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## INFORMATION NOTE

### Compliance of the Electoral System of the Legislature with the International Covenant on Civil and Political Rights: New Zealand

#### 1. Background

1.1 At the meeting of the Panel on Constitutional Affairs held on 20 March 2006, Members discussed the methods of electing members of the legislature in other countries. During the deliberations, questions had been raised about the mixed member proportional (MMP) electoral system adopted by New Zealand and Germany. In particular, a Member expressed a concern that the MMP system might not comply with the requirements set out in Article 25 of the International Covenant on Civil and Political Rights (ICCPR)<sup>1</sup>, which states that:

*"Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in Article 2<sup>2</sup> and without unreasonable restrictions:*

- (a) to take part in the conduct of public affairs, directly or through freely chosen representatives;*
- (b) to vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors;*
- (c) to have access, on general terms of equality, to public service in his country."*

1.2 The Research and Library Services Division (RLSD) was asked to conduct a research to study whether or not the MMP system complied with Article 25 of the ICCPR. To prepare this information note, RLSD has asked the Electoral Commission of New Zealand (Electoral Commission), the Consulate of Germany<sup>3</sup>, the Office of the United Nations High Commissioner for Human Rights (UNHCHR) and overseas academics to provide the required information.

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<sup>1</sup> Germany and New Zealand ratified the ICCPR in March 1976 and March 1979 respectively.

<sup>2</sup> Article 2 of the ICCPR is in Appendix for Members' easy reference.

<sup>3</sup> According to the Consulate of Germany, the Bundesrat and the Foreign Ministry are still in the process of gathering the required information.

1.3 As at the publication of this information note, the Electoral Commission, Dr. David Denemark<sup>4</sup> and Prof. Jack Vowles<sup>5</sup> have responded to RLSD's enquiry. As a result, this information note covers New Zealand only.

## **2. Historical development of the parliamentary electoral system**

2.1 In New Zealand, between 1913 and 1993, parliamentary elections were held on the basis of plurality or first-past-the-post (FPP) voting in single-member constituencies called electorates.

2.2 By 1936, a stable two-party system had begun to take hold. Two major parties – the Labour Party and the National Party – alternated in power over the course of the following six decades. For many years, the National Party and the Labour Party were the only two parties represented in Parliament<sup>6</sup>: under the FPP system, it was considered difficult for minor parties with evenly spread support in the country to win seats in Parliament.

2.3 Concerns about the fairness of the FPP system emerged as early as 1954, when the Social Credit Political League won 11% of the vote in the general election but no seats in Parliament. Criticism of the electoral system intensified after the 1978 and 1981 elections, in which the National Party won an absolute majority of seats in Parliament and remained in power, despite receiving fewer votes than the Labour Party. In both elections, the Social Credit Political League obtained a substantial number of votes but only won few seats in Parliament.

2.4 In 1984, the Labour Party returned to power. The following year, the Labour government established a non-partisan Royal Commission on the Electoral System (Commission) to consider alternative systems for electing Members of Parliament (MPs).

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<sup>4</sup> Dr. Denemark is the Associate Professor of Political Science and International Relations of the University of Western Australia. He has a major research interest in elections, electoral behaviour and electoral campaigning in Anglo-American democracies. One of his research publications is "Choosing MMP in New Zealand: Explaining the 1993 Electoral Reform".

<sup>5</sup> Prof. Vowles is the Professor of Political Studies of the University of Auckland. His current research interests are in New Zealand and comparative politics, elections, public opinion, and the consequences of electoral systems. One of his research publications is "New Zealand: The Consolidation of Reform?".

<sup>6</sup> The New Zealand Parliament was established by the British New Zealand Constitution Act 1852 as a bicameral legislature. However, the upper house of Parliament, the Legislative Council, was abolished in 1951. The New Zealand Parliament is now unicameral, which is known as the House of Representatives.

2.5 The Commission's report, entitled *Towards a Better Democracy*, was published in 1986, and established 10 criteria for choosing an electoral system:

- (a) Fairness among political parties. In the interests of fairness and equality, the number of seats gained by a political party should be proportional to the number of voters who support that party.
- (b) Effective representation of minority and special interest groups. The voting system should ensure that parties, candidates and MPs are responsive to significant groups and interests. As such, the number of seats won should not only be proportional to the level of party support but also reflect other significant characteristics of the electorate, such as gender, ethnicity, socio-economic class, locality and age.
- (c) Effective Maori<sup>7</sup> representation. In view of their particular historical and socio-economic status, Maoris and the Maori point of view should be fairly and effectively represented in Parliament.
- (d) Political integration. While the electoral system should ensure that the opinions of diverse groups and interests are represented, it should at the same time encourage all groups to respect other points of view and to take into account the good of the community as a whole.
- (e) Effective representation of constituents. An important function of individual MPs is to act on behalf of constituents who need help in their dealings with the government. The voting system should therefore encourage close links and accountability between individual MPs and their constituents.
- (f) Effective voter participation. If individual citizens are to play a full and active part in the electoral process, the voting system should provide them with mechanisms and procedures which they can readily understand.
- (g) Effective government. The electoral system should allow governments to fulfill their responsibilities. Governments should have the ability to act decisively and there should be reasonable continuity and stability both within and between governments.

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<sup>7</sup> Maoris are indigenous inhabitants of New Zealand (an estimated 15% of the total population at the census of 2001).

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- (h) **Effective parliament.** In addition to providing a government, Parliament has a number of other functions, such as enacting legislation, authorizing tax increases and public expenditure, and scrutinizing government operation and policies. The voting system should provide a parliament which is capable of exercising these functions as effectively as possible.
- (i) **Effective parties.** The voting system should recognize and facilitate the essential role played by political parties in modern representative democracies in formulating and articulating policies and providing representatives for the people.
- (j) **Legitimacy.** Members of the community should be able to endorse the voting system and its procedures as fair and reasonable and to accept its decisions, even when they themselves prefer other alternatives.

2.6 The Commission concluded that the FPP system rated well in relation to effective representation of constituents, voter participation, effective government, effective parliament and legitimacy. In its view, however, the FPP system had "severe weaknesses" in relation to fairness to major and minor parties, minority representation and Maori representation.

2.7 Having remarked that the FPP system was "inherently flawed", the Commission examined a number of alternative systems, particularly the MMP system, the single transferable vote<sup>8</sup> (STV) system, the supplementary member<sup>9</sup> (SM) system and the alternative vote<sup>10</sup> (AV) system.

2.8 The Commission concluded that the MMP system was the most suitable alternative to the FPP system, since it would be fairer to political parties and would improve voter participation, representation of Maoris or other groups, and be seen as more legitimate. It also recommended holding a binding referendum to decide the adoption of a new electoral system.

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<sup>8</sup> Under the STV system, the country is divided into multi-member constituencies; and voters rank candidates in declining order of preference.

<sup>9</sup> The SM system is similar to the MMP system, combining the FPP system with proportional representation. However, proportionality is confined to list seats and not all the seats in the legislature.

<sup>10</sup> The AV system is similar to the FPP system, with voters ranking candidates in declining order of preference.

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2.9 In September 1992, the Labour government held a two-part, non-binding referendum on the electoral system, in which voters were asked if they wanted to change the existing FPP system, and then to choose among the four alternative systems considered by the Commission: MMP, STV, SM or AV. About 55% of the voters took part in the vote, in which a proposal to establish a new electoral system was overwhelmingly approved in the first part of the referendum, with 85% of the voters in favour against 15% for retaining the existing system.<sup>11</sup> In the second part of the referendum, 71% of the voters chose the MMP system as the alternative electoral system.

2.10 In a second, binding referendum held in conjunction with a general election in November 1993, voters were asked to choose between FPP and MMP. A majority (54%) voted for the MMP system while only 46% for the FPP system.

### **3. The current parliamentary electoral system**

3.1 Following the referendums, the Electoral Act was amended in 1993. Under the new law, the number of MPs increased from 99 to 120. The membership of Parliament is elected via the MMP system, which combines elements of the single-member constituency plurality system with proportional representation. Under this system, the country is divided into a number of single-member constituencies or electorates. There were 65 electorates in the 1996 election, 67 in 1999, and 69 in both 2002 and 2005. Electorate seats are filled by the FPP system, under which the candidate obtaining the largest number of votes in each constituency is elected.

3.2 In addition to nominating individual candidates at the electorate level, political parties set up lists of individuals at the national level. Each voter casts two votes, namely a party<sup>12</sup> vote for a list, and an electorate vote for a constituency candidate. Party lists are closed so that voters cannot choose individual candidates on the lists or alter the order of such lists. The party vote is paramount in the electoral system, because it determines the overall number of seats a party is entitled to in Parliament.

3.3 The overall number of candidates of a party elected to Parliament is determined by the national percentage of votes the party obtains (those parties obtaining less than 5% of the votes or failing to win an electorate seat is disregarded).

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<sup>11</sup> Some studies showed that the overwhelming rejection of the FPP system in the 1992 referendum appeared to have been brought about by mounting voter discontent with the two major parties, both of which had broken campaign promises and pursued unpopular economic policies while in office.

<sup>12</sup> To run a party list, a political party must be registered by the Electoral Commission. To qualify for such purpose, it must demonstrate to have at least 500 fee-paying members who are eligible to enrol as voters. Unregistered parties and independent candidates may only run for electorate seats.

#### **4. Compliance of the mixed member proportional electoral system with Article 25 of the International Covenant on Civil and Political Rights**

4.1 In order to study whether or not the MMP system complies with Article 25 of the ICCPR, RLSD has asked UNHCHR<sup>13</sup>, the Electoral Commission, Dr. Denmark and Prof. Vowles to provide their comments, which are presented below.

##### Electoral Commission

4.2 The Electoral Commission has stated that the MMP system is accepted by all who study electoral systems to be fair and democratic. The Electoral Commission remarks that the New Zealand Parliament scores the highest mark possible on measures of proportionality, as its electoral system considers the percentage votes cast for each party as well as the percentage of MPs that each party has in Parliament.

4.3 In effect, under the MMP system, the party vote is cast by all participating voters and is not restricted to those who are party members. An independent candidate is not prohibited from contesting the electorate vote. A voter who wants to vote for the independent candidate can give the electorate vote to that candidate and the party vote to whichever party the voter prefers. The independent candidate would have the same chance as all other candidates of winning in the electorate. In practice, there have been very few independent candidates contesting elections in New Zealand.

4.4 According to the Electoral Commission, UNHCHR has not expressed any concern regarding the MMP electoral system adopted in New Zealand<sup>14</sup>.

##### Dr. David Denmark

4.5 Dr. Denmark has replied that it is clear that there is no such violation of Article 25 on the basis of party voting under the MMP system. Registered voters are given two ballots: one that records a vote for an electorate representative candidate and a second that records a vote for a party.

4.6 Voters may cast a party list vote, and may do so for any party they wish. They may also (as happens frequently in New Zealand) split their votes by casting their constituency ballot for a candidate for one party, and then casting their party list ballot for a different party.

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<sup>13</sup> As at the publication of this information note, UNHCHR has not responded to RLSD's enquiry.

<sup>14</sup> RLSD has not been able to find any published UNHCHR report discussing the compliance of the MMP system with Article 25 of the ICCPR.

4.7 In addition, he is not aware of any studies conducted by UNHCHR investigating the implications of the MMP system under the ICCPR electoral requirements. He opines that the lack of studies may be because there are no obvious implications in this respect. If the MMP system had violated this sort of fundamental human right, the German and New Zealand MMP systems would have been condemned and forced to be revised long ago.

#### Prof. Jack Vowles

4.8 Prof. Vowles has explained that Article 25 does not seem to require absolute fairness, but only the right to stand for election. So long as an independent candidate can stand freely in one part of the system, that is, for the electorate vote, this would seem to imply compliance.

4.9 As long as any person is equally able to form his own political party, and register it, he can then put up a list – which could be of one person – and run for the party vote. To register as a political party eligible to put up a party list, one simply needs 500 fee-paying members who are eligible to enrol as voters in New Zealand. According to Prof. Vowles, as one would need many more than 500 people to vote for one to have a chance of being elected as an independent candidate, this is not an unreasonable hurdle.

4.10 In any event, no one is likely to do this, because of the threshold for taking a seat or seats in Parliament: 5% or more of the party vote, or winning one or more electorates. An independent candidate is much more likely to win an electorate than gaining 5% or more of the party vote. Consequently, no one is likely to form a political party and run nationally since it makes more sense to put all of one's efforts into winning an electorate seat. Running a political party for the party vote across the country would not increase the chances of being elected. In fact, Prof. Vowles argues that the party would reduce the chances of winning if it spreads the resources thinly. The bottom line is that, so long as anyone is free to form a political party, there is no problem in principle. In practice, forming a political party and running nationally would not enhance the election chances.

4.11 Prof. Vowles has also stated that UNHCHR has never expressed any concern over the compliance of the MMP system with the ICCPR.

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## Appendix

### Article 2 of the International Covenant on Civil and Political Rights

A.1 Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

A.2 Where not already provided for by existing legislative or other measures, each State Party to the present Covenant undertakes to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such laws or other measures as may be necessary to give effect to the rights recognized in the present Covenant.

A.3 Each State Party to the present Covenant undertakes:

- (a) to ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity; to ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy;
- (b) to ensure that the competent authorities shall enforce such remedies when granted.

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