

GOVERNANCE IN LESOTHO: REPOSITIONING FOR SUCCESS

**Report on the study visit to New Zealand by a delegation
from the Kingdom of Lesotho**

*Dr Rajen Prasad
Commonwealth
Adviser
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Introduction

The April 2013 scoping report by the Commonwealth Expert Adviser to Lesotho¹ Dr Rajen Prasad entitled '*Sustaining Coalition Governments in the Kingdom of Lesotho*' recommended a number of reforms to the public service, parliamentary processes, coalition formation and operation for the coalition government of Lesotho to consider. These recommendations for reforms were endorsed and accepted by all parties. A major step in developing the recommended programme of change was a study visit to New Zealand to observe the following: the operation of a Mixed Member Proportional (MMP) electoral system, the nature of a non-political public service, the mechanics of managing a successful coalition and procedures for government formation after an election.

This visit took place from 30 June to 4 July 2014. The 25-person delegation was led by the Deputy Prime Minister Hon Mothetjoa Metsing and included the following: Ministers, Members of Parliament - including some from the Opposition, Principal Secretaries, the Deputy Speaker and the Clerk of the National Assembly, the Vice President of the Senate, the Government Secretary, the Cabinet Secretary, several officials from coalition partners including political advisers, an Electoral Commissioner, a Director from the Ministry of Foreign Affairs and a member of the faith community. A full list of the delegation is included in the appendices.

The visit was hosted by the New Zealand Parliament in Wellington. The delegation participated in an intensive five day programme that included presentations by former Governor-General Sir Anand Satyanand, senior officials of the Parliament including the Speaker and the Clerk, Members of Parliament from the Government as well as the Opposition, senior public servants, officials from the Department of Prime Minister and Cabinet, the Electoral Commission, the State Services Commission, and Parliamentary Services. The full programme is appended to this report.

Subsequent to presentations by key New Zealand experts, which always included a question and answer session, the delegation engaged in several detailed discussions to clarify what was presented and to consider its implications for possible reform of governance arrangements in Lesotho.

¹ 'Sustaining Coalition Governments in the Kingdom of Lesotho: scoping study of suggested reforms for the Government of Lesotho', Dr Rajen Prasad, April 2013

Organisation of the Report and Recommendations

The report is organised along the four themes of the study visit. Each section identifies the major aspects of New Zealand's governance architecture and processes, and the key points made by the presenters.

The major recommendations were developed by the delegation and represent the consensus that was reached on the final day. Suggestions on how to progress the recommendations were developed by the Commonwealth Advisers and represent suggestions to the Government of Lesotho and any future implementation team. The recommendations are informed by the extensive consultations conducted with a wide cross-section of interests in Lesotho since the May 2012 election by the Commonwealth team and their knowledge of workings of the New Zealand governance system.

Next Steps

It is now for the Government of Lesotho to decide whether, and if so, how it implements proposed reforms. In general, the recommendations of this report and the proposed reform programme represent a set of interrelated changes that is advisable for deepening democracy and enhancing development. It is the Commonwealth Expert Adviser's view that addressing only some of the recommended changes will not produce the sustainable change that various stakeholders have informed the Commonwealth team is required in Lesotho. Together, there is every chance that sufficient momentum will be gained to give citizens confidence in their governments and will enable governments to focus on those things that could lift Lesotho from the group of least developed nations.

The programme suggested here depends on strong leadership that is focused on doing what is best for the country and nothing else. The MMP system gives everyone a chance to participate and citizens will also be keen to see what their first MMP parliament achieved. The Commonwealth Advisers believe that Lesotho has the potential to become a leading example of participatory democracy in Africa, and through this, progress prosperity for its two million citizens. The work of the Commonwealth team has been motivated by this vision.

Chapter One

Establishing an independent public service

Introduction

There is now a widespread consensus amongst all political parties, civil society and the public service that the Lesotho public service should be reshaped as an independent, non-politicised, professional service delivering the policies set by Ministers and approved by Cabinet. It has also been accepted that processes should be enhanced so that Principal Secretaries are more accountable to their Ministers and that Parliament should be further enhanced to hold both Ministers and Principal Secretaries accountable through its various procedures.

One of the key tasks of the Lesotho delegation during its study visit to New Zealand in July 2014, was to gain an understanding of how such a service operates and how the transition to a non-politicised service might be achieved.

The delegation had an opportunity to hear from the former Governor-General Sir Anand Satyanand about New Zealand's parliamentary democracy and its system of checks and balances. This was followed by a detailed presentation on New Zealand's politically neutral public service by the State Services Commission (equivalent to Lesotho's Public Service Commission) and visits to four Ministries (Defence, Police, Social Development and Primary Industries). The delegation also received a presentation by the Opposition Spokesperson for the State Services and the views of one of New Zealand's most senior public servants who has led several Ministries over the years under various coalition governments.

Throughout the study week there were several extensive discussions amongst members of the delegation and the Commonwealth team based on the presentations. The recommendations in this report are based on the broad consensus that emerged.

An independent public service is an important aspect of strong and stable governance. Ministers must have confidence that their ministry officials are competent, will provide free and frank, evidence-based advice, and will implement the government's policies effectively. An impartial public service is held accountable by Ministers and Parliament.

A professional public service will have the capability to implement a government's policies competently. Principal Secretaries and Chief Executives will provide advice to Ministers based on the collective thinking of competent staff, enabling the Minister to be fully informed about the potential effects of government policies before they are implemented.

The international standard is for public servants to be appointed on the basis of their competence and experience, and that their political views will be kept private. However, it will require strong political will to reposition a country's public service

as a non-political, independent and professional public service. The starting point for reform of the public service in Lesotho is the political will of the Cabinet.

Key aspects of New Zealand's system of government, public service and its checks and balances

New Zealand's independent public service does not exist in a vacuum but is a key aspect of its parliamentary democracy. Its architecture includes the following elements, some of which represent checks and balances which moderate the power of the executive branch (the Government):

- New Zealand is a democracy whose citizens elect a government with a maximum term of 3 years.
- New Zealand is a Parliamentary democracy, with Members of Parliament passing its laws.
- New Zealand is a monarchy which retains Her Majesty The Queen as its Head of State. The Queen appoints a representative called the Governor-General who carries out her duties in New Zealand.
- New Zealand has an independent judiciary. The court system upholds both the laws passed by parliament, and the legal rights of those brought before the courts
- New Zealand maintains the separation of powers of its legislative, executive and judicial branches.
- New Zealand has an independent and politically neutral public service.
- It is the responsibility of the public service to maintain a group of appropriately trained staff capable of undertaking the tasks required of them. This necessitates an extensive training programme which extends to the utilisation of a system of accountability and measurement of performance.
- The New Zealand Parliament has systems and processes for scrutinizing the public service as well as Ministers. These are discussed in more detail below.
- The New Zealand Police and Defence Force are professional operations, which operate independently and impartially and in accordance with their empowering legislation. Their work is subject to the scrutiny of parliament. The Defence Force cannot take any unilateral military action except as directed by parliament.

Role of the Governor-General

The Governor-General is appointed for a five-year period to act as the Head of State on behalf of The Queen. The Governor-General always acts on the advice of the Prime Minister and other Government Ministers.

The only exception occurs immediately following an election when the Prime Minister no longer holds office and it is up to the Governor-General to decide which party (or parties) can form a stable government. This is a similar process to

the Council of State in Lesotho that advises the King which parties to appoint as a government.

Role of the State Services Commission²

The State Services Commission plays a pivotal role in the New Zealand public service. There is a tripartite relationship between the State Services Commissioner, Minister of the Crown and Chief Executives of Ministries who are responsible for the hiring of all staff. The State Services Amendment Act 2013³ sets out in legislation the following functions of the State Services Commissioner:

- Appointment and employment of public service chief executives.⁴
- Reviewing the performance of public service chief executives.
- Investigating and reporting on matters relating to ministry performance.⁵

The role of the State Services Commissioner as set out in the State Sector Act 1988 also includes the following:

- Provide system leadership and oversight.
- To review design, capability and performance of the State services.
- To provide leadership development strategy in the public service.
- To issue codes of conduct; and provide advice and guidance.
- Undertake investigations.

The State Services Commissioner also provides guidelines for the conduct of the public service and advice to Chief Executives on a range of matters.

Process for major appointments in New Zealand

New Zealand has well established processes for major appointments in constitutional and senior public service roles, some of which are described below:

- *Governor-General:* the Governor-General is appointed by The Queen on advice from the Prime Minister. The Prime Minister consults with senior Members of the Opposition to make sure they agree with the appointment. This allows for stability if the government changes. Individuals who have been politically active or stated publicly their political affiliation are not likely to be appointed as Governor-General.

² The State Services Commission in New Zealand is the equivalent entity to the Public Service Commission in Lesotho, although there are major differences in their respective roles and responsibilities.

³ All New Zealand legislation can be accessed online at: <http://www.legislation.govt.nz/>.

⁴ As mentioned previously chief executives are the equivalent to Principal Secretaries in Lesotho.

⁵ We understand that in Lesotho, parastatals are not under the management of the Public Service Commissions. In this report when using the term “public service”, we are referring to all organisations which are funded by the state.

- *Chief Executives (called Principal Secretaries in Lesotho)*: appointment is the responsibility of the State Services Commissioner. All vacancies are publicly advertised and applicants are assessed on their experience and competence. Once shortlisted, applicants usually undertake 2 interviews by recruitment consultants, sit an IQ and psychometric test, and attend a panel interview. The panel then makes a recommendation to the Commissioner, who appoints the Chief Executive after consulting the Minister and Cabinet. Chief Executives are appointed for a period of up to 8 years, and may be reappointed depending on their performance. However the usual period of appointment is five years.

The process for appointing the Chief of Defence and Police Commissioner is roughly the same as appointing a Chief Executive. Appendix A is a diagram of the process for appointment of Chief Executives in New Zealand.

Impartiality of Chief Executives (Principal Secretaries)

The culture of political neutrality of the public service in New Zealand is so well established that all Chief Executives who addressed the delegation presented the same view of neutrality. When engaging with Ministers they followed two very simple rules:

- *The rule of law*: Help Ministers to implement policies within the bounds of the law.
- *Political neutrality*: Most people have a political preference. However, the role of the public servant is to never show their preference in public and act in a professional manner.

In New Zealand, Chief Executives head ministries and work to execute their Minister's policies. Ministries provide evidence-based advice to Ministers on policy, and also implement the policy once the Minister makes a decision. If the Chief Executive disagrees or refuses to implement a policy they must resign their position.

For governments to have their policies implemented successfully, and for citizens to have confidence in the public service, public servants must be appointed on the basis of their merits and competence level. In addition, public servants have a responsibility to remain politically neutral when undertaking their duties.

The delegation carried out site visits to the New Zealand Defence Force, Police Service, Ministry for Primary Industries, and Ministry of Social Development. All Ministers are based in parliament and have their own staff, while Chief Executives are based with their Ministries in buildings around parliament and in the central business district. Ministers are not located in Ministries as it is thought this could compromise the separation of powers between the two. Ministers cannot direct the operations of their ministries. In New Zealand, the operation of a ministry is the sole responsibility of the Chief Executive.

Chief Executives meet with Ministers regularly throughout each week and are accountable to Ministers to implement their policies. The Chief of Defence Force and Commissioner of Police are appointed through the same process as other

Chief Executives. The Commander-in-Chief is the Governor General who exercises his powers on the advice of the Minister of Defence under the Defence Act 1990. Similarly the Police Force carries out duties contained in its empowering legislation.

Scrutiny by Offices of Parliament⁶

New Zealand has a number of Offices of Parliament which are crucial to ensure the continued scrutiny of the independence and effectiveness of the public service. Two of these are described below:

- *Ombudsman*: the role of the Office of the Ombudsman⁷ is to investigate complaints about administrative decisions or recommendations made by New Zealand public service.
- *Auditor-General*: the Office of the Auditor-General⁸ reports directly to parliament; it is the auditor of every public organisation⁹ in New Zealand. The Public Audit Act 2001 provides that the Auditor-General can examine whether public entities are carrying out their activities effectively and efficiently, and whether they are complying with their statutory obligations.

Discussion

The delegation was introduced to the key elements of an independent public service. Every presentation to the delegation gave the same message. The independence and non-political nature of the public service provides guarantees to Ministers and the government that it will receive frank advice from its officials and absolute loyalty in working to its policy prescriptions. The independent public service provides continuity and stability when governments change and ensures that there is no period when the government machinery is not fully operational.

The various elements to an independent public service work in unison to give governments the certainty that its policies will be put into operation and that it will receive the best advice possible on the best methods to achieve its goals. Imagining how an independent public service might be designed and implemented in Lesotho was a challenge for the delegation. They had many questions, only some of which have been fully answered. Moving from a politicised public service will require political leadership as well as critical technical input. There will be implications for everyone in the country and it will not be easy to move from the current system of patronage to one based entirely on merit. However, the delegation agreed that this challenge must be faced as a matter of urgency in Lesotho.

In this regard, specific recommendations follow.

⁶ In New Zealand these are independent organisations which are accountable to and report to Parliament.

⁷ For further information see: <http://www.ombudsman.parliament.nz/>

⁸ For further information see: <http://www.oag.govt.nz/our-work>

⁹ Every organisation which is owned by the state or state funded.

Recommendations for the establishment of an independent public service:

1. That the government immediately signal its intention, and begins the process to transform the public service into a non-political and independent public service where appointments are based on merit and made by an independent authority at arm's length from the executive.
2. That the government appoint a Public Service Reform Design Team (the Design Team) with appropriate technical assistance, to begin the design of the new public service of Lesotho. The redesign should broadly be in line with this report, the Commonwealth Expert Adviser's scoping report of April 2013 and with international best practice for a non-political public service.
3. That the design team propose a detailed change management plan for repositioning the public service as non-political and independent.
4. That the design team consider rationalising the roles of the Ministry of Public Services and the Public Service Commission into one body responsible for the appointment of Principal Secretaries.
5. That the design team's first task should be to recommend interim measures to stop any further political appointments to the public service.
6. That the design team should also recommend an interim process for appointments to Principal Secretary positions that are based on merit and that must be non-political.
7. That the design team recommend other interim measures it considers necessary to avoid a rush of political appointments from the day of the announcement that future appointments to the public service will be non-political.
8. That the design team prepare interim guidelines to ensure all appointments to the public service will be non-political.
9. That, in association with the Public Service Commission, the design team prepare interim guidelines on how public servants are to be non-political and independent.
10. That the design team develop a public information programme signalling the move to an independent public service and its implications for all citizens.
11. That the design team report its detailed proposals to Cabinet through the Minister for Public Services within three months of being appointed.
12. That Cabinet consider legislative change to give force to the redesigned public service and its mechanisms.

Chapter Two

Repositioning Parliament for a Mixed Member Proportional environment

Introduction

A second remit for the delegation was to study the nature of New Zealand's MMP parliamentary processes and institutions and recommend reforms for the Lesotho Parliament to consider.

A strong democracy depends on a parliament with processes and procedures that enable the business of law making to be conducted efficiently and for citizens to participate effectively. Parliament is where the government and the bureaucracy are held to account in a transparent manner. Parliament is where citizens expect their representatives to lead the nation and where the Opposition robustly questions the government and bureaucracy.

MMP has the potential to enable a House of Representatives to be truly representative of the interests of all of its peoples. Parliament is the ultimate legal authority in the land. With time and smooth transitions, parliament comes to represent the major institution in which citizens place their faith and trust, even when governments change. When parliament respects the will of the people, when all institutions of the state take their authority from parliament, and when transitions are smooth and predictable, a country can be said to have good governance structures to enable the economy to grow, commerce to thrive, and for citizens to have good jobs and access to health, education and safety.

Over the last eighteen years, the architecture of the New Zealand Parliament has evolved and can now be considered fit for purpose in an MMP environment. Adapting parliamentary procedure and systems for the Lesotho Parliament could be considered in the reform process.

The delegation had opportunities to examine each of the key aspects of the New Zealand Parliament. It heard from the Speaker of the New Zealand Parliament, the Right Hon. David Carter, and the Clerk of the House. It was briefed on the workings of Select Committees (Portfolio Committees in Lesotho) and attended a hearing, followed by an interactive session with the Social Services Select Committee. The delegation also met with three Whips from Government and Opposition Parties before observing the House during '*Question Time*' and the commencement of an urgent debate. The day was rounded off with an address from the Shadow Leader of the House. The delegation also had an opportunity to meet the Speaker and other Members of Parliament at a reception.

The Speaker of New Zealand's Parliament reflected a common belief in New Zealand that MMP has significantly advantaged democracy. He conveyed that adapting to MMP was not an easy process but, with persistence and respect for the will of the people who voted for MMP, successive parliaments have made the

necessary adaptations and the systems now works well. The overwhelming majority voted “no” in a referendum on whether New Zealanders wanted to change the MMP system.

MMP in Lesotho

In 1999 the political parties which had contested the 1998 election unanimously agreed to adopt an MMP electoral system. The idea was to promote inclusiveness and to guard against domination by a single party. MMP was first used in Lesotho’s 2002 election. In the 1998 election, 80 members were elected by simple majority vote. The May 2012 elections resulted in Lesotho’s first coalition government. Today the eighth National Assembly (House of Representatives) has 120 members who are elected for a five-year term: 80 members are elected from single-member constituencies by simple majority vote, and 40 members are elected from nationwide party lists. In order to achieve overall proportional representation, party list seats are allocated in accordance with the number of constituency seats won by each party and the total number of votes obtained by each party.

MMP in New Zealand

In a 1993 referendum held in conjunction with the general election, New Zealanders voted to adopt the MMP voting system and it was introduced at the 1996 election. The system of MMP adopted by New Zealand seeks to balance two important objectives; the principle of proportionality: (1) that a party’s share of seats should reflect its share of the nationwide vote; (2) and the need to ensure elections deliver effective parliaments and stable governments by avoiding an undue proliferation of very small parties in parliament.

The defining characteristics of MMP are a mix of MPs from single-member electorates and those elected from a party list, and a parliament in which parties’ shares of seats roughly mirror their share of the nationwide vote. In New Zealand, each voter has two votes, a vote for a party and a vote for their preferred candidate in their electorate. A party may be eligible for a share of the list seats if it gains 5 percent or more of the nationwide party vote or wins one or more electorate seats. While the Lesotho parliament effectively has no threshold, the New Zealand Parliament has a high threshold of 5 percent of the party votes cast.

The current government is a coalition of four parties and the Opposition is made up of four parties and an independent MP. The leader of the largest party in government is the Prime Minister and the leader of the largest party in Opposition is the Leader of the Opposition.

New Zealand’s parliamentary architecture

New Zealand’s parliamentary architecture is represented by a complex set of interrelated systems with specific functions, a large number of experts and support staff, rules and conventions that inform the processes of the institution, and a collective desire to ensure everything works symbiotically to ensure parliament is efficient and responsive. The introduction of MMP in New Zealand required that

the parliamentary procedures developed for an essentially two-party system, had to be adapted for a multi-party system. This is now a constant process of review and improvement by multi-party committees who work collaboratively to ensure an effective outcome.

The sources of the rules which govern how the House and its committees work include statutes (principally the Constitution Act 1986 and the Electoral Act 1993), Standing Orders, Speakers' Rulings, and practice.

The New Zealand Parliament sits for about 30 – 32 weeks of the year with a summer break of about seven weeks over the Christmas period.

Statute Law

The House is bound by the law. However, conventions of parliamentary privileges provide that some aspects of the general law may not apply to parliamentary proceedings because of the privileges enjoyed by the House and its members in carrying out parliamentary business. Statute law provides a framework around which a great deal of the financial business of the House revolves. There are also many statutes directing that reports and regulations are laid before the House. Where a statute applies to the House, all other forms of procedure are subservient to it.

Standing Orders

The Standing Orders of the House form its basic code of rules of procedure. In almost all circumstances when a point of procedure needs to be established, the first resort is to review the Standing Orders. A prime objective of the Standing Orders is to support and give effect to statutory requirements applying to the House. For example, the detailed mechanical provisions for electing a Speaker help to fulfil the House's duty at its first meeting after a general election to elect a Speaker. Standing Orders are not intended to diminish or restrict the rights, privileges, immunities and powers otherwise enjoyed by the House.

Standing Orders also represent political accommodations and allocations among the various parties and members of the House. The introduction of the multi-party MMP environment saw changes made to the Standing Orders in 1996 to explicitly recognise parties, define the role of and establish the Business Committee, determine the allocation of questions for oral answer, speaking rights, committee memberships, and the seating arrangements in the Chamber. The Standing Orders perform a critical rationing function for that scarce commodity of time, and are designed to promote good outcomes by providing for the House to follow robust procedures. A Standing Orders Committee conducts reviews of, and reports on the Standing Orders and the House's procedures and practices, making recommendations as it sees fit.

Speakers' Rulings

The Standing Orders require that in cases for which they do not provide, the Speaker is to decide, guided by previous Speakers' Rulings and the established

practice of the House. From time to time, collections of the more significant Speakers' Rulings are published as guidance for the future.

Practice

This refers to the manner in which things are consistently done, rather than that which is expressly laid down in the Standing Orders or Speakers' Rulings. However, practice must be consistent with these rules. Practice may take the form of guidelines, for example, as an aid to meeting procedures. The Standing Orders Committee is itself an important source of practice by recommending how procedures are to be applied.

New Zealand's Parliament draws on a history of more than 150 years, and considerable practice and convention has developed over this time. Without this history, it could be more helpful for Lesotho's Parliament to more clearly prescribe the way its Standing Orders operate and enhance its legislation.

Business Committee

With New Zealand's move towards a multi-party environment in 1996, it was realised that managing parliamentary business would be a more complex matter than it had been in the past. The desire for a forum in which discussions could be held among the parties represented in the House about the organisation of the business to be transacted resulted in the establishment of the Business Committee. Chaired by the Speaker with representatives from each party, the committee meets weekly and works constructively and by consensus to determine matters such as the order of business, the allocation of speaking times, and appointments to select committees.

The Business Committee, as detailed in the Standing Orders, is a much praised feature of New Zealand's Parliament under MMP. It could serve as a useful model for the efficient transaction of business and productivity in Lesotho's Parliament.

Select Committees

Select committees are the engine rooms of the House, carrying out its most intensive work, whether it is of a legislative, financial scrutiny, or investigatory nature. Whereas debate in the House is confined to Members of Parliament, select committees directly involve the public in their work through a public submission process. In doing so, they enable the public to have input into the development of legislation. The select committees also play an important role in holding the government to account. In particular, the committees question Ministers in their examination of the Estimates, with assistance from the office of the Auditor-General, and conduct Financial Reviews of government agencies by questioning chief executives.

There are 13 subject committees, for example - health, justice and electoral, with each being serviced by Select Committee Office staff who provide procedural, report-writing and administrative support. Committees are expected to set politics aside, appoint advisers from the relevant government departments and generally

work in a constructive cooperative way. In an MMP environment the membership of select committees overall is proportional to party membership in the House. The Business Committee is responsible for determining the membership of individual committees, which range in size from 5 to 12 members.

Key positions in New Zealand's Parliament

The Speaker

The Speaker of the House of Representatives is the highest officer elected by the House and must fulfil the role without bias to any political party. This is especially important in an MMP environment with multiple parties. In the House, the Speaker ensures that parties are treated fairly, order is maintained, and the Executive is held to account. The position is the third most important in New Zealand, after the Governor-General and the Prime Minister.

Clerk of the House

The Clerk of the House is the principal permanent officer of the House of Representatives. The Clerk is an expert in parliamentary law and procedure and is appointed by the Governor-General on the recommendation of the Speaker. The Clerk is a non-political officer who remains in office regardless of which party forms the Government. A Deputy Clerk, appointed in the same way, assists the Clerk. When the House is sitting, the Clerk notes proceedings, calls items of business, conducts votes, and advises members as required. One of the Clerk's duties is to issue the Order Paper for each sitting day, which lists all business before the House.

The Clerk also has custody of all records and documents presented to, or belonging to the House, and prepares bills for royal assent. The Clerk is the chief executive of the Office of the Clerk of the House of Representatives and is responsible for the management of the Office. The Office has about 120 staff members who provide secretariat support to the House of Representatives.

Leader and Shadow Leader of the House

A Cabinet Minister is appointed as Leader of the House to manage its business, deciding according to urgency and with the support of coalition partners what legislation comes up at what time, and managing the allocation of questions and calls to speak. The major Opposition party also appoints a Shadow Leader of the House. The Business Committee is an important forum for the Leader and Shadow Leader to undertake robust exchanges in a situation of give and take.

Party Whips

In the words of a party whip, the job involves making sure all MPs are in the right place at the right time, doing the right thing, and voting correctly. Responsibility extends to financial management of allocated resources, and the training of members of parliament, including providing mentors, coaches and pastoral care. Each party has a whip and it was conveyed that a certain level of cooperation and

understanding between whips is important to the smooth running of a parliament under MMP. Whips are also members of the Business Committee.

Casting of Party Votes

New Zealand has developed an efficient method of casting and counting votes in the House which enables Ministers and a number of other MPs to have their votes counted while they undertake parliamentary work outside the House. The Standing Orders allow whips to cast proxy votes for all Members of their party, and 25 percent of members can be away from the parliamentary precinct and still have their votes counted. To be absent from the precinct the Member first needs the approval of the whip.

Testing Confidence

There are a number of set piece events in the New Zealand Parliament when the Opposition tests the confidence of the government. This is usually done during the debate on the speech from the throne and during the debate on money bills. The government must win these debates in order to continue to govern. On one occasion when a government was in danger of losing such a debate the Prime Minister advised the Governor-General to dissolve parliament and call a snap election. The government was subsequently defeated at the elections.

Crossing the floor

The practice of crossing the floor to join another party affects the proportionality of parliament and could destabilise the government. During the 1996 coalition government a coalition party experienced a number of defections which threatened to destabilise the government. The government survived with a slender majority but the episode raised a number of questions about floor crossing when the proportionality of parliament was affected.

The next coalition government introduced the Electoral Integrity Act, which required MPs who wanted to leave their party to resign from parliament. The legislation had a sunset clause which expired at the 2005 general election. Despite efforts to reintroduce it, it was discharged in 2008 before the second reading.

While in operation, the legislation set in place the following mechanism: where a parliamentarian ceases to be a member of the political party that he/she stood for at the last election, it provided for the seat to be declared vacant by the Speaker. A Member could notify the Speaker that he/she had left the political party. Alternatively, the leader of that Member's parliamentary party could notify the Speaker that he/she believed that the Member had distorted the proportionality of parliament and was likely to continue to do so. The leader needed the support of two-thirds of the caucus to give such a notice, so there was a built-in safeguard that ensured the leader acted with the support of a significant majority. The legislation treated both list and electorate members equally.

Those in favour of the legislation argued that under the MMP electoral system that New Zealand adopted, voters had the right to expect that the parties they elected

to parliament remained in the same proportion for the next 3 years. They also believed that party hopping was unacceptable to the general public, particularly because the MPs concerned often used their votes quite irresponsibly to tip the balance of power.

Those who were against this legislation argued that it gave too much power to political parties. The fear was that this would have a chilling effect on MP's freedom of expression, and their ability to vote against their party and that this would undermine democracy. As New Zealand's MMP system has matured it has relied more on the country's political parties and their systems and controls.

Lesotho has a particular history of Members leaving their parties and forming new alliances which threaten or change parliamentary majority. Members leaving their parties and staying an independent member in the House on the same "side" (government or opposition) as they were when they were elected will not destabilise the government if they vote with their former parties. However, it appears that these shifts are either designed to destabilise the government or gain advantage going into a subsequent election. These shifts will cause significant instability and compromise the ability of parties to govern effectively until Lesotho's MMP parliamentary system matures. It is imperative that these matters are examined from ethical and political perspectives and are resolved so that instability is eliminated.

Parliamentary Services

New Zealand has a Parliamentary Service that comprises all of the facilities and services associated with the efficient operation of parliament. These services ensure parliamentarians have the resources to perform their responsibilities to a high standard and are able to hold the public service to account. Parliamentary Services extend to library and research support, which allow members to fully participate in select committees and the consideration of legislation.

New Zealand's Parliamentary Services are overseen by a commission that advises the Speaker on key issues. The commission is composed of senior members of all parties and chaired by the Speaker, ensuring accountability and oversight from across the political spectrum. The service is also subject to scrutiny through estimates and financial reviews by select committees. Parliamentary Services provide for the operational management of parliament – facilities, human resources, budgeting support, and the management of entitlements. The commission appoints the General Manager of the service, who is then responsible for the staff and day-to-day matters. Funding for Parliamentary Services is signed off by the Speaker, and provided by Treasury. Staff remuneration is calculated based on market rates.

Members' staff are on contracts that are aligned to the term of a parliament. While working for a Member and being paid by Parliamentary Services, staff cannot

participate in political matters, but members can choose from their supporters to fill these roles if they wish.

Discussion

Members of the delegation saw an efficient MMP parliament in operation. The New Zealand Parliament has available to it considerable expertise and resources to ensure its business is efficiently conducted. Its rules are well documented in its Standing Orders or in Speaker's Rulings. The House's Business Committee is an important mechanism for managing the government's legislative programme as well as enabling the Opposition to scrutinise the actions of government.

It was noted that while the debating chamber is a combative environment, the Business Committee works more or less on a consensual basis and the select committees work on the details of legislation and scrutiny of ministers and ministries.

MMP is all about parliament looking like the citizens it serves. As with all effective parliaments, an MMP parliament is expected to be accessible to citizens, facilitate their participation, address their concerns, debate their issues, and develop their nation. This only happens when parliaments meet fairly regularly, when they debate issues transparently, and when they hold Ministers and the bureaucracy to account. Parliament can also apply sanctions to those who breach its rules and jeopardise its interests. Parliaments develop and change their structure and rules to ensure it meets these expectations efficiently.

Recommendations for the reform of parliament and its procedure

1. That the Government appoint a Parliamentary Reform Committee (the Committee) to undertake a review of Lesotho's parliamentary processes and institutions, and recommend changes, guided by the contents of this report and international best practice, to make them fit for purpose in an MMP environment.
2. That all political parties or block of parties be represented on the Committee.
3. That the committee ensure its recommendations are suited to the cultural traditions of Lesotho.
4. That the Committee examine the impact of floor-crossing on proportionality which frustrates the results of Election Day, and suggest rules that will give parliament stability.
5. That the Committee review the portfolio committees with a view to increasing the number of committees, reducing their size and circumscribing their areas of focus.
6. That the Committee examine ways of increasing the participation of citizens in the portfolio committees.
7. That the Committee review the regularity with which parliament meets for the best fit with its law making and monitoring roles, and for providing citizens with adequate access.
8. That the Committee consider the need for community education on the role of parliament and how citizens can access it.
9. That the Committee review the method by which votes are cast in parliament and to consider the merits of introducing the casting of party votes, as used in the New Zealand Parliament, in order to increase the efficiency of parliament.
10. That the Committee recommend any changes to relevant legislation, the constitution, standing orders or other rules governing parliament.
11. That the committee progress the establishment of a Commission to oversee parliament and the separation of parliamentary operations from House business.
12. That the Committee report to parliament within three months of being established.

Chapter Three

Forming and sustaining successful coalitions

Introduction

The MMP environment is founded on the principle that governments are formed by an agreement of willing parties to join their elected numbers to form a majority, in return for the ability to lead and influence government policies and programmes in the direction favoured by their political philosophy and policies. This is usually the basis on which the parties campaigned and the undertakings they gave to the electorate about what they will do in government.

Coalition negotiations are usually hammered out after elections and before the government is formed. This is called the government formation process. Once coalition formation negotiations are finalised, the parties enter into firm agreements by way of a signed agreement. When duly signed and a majority is established, the process of the swearing in of the government is begun and parliament is recalled. Those who have led successful coalitions agree that the most important contributors to the success are the relationships amongst the parties, the existence of trust, and respect for each other.

In its examination of the process of forming and sustaining successful coalitions the delegation was provided with an analysis of all the coalition agreements made in the New Zealand Parliament since the inception of MMP in 1996. They also received presentations from two senior politicians, who between them, had been involved in every coalition government since 1996 and were current MPs and leaders of their own parties. The delegation also had the benefit of advice from a senior MP in the current parliament who had been part of the team that successfully negotiated several coalition agreements since 1999.

Throughout the study week there were several intensive discussions with seasoned politicians and senior public officials on formation and sustaining coalitions in the New Zealand Parliament. The delegation was eager to hear about the specifics of the coalition formation process. What follows is a synthesis of the critical aspects of the process of forming and sustaining coalitions which hopefully provide guidance to current and future politicians in Lesotho.

Consideration of the process of forming and sustaining successful coalitions is virtually inevitable in an MMP environment. The process requires disciplined engagement by the leadership and advisers of political parties. This section of the report begins with a discussion of the context of coalition formation and negotiation followed by a step by step discussion of the main aspects of this process. The purpose here is to construct a template for forming and sustaining coalitions for the use of future coalition negotiators.

The MMP voting system often results in coalition governments. Parties that contest MMP elections usually promote a policy platform that is targeted at a particular constituency, for example, a party promoting the rights of children. If no party holds an outright majority once the votes have been counted, parties must enter into negotiations to determine which mix of parties are willing to unite to form a governing coalition. There are two examples of this from New Zealand: formal coalition agreements and “confidence and supply” agreements. Both of these are discussed in this chapter. There is also discussion on the role of the out-going government, described as a “Caretaker Government” in New Zealand.

MMP is an electoral system that lends itself to a contest on policy rather than on personalities. New Zealand changed its electoral system in time for the 1996 general election, due to the disillusionment felt by citizens that under the first-past-the-post system, government policies did not change much even when governing parties changed. The change in electoral systems has arguably resulted in greater participation in politics and a more diverse House of Representatives. New Zealand’s form of MMP is unique to New Zealand, but New Zealanders have come to embrace it.

Coalitions have to organise themselves to negotiate with parties they can support and which will provide them with opportunities to advance some of the policies they campaigned on. A coalition environment forces politicians to reach agreement. All parties come together in good faith. Coalitions are like marriages, parties have to work at them to keep them strong.

Political parties will always disagree with one another, even in coalition. Thus most coalition agreements make provisions for how they will disagree with each other on some matters but will still provide confidence and supply to the major party. These agreements also spell out the responsibility of the leaders to resolve differences quickly and respectfully.

The length and detail of coalition agreements in New Zealand is becoming more standardised, towards short, process-based agreements, which detail how policy decisions will be made, and issues resolved. However, agreements have gone through an evolutionary process where subsequent agreements between parties tend to include greater specificity and policy agreements.

Coalition negotiations

During the coalition negotiation phase, different parties identify specific policies from their election manifesto that they want to see implemented by a coalition government. Parties are willing to enter into these negotiations because they want to influence the direction of the country in particular areas in order to build a better society. Coalitions always require compromise and negotiation to steer a successful pathway that meets the aspirations of the electorate which did not give any one party the mandate to rule on its own.

During the coalition negotiations the bulk of the time is spent on discussions about policy concessions. There is also some discussion about how the coalition will be

managed. All parties that agree to join in coalition need to have an agreement on where they are heading. It is acceptable for the parties to have different ways to reach the same destination, but there must be agreement on the destination.

The coalition agreement usually includes provisions designed to ensure open communication in advance, including a *'no surprises'* clause. The agreements also always include a statement on consultation requirements. These statements are not intended to be onerous, and usually require conversations between the leaders of the coalition parties in advance of public disclosure of information. These meetings are important as they keep the relationships between the different parties fresh. Some coalition agreements state how frequently these meetings will occur, such as fortnightly, while others leave this for the leaders to determine at a later date. These meetings are considered the business of parties, not of government, and so are not funded by the state, and public servants are not present.

A New Zealand Minister explained that he has had policy disagreements with both major parties with which he has been in coalition. He said that when he realised there was disagreement on a particular policy, he was careful to ensure that the major party was aware of this disagreement in advance. In some cases, the two parties would choreograph how the disagreement would be made public. The Minister also noted that any disagreements were strictly limited to disagreements over policy, rather than personality disagreements. This allowed the parties to disagree without frustrating each other. The *'agree to disagree'* provisions of different coalitions are discussed later in this report.

The important steps when negotiating a coalition agreement:

1. Prepare the negotiating team.
2. Test the waters with the parties you are hoping to negotiate with, discover what possibilities are available, and what can be ruled out. When entering into coalition negotiations, it is best to start with those things the parties agree on.
3. Begin actual negotiations. Determine which policy concessions your party is willing to accept, and which go too far.
4. Reassess your party's policy needs and concessions based on the information raised in the negotiations.
5. Reach an agreement.
6. Sign the coalition document. At this point, the agreement becomes public. The agreement should not become public before this point, as it can complicate the negotiations.

Steps three and four may need to be repeated multiple times during the negotiation period before the parties can move forward.

International experience suggests that forming coalitions after elections can be time-consuming. New Zealand does not have a time-limit on coalition formation. It can be measured in days, weeks, or months if necessary. New Zealand's first coalition negotiations took seven weeks to finalise. However, more recent negotiations have been concluded in less time. The length of the negotiation

period is determined by the length of the coalition contract, which itself is determined by the preferences of the individual parties. The length of time needed to negotiate a successful coalition will vary depending on the relative size and strength of the different parties. In New Zealand, the earlier coalition negotiations took longer than the more recent negotiations, as people now have a better understanding of how best to negotiate coalition formation and draft an agreement.

New Zealand has been fortunate that during the coalition negotiation period, businesses and the markets do not display concern. The general public understands that the parties need time to negotiate. It is crucially important for this process to produce an agreement that all parties accept, as the agreement will determine the governing arrangements for the parliamentary term.

Since the first MMP election in New Zealand, the largest party has always been part of the governing arrangements, but this is not codified in legislation. Previous Governor-Generals have indicated that they expect parliament to come to an arrangement where a government can be formed without their intervention. There is reluctance for further elections to be called, although there is an understanding that this may be necessary in extreme future situations.

The key lessons that one major party learned from negotiating several agreements was that more detail in agreements causes more complex issues, and that negotiations need to happen at multiple levels, with leaders committing to solving any problems that arise. They felt that the most important thing to include in the agreements was how issues would be resolved during the course of the coalition.

Common features of coalition agreements in New Zealand

An analysis of all of the coalition agreements completed in New Zealand over the past 18 years shows that their common features include the following:

- A statement of purpose, or objective with a headline agreement that the party agrees to provide confidence and supply on the basis of the agreement.
- Some statement of philosophy or values (especially amongst parties that have some common or highly compatible principles or values).
- Some statement about parties maintaining their separate identities.
- A statement on how the parties will cooperate with each other.
- A statement enabling the major party to enter into agreements with other parties.
- What consultative arrangements have been agreed to.
- How the coalition will be managed by the leaders of the parties.
- A statement on good faith and no surprises.
- What policy concessions or agreements have been made.
- What will be the government's legislative programme.
- What Cabinet positions have been agreed to (both in and outside Cabinet).
- What select committee positions have been agreed to.
- A statement on collective Cabinet responsibility.
- A statement on confidence and supply.
- An agreement on procedural motions.

- An agree-to-disagree provision.

Negotiating team

Before entering into the negotiations, the different parties must decide who the party's negotiators will be. This should be a small team. In most coalition negotiations, the main negotiators have been the party leaders, their deputy leaders, and their chiefs of staff. No coalition negotiation has yet required a mediator, although there may be situations in the future where a mediator may be needed. The negotiating team should prepare themselves before entering into negotiations with the other parties, and agree among themselves issues of policy (which ones they are willing to negotiate on, and which ones are non-negotiable), and process (how they want the coalition to run). When considering who will be on the negotiating team, parties should be aware of the 'soft skills' that negotiators will need. Consideration should be given to their affability, respectfulness, ability to inspire confidence and whether they are conflicted.

Formal coalition agreement

A coalition government is a mechanism through which willing parties come to power to lead the nation. Coalition governments are formed by an agreement of willing parties, based on an agreement on the policies the Government should enact. The government's policy platform is based on the policies the respective parties campaigned for in the preceding election. This is one of the reasons MMP is attractive to citizens as they can vote to support the party that promotes the policy they support.

During the election campaign, some parties acknowledge, or even promote, other political parties that they would like to work with post-election. Other parties announce that they will seek to negotiate with the largest party post-election, whichever it might be. In all the New Zealand examples, the coalition agreements are negotiated post-election. They then run the Government on the basis of agreed policies.

In New Zealand there are no specific rules on who will negotiate with whom and in what order. Clearly the largest party is in an advantageous position but if it does not have potential coalition partners it may falter. The largest party often negotiates with smaller parties around specific policy concessions and sometimes on Cabinet roles. Sometimes parties negotiate with several parties in good faith to see what will work best for them.

The coalition agreement covers the whole package of policies agreed to in the negotiation period. If new policy decisions need to be made during the term then the major parties usually agree to negotiate with the minor parties on a case-by-case basis. In these instances, some minor parties negotiate for further concessions for policies that are not already in the coalition agreement.

The first coalition agreement in New Zealand was incredibly detailed. It ran to 55 pages and included details on each policy area. Since then, coalition agreements have been much shorter and focus more on how policy disputes will be resolved, rather than trying to resolve them all before the Government is sworn in. This shift in drafting agreements is only possible in a coalition where there is a high level of trust between the parties.

Both minor party leaders conveyed to the delegation that once a coalition agreement has been made, the minor party must work hard to ensure that the government lasts the whole parliamentary term. The minor party usually experiences the bulk of the public backlash if the Government is not able to last the full term. The public also generally takes a dim view of minor parties that threaten the stability of the government by threatening to end the coalition agreement when there is policy disagreement.

Confidence and supply

Some coalition agreements have been formed for political expediency, where political parties decide that there are policy concessions they are determined to win, and they will support whichever party will enable this. Other times, parties come together to form government motivated by a desire to keep other parties out of government, rather than to achieve particular goals themselves. These agreements were described as “*negative agreements*”. Under such agreements, policy decisions are made on a case-by-case basis. These agreements have positive and negative aspects for major and minor parties.

The most basic type of coalition agreement is a “confidence and supply” agreement. Under these agreements, the minor party agrees to support the major party on issues relating to “supply” or expenditure issues, and motions of confidence in the House. The minor party also agrees to vote with the major party on procedural issues, which is an important clause. Both major parties in New Zealand have been conservative over what constitutes a ‘confidence’ issue. They know that if they consider every difference of policy this would threaten confidence and eventually result in driving the minor party out of the coalition agreement. However, minor parties are cautioned against dragging down the Government, due to the potentially severe consequences the electorate could impose on them. The minor parties consider the potential rewards of stable government, and how this is balanced against the will for self-promotion.

In New Zealand, there have also been examples of parties negotiating a complicated set of arrangements concerning what issues they wanted to be consulted on. The most important aspect seems to be to determine where a party wants to gain influence in return for providing a guarantee on confidence and supply. Thus it makes sense to be as clear as possible in the preparation phase of the coalition forming process.

Allocation of Cabinet positions

The accepted practice in New Zealand is that the head of the largest coalition party will become the Prime Minister. Where the second largest coalition party is a similar size, the leader of that party may become Deputy Prime Minister. The only other positions that are determined during the coalition negotiations are Cabinet ministers, associate (or deputy) ministers, and committee chairpersons. The decisions determining which ministerial portfolios are held by which party are influenced by the relative strength of the parties that make up the coalition. All ministers appointed to Cabinet sign up to the Cabinet Manual, which has rules that govern their actions. There is no patronage in public service appointments, reflecting the separation of powers in the New Zealand context. The public service is neutral, a position that is codified in the State Sector Act 1988. Ministers are only responsible for appointments to political positions within their own offices.

In 2005, leaders of coalition partners that were not from the governing party, agreed that they would serve as ministers outside of Cabinet. Ministers outside Cabinet have full legal powers as ministers, and may be appointed to full portfolios. They have the same role, duties, and responsibilities as ministers inside Cabinet, and are also bound by the principle of collective responsibility. They do not attend Cabinet, but, with the agreement of the Prime Minister, may attend for particular items relating to their portfolio interests. They are usually members of one or more committees, attending other committees where relevant.¹⁰

These ministers were bound to support the Government on matters that related to their portfolios, but were not bound to do so in other policy areas. They did not sit in Cabinet, or on Cabinet committees, but will join the Cabinet for discussion on matters relating to their portfolios. In New Zealand, the establishment of the position of Minister outside of Cabinet for minor parties has resulted in the concept of collective Cabinet responsibility becoming somewhat more flexible. After the 2008 general election, these positions remained, but are now described as “ministers from a party supporting the government”. They attend Cabinet when matters relating to their portfolio are discussed, and they also sit on Cabinet committees.

Maintaining separate identities

In MMP systems as in first-past-the-post, parties articulate their beliefs and state how their beliefs shape their policy decisions. They then attract members who share the philosophical beliefs and policy goals with the party. From these members, they recruit candidates to contest elections, and after being elected to parliament they try to implement as many of these policies as they can. All of these activities are independent of parliament and are the sole responsibility of political parties.

¹⁰ New Zealand Cabinet Manual 2008, <http://cabinetmanual.cabinetoffice.govt.nz/node/86#2.26>

MMP is a system that allows different parties to show their constituencies the policy concessions they are able to win during coalition negotiations and subsequently progress during the term of government. This is important as it can form the basis of future election campaigns, where parties can identify previous policy concessions as evidence that they will be able to deliver on future policy concessions. It is in this way that the MMP system has been very good at giving interest groups a voice.

After parties have agreed to enter into a coalition government, many parties experience a consistent tension between trying to maintain their separate identities while simultaneously trying to create and maintain a strong coalition identity. No individual party would want to give up their identity as they will need to campaign on it at the next election. However, coalition partners must also have a joint identity, so that the electorate knows what to expect from their government. The problem of maintaining a separate political identity often happens when a particular policy associated with a minor party is adopted as government policy without the party proposing the policy getting any credit for it. In New Zealand, major parties previously saw the issue of maintaining individual identities as a problem for the minor party, but this view has evolved as the major parties realise that they need the minor party to continue to provide them with a coalition option. This change can be seen when major parties announce policies with minor party leaders, and credit these leaders with ensuring the policy is passed. In this regard, MMP encourages collaborative governance and consensus.

Coalition agreements must allow the parties in the coalition to maintain their individuality and identity of the different parties. All political parties strive to maintain their separate identities, they campaign separately, have different party conferences and party structures, and different policy teams. Many coalition agreements include an *'agree to disagree'* provision, which allows the different parties to take a stand on issues that are important to them, without jeopardising the coalition agreement.

Discussion

With no previous experience of forming coalitions in Lesotho, the parties to the first coalition government had to make do with little information and advice. An analysis of the agreement between the current coalition parties shows their focus on Cabinet positions and control of foreign ministries. There is little discussion on policies, legislation or budgets.

After their initial experience, it is unlikely that even the current coalition partners will repeat this process. The presentations to the delegation highlighted many examples of how a party gains policy concessions, how they shift their interests up the political timetable and also receive some senior positions inside and outside parliament. Those who presented to the delegation were also able to point to the achievements in a coalition which assists their party to maintain a separate identity and have successes on which to campaign at the next elections.

The delegation had several extended discussions about the forming of coalitions and the focus on policy rather than positions. Perhaps in the absence of a perception that there were significant policy differences the focus was more on positions and personalities.

The delegation had a lot of interest in the mechanics of forming a coalition. Speakers who addressed the delegation were able to very competently articulate their focus and what concessions they were arguing for. It appeared this was uncharted territory for the delegation. It is an observation that the current coalition in Lesotho has focused more on inclusiveness and working as one team rather than as three partners in a coalition which have negotiated policy and focus.

While this approach is possible, it is only likely to succeed amongst partners whose political values and policies are very similar. In most cases, and for good reason, parties have not wanted to give up their identity because they would essentially lose an advantage at the next election. Rather, they have tended to focus on policies gained and changes achieved in order to demonstrate to their supporters that they were successful in coalition and should be re-elected. The model adopted by the current coalition partners in Lesotho puts huge demands on leaders to ensure everyone understands the perspective of all their coalition partners. The alternative model is to understand your party's own philosophy and policies and only concentrate on those policies of your coalition partners that were included in the coalition agreement. This is the reason why coalition formation talks must be carefully and fully negotiated.

Recommendations: Forming and sustaining successful coalitions

1. That the Government ask the Council of State to commission the preparation of a handbook on the nature of coalition governments and the process of coalition formation.
2. That the Council of State consider appointing a suitable senior lawyer to manage the process.
3. That the handbook be used as the major instrument for enhancing the awareness of citizens of the MMP system and how governments will be formed after an election.
4. That the handbook include a template based on the content of this report and international best practice for political parties on negotiating successful coalitions.
5. That the handbook underscore the message that successful coalitions depend on a relationship of trust and respect amongst partners and that successful coalitions rely on the discipline of coalition partners to deliver on what has been agreed to.
6. That all coalition agreements should include policy agreements and the relationship management role of Leaders of Political Parties to the agreement.
7. That sufficient time is allowed for coalition negotiations.
8. That agreements should be based on the clear understanding that the public service is non-political and independent.
9. That all negotiations should be managed by political leaders, in consultation with their political parties.
10. That all coalition agreements should be made public.
11. That parties should commit to respecting the spirit as well as the provisions of the coalition agreement.
12. That the handbook be presented within three months of commissioning.
13. That in time, this handbook include the relevant laws and conventions relating to coalition formation.

Chapter Four

Procedures for government formation after an election

Introduction

The dawn of coalition politics caught Lesotho unprepared in 2012 when the electorate did not give any one party a clear majority to form a government. This lack of preparedness together with a constitutional requirement that parliament be recalled within two weeks of Election Day resulted in a rushed coalition formation process.

While the public expectation of a coalition government was underdeveloped, it nevertheless expected a new approach to government and a change from the practices of patronage and advantage. The public intuitively knew that a coalition government was going to be different and somehow expected it to perform better than a one party government. Most of all, the public expected an end to what it saw as corruption, and expected earnest work to begin on addressing the perennial issues of concern to voters like health, poverty and employment.

When the public saw the results of the current coalition agreement it likened the approach to victors sharing the spoils of war rather than as a blue print for the transformational change it was expecting. During the extensive consultations the Commonwealth team had with various stakeholders in the scoping phase of its work, individuals further described this 'sharing of spoils' as the territorialisation of government. The focus on political appointments and the absence of a detailed focus on policy gave rise to cynicism that the coalition would not respond to the expectations that voters had for Lesotho's first coalition government.

In addressing the shortcomings of Lesotho's current governance arrangements the process of coalition government formation after an election has been highlighted. There are three aspects to this process. The first is that the role and powers of the caretaker government have to be codified and made public. The second is that the government formation process after an election need to be carefully laid out and widely understood by citizens. A third aspect identified during the Commonwealth's scoping exercise was the need for clarity around the transmittal of Cabinet decisions to the relevant Principal Secretaries and other relevant bodies.

During the study visit the delegation met with a team from the Department of Prime Minister and Cabinet who discussed the process of government formation and how decisions were passed from Cabinet to the relevant people in the state services. The delegation also received a briefing on New Zealand's transitional arrangements from when elections were called to the swearing in of the new government. Thirdly, the delegation was briefed by the Chief Electoral Officer on the electoral process culminating in the announcement of results.

Elections in New Zealand

Clear rules governing elections and the transfer of power afterwards have resulted in voters having a high level of trust in New Zealand's electoral processes. Transparency, independent oversight and clear rules, coupled with serious sanctions for rule breakers, account for the confidence of New Zealand voters in its electoral system. These matters have also enabled voters to be patient during the government formation process.

New Zealand practice

In New Zealand, a prescribed process is triggered by the calling of parliamentary elections. Parliament is dissolved and writs issued to enable the general election and the summoning of the new parliament.

The operation of the election, as well as the enrolment of voters and the registration of parties, is managed by the Electoral Commission which is an independent Crown entity, the Electoral Commission. The Commission's role is primarily administrative, but also includes monitoring compliance with rules governing political party funding. Its entire staff, both permanent employees at national office and the temporary workers hired around the country for Election Day, are neutral and not politically appointed. The Commission's governing legislation directs it to act in an independent manner, but this is balanced with accountability to a monitoring ministry and minister.

Voters in New Zealand can enrol at any time, and the roll is continuously maintained. The enrolment deadline for voters who wish to participate in an upcoming general election is the day before the election. The Electoral Commission runs regular national enrolment drives, as well as targeting high school students, to ensure as many New Zealanders as possible meet the legal requirement to register as voters. The requirements for enrollees to prove identity and residence help to ensure that voters can enrol only once, and in an electorate in which they live. The Commission can also access selected government databases to help it maintain an accurate and comprehensive roll. Political parties can pay a fee to access the electoral roll for political purposes.

Political parties in New Zealand have to maintain a minimum membership of 500 fully paid up members to be recognised in the New Zealand system. The Electoral Commission has established a clear and structured process for deregistering a political party that does not meet this requirement. This ensures that the Commission can make a decision to do so safe from accusations of political bias. It is the Electoral Commission that declares the results of elections and works out the number of list members a party has gained according to a strict mathematical formula.

During an election period, sitting Members are restricted from using parliamentary resources for campaigning. The Electoral Commission has oversight and ensures that candidates adhere to rules differentiating the funding of electioneering and standard parliamentary business. For example, sitting members cannot use their

parliamentary funded travel to attend an election rally, but can use it to visit constituents. Though sitting Members may be seen to have an advantage during campaigns, this is unavoidable as members are still serving while campaigning. Parties can raise their own funds to pay for the costs of campaigning – this process is governed by a clear set of rules, overseen by the Electoral Commission.

Transition arrangements

Electors want certainty that government business will be stable and will continue during the transition period. This certainty is provided by setting up predictable and sustainable transition arrangements. This includes the setting of limits on the powers of the caretaker government. Should decisions become necessary before a new government is sworn in, caretaker governments must only make decisions as directed by the incoming government.

Caretaker Government: New Zealand's arrangements

New Zealand has a fully developed caretaker convention¹¹. If the government loses an election, or the confidence of the House, it becomes 'caretaker' until the new government is appointed. While the incumbent government is the lawful executive authority, it is constrained in what it can do. The convention requires that outgoing governments consult their replacements on decision making, and do not introduce new policies. This convention extends to preventing the making of senior public appointments, undertaking significant expenditure and generally staying away from the media. The New Zealand Cabinet Manual prescribes limits on decision making.

Day-to-day administration of government agencies generally continues during the caretaker period. A politically neutral public service will help to ensure this, as public servants will be able to continue service delivery while a new government is formed. Sustaining effective public service through this change also ensures that a new government has experienced public servants ready to provide support and advice.

If a government loses the confidence of the House, a new administration may be formed without a new election. Before that government forms, the outgoing government acts as caretaker.

Like other conventions, political pressure is the main incentive for compliance.

Government formation

The goal of the government formation process is to establish a grouping of parties that will command the confidence of the House. The confidence of the House gives the stability required for legitimate, democratic government. When the

¹¹ See the Cabinet Manual 2008, Section 5 and 6: 'Cabinet decision-making' and 'Government formation'. <http://www.cabinetmanual.cabinetoffice.govt.nz/summary>. The delegation was provided with copies of the 2008 Cabinet Manual.

results of the election become clear, parties can turn to the issue of government formation. The issue of coalition arrangements is covered in more detail in chapter three of this report.

New Zealand

The incumbent Prime Minister must resign before a new one can be appointed. Then, the Governor General appoints the new Prime Minister when he/she is satisfied that a bloc within the House has its confidence. The new administration takes over from the caretaker government.

After the Prime Minister is appointed, he/she selects the ministers, who then take the oath of office administered by the Governor-General. This oath is different to that taken by Members in the House and is indicative of the separation between the executive and the legislature.

Cabinet decision making

New Zealand's Cabinet

Cabinet is the forum for key government decision making. Ministers discuss policy proposals with one another and consult with ministers whose portfolios may be impacted by new policy rollouts. Cabinet is largely self-regulated – there are few fixed rules. The Cabinet Manual sets out all of its procedures. Underneath Cabinet, Cabinet committees meet to discuss issues in more detail. Their decisions are not final and must be confirmed by the Cabinet as a whole. Ministers do not swear allegiance to the Cabinet. It is up to the Prime Minister to ensure that ministers fully consult one another. New Zealand's Cabinet is supported by a secretariat offering legal, constitutional, and ethics advice as well as administrative support.

Under MMP, Cabinet composition can be divided among coalition partners or be the exclusive domain of the lead party. The size of support parties and their value in ensuring the stability of government tends to determine their influence and the number of Cabinet and/or ministerial positions they can command.

Collective responsibility binds ministers from support parties in so far as they have portfolio responsibility. On other issues, they can agree to disagree. In such a situation, disagreement is signalled in advance, so there are 'no surprises'. New Zealand's coalitions traditionally rely on strong personal relationships built on trust and good faith. Ministers rely on these relationships to negotiate policy decisions and concessions.

Some ministers are not members of Cabinet. They cannot attend Cabinet unless it is discussing issues directly related to their respective portfolios. These ministers have to utilise other mechanisms for staying informed like having regular meetings with other ministers. This is where personal relationships are valuable, allowing for ministers to have informal discussions and share ideas outside of Cabinet.

The Cabinet staff is an important link between the executive and the public service. They regularly meet with the heads of all public service departments to ensure that Cabinet policy decisions are clearly communicated to those who are required to implement them and/or who are affected by them. These meetings also ensure that Cabinet members are well informed about the operations of ministries. The Cabinet Secretary is responsible for keeping Cabinet minutes and for ensuring they are transmitted to the appropriate official in the public service.

Remuneration Authority

In New Zealand, an independent body sets the salaries of Members, as well as their travel and accommodation allowances, and those for their families. These figures are reviewed annually. Currently the government of Lesotho is working towards establishing a similar body, and the delegation supports this.

Discussion

In Lesotho there is considerable uncertainty about the procedures for government formation. This is particularly so after an election in the case where one party does not have a majority and a coalition is a possibility. Similarly, there is a lack of clarity about the powers of the “caretaker government” and the resources to which it is entitled during the election period.

During the study visit members of the delegation were introduced to the rules, processes and conventions that collectively contribute to the smooth running of elections, acceptance of the results by citizens and a predictable process for changing the government when this is the will of the people.

The three major aspects to the conducting of elections and a smooth transition to a new government are: a well-run election process, clarity about the role of the caretaker government, and a predictable process of government formation.

The rules for conducting elections and the role of the Independent Electoral Commission is reasonably well established in Lesotho and worked well at the last elections. Nevertheless, the Commonwealth Observer Group and other Observers did make recommendations for improvement. As Lesotho moves to a non-political public service it will also have an impact on the appointment of Electoral Commissioners and staff of the Electoral Commission.

There is a need to codify the process to be followed from when an election is called to when results are announced. This codification should include the role of the caretaker government and the limits to this role from when parliament is dissolved to when it meets again. The role of public servants in an independent public service during a period of three months before Election Day to when the new government is sworn will also need to be codified so that the neutrality of the public service is maintained.

The Department of Prime Minister and Cabinet has an important role to play in the government formation process. It provides advice to the Governor General as well as the incoming and outgoing governments. It prepares many of the documents

and instruments that set in train the process for dissolving parliament, calling elections and assisting the coalition formation process.

Lesotho's constitution is relatively silent on many of these matters. There is now a call for clarifying what the processes should be and enshrining them in legislation or the constitution to ensure they are clear to everyone and will be followed in the elections and government formation period.

There was a good deal of interest in the role of the caretaker government and the caretaker convention. Given the political history of Lesotho and the absence of rules around the role of the caretaker government, the delegation found the New Zealand reliance on conventions a difficult concept. There was an insistence that those matters that are considered conventions in New Zealand should be codified into legislation to give certainty in the Lesotho context.

Recommendations: Procedures for Government formation

1. That the Cabinet appoint a Government Formation and Transitions Reform Committee (the Committee) chaired by a judge or senior lawyer, and with representation from political parties, civil society and other eminent citizens, to review the system of rules, practices and conventions that apply to government formation and propose the enactment of new provisions that will give greater certainty and clarity in the future.
2. That the Committee review the process from the calling of an election to the swearing of a new government and make recommendations that will ensure Lesotho has a system that reflects international best practice and local cultural traditions.
3. That the Committee codify the role of the caretaker government, the limits to its powers and the process to follow in the circumstance that critical national decisions need to be made before the new government is sworn in.
4. That the Committee clarify rules for the use of government resources during election campaigns by Members of Parliament.
5. That the Committee review the ordinary provision of security services to senior political figures, as well as during election campaigns, to ensure it is a reliable service which is independent from the Defence Forces or the Police.
6. That the Committee review the processes by which Cabinet decisions are transmitted to ministries and relevant public service personnel, and recommend changes that will ensure the decisions are properly transmitted and necessary follow up undertaken.
7. That the Government Formation and Transitions Reform Group propose law and/or constitutional changes to give effect to its recommendations.
8. That the Committee report to parliament within three months of its appointment.

Chapter five

Summary and Conclusions

When the Kingdom of Lesotho adopted the MMP system of government it did not undertake a parallel process to reform its governance system. For as long as it produced one party government this did not matter. However with the dawn of coalition politics the inadequacies of the current system have become apparent. This makes the reform programme urgent as future governments will also get trapped into difficulties that result from the mismatch between the current system of governance and what is actually required for an MMP parliament. This report follows an earlier scoping exercise by the Commonwealth team which recommended that before Lesotho undertook reforms it should visit an MMP parliament and observe first-hand how it works and how its governance instruments are aligned. There is a serious desire for governance reforms in Lesotho. The recommendations contained in this report are focused on the four areas we consider urgent: establishing an independent public service, reforming parliamentary procedures, forming and sustaining successful coalitions and procedures for government formation.

Each of the four matters that have been the focus of the study visit is critical to the future of Lesotho's parliamentary democracy. They all require reform. The visit to New Zealand has shown the delegation what is possible and what will be the positive spin off for Lesotho if the reforms could be implemented. This report shows a way forward. It now requires political will to make it happen.

A note on the recommendations:

The specific recommendations for each area of reform follow over the next few pages. Though stated separately they are not discrete suggestions. Each area of reform depends on all of the other stated areas and need to be progressed together. While a tight time table for getting this work done has been suggested it is achievable with the right people selected to lead them and with crucial overarching coordination to monitor progress and provide clarification and assistance as required. In this regard, the Commonwealth remains committed to working with Lesotho.

Recommendations for the establishment of an independent public service:

1. That the government immediately signal its intention, and begins the process to transform the public service into a non-political and independent one where appointments are based on merit and made by an independent authority at arm's length from the executive.
2. That the government appoint a Public Service Reform Design Team (the Design Team) with appropriate technical assistance, to begin the design of the new public service of Lesotho. The redesign should broadly be in line with this report, the Commonwealth Expert Adviser's scoping report of April 2013 and with international best practice for a non-political public service.
3. That the design team propose a detailed change management plan for repositioning the public service as non-political and independent.
4. That the design team consider rationalising the roles of the Ministry of Public Services and the Public Service Commission into one body responsible for the appointment of Principal Secretaries.
5. That the design team's first task should be to recommend interim measures to stop any further political appointments to the public service.
6. That the design team should also recommend an interim process for appointments to Principal Secretary positions that are based on merit and that must be non-political.
7. That the design team recommend other interim measures it considers necessary to avoid a rush of political appointments from the day of the announcement that future appointments to the public service will be non-political.
8. That the design team prepare interim guidelines to ensure all appointments to the public service will be non-political.
9. That, in association with the Public Service Commission, the design team prepare interim guidelines on how public servants are to be non-political and independent.
10. That the design team develop a public information programme signalling the move to an independent public service and its implications for all citizens.
11. That the design team report its detailed proposals to Cabinet through the Minister for Public Services within three months of being appointed.
12. That Cabinet consider legislative change to give force to the redesigned public service and its mechanisms.

Recommendations for the reform of parliament and its procedure:

1. That the Government appoint a Parliamentary Reform Committee (the Committee) to undertake a review of Lesotho's parliamentary processes and institutions, and recommend changes, guided by the contents of this report and international best practice, to make them fit for purpose in an MMP environment.
2. That all political parties or block of parties be represented on the Committee.
3. That the Committee ensure its recommendations are suited to the cultural traditions of Lesotho.
4. That the Committee examine the impact of floor-crossing on proportionality which frustrate the results of Election Day and suggest rules that will give parliament stability.
5. That the Committee review the portfolio committees with a view to increasing the number of committees, reducing their size and circumscribing their areas of focus.
6. That the Committee examine ways of increasing the participation of citizens in the portfolio committees.
7. That the Committee review the regularity with which parliament meets for the best fit with its law making and monitoring roles, and for providing citizens with adequate access.
8. That the Committee consider the need for community education on the role of parliament and how citizens can access it.
9. That the Committee review the method by which votes are cast in parliament and consider the merits of introducing the casting of party votes, as used in the New Zealand Parliament, in order to increase the efficiency of parliament.
10. That the Committee recommend any changes to relevant legislation, the constitution, standing orders or other rules governing parliament.
11. That the Committee progress the establishment of a Commission to oversee parliament and the separation of parliamentary operations from House business.
12. That the Committee report to parliament within three months of being established.

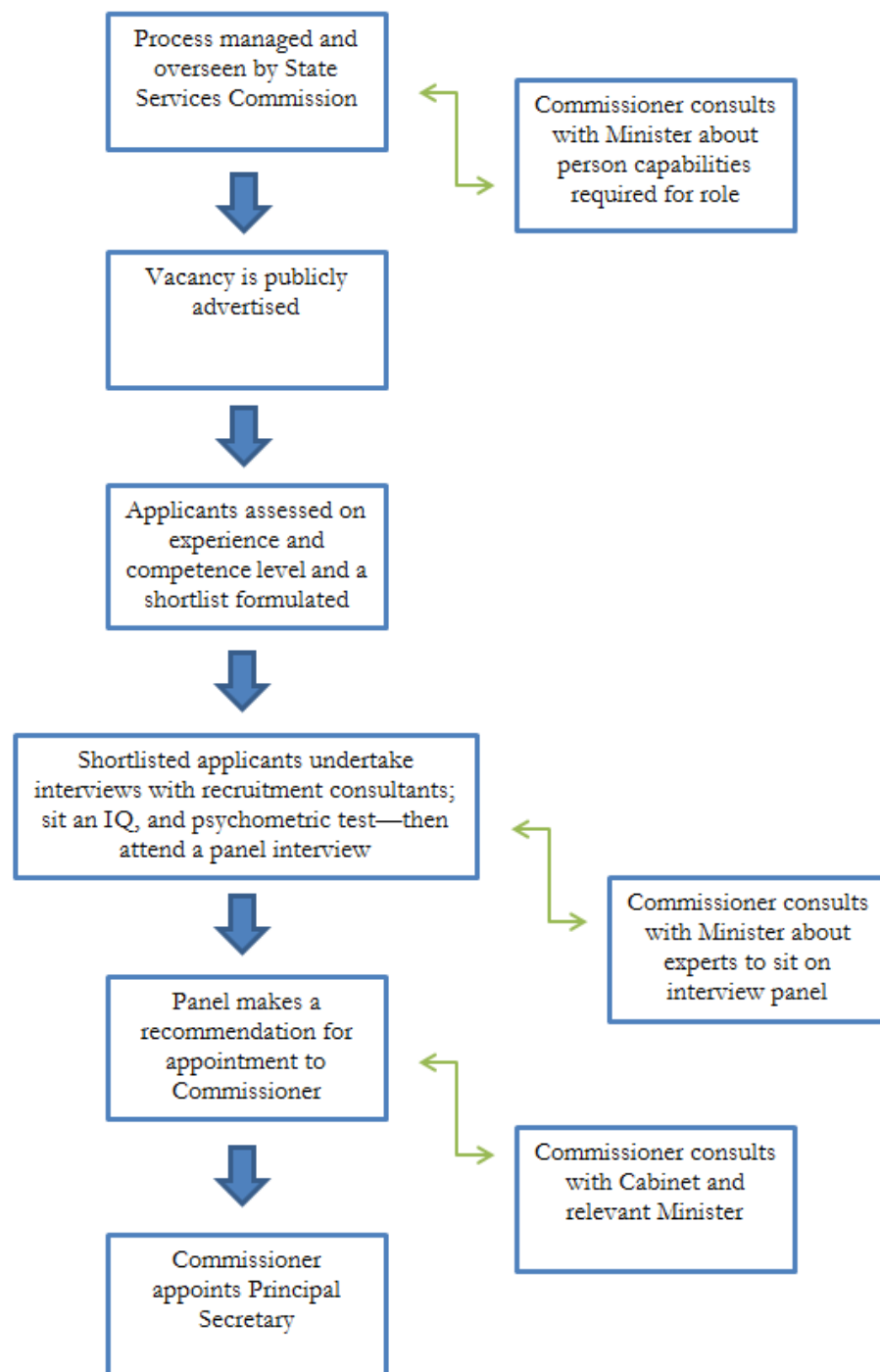
Recommendations: Forming and sustaining successful coalitions

1. That the Government ask the Council of State to commission the preparation of a handbook on the nature of coalition governments and the process of coalition formation.
2. That the Council of State consider appointing a suitable senior lawyer to manage the process.
3. That the handbook be used as the major instrument for enhancing the awareness of citizens of the MMP system and how governments will be formed after an election.
4. That the handbook include a template based on the content of this report and international best practice for political parties on negotiating successful coalitions.
5. That the handbook underscore the message that successful coalitions depend on a relationship of trust and respect amongst partners and that successful coalitions rely on the discipline of coalition partners to deliver on what has been agreed to.
6. That all coalition agreements should include policy agreements and the relationship management role of Leaders of Political Parties to the agreement.
7. That sufficient time is allowed for coalition negotiations.
8. That agreements should be based on the clear understanding that the public service is non-political and independent.
9. That all negotiations should be managed by political leaders, in consultation with their political parties.
10. That all coalition agreements should be made public.
11. That parties should commit to respecting the spirit as well as the provisions of the coalition agreement.
12. That the handbook be presented within three months of commissioning.
13. That in time, this handbook include the relevant laws and conventions relating to coalition formation.

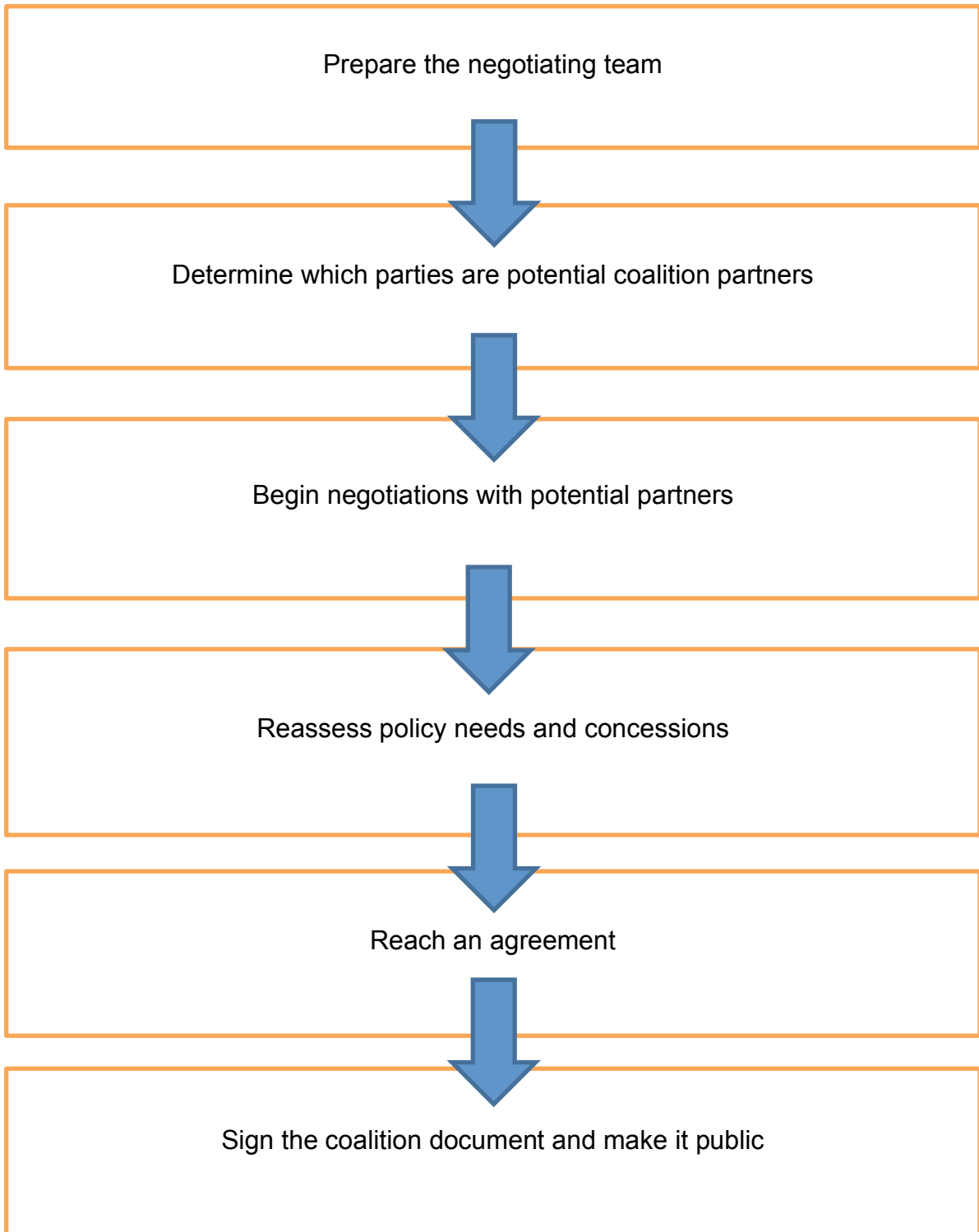
Recommendations: Procedures for Government formation

1. That the Cabinet appoint a Government Formation and Transitions Reform Committee (the Committee) chaired by a Judge or senior lawyer, and with representation from political parties, civil society and other eminent citizens, to review the system of rules, practices and conventions that apply to government formation and proposing the enactment of new provisions that will give greater certainty and clarity in the future.
2. That the Committee review the process from the calling of an election to the swearing of a new government and make recommendations that will ensure Lesotho has a system that reflects international best practice and local cultural traditions.
3. That the Committee codify the role of the caretaker government, the limits to its powers, and the process to follow if critical decisions need to be made before the new government is sworn in.
4. That the committee clarify rules for the use of government resources during election campaigns by Members of Parliament.
5. That the Committee review the ordinary provision of security services to senior political figures, as well as during election campaigns, to ensure it is a reliable service which is independent from the Defence Forces or the Police.
6. That the Committee review the processes by which Cabinet decisions are transmitted to Ministries and relevant public service personnel and recommend changes that will ensure the decisions are properly transmitted and necessary follow up undertaken.
7. That the Government Formation and Transitions Reform Group propose law and/or constitutional changes to give effect to its recommendations.
8. That the Committee report to parliament within three months of its appointment.

Appendix A: Process for appointment of Chief Executives (Principal Secretaries) in New Zealand



Appendix B: Important steps when negotiating a coalition agreement





The Commonwealth

Study tour by Eminent Working Group from Lesotho to New Zealand

Organised by the Commonwealth Secretariat and the New Zealand Parliament, and supported by the UNDP (Lesotho office).

Visit Dates

Monday 30 June 2014 to Friday 4 July 2014

Programme

Objectives of the visit

This study tour will focus on the following four broad areas:

- Parliamentary processes
- Transition arrangements from when elections are called to when a new government is sworn in
- Establishing an independent public service
- Management of coalition arrangements

Parliamentary Programme

Monday, 30 June 2014

- 0830** Welcome and introduction to programme
- 0900** Session 1 - New Zealand's parliamentary democracy and its system of checks and balances (Rt Hon Sir Anand Satyanand)
- 1000** Morning Tea
- 1030** Session 2 - New Zealand's politically neutral Independent Public Service:
Gordon Davis –Chief Legal Advisor
Mary Slater – Assistant Commissioner
State Services Commission
(3) Q&A
- 1215** Lunch
- 1330** Session 3 – Visits to State Services entities:

(1)Police
(2)Defence
(3)MPIA
(4)MSD
- 1500** Session 4 - Political perspective on the independence of the public service:

(1) Hon Maryan Street MP, Opposition Spokesperson for the Public Service
(2) Q&A
- 1615** Session 5 - Leading an independent public service: the views of a Chief Executive

Peter Hughes
Ministry of Education
- 1715** Process for report writing
- 1900** Dinner hosted by Rt Hon David Carter, Speaker of the House of Representatives

Tuesday 1 July 2014

- 0900** Session 7 - Gaining policy concessions as a coalition partner
- 1000** Morning tea
- 1030** Session 8 - Key aspects of successful coalitions
- 1130** Maintaining successful coalitions
Rt Hon Winston Peters MP
- 1300** Lunch
- 1400** Session 10 - Report drafting on making coalitions work
- 1500** Afternoon tea
- 1515** Session 11 - Negotiating coalitions
Grant Robertson MP
- 1630** Session 12 - Panel of MPs in an MMP parliament Q&A

Wednesday, 2 July 2014

- 0900** Session 13 - Parliamentary process including the instruments we use in our MMP system:
- Standing orders
Speaker's rulings
Privileges Committee
- Rt Hon David Carter, Speaker of the House
Ms Mary Harris, Clerk of the House
- 1000** Morning tea
- 1015** Session 14 - Briefing on Select Committees
- 1030** Visit Social Services Select Committee
- 1130** Processes in the House
- 1215** Session 15 - The role of Party Whips in a coalition environment, Maintaining majority Party discipline
- Party whips
- 1300** Lunch
- 1340** Session 16 - Observe the House for the duration of question time
- 1500** Session 17 - Effective parliamentary process
- Hon Gerry Brownlee MP
Leader and Shadow of the House
- Grant Robertson MP
Shadow leader of the House
- 1600** Afternoon tea
- 1615** Session 18 - Mid-study review and discussion
- 1715** Session 19 - Report Drafting

Programme

Thursday, 3 July 2014

- 0900** Session 20 - Parliamentary Services and Parliamentary Services Commission
David Stevenson GM
- 1000** Morning tea
- 1030** Session 21 - Process from calling of elections to swearing in of new government
- 1115** Session 22 – Review and group discussion
- 1215** Lunch
- 1330** Session 23 - Review and group discussion
- 1430** Session 24 - Transmitting Cabinet decisions, constitutional processes for government formation
Martin Bell, Deputy Cabinet Secretary
DPMC
- 1530** Afternoon tea with Q&A
- 1630** Session 25 - New Zealand's electoral processes, process for when majorities change
Robert Peden
Chief Electoral Officer
- 1745** Report Drafting

Programme

Friday, 4 July 2014

0900	Session 27 - Summary of the week and progress on final report
1000	Morning tea
1030	Session 28 - Finalising Report
1200	Lunch
1400	Session 29 - Finalising Report
1530	Session 30 - Finalising Report
1700	Session 31 – Final reflections

Appendix D: Delegation list

Lesotho

1. Hon. Mothetjoa Metsing, Deputy Prime Minister, Minister of Local Government and Chieftainship
2. Hon. Dr. Motloholoa Phooko, Minister of Public Service
3. Hon. Moeketsi Majoro, Minister of Development Planning
4. Hon. Motlohi Maliehe, Minister of Justice and Correctional Services
5. Hon. Haae Edward Phoofolo, Minister of Law and Human Rights
6. Hon. Joang Molapo, Minister of Home Affairs
7. Hon. Pelele Abraham Letsoela, MP
8. Hon. Lekhetho Evaristus Rakuoane, Deputy Speaker
9. Hon. 'Mamonaheng R. Mokitimi, Vice President Senate
10. Hon. Dr. Pontso 'Matumelo Sekatle, MP
11. Hon. Paul Teboho Lehloenya, MP
12. Mr Moahloli Mphaka, Government Secretary
13. Mr Tebello Thabane, Principal Secretary Law
14. Ms Machabana Lemphaneletsie, Principal Secretary - Public Service
15. Ms Mataeli Makhele Sekhantso, Principal Secretary - Cabinet
16. Adv. Lebohang Fine Maema, Clerk to National Assembly
17. Adv. 'Mamosebi Theresia Pholo, IEC Commissioner
18. Mr Pholo Mapetla, Secretary - Public Service Commission
19. Mr Samonyane Ntsekele, Political Adviser to the Prime Minister
20. Mr Mpho Malie, Political Adviser to the Deputy Prime Minister
21. Mr Sekhohola Cletus Molelle
22. Mr Chaka Ntsane
23. Rev. Tseliso Simeon Masemene, (Faith community representative)
24. Mr Matete Nena, Director Pacific and Asia, Ministry of Foreign Affairs
25. Mr Khoalinyane, Security Aide

Commonwealth Secretariat Team

26. Dr Rajen Prasad
27. Dr Tres-Ann Kremer
28. Ms Madonna Lynch

Resources

Cabinet Office, *Cabinet Manual 2008*, available at:

<http://www.cabinetmanual.cabinetoffice.govt.nz/>, published April 2008.

Parliamentary Council Office, New Zealand Legislation website, available at:

<http://www.legislation.govt.nz/>

State Sector Act 1988,

<http://www.legislation.govt.nz/act/public/1988/0020/latest/DLM129110.html>

State Services Commission, Presentation on New Zealand's Politically Neutral Public Service, received 30 June 2014.

State Services Commission, Standards of Integrity and Conduct, available at:

<http://www.ssc.govt.nz/sites/all/files/Code-of-conduct-StateServices.pdf>, published June 2007.