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# Reconstituting the Constitution

 Springer

### 13.4.3 *Is There a Problem?*

It has been suggested that fixing the period between elections would achieve a fairer system. But is the Prime Minister's right to determine the election date a problem that needs fixing? Prime Ministers, historically, under the Westminster system have enjoyed the right to fix the date of elections. For a fixed parliamentary term, legislation would need to do two things: abrogate the Prime Minister's right to choose the election date, and allow early elections where there had been a vote of no-confidence in the Government. The granting of an early dissolution entails an exercise of the royal prerogative which, by convention, is exercised on the Prime Minister's advice. The question is: Should New Zealand adopt such an arrangement?

There appears to be no perception that there is a problem with the status quo. This may be attributable, in part, to New Zealand's short electoral cycle. With a 3-year window, there is not the temporal flexibility to manoeuvre election dates to treat the voters. Exceptions do occur: for example, when National Prime Minister Robert Muldoon sought a fresh mandate and brought forward by 4 months the 1984 elections, and when Labour Prime Minister Helen Clark sought to take advantage of the polls and brought forward by the same period the 2002 elections.<sup>68</sup> The only other early election since the Second World War (1939–1945) was in 1951, following the divisive, nationwide waterside workers' strike. National Prime Minister Sidney Holland condemned the strike as "industrial anarchy" and moved quickly to capitalise on the public mood. He sought a fresh mandate from the people and was returned with an increased majority of seats.

The parliamentary record does not identify a problem that needs fixing. The above exceptions apart, Prime Ministers have been intent to govern for the maximum period permitted by the term of our Parliament. Three years is a challenging term for Governments intent on implementing their policies in time to ready for the next elections. In the post-war era, Holland has been the only Prime Minister to exploit the prime ministerial prerogative. In 1951 Parliament had a full 15 months to run when Holland seized the electoral advantage and went to the country. Muldoon and Clark also manipulated the electoral cycle but only by 4 months. As long as New Zealand retains the 3 year cycle, there is no pressing need to fix Parliament's term.

A caveat is affixed to this advice: the question of a fixed term might be revisited were New Zealand to consider extending its parliamentary term. The temporal flexibility of a 4-year term would inevitably tempt governments to exploit the electoral cycle according to the vicissitudes of the polls. That has invariably been the experience of countries that have 4–5 year parliamentary terms.

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<sup>68</sup> In 1984 elections were held on 14 July, not the last Saturday in November as was traditional at that time. The 2002 general election was held on 27 July, also 4 months earlier than was envisaged under the normal parliamentary cycle.

## 13.5 Term of Parliament

### 13.5.1 *Obvious and Warranted Reform*

Extending the term of Parliament from 3 to 4 years would be an obvious and warranted reform. Nevertheless, earlier attempts at reform suggest it is unlikely to happen.

New Zealand's is one of the shortest parliamentary terms in the modern world. We are not alone: Australia, for example, also has a maximum parliamentary term of 3 years. However, it is suggested this is problematic for both countries. Three years is too short a period for governments to implement their range of policies with optimal efficiency. The parliamentary term is typically broken into three blocs: the first year is “settling in” year, the second the “working” year, and the third “election” year. Year one is adapting to the bureaucracy, year two is developing and implementing policies, and year three is making ready for the elections. Even where the Prime Minister is returned, confidence and supply arrangements usually require a reshuffling of ministerial appointments and portfolios, resulting in a settling-in period.<sup>69</sup> Extending the term to 4 years would promote a longer “working” period for implementing and refining government policy, producing longer-term efficiencies in public administration. A longer term would also promote more informed voter behaviour. Under a 4-year term, governments could present at elections a more complete record of achievements that take longer time to produce results.

International statistics support the case for a longer term. Most countries have 4 or 5 year terms for their legislatures or governments.<sup>70</sup> Upon a breakdown of all regions and parliamentary structures, the greatest number of countries has a 5 year term. This accounted for 122 states, representing 45.52% of the countries surveyed. The second highest number of countries has a 4 year term (90 states representing 33.58% of countries). The third highest number has a 6 year term (24 states representing 8.96% of countries). Nine states, representing just 3.36% of countries, have a truncated 3 year term, placing New Zealand and Australia within a very small minority of states. Only three states, representing 1.12% of countries, operate under a shorter, 2 year term.

The parliamentary term in New Zealand has not always been as short. Under the New Zealand Constitution Act 1852 (United Kingdom), Parliament's term was 5 years but was reduced to 3 years in 1879, following the abolition of the provinces.

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<sup>69</sup> Every government is formally sworn in following an election, even if the Prime Minister is returned. The symbolism of the formal swearing is in recognition that each MMP government is a separate administration, even if its membership remains largely the same as under the previous administration: see Cabinet Office (2008), para. 6.46. The swearing-in ceremony formally marks the formation and commencement of the new administration and marks the end of the caretaker period.

<sup>70</sup> Inter-Parliamentary Union (2011).

It was feared that abolishing provincial government would disproportionately strengthen central government at the expense of provincial interests. The response was to strengthen voter control by introducing more frequent elections every 3 years. Since then, the 3-year term has been extended on only three occasions: during the First and Second World Wars (1914–1918, 1939–1945) when the term was extended to 5 years and 4 years respectively, and in 1934 when a 4 year term was introduced. The extended 4-year term encountered immediate widespread opposition and was repealed 3 years after its introduction.<sup>71</sup> Since then, the term has remained at 3 years, excepting the temporary departure during the Second World War.

### 13.5.2 *Royal Commission Recommendation*

For the Royal Commission that promoted MMP, a balance must be struck between “voter sovereignty” and “effective government”.<sup>72</sup> On the one hand, voters must be empowered to change the government at frequent intervals through regular elections. But, on the other hand, governments must have sufficient time to implement cohesive policies that will optimise the national interest. The Commission considered but rejected any case for change to a 5 year term, pointing to the lack of constitutional restraints typically found in countries with a longer parliamentary term.<sup>73</sup> The commission instanced the lack of a second chamber or proportional voting system, and observed that New Zealand had no bill of rights or federal separation of powers. Under conditions then present, the commission reported that a 5 year term would represent an “unacceptable erosion of voter control”.<sup>74</sup> However, it did recommend that a referendum be held not later than 1993 on whether New Zealand should adopt a 4 year term. The referendum, it suggested, should be deferred to allow New Zealand the opportunity to adopt some of the constitutional safeguards which were lacking when it reported in 1986.

The Commission recommended that the referendum proposal be for a *fixed* 4 year term. In its view, a longer term would “almost certainly” invite a spate of early elections, which would be destabilising and disruptive.<sup>75</sup> Dissolutions sought purely for political advantage would “reduce the chances of a fair election at a regular time . . . and negate any advantage in increasing the term”.<sup>76</sup>

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<sup>71</sup> Electoral Amendment Act 1937, s 2.

<sup>72</sup> Royal Commission on the Electoral System (1986), Chap. 6.

<sup>73</sup> *Ibid.*, pp. 157, 164–165.

<sup>74</sup> *Ibid.*, p. 158.

<sup>75</sup> *Ibid.*, p. 166.

<sup>76</sup> *Ibid.*, p. 166.

The Commission proposed that the term be fixed, subject to the need for an early election where there had been a no-confidence vote in the government.<sup>77</sup>

### 13.5.3 *Prospects of Reform*

What are the prospects of extending Parliament's term? Not good, if the parliamentary record is any guide. There have been two attempts to extend Parliament's term and each failed by a wide margin. Section 17(1) of the Constitution Act 1986 prescribes the maximum term as 3 years, running from the day fixed for the return of the writs issued for the last preceding election. As a matter of practice, the Governor-General, acting on the advice of the Prime Minister, dissolves Parliament shortly before it expires by effluxion of time.<sup>78</sup> Section 17(1) is the trigger that prompts the dissolution and calling of fresh elections, and that section is one of eight "reserved provisions" under s 268 of the Electoral Act 1993. Section 268 provides that none of the reserved provisions (including s 17(1)) shall be repealed or amended unless the proposal is passed by 75% of all the members of the House of Representatives, or has been carried by a majority of the voters at a national referendum.<sup>79</sup> Two referenda have been held on extending Parliament's term to 4 years. In 1967 and 1990, 68.1% and 69.3% of voters, respectively, supported the status quo (a 3 year term). Less than one third of voters favoured an extended term.

In the intervening years, New Zealand has adopted some of the constitutional safeguards that were lacking when the Royal Commission reported. A parliamentary bill of rights was enacted in 1990 and elections since 1996 have been conducted under proportional representation.<sup>80</sup> However, New Zealanders' innate suspicion of politicians and governments militate against any extension of the term. At the 1967 and 1990 referenda, over two-thirds of voters opposed the proposal for a 4 year term. The popular verdict was unequivocal, if unimaginative. A 4 year term would: encourage longer-term strategic planning and decision-making in government; reduce the frequency of distracting election-year influences and "vote-buying" policies; encourage greater consultation in decision-making, and promote less haste in enacting legislation. The question is: Would the careful articulation of these matters sway the public mind? Reasoned argumentation does not always drive public perception and political decision-making. In an earlier study, I examined the future of the Māori seats and observed that politics is not a logically ordered world:

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<sup>77</sup> Ibid, p. 166.

<sup>78</sup> Compare *Simpson v Attorney-General* [1955] NZLR 271 (SC & CA) (an oversight in applying the statutory timetable under the Electoral Act caused Parliament to cease by expiration of time, rendering the Governor-General's writ to dissolve Parliament a nullity).

<sup>79</sup> Section 268 of the Electoral Act 1993 carried over verbatim (except for section number changes) the former entrenching provision which was section 189 of the Electoral Act 1956.

<sup>80</sup> See respectively the New Zealand Bill of Rights Act 1990 and the Electoral Act 1993.

There is a yawning gulf between reasoned discourse and the real world forces that shape the political constitution . . . National politics are about securing political advantage, not producing optimal outcomes. These brutish realities weave a web of intricate political manoeuvrings and marginalise objective argumentation as a purveyor of political change.<sup>81</sup>

There is one glimmer of hope. In the August 2010 poll, 40% of respondents supported a longer parliamentary term, as opposed to 33% who opposed a longer term. 19 per cent neither supported nor opposed change, and 7% did not know.<sup>82</sup> These are surprising, if encouraging, results, given the 1967 and 1990 referenda results.

### 13.6 Conclusion

What is the scorecard on our selected reforms? First, there is little or no political appetite to abolish the Māori seats, despite the logic of abolition. The Royal Commission was adamant that MMP would trump the need for separate Māori representation. The Māori seats would compromise the integrity of the proportional system, which was designed to promote broader parliamentary representation through the presence of minor parties. Retaining the seats fuelled the perception that Māori representation was to be addressed within the Māori electorates, rather than through the mainstream political system.

The seats should be abolished but what is the chance of that occurring? Very little, one surmises. The Key government has undertaken not to seek to remove the seats without the consent of Māori, and the Labour Party has espoused essentially the same policy. This commitment, well-intentioned though it may be, was not well thought through. The Māori Party, I believe, would thrive were it to ply for the national party vote rather than tether itself to the separate Māori electorates. Cutting adrift of the Māori electorates and branding itself as a truly national political party would indubitably enhance the party's bargaining leverage. The party will continue to undersell itself while its strategy is to target the numerically-capped seats.

Secondly, what does the future hold for MMP? A betting person would plump for the status quo and predict the retention of MMP. There is no stomach for a return to FPP politics and MMP is the proportional system with which voters are familiar. The August 2010 poll suggests change, although a degree of caution is required. A telling statistic was the percentage of respondents who remained undecided. The public education programme on the electoral system demonstrably influenced voting behaviour at the 1993 referendum, and the public education programme that will precede the 2011 referendum might be expected to do likewise.

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<sup>81</sup> Joseph (2008), p. 21. The concept of the political constitution was developed by JAG Griffith in 1977. See now Griffith (1997). For an introduction to the political constitution, see Harlow and Rawlings (1997), pp. 1–4.

<sup>82</sup> ShapeNZ (2010), p. 4.

Thirdly, what prospect is there for a fixed-term Parliament? Very little, one imagines under the current 3 year term. There is no perception of a problem that needs fixing. Governments are too intent on utilising what time they have under the 3-year cycle, than ponder an early election. However, the political calculus might change were New Zealand to extend the parliamentary term. Under a 4-year term, governments in their final year might be tempted to go early, which would immediately prompt the question of a fixed-term Parliament.

Fourthly, would a referendum proposal for a 4-year term have a real prospect of succeeding? No, if the 1967 and 1990 referenda results are an indication. The people are more intent on retaining voter sovereignty than on optimising the quality of government decision-making and performance. Whatever the argument for a longer term, popular sentiment drives referenda outcomes. If there is no desire to extend Parliament's term, then proposals for a fixed term are a non-starter.

The scorecard is complete but leans decidedly in favour of the status quo. On the four subjects examined, the prognosis is against change. This, itself, is an interesting outcome as three of the four change proposals (the Māori seats, a fixed parliamentary term and an extended term) are backed by persuasive argument. What does this tell us? Is it that representative democracy is unresponsive to reasoned argumentation and opportunities for advancement? Or is it that national politics are about strategic political outcomes rather than altruistic aspiration and ideals of public service? This analysis might powerfully endorse the concept of the political constitution, under which the swirling forces of national politics devour all that stands in the way of politically-driven outcomes.<sup>83</sup>

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<sup>83</sup> See Griffith (1997); Harlow and Rawlings (1997), above note 81.

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# Chapter 14

## Misbehaving Members of Parliament and How to Deal with Them

Caroline Morris

### 14.1 An Introduction to the Problem

I'm not a sex fiend or a sex addict but the reality is that I watched blue movies ... I've obviously got to watch BBC more. I'm a red-blooded, robust dude.<sup>1</sup>

Shane Jones MP, New Zealand House of Representatives

Some people think MPs shouldn't have anything, but where does that end? Are we only allowed to buy things from the 99p store?<sup>2</sup>

Michael Connarty MP, United Kingdom House of Commons

The temptations of sex and money have been the downfall of many. Even of Members of Parliament. Or, as recent events in the United Kingdom and New Zealand have shown, especially Members of Parliament.

While scandal and British MPs are no strangers to each other, the relationship was taken to new heights in 2009 when the *Daily Telegraph* newspaper broke revelations of extensive abuse and misuse of the parliamentary expenses and allowances scheme.<sup>3</sup> Leaked data showed that MPs had been using the scheme to claim reimbursement for items such as bathplugs, pornographic films, home extensions, and in the case that came to stand for the extravagance

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<sup>1</sup> Cheng (2010).

<sup>2</sup> McAngus and Sinclair (2009).

<sup>3</sup> Although this information was due to be released under the Freedom of Information Act 2000, the concerns of an unknown whistleblower over the extent of the redactions led to the information being leaked to the *Daily Telegraph*.

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involved in the affair, a floating “duck palace” for the MP in question’s garden pond.<sup>4</sup>

Not to be outdone, MPs in New Zealand have also been found to have been rather generous in their interpretations of what could be done with public money. Earlier in 2010, it was revealed that Ministers in the current and previous government had not been following the rules attached to the use of ministerial credit cards.

If MPs could conduct themselves with propriety at all times, there would be no need for the question this chapter sets out to examine, that is, how best to regulate, and ultimately, discipline, Members of Parliament. However, it is clearly a question still in need of an answer.

Moreover, this is not a new question. Over time, several systems of regulation have been put into place and exercised over MPs. Yet, as we will see, they have met with varying degrees of success. What options are there for the regulation and discipline of Members of Parliament suspected of misconduct? There are two broad forms: internal and external regulation. Most recently, the Conservative–Liberal Democrat coalition government formed after the May 2010 United Kingdom election has proposed another way to address the misconduct of MPs. This is the device of the recall, which will sit alongside the existing forms of regulation. Each of these will be explored in more depth.

### ***14.1.1 The Regulation Options***

First, there are “soft” forms of internal regulation. These typically take the form of non-statutory Codes of Conduct, which may or may not be accompanied by registers of pecuniary and other interests. Next, there are “hard” forms of internal regulation, most typically Parliament’s own form of law, parliamentary privilege, under which MPs can be investigated and disciplined for varying offences.

External regulation is a new development in this area. In 2009, the United Kingdom Parliament under the then Labour government established the Independent Parliamentary Standards Authority, or IPSA, as a response to the expenses and allowances scandal outlined above. The “Independent” part of this body’s name was intended to signal its distance from its objects of regulation, and enhance public confidence in its regulatory activities. However, the IPSA as introduced turned out to be somewhat different from the IPSA as finally established, the net result of which has called into question its ability to act as an effective regulator.

Most recently, the new government brought in after the May 2010 Westminster elections used the Queen’s Speech to announce its intention to create a right of “recall” over misbehaving MPs – able to be activated by the ordinary voter. While the details at the time of writing are available only in outline form, this chapter will,

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<sup>4</sup>In fairness to that particular MP, it should be noted that this claim was rejected by the House of Commons Fees Office.

drawing on its use in other jurisdictions, raise some questions about how this new form of regulation might work, and in particular, its applicability to New Zealand with its Mixed Member Proportional (MMP), rather than first-past-the-post (FPP), Parliament.

## 14.2 MPs Behaving Badly

Having noted earlier that sex and money seem to be at the root of most MPs' troubles we now turn to look at the specific events that have prompted this chapter. They come on the back of a long history of parliamentary misconduct, some further examples of which will be encountered later.

### 14.2.1 *The United Kingdom Scandal*

Members of the House of Commons had long enjoyed a system of expenses and allowances designed to compensate MPs for the additional costs involved in their parliamentary work.<sup>5</sup> The allowances scheme covered expenditure on areas such as staff, travel, and communications, but most of the misuse occurred in relation to housing related costs.

MPs could claim various allowances for groceries and other household items, and household repairs. They were also entitled to a wide range of financial benefits relating to the cost of maintaining a second home (either in their constituency or in London). Significant abuses were uncovered in relation to second homes claims, including several cases of “flipping” the designation of primary and secondary homes during the parliamentary term in order to benefit twice for various allowances and certain tax advantages,<sup>6</sup> claims for second homes occupied by family members,<sup>7</sup> and a claim for £16,000 in relation to a mortgage that appeared to no longer exist.<sup>8</sup>

Despite the requirement that “claims must only be made for expenditure that it was necessary for a Member to incur to ensure that he or she could properly perform his or her parliamentary duties”,<sup>9</sup> two problems arose. One was that a view had arisen that the expenses and allowances scheme had come to be seen as a way of topping up an MP's salary (rather than taking the route of increasing MPs' base

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<sup>5</sup> House of Commons (2009).

<sup>6</sup> See for example Hope (2009).

<sup>7</sup> Beckford et al. (2009).

<sup>8</sup> Winnett and Watt (2009).

<sup>9</sup> House of Commons (2009), p. 7.

salaries), so that MPs felt it acceptable to claim the maximum allowed under the scheme, whether it was actually needed or not.<sup>10</sup> This practice was assisted by the fact that claims for £250 or less required no receipt (and in the case of food, up to £400). The other was that a rather relaxed interpretation was taken of the link between the expenditure and the Member's parliamentary duty. This led to claims ranging from 55p for a cup of Horlicks,<sup>11</sup> and a "Genius 4 piece garlic peeling & cutting set" bought on a TV shopping channel<sup>12</sup> to the equally questionable but considerably more expensive moat cleaning,<sup>13</sup> and the previously mentioned duck palace.

### ***14.2.2 The New Zealand Scandal***

Smaller in scale, but similar in character, in 2010 the details of New Zealand ministerial credit card spending were released following an Official Information Act 1982 request. Released in two stages, these covered the spending of both National and Labour party ministers from 2003.

Analysis of the receipts showed that Ministers had not kept strictly to the terms of the agreement covering the use of the card, which stipulates that that cards should not be used for personal expenses except in an emergency.<sup>14</sup> While some items claimed for, such as golf clubs, CDs, massages and pornographic films, were repaid from Ministers' personal funds, other items, where the parliamentary nature of the expenditure, particularly expenditure on entertaining and alcohol, was in question, were not.<sup>15</sup>

### ***14.2.3 Why Are Solutions Needed?***

Before we turn to look at the options for regulating MPs, there is a prior question that needs answering. That is the question of why a system of regulation is merited. In my view, the justifications are threefold.

First, Members of Parliament occupy a position of trust in regard to the electorate. This comes from their status as representatives, as they are entrusted with the power inherent in the people under the doctrine of popular sovereignty. Should they

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<sup>10</sup> Barratt (2009).

<sup>11</sup> Daily Telegraph (2009a).

<sup>12</sup> Ibid.

<sup>13</sup> Prince (2009).

<sup>14</sup> Ministerial Services (2008).

<sup>15</sup> Staff Reporters (2010).