parliament.

So we in Queensland, faced with similar problems associated with our single chamber system, in principle encounter a similar question to that which confronted you in New Zealand when you chose to adopt MMP. Is MMP, or something like it, the best solution to our political problems in Queensland? Or is even more radical surgery needed—such as the reintroduction of a democratically elected upper house, using some system of proportional representation?

I pose this question conscious that, with a review of your constitutional system and a referendum on MMP on the horizon, you in New Zealand are again facing much the same questions. Should you retain MMP, should you return to the old system, or should you go down a different path altogether, such as the reintroduction of an upper house—as Jim Bolger was advocating in the early 1990s?

In this lecture, I will seek to address these questions, essentially along the lines I have indicated so far. First, I will go into some more detail about the problems that unicameral, single-chamber systems face in terms of democratic representation, public-deliberation, government accountability and legislative haste. In so doing I will rehearse what I regard to be the most important arguments in favour of a democratically elected upper house, with particular emphasis on how the existence of a carefully designed second chamber can help to remedy the problems associated with unicameral systems.³ Then, in the second part of my lecture—and by way of conclusion—I will ask: what difference does MMP make, and is MMP, together with a vibrant committee system, an effective substitute for a second chamber?

In addressing these questions, I primarily have in mind the lessons that we in Queensland might draw from your experience here in New Zealand. In doing so, I certainly do not want to presume to lecture you about what you should do; that is of course a matter for the people of New Zealand to determine. But I do hope that, as a concerned Queenslander, my ruminations on the topic may be of some assistance to you, as you grapple with what are essentially the same issues.

THE PROBLEMS OF UNICAMERALISM

So let me turn now to the problems of unicameralism, and begin, in particular, with the problem of democratic representation.

Democratic Representation

The classical and, I think, the most influential argument *against* upper houses casts them as conservative and undemocratic institutions which prevent progressive governments from pursuing popular and necessary policies for the benefit of the people. The image is of a traditional upper house, like the old British House of Lords, composed solely of members of the aristocracy, holding their positions by hereditary title (or dependent on a system of royal patronage), resisting the will of a democratically elected lower house, such as the British House of Commons. According to democratic ideals, an aristocratic—indeed oligarchic—upper house is by definition illegitimate, and liable to be reactionary and corrupt. As the French publicist, Emmanuel-Joseph Sieyès, is reputed to have put it, if an upper house resists the will of the lower house, it is acting mischievously; if it *agrees* with the lower house, it is superfluous and redundant.⁴

This last point about redundancy is an important one. The idea is that even if an upper house is placed on a democratically elected basis then its existence becomes entirely pointless, for it merely repeats the representative function of the first chamber. Such a line of argument is powerful. It demonstrably influenced those who abolished the Legislative Council in Queensland in 1922, and I venture it influenced those who abolished the New Zealand Legislative Council in 1950 as well.⁵ It also influenced the Royal Commission on the Electoral System when in the mid 1980s it considered, and rejected, the suggestion that New Zealand should reintroduce an upper house.⁶

However, at the heart of this two-pronged line of criticism of upper houses lies a problematic understanding of democracy and of its practical operation under existing electoral systems. *First*, the classic form of the argument, as expressed by the Abbe Sieyès, assumes that political communities are composed of a unitary "people" or *demos* which can be

represented unproblematically in a single institution—the lower house—based on a particular electoral process. *Second*, it assumes that democracy equals majoritarianism—that legitimate democratic governance is sufficiently realised through a system of majority rule. *Third*, it assumes that prevailing lower house electoral systems actually give effect to the rule of the majority. Each of these propositions is extremely doubtful. Let me deal with each of them in turn.

The first problem is that although our perception of social and political reality in contemporary societies involves a sense of "peoplehood" conceived on a national or state-wide scale, we are also acutely conscious of our other important corporate or collective identities. These include, belonging to this or that region, city, town, and village; or our identities as members of particular ethnic communities, whether European, Asian, Aboriginal, Maori or Pasifika, and so on. To a significant extent, our political systems recognise this plurality of identities, whether through local governments, local electorates, or in Australia, our wider federal system of government—as well as through special seats for Maori in New Zealand and the possibility of Indigenous representation in Australia. In the face of this social plurality it is doubtful whether a single house of parliament has the capacity to unambiguously represent the full complexity of our plural identities.

In the second place, it is not at all clear that a system where the majority are taken to speak authoritatively for the whole exhausts our aspirations for democratic governance. Majority rule is a valuable decision-making procedure, but it is widely recognised that majorities can be tyrannical, and some political philosophers persuasively argue in favour of an alternative, consensus model of democracy, in which decisions are ideally made with the consent—or at least in a manner that reflects the deliberative contribution—of as wide a range of people in the political community as possible. This is a point to which I will shortly return.⁷

Thirdly, the kinds of electoral systems that operate today in Queensland and used to operate in New Zealand prior to MMP do not even generate majority rule. As I noted at the outset, under systems that use single member districts, governments are formed

and routinely gain control over our parliaments with significantly less than 50 percent of the popular vote—often in the low 40s, and sometimes less than 40 percent. And my point here is not simply that minority governments are formed with less than a majority in the lower house of parliament, but that majorities in the lower house are secured with significantly less than a majority of the voters supporting them. Control over the legislative powers vested in parliaments, as well as over the executive powers of government, are routinely secured with less than majority support.

With all of these factors in mind—that our political identities cannot be reduced to a “unitary people,” that majority rule does not exhaust our aspirations for democracy, and that electoral systems do not even generate majority rule—when we take these factors into account it becomes very clear that the conventional argument *against* upper houses presupposes far too much about the democratic credentials of lower houses. Recognising that our political identities are complex and overlapping, that democracy is more than majority rule and that few electoral systems reliably generate governance by members of parliament who genuinely represent the majority, democratically elected upper houses can in fact enhance and enlarge the democratic credentials of parliaments. At least this is the experience of the Australian states that do have upper houses, as well as the experience of the national Parliament of Australia.

Public Deliberation

The word parliament is derived from the French word *parler*, which means “to speak” or “to talk.” The Old French sense of the word *parlement* carried the primary sense of a “discussion,” a “conversation,” and a “meeting” at which “negotiations” were held. The root idea of a “parliament” is thus a deliberative assembly at which discussions, in the sense of negotiations, are held concerning the governance of a particular political community.⁸

Our parliaments play a very important role as meeting places where political issues are raised, debated and discussed. The quality of deliberation that occurs within a parliament depends, of course, on the calibre of the participants, as well as upon the rules that govern procedure and the practical operation of the

institution on a day-to-day basis. But here again, where there is only one house of parliament, the opportunity for formal public deliberation is limited to only one forum, and the quality of debate is determined by the representativeness of the institution and the extent to which it provides an opportunity for genuine discussion to occur. Alas, as the system operates in Queensland and as it operated in New Zealand at least prior to MMP, government control of the house has tended to mean that agendas are controlled by the government, the opportunity for contrary arguments to be made is closely controlled, and changes to policy only occur when governments are convinced in terms of their own prevailing values, priorities and responsiveness to public opinion. Apart from this, there is very little need or warrant for governments to compromise.

The existence of an upper house provides a second forum for political discussion and debate which has the potential to improve parliamentary deliberation in three respects. *First*, an appropriately designed second chamber will have a different representative profile to the first chamber, and will therefore give an opportunity for a wider array of political values and interests to engage in policy debate. *Second*, because in the ordinary case the consent of the second house is necessary for the passage of legislation, the government in the lower house will be forced to take into consideration the views prevailing in the upper house and accept amendments that are likely to reflect a wider and more representative sample of values and interests. *Third*, noting that parliament has an important role in holding the government and the exercise of executive powers and prerogatives to account, a second chamber provides an opportunity for deliberation about the performance of the government to be conducted by an assembly that is not controlled by the government.

This last point leads me to the third fundamental problem with unicameral systems—the problem of their inability to hold governments to account.

Government Accountability

I mentioned the mixed constitution earlier, and the idea that the chief virtue of monarchy is the unity of purpose and leadership provided by the rule of a single individual. I want to return to this idea briefly because it is very

relevant to the question of government accountability. Government accountability in Westminster systems like ours is about the accountability of the Prime Minister, the cabinet and the wider ministry for the way in which they exercise the executive powers of government; powers that are formally vested in the Queen and exercised by the Governor-General on the advice of responsible ministers. In the theory of Westminster systems, this accountability and responsibility is to parliament as an institution. Ministers must have the support and confidence of parliament in order to hold and retain their commissions from the Queen.

Because the powers that are being exercised are those of the Crown, executive power is by its very nature concentrated in, and exercised by, a very small group of people; principally a cabinet presided over, and in our day largely dominated by the Prime Minister—the rule of the one, and the few, but not the many. In theory, this power is made democratically accountable through the parliament. But the problem in unicameral systems is that governments by definition control the parliament because their particular party or coalition of parties ordinarily commands a majority of votes in the solitary lower house. This means two things. *First*, the capacity of the parliament to hold the government to account is profoundly undermined. How can an institution controlled by the government hold that government to account? Parliament's capacity to scrutinise the government is limited to whatever opportunity the opposition or minority parties have to ask questions of ministers, to debate questions of public importance, undertake inquiries into the administration of government and so on. Ultimately however, a unicameral parliament will always support the government—unless the governing party itself chooses to turn against the Prime Minister; but as we have recently seen in Australia, this merely means a different Prime Minister from the same party, and not much more than that at all.

Secondly, government control of parliament means that the same small body of people not only exercise the executive powers of government but also effectively control the legislative powers of parliament as well. Executive and legislative power is concentrated in the same hands. Baron Montesquieu famously argued that the separation of powers was a vital protection of individual liberty. If a small group of people control both legislative and executive power, they are in a position

not only to make the law but to execute it against individuals or minority groups.

The existence of a second chamber of parliament can contribute substantially to the amelioration of both of these problems. A second chamber which, because of its electoral basis, is unlikely to be controlled by the government, will be a much more effective institution for scrutinising ministers and holding governments to account. Houses of parliament have substantial powers to investigate, hold inquiries, require the production of documents, and ask questions of individuals—whether statutory officers, public servants or even Ministers. A lower house of parliament is not going to exercise these powers very effectively against the government—a second chamber is much more likely to do so—and analyses of the performance of Australia's second chambers shows that, while they are certainly not perfect institutions, they do make a substantial difference.⁹

These observations bring me to the fourth problem with unicameral parliaments—the problem of legislative haste.

Legislative Haste

Government control over a unicameral parliament means that it is always in a position to force through its legislation, no matter what the resistance among the public at large. Government control also means that it is in a position to enact its legislation very quickly. However, if a second chamber exists it can slow things down and it can scrutinise legislative proposals from an alternative point of view. Rushed legislation is not likely to be well drafted legislation, let alone well considered or carefully scrutinised. A single chamber of parliament, controlled by the government, is not likely to scrutinise legislation for its values and practical effect with quite the level of rigour that a second chamber, elected on a different basis and not controlled by the government, is likely to do. Legislation that passes two houses of parliament undergoes a level of scrutiny which makes unintended consequences less likely, and makes it more likely that the enactment will survive a change of government at a subsequent election. This is because the existence of two chambers, differently constituted, require a higher and wider level of consensus to support specific legislative enactments.

THE BENEFITS OF MMP

Now, having said that there are certain substantial benefits to be gained from bicameral parliaments, the obvious question is whether MMP and closely related reforms to parliamentary procedures such as a vibrant committee system sufficiently ameliorate the shortcomings of unicameralism in ordinary Westminster systems.

As I read the literature here in New Zealand, it strikes me that much of the discussion has understandably focussed on coming to grips with the new complexities in government formation, policy-making and enacting legislation that MMP has introduced, but that the discussion has not systematically worked its way through *each* of the four key shortcomings of unicameral systems that I have identified, with a view to identifying the *extent* to which MMP has made a difference, as well as the extent to which it has not. These four issues—lack of effective representation, inadequate democratic deliberation, lack of executive government accountability, and rushed legislation—raise distinct issues, and the scorecard for MMP is not the same in each respect.

Democratic Representation

MMP has certainly improved the representative credentials of the New Zealand Parliament. Because MMP supplements the system of single-member electorates with a party list system, the overall party composition of the parliament now much more closely reflects the choices made by New Zealand voters at each election. In your most recent 2008 election, for example, the National party secured 44.93 percent of the popular vote and a total of 47.54 percent of the seats in Parliament (58 of 122). The results of the elections of 1996, 1999, 2002 and 2005 show a similar pattern of greater proportionality between the popular vote and the number of seats secured by each party, major and minor.

This has had two important implications. *First*, the two major parties have not been able to secure the commanding majorities in the parliament that they once did, with popular votes often in the low 40s. The *second* implication is that the governments that are

formed under MMP are themselves more representative in the sense that the two major parties have had to rely on the support of minor parties to form government, and the cost of this support has often been a sharing in the spoils of government in the form of cabinet or outer ministry seats. As Jonathan Boston and David Bullock have explained, in some cases this has meant bringing a minor party into Cabinet, in other cases giving those parties ministerial positions outside Cabinet, and in yet others again, creating "spokesperson" roles in relation to particular policy fields.¹⁰ Sometimes, the result is majority coalition government; more often, as Phillip Joseph has emphasised, it results in minority government, whether in coalition or not.¹¹

The only hitch in the system—if indeed it is a hitch—is that most voters still seem to prefer the two major parties, and increasingly so in recent years. At the last two New Zealand elections, close to 80 percent of voters supported the major parties—not much less than the 83.85 percent of voters in Queensland. This raises questions about the capacity of MMP to encourage consensus government on a sustainable basis. But at least we can say that in New Zealand—unlike Queensland—the number of seats each party holds in the Parliament is proportionate to the popular vote.

What implications has this had for public deliberation?

Public Deliberation

The MMP scorecard in relation to public deliberation is, I submit, not quite so strong. Public deliberation, in its widest sense, of course extends beyond the confines of parliament and the other formal institutions of government. Changes to the electoral system and the composition of parliament are not the only factors here.¹² But if we confine ourselves to the formal institutions, I think we have to give MMP just two cheers, and not three. Two cheers because the greater diversity and proportionality within the parliament and within government—including the advent of "agree to disagree" arrangements with the minor parties—mean that there is now much more room for genuine debate, disagreement and compromise; and this can only be

good for improving public deliberation.¹³ One of the reasons why MMP deserves only two cheers however, is that the parliament remains unicameral, and so the opportunity for inter-cameral dialogue simply does not exist as it does within bicameral systems.

If we want to maximise the level of debate and deliberation within parliament, it seems to me that there is no substitute for a second chamber or upper house. Reflecting on Australia's bicameral system, observers often remark that the tone of debate in the Australian Senate is much more moderate, deliberative and constructive than that which usually occurs in the House of Representatives, where Question Time so often degenerates into a slanging match. MMP in New Zealand means that a greater variety of points of view are given expression than used to be the case, but the House of Representatives remains the house of government, and so it should come as no surprise that, as Jack Vowles has observed, there is "little evidence that MMP has so far facilitated a less polarised and adversarial parliamentary culture" in New Zealand.¹⁴

But let me underscore: MMP certainly deserves two cheers for public deliberation, not least due to the significant role that the minor parties play within your parliament, as well as the way in which MMP supports and undergirds the resilience, vigour and effectiveness of your select committee system. That system surely does improve the deliberative functions of your parliament, by enabling genuine inquiry and discussion to occur, both within the committees and through public submissions to those committees, without so much of the rancour associated with parliamentary politics in the government-opposition style, especially during Question Time.

This last point—about the select committees—brings me to the third issue I need to touch on: the important question of the haste with which legislative proposals are enacted into law—an issue shaped fundamentally by whether parliament is unicameral or bicameral.

Legislative Haste

The Standing Orders of the New Zealand House of Representatives provide for a impressively sophisticated system of select committees to consider and report on proposed laws and to inquire into matters on their own motion.¹⁵ The committees cover a range of matters,

embracing the full panoply of issues addressed by government. The membership of each is proportional to party membership in the house and each committee freely elects its chairperson and deputy. The select committees also have the power to call for evidence and require the production of documents. Moreover, in the ordinary case, bills are automatically referred to a relevant committee for scrutiny. Because committees are composed of backbench members of parliament who do not hold ministerial office, committee scrutiny of bills and of government action is in principle independent of the government. Changes to bills recommended by committees are drafted into bills as reported, and adopted automatically by the House at second reading stage if unanimously supported within the committee.

As Ryan Malone has chronicled, the prescribed process of committee inquiry into bills has, with the advent of MMP, significantly slowed down the pace of legislation and enabled Parliament to scrutinise bills in a much more rigorous fashion.¹⁶ Government bills, it seems, have a substantially lower success rate under MMP than previously.¹⁷ Genuine debate, negotiation and compromise over bills are now typical. However, while the absolute number of government bills passed has been reduced, as David McGee has pointed out, the total amount of legislation has not.¹⁸ And then there is the problem of the misuse of declarations of urgency. While no doubt often warranted, urgency is sometimes—too often—used to bypass committee scrutiny, and to enable governments to force through their legislative agendas without due time for parliamentary and public consideration. Although multi-party government under MMP has made a clear difference, all governments since MMP have made use of urgency to rush bills through; and it seems that this has accelerated under the present government. And importantly, as studies have shown, once minor parties agree to support a government, it is very rare for them to vote against the government on urgency motions.¹⁹

Moreover, even if a bill goes to a committee, it seems there is still room for government manipulation. The misuse of Supplementary Order Papers, and reports of opposition speeches sometimes delivered before a near-empty house add to the picture. Jeremy Waldron may have been exaggerating when he said that New Zealand's "fast-track" procedures were "quite disgraceful by world

standards" and a "plaything of the executive," but his hyperbole had a point.²⁰ All of this leads me to give MMP only two cheers, not three, as far as legislative haste is concerned.

The effectiveness of committee scrutiny and the likelihood of urgency depends, ultimately, on the numbers on the floor of parliament. And here, what is critical, is whether the government can effectively command a majority in the parliament, not simply as a matter of confidence and supply, but in order to have its way on substantive matters such as the enactment of legislation. It is true, in principle, as Elizabeth McLeay has pointed out,²¹ that where an election result leads to a *minority* government being formed, the non-government parties—who form a majority—are generally able to reject urgency motions, to question and resist government positions within the committees, and to vote down amendments proposed through Supplementary Order Papers. In the circumstances of *minority* government, therefore, parliament is on the whole significantly more effective and poses an effective counter-balance to the executive government. However, where *majority* governments are formed—which, though rare, can certainly occur under MMP—then the government, which by definition has majority control over the parliament, can push bills through on the basis of urgency, or short of that, can control the recommendations made by committees, as well as freely use Supplementary Order Papers to make substantial amendments to bills.

But the problem of analysis for New Zealand politics is that it is not so easy to distinguish majority and minority governments in this way—especially when one is asking, not about cabinet solidarity or confidence and supply, but practical questions about the capacity of the government to have its way with parliament in relation to all kinds of particular matters, whether involving proposed legislation, government policy, or questions about ministerial integrity and competence. And whether support parties hold ministerial positions within or outside cabinet is very relevant here, for the decisive question is the extent to which the minor support parties have an interest in supporting the government, or opposing it—on the floor of parliament, in the committees or even within cabinet. MMP undercuts the ability of the major parties to govern in their own right, but it does not take away the need for

unity in order to exercise control—a goal which both the major parties and their potential partners in government share. And this has very important implications for the capacity of the unicameral New Zealand Parliament and its committees to use their powers to hold governments to account.

Government Accountability

This brings me to my final point, and, in particular, to a hypothesis that I would like to present for your consideration. The hypothesis concerns the way in which minor parties navigate what Boston and Bullock have identified as the tension between "unity" and "distinctiveness."²² The "unity" side of the coin is that the major parties, when forming government, wish to consolidate their power and exercise it as efficiently as possible, and their support parties, especially when holding positions within cabinet or the outer ministry, have an interest in staying in power and sharing the spoils of executive government. The "distinctiveness" side of the coin however, is that the support parties also have to maintain their electoral base, and to do so, they need to maintain points of difference from the major party. That means finding some way to hold out on particular issues, especially in a way that appeals to their voters. The drive to distinctiveness explains why minor parties, although willing to support a major party in government, nonetheless typically negotiate the freedom to disagree over certain matters of substantive policy. The incentive to policy distinctiveness is however, counter-balanced by the drive for unity as the price of securing a place in government and a share in the exercise of executive power.

My hypothesis is that the drive for distinctiveness is generally satisfied if a minor party asserts its independence on particular matters of policy, for this is the most effective way in which a party is able to appeal to voters. Distinctiveness about *policy* is enough. It is not necessary (and indeed would be counter-productive) for support parties to go further and assert their independence through the kind of scrutiny of government that one usually associates with "opposition,"²³ meaning the assessment of whether particular Ministers of State are managing their portfolios competently and with integrity. Indeed, the drive to unity positively militates against this, particularly when support parties hold

ministerial positions, and especially when they sit in cabinet. Minor support parties have a strong incentive not to criticise ministers for the quality of their administration and the manner in which they exercise executive power—but rather to support them. And, given the realities of party discipline and the numbers on the floor of parliament that make the formation of such governments possible, this undercuts the willingness of the House of Representatives as a whole, as well as the select committees, to use their considerable powers of inquiry to investigate ministerial incompetence and misfeasance and to scrutinise the government generally. The governing party, with its support parties, by definition has a majority in the house, as well as in the committees. And here, as Harshan Kumarasingham has warned, there is the constant risk of select committees becoming little more than “facsimiles of executive instruction as they were in the FPP days.”²⁴

In these circumstances, the political need of the minor parties to maintain party distinctiveness remains very important, but it is always qualified by the drive for unity as a means of forming government and sharing in governing power. As Philip Joseph has put it, “occupying the Treasury benches” is still the primary goal of politics, and “retaining the confidence of the House remains the axis around which the entire system revolves.”²⁵ For these reasons, in relation to the question of accountability, I submit that MMP is deserving of only one cheer—not two, and certainly not three. Minor parties that support the government have an interest in maintaining the government in power while at the same time seeking to negotiate for their own distinct policy goals. And these minor parties, with the major party, by definition command a majority in the parliament.

CONCLUSIONS

So, in conclusion, what lessons are to be drawn for someone like me, concerned about the dynamics of Queensland's unicameral system and interested in New Zealand's experiment with MMP as a possible model for reform?

I have argued that MMP has indeed made a positive difference in New Zealand, especially to the level of democratic representation within the Parliament, and also to the quality of public deliberation and the scrutiny

of legislative proposals. However, where it seems to have made the least difference, concerns government accountability. My argument here has been that the need for support parties to assert their distinctiveness is usually sufficiently satisfied if they target the particular policy issues that matter most to their constituents. For they have very little, if any, positive incentive to hold governments to account for the integrity and effectiveness of their administration. Indeed, if a minor party holds ministerial positions, especially within Cabinet, it has a positive incentive to keep the major party in power.

Under bicameral systems, with single member electorates in one house and proportionality in the other, these basic drivers to unity and distinctiveness are also in operation, but their practical effect is quite different. Apart from very rare circumstances, where the results of an election are very close, minor parties have minimal if any prospect of significant influence within the lower house of parliament, and therefore concentrate their attention to securing seats in the upper house. But to secure seats in the upper house, party distinctiveness is the key requisite; and maintaining solidarity or unity in government is simply irrelevant. As a consequence, minor parties in Australia have no special interest in protecting governments or keeping them in power. Their main interest is in occupying policy positions that are distinct from the other parties, and from this position, negotiating with government over its legislative and policy programme. But because they have no essential interest in keeping the governing party in power, they also have an interest in gaining electoral support by questioning the competence of government decisions, scrutinising the behaviour of ministers and generally holding the government to account. It is the location of these minor parties in a different house of parliament, where the spoils of executive government are not available, that focuses them on these tasks of policy negotiation, ministerial scrutiny and government accountability. By contrast, while within New Zealand's unicameral Parliament, the minors have an incentive to negotiate over particular policy positions, they have very little if any incentive to scrutinise and hold Governments to account.

So, to bring my remarks to a close, my respectful conclusion is that a better path to contemplate—for

Queensland at least and perhaps also for New Zealand—is more thorough-going reform: the re-establishment of a second chamber or upper house of parliament, democratically elected on a proportionate basis, combined with a lower house based on single-member electorates, under a system of non-compulsory preferential voting. Such a system would, in most cases, enable governments to be formed in the lower house with clear majorities. This would enable our systems to maintain the advantages of decisiveness and unity of purpose that are desirable attributes of government. But, as I have said, there are profound problems associated with the concentration of power that this entails in a unicameral system; and so I think that the power of the lower house needs to be counter-balanced by a second chamber, democratically elected and equal in power, except in relation to money bills and votes of no confidence.

ENDNOTES

- 1 Only 38.77 percent of the vote was enough for Robert Muldoon to form a National Government in 1981, and 38.86 percent was enough for Peter Beattie to form a Labor Government in 1998. In 1995, although the Liberal-National Coalition secured 53.27 percent of the two-party preferred vote, it was not enough to prevent Wayne Goss from forming a Labor Government with only 42.89 percent of the primary vote and 46.73 percent of the two-party preferred. The current Labor Government of Anna Bligh in Queensland was re-elected in 2009 with a mere 42 percent of the primary vote, an outcome which gave her party 57 percent of the seats; a comfortable majority.
- 2 G. Palmer, *Unbridled Power? An interpretation of New Zealand's Constitution and Government* (Auckland: Oxford University Press, 1979), ch 9.
- 3 I draw here on N. Aroney, "Four Reasons for an Upper House: Representative democracy, public deliberation, legislative outputs and executive accountability" *Adelaide Law Review* 29, no. 2 (2008): 205.
- 4 See J.A.R. Marriott, *Second Chambers* (Oxford: Clarendon Press, 1910), 1. For a recent, slightly different statement of the dilemma, see A. Mughan and S.C. Patterson, "Senates: A comparative perspective" in S. Patterson and A. Mughan (eds), *Senates: Bicameralism in the contemporary world* (Columbus: Ohio State University Press, 1999), 338-340.
- 5 K. Jackson, *The New Zealand Legislative Council: A study of the establishment, failure and abolition of an upper house* (Dunedin: University of Otago Press, 1972).
- 6 Report of the Royal Commission on the Electoral System, *Towards a Better Democracy* (1986) 281-282, paras 9.151-156.
- 7 See for example A. Lijphart, *Patterns of Democracy: Government forms and performance in thirty-six countries* (New Haven: Yale University Press, 1999).
- 8 Today we are more inclined to speak not so much of the mixed constitution, but rather of the "separation of powers" as a means of limiting government power, providing checks and balances, and securing individual liberty.
- 9 B. Stone, "State Legislative Councils—Designing for Accountability" in N. Aroney, S. Prasser and J. Nethercote (eds), *Restraining Elective Dictatorship: The upper house solution?* (Perth: University of Western Australia Press, 2008) 175.
- 10 J. Boston and D. Bullock, "Experiments in Executive Government Under MMP in New Zealand: Contrasting approaches to multi-party governance" *New Zealand Journal of Public and International Law* 7 (2009): 39.
- 11 P. Joseph, "Constitutional Law" *New Zealand Law Review* (2006): 123.
- 12 One indirect measure of public deliberation is voter participation—something that has been dropping: A. Geddis and C. Morris, "All Is Changed, Changed Utterly?—The causes and consequences of New Zealand's adoption of MMP" *Federal Law Review* 32 (2004): 451.
- 13 Another reason may be that the additional MPs introduced through the list system lack a constituency power base, are dependent on the parties for their position on the list, and generally lack the experience and independence necessary to participate quite so effectively in robust political debate.
- 14 Quoted in A. Geddis and C. Morris, "All Is Changed, Changed Utterly?—The causes and consequences of New Zealand's adoption of MMP," 475.
- 15 See E. McLeay, "Parliamentary Committees in New Zealand: A house continuously reforming itself" *Australasian Parliamentary Review* 16 no. 2 (2001): 121.
- 16 R. Malone, *Rebalancing the Constitution: The challenge of government law-making under MMP* (Wellington: Institute of Policy Studies, 2008), ch 9.
- 17 R. Malone, "Who's the Boss?: Executive-legislature relations in New Zealand under MMP" *New Zealand Journal of Public and International Law* 7 no. 1 (2009): 19, claims that the average number of government bills passed each year dropped from 160 (1987-1996) to 107 (1997-2006), a reduction of 33 percent. G. Palmer and M. Palmer, *Bridged Power: New Zealand's Constitution and Government 4th Ed* (Melbourne: Oxford University Press, 2004), 371, similarly claim that over the period 1996-2002, the rate dropped to 67 percent of the average over the years 1980-1996.
- 18 D. McGee, "Concerning Legislative Process" *Otago Law Review* 11 no. 3 (2007): 417, 431.
- 19 C. Geiringer, P. Higbee, and E. McLeay, "The Urgency Project," Submission to Standing Orders Committee, Standing Orders Review 49th Parliament (2010), 6.
- 20 J. Waldron, *Parliamentary Recklessness: Why we need to legislate more carefully*, Annual John Graham Lecture (Auckland: Maxim Institute, 2008), 20.
- 21 E. McLeay, "Parliamentary Committees in New Zealand: A house continuously reforming itself" *Australasian Parliamentary Review* 16 no. 2 (2001): 123.
- 22 J. Boston and D. Bullock, "Experiments in Executive Government under MMP in New Zealand: Contrasting approaches to multi-party governance," 64-65.
- 23 See A. Kaiser, "MMP, Minority Governments and Parliamentary Opposition" *New Zealand Journal of Public and International Law* 7 (2009): 77.
- 24 H. Kumarasingham, *Onward with Executive Power—Lessons from New Zealand 1947-57* (Wellington: Institute of Policy Studies, 2010), 156.
- 25 P. Joseph, "MMP and the Constitution" *New Zealand Journal of Public and International Law* 7 (2009): 111, 113.

First published online in June 2011 by Maxim Institute

PO Box 49 074, Roskill South, Auckland 1445, New Zealand | Ph (+64) 9 627 3261 | Fax (+64) 9 627 3264 | www.maxim.org.nz

Copyright © 2010 Maxim Institute

ISBN 978-0-9864662-0-5

This publication is copyright. Except for the purpose of fair review, no part may be stored or transmitted in any form or by any means, electronic or mechanical, including recording or storage in any information retrieval system, without permission in writing from the publisher. No reproduction may be made, whether by photocopying or by any other means, unless a license has been obtained from the publisher or its agent.