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THE IMPACT OF MMP ON SELECT
COMMITTEE SCRUTINY OF LEGISLATION

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ABSTRACT
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This paper examines the manner in which the introduction of the MMP electoral system

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ABSTRACT

This paper examines the manner in which the introduction of the MMP electoral system contained in the Electoral Act 1993 will alter the operation of select committees when they consider Bills. In particular, the paper examines the contention that MMP will allow select committees to operate in a more independent manner than at present and as a consequence be more politically effective. It pays particular attention to the current relationship between the members of committees and the caucuses and their respective parties as well as the formal rules which control the operation of committees. The main argument developed in this paper is that while committees may be able to exercise greater independence from the Government under MMP, the members of the committees will not be free from the requirements of party loyalty. The dictates of party cohesion will inevitably require committee members to take party positions over positions they themselves have developed. This will tend to limit the effectiveness of select committees, when considered as groups of MPs, under MMP. Further, for the political system to operate effectively, MMP requires that parties enter into agreements. This requirement applies particularly strongly to the passage of legislation. This paper argues that it is not at all clear that select committees are the appropriate forum for the political bargains and compromises needed for inter-party agreements on the passage of legislation.

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The text of this paper (excluding contents page, abstract, footnotes, and bibliography) comprises approximately 15,000 words.

INTRODUCTION

The commencement of the Mixed Member Proportional electoral system (MMP) will see great changes to the way the House of Representatives, and its constituent parts, carry out their functions. Parliamentary select committees, as one of the most important institutions of the House, will not be immune from these changes. This will be true of both their inquiry role and the function they perform scrutinising legislation. While those changes will be significant, it is doubtful that they will alter the basic relationship between select committees and the House. This suggests that the process of scrutinising legislation by select committees will not undergo tremendous modification with the introduction of MMP. It also suggests that select committees, when they consider legislation, will remain creatures of Parliament and, more particularly, creatures of political parties. Committees under MMP, as now, will possess a circumscribed discretion to make changes to the legislation they consider. Indeed, under MMP the scope of their delegated authority may even be less. MMP will see a power transfer from a single governing party to a number of parties in the House; but it will not to any significant extent transfer power from parties to the floor of the House. Because it will not do so, effective political power will not devolve to committees.¹

At its most basic, the change in electoral systems from First Past the Post (FPP) to MMP will alter the pattern of party representation in the House of Representatives and its select committees. New Zealand will move from a system characterised by stable single-party majority governments to a political arrangement in which it will be very difficult, if not impossible, for a single party to control the majority of seats in the House. Accordingly, the normal result of elections under MMP will be the formation of either single-party minority governments or majority coalition governments. This will inevitably cause some political power to slip from the Cabinet and governing party, where it resided under FPP, to be more diffused among the parties represented in the House. An altered power relationship in the House will necessarily alter the power relationships within select committees. Although MMP will result in major changes to the relationship between the Government and the House and in the power dynamics within the House of Representatives and committees it will not, of itself, change the fundamentals of the Westminster system by which the New Zealand Parliament operates.

¹ This paper deals only with the legislation scrutiny function of select committees. It does not explore in any depth their inquiry function, except where this has some effect on committees' scrutiny of legislation. Nor does it discuss the jurisdiction of the Regulations Review Committee or the 'business' select committees.

Patterns of law-making

New Zealand, before the introduction of MMP, could be regarded as possessing a system of law-making whereby the Government made laws but was obliged to submit its proposals to the Parliament for consideration. The Parliament's consideration—the most important part of which was conducted by select committees—did not normally result in any substantial alterations to the principles and policies of the Bill. This system also ensured that any legislation proposed by other parties in the House would only succeed if it won the support of the Government.

With the introduction of MMP two main scenarios will emerge. When a government does not command a majority of the House, the power of the other parties in the House will increase. Power will become less concentrated in the governing party, and New Zealand will develop more of a parliamentary system. This has great implications for Parliament's select committees, as the House of Representatives will possess an increased ability to make changes to or even decline its approval for the Government's legislative proposals. Accordingly, the other parties in the House will become more politically effective in their dealings with the Government.

Alternatively, where a coalition Government commands a majority in the House, less power will devolve to Parliament. Decisions on policy—whether in general or contained in particular Bills—will continue to be made by the Government coalition partners rather than the House itself. However, decisions made by the coalition require the agreement of two or more parties. These parties by definition will together hold a majority of seats in the House and represent a majority, or near a majority, of voters. Conclusions reached by the coalition partners will therefore be reached on a consensual or negotiated basis because of the need to gain agreement from two or more parties. They will also be stronger and more politically acceptable because they will have the support of a majority of the House and a majority of voters.

Effectiveness of committees

Under either scenario it is unlikely that the political effectiveness of committees will be enhanced. In other words, committees may not be able to have frequent and significant influence over matters of policy and be periodically able to deny the Government either the approval or the means to carry out a particular policy in legislation.² Under MMP it is unlikely that select committees will acquire the increased independence of party required

² This definition of effectiveness comes from Michael Rush, "Parliamentary Committees and Parliamentary Government: the British and Canadian Experience" (1982) 20 *Journal of Commonwealth and Comparative Politics* 138, p 138.

for them to exercise an independent role in the policy process. Committees will not become in any major extent political entities in their own right. They will remain to a large degree subordinate to the dictates of party politics. Indeed, under MMP—an electoral system which gives political parties a formal place in the constitution for the first time—committees may well become increasingly subject to party decisions. This does not mean that committees will not be able to exercise power independently of Government, rather, it suggests that they will not be able to exercise political power independently of party.

It should be noted that the way in which the political effectiveness of committees is defined above is not the only way the political power of committees can be measured. The definition offered above emphasises the ability of committees to hold the Government to account by a forceful assertion of the power of committees to make substantial changes to Bills and to deliver stinging critiques of Government action or inaction. This power can be phrased at a much lower level. Bernard Crick, for example, would argue that the political effectiveness of committees should be limited to “*influence*, not direct power; *advice*, not command; *criticism* not obstruction; *scrutiny* not initiation; and *publicity* not secrecy”.³

In assessing the appropriate standard to apply, much depends on how one views, in normative terms, the relationship between the Parliament and the executive Government. If one starts with from the position that legislating is primarily a function of the Parliament, the changes made to Bills as a result of debate, or through the result of committee deliberations, will be regarded as relatively unimportant. They will be a manifestation of Parliament’s ability to make the law as it chooses. On the other hand, if one believes that law-making is the Government’s responsibility, then a different and more critical view of the changes made in the House will be taken.⁴ Changes made by the House or its committees, especially if they are not sanctioned by the Government and can be seen as critical of the Government’s position, will be perceived as unnecessarily disturbing the relationship between the Government and the House.

However, a restricted definition of parliamentary or committee influence upon the executive, such as that given by Crick, may not be appropriate given the change of political culture expected to occur because of the introduction of MMP. The expectation exists that

³ Bernard Crick, *The Reform of Parliament*, 2nd ed, London: Weidenfield and Nicolson, 1968, p 80. Also, “The only means of parliamentary control worth considering and worth the House spending any time on, are those which do not threaten the parliamentary defeat of a government, but which help to keep it responsive to the underlying currents and the more important drifts of public opinion” (ibid, p 79) and “Parliament should not and does not threaten the ability of the government to govern”, Crick, “Whither parliamentary reform”, in A H Hanson and Bernard Crick (eds), *The Commons in Transition*, London: Fontana/Collins, 1970.

⁴ See J A G Griffith, *Parliamentary Scrutiny of Government Bills*, London: George Allen & Unwin Ltd, 1974, pp 195-6.

MMP will transfer substantive political power to Parliament. This transfer should, according to advocates of MMP, lead to Parliament and its committees being able to exercise some substantive influence over Government policy as embodied in proposed legislation. Accordingly it is appropriate to assess select committees' likely political effectiveness under MMP in terms of their capability to effect substantive changes to the Bills which they examine and the potential of committees to deliver effective rebukes to the Government.

The effectiveness of select committees can also be discussed in terms of their ability to act as a 'safety valve' for public opinion on a Bill, their ability to provide exhaustive technical scrutiny of the provisions of a Bill, and their ability to assist the House in dealing with a greater legislative workload than it would without them. These are very important roles of select committees but are not central to the ability of committees to act as an effective political check on Governments.

Development of New Zealand's committee system

Under FPP, the Government of the day effectively controlled Parliament. One means of improving Parliament's ability to hold the executive to account is through its committees, and New Zealand, since 1985, has possessed one of the most well-developed committee systems in the world.⁵ Committees, provided they are sufficiently independent and possess wide enough powers, provide a powerful forum for small groups of MPs to engage in in-depth scrutiny of Government legislative proposals and its policies, administration, and expenditure. They perform tasks that Parliament itself should perform but does not because work is too detailed, technical, and complicated for the entire House to perform. New Zealand's parliamentary committees possess extensive formal powers and are empowered to conduct extensive hearings on Bills and make major changes them based on the evidence that they hear. Further, committees can conduct inquiries into all aspects of Government policy, administration, and finance.

These powers allow select committees to effect some control over governments' exercise of power. However, although committees have extensive formal powers, they have seldom exercised them to their fullest extent. Select committees have in general lacked real political effectiveness. They have been unable to hold the Government to account both in terms of the scrutiny of Government policies as embodied in Government Bills and in terms of

⁵ See, for example, Austin Mitchell, "The New Zealand Way of Committee Power" (1993) 46 *Parliamentary Affairs* 91.

holding inquiries into Government activities. In other words there has been a gap between the formal powers of committees and their willingness or ability to exercise those powers.

The main reason for this gap between theory, or expectation, and practice is the domination of party political interests over the views and beliefs of individual MPs. Currently, although MPs in select committees do behave in a less partisan manner than in the House, on issues of contentious policy their party affiliations will dominate any conclusions they may themselves reach. Under MMP this is unlikely to change. Party affiliations, if anything, will become stronger with the introduction of MMP, because of the constitutional status it gives to parties and the difficulties facing those who would wish to set as independent members of Parliament. These factors will be reinforced by the actions of the political parties as they attempt to make certain the continued loyalty of their MPs. The political imperative under MMP is to maximise party strength in the House by ensuring that the party remains cohesive. Party leaders must have assurance that their members will remain constant if the leaders are to negotiate effective political bargains with other parties.

Further, while select committees provide an excellent 'safety valve' for public submissions, they do not necessarily provide a particularly useful forum for the political bargaining and negotiation that will be required to reach policy agreements under MMP. Under a majority coalition government it is likely that the necessary political compromises will be worked out before a Bill is introduced into the House. In that case it would be very difficult for a select committee with a majority consisting of members from the coalition parties to make substantial changes to the policy of the Bill. When a minority government is in power, select committees may still not be the most appropriate place for the formulation of the political compromises necessary to ensure that a Bill passes through the House. It is likely that compromises will be reached between the parties, independently of the select committee process, with the fruits of that agreement being implemented in the Committee of the Whole House. Even were a committee able to make extensive changes to the legislation put forward by a minority Government, there is no guarantee that the decisions reached by the committee would be acceptable to the majority of the House.

SELECT COMMITTEES UNDER FPP

Changes to Standing Orders in 1979 and 1985

The current formal powers of select committees were introduced by changes to Standing Orders in 1979 and 1985. These major revisions of the rules applying to select committees evidence a willingness and desire to give them more power and responsibility. They now

see almost all legislation introduced into the House referred to a committee, and committees are able to initiate their own inquiries. The strength of this trend would suggest that there is no prospect of the formal powers and responsibilities of select committees decreasing as a consequence of the adoption of the MMP electoral system, and that there is some prospect for their formal powers to increase. However, as noted above, increased formal power does not automatically mean increased power in practice. While select committees have possessed very wide powers since 1985 they have not been used to their fullest extent and it appears that the political dynamics of MMP may work towards ensuring that the powers are never fully developed.

The amendments to Standing Orders in 1979 gave a greater role to select committees than they had previously enjoyed. From that time almost all Government Bills and every private member's Bill was automatically referred to a committee.⁶ This dramatically increased committees' importance and workload, and culminated the expansion in the responsibilities of select committees in the scrutiny of legislation that had been under way since the mid-1960s. Before that time only Bills affecting Crown land were subject to mandatory referral to a committee. Other Bills were referred, if at all, to *ad hoc* committees after their second reading.⁷ This, of course, meant that select committees could have no influence on the policy of legislation, and were confined to ensuring that the provisions of a particular Bill properly implemented the Bill's policy. Before 1979 between a fifth and a half of Bills were referred to a select committee.⁸ In the 1955 session, of the 119 public Bills introduced, only 46 were referred to a committee, while in the 1978 session only 26 of the 71 Government Bills introduced were referred to a select committee.⁹ Some of these were referred after the second reading.¹⁰

The only exceptions to the current rule that all Bills are referred to a select committee after their introduction and first reading are Bills introduced under urgency (normally budget legislation), and Appropriation and Imprest Supply Bills.¹¹ The Standing Orders Committee in 1979 recommended that Bills "of a financial or budgetary nature", or money Bills, should not be referred to select committees.¹² However, the definition of money Bills has become

⁶ SO 217(1). See also Standing Orders Committee, *Final Report for 1979*, [1979] AJHR I14, pp 7-8, the most relevant part of which is quoted by Walter Iles, "The New Zealand Experience of Parliamentary Scrutiny of Legislation", [1991] Statute LR 165, pp 165-7.

⁷ Robert N Kelson, *The Private Member of Parliament and the Formation of Public Policy: a New Zealand Case Study*, Toronto, University of Western Ontario, 1964, p 85.

⁸ Geoff Skene, *New Zealand Parliamentary Committees: An Analysis*, Wellington, Victoria University of Wellington Institute of Policy Studies, 1990, pp 11-12.

⁹ Kelson, above n 7, p 85; Iles, above n 6, p 165.

¹⁰ Iles, above n 6, p 167.

¹¹ SO 217(4).

¹² Standing Orders Committee, above n , pp 7-8.

increasingly restricted, and now encompasses only Appropriation and Imprest Supply Bills.¹³ The former is considered by select committees when they examine the estimates for Government departments even though the formal Bill is not, while the Imprest Supply Bills, of which there are an average of three a year, are passed in one day and so allow no time for committee consideration.¹⁴

This demonstrates an increasing tendency to that all Bills, with only very limited exceptions, are referred to select committees. This has had the effect that in 1987-89 the proportion of Bills referred to a committee was 83%.¹⁵ In 1994 the Clerk of the House estimated that at least 90% of Government Bills, and 100% of all other Bills, are referred to select committees.¹⁶ It also demonstrates a changing attitude of the House towards committees and the role they perform. It is now recognised that committees are able to scrutinise legislation which creates enormous political controversy. One reason is that the parties recognise that committees are clearly under the control of the governing party and will not make recommendations which either surprise the Government or are politically unacceptable to it.

The 1985 changes, implemented as part of the Labour Government's election manifesto,¹⁷ further increased the importance and powers of committees by providing them with an independent inquiry function. Such a move had been suggested to the Standing Orders Committee when it conducted its 1979 review, but rejected.¹⁸ In its 1984 general election Open Government Policy, the Labour Party stated that it would reorganise the select committee system from "first principles".¹⁹ After a report from the Standing Orders Committee,²⁰ the House adopted new Standing Orders in 1985 substantially embodying the Labour Government's policy.²¹

¹³ SO 217(4)(a) and (b).

¹⁴ David McGee, *Parliamentary Practice in New Zealand*, 2nd ed, Wellington: GP Publications, 1994, p 262.

¹⁵ Skene, above n 8, pp 11-12.

¹⁶ McGee, above n 14, p 262.

¹⁷ Geoffrey Palmer, *New Zealand's Constitution in Crisis: Reforming Our Political System*, Dunedin, John McIndoe, 1992, p 110.

¹⁸ Standing Orders Committee, above n 6, pp 11-12. This was the ostensible reason. The real reason was more political and personal, the then Prime Minister, Robert Muldoon, refused to allow the introduction of such committees to New Zealand. See Skene, above n 8, p 3.

¹⁹ New Zealand Labour Party, "Open Government Policy 1984" in NZLP, *1984 Policy Document*, Wellington, NZLP, 1984, paras 2 and 3, quoted in Geoffrey Palmer, *Unbridled Power: An Interpretation of New Zealand's Constitution and Government*, 2nd ed, Auckland, Oxford University Press, 1987, Appendix 1, p 218.

²⁰ Standing Orders Committee, *First Report 1985*, [1985] AJHR I14A. The Committee was appointed on 17 August 1984 and part of its terms of reference was to "study the organisation and powers of select committees and recommend such changes as may be necessary or desirable to ensure for their effective operation, and in particular to provide for a more systematic scrutiny of Government activity." The new inquiry function for committees was based on reforms

The independent power of inquiry is expressed in Standing Orders as the power “[t]o examine the policy, administration, and expenditure of departments and associated non-departmental government bodies related to [the subject area of the committee]”.²² This power allows a select committee to investigate all Government bodies and all Government agencies within its subject area. However, should a committee wish to investigate something outside its subject area, it must ask the House for a specific power.²³ Should two committees wish to investigate the same matter, the Speaker decides which committee can conduct the proposed inquiry.²⁴ Before 1985, most committees possessed no independent power of inquiry and were limited in their inquiries to matters referred to them by the House.²⁵

Provisions are made in Standing Orders for the results of any committee report to be debated in the House for up to one hour. Further, the Government must, within 90 days, table a response to the committee’s reports. However, there is no provision in Standing Orders which allows that response to be discussed in the House.²⁶

Currently, Standing Orders provide for 13 ‘subject’ committees. These have terms of reference which, between the committees, cover the whole field of government activity.²⁷ Subject select committees have four separate parliamentary functions: (1) scrutiny of legislation; (2) conducting inquiries into government administration; (3) examination of estimates; and (4) consideration of petitions. In addition, Standing Orders provide for four further committees covering various matters, while the current Parliament also has three committees which will operate for the duration of the Parliament.²⁸ Temporary committees

introduced to the House of Commons in 1979. The committee believed that its proposals would “greatly strengthen the accountability of Government to Parliament by the more systematic, comprehensive scrutiny of Government activity” (p 35).

²¹ Some policies were not implemented because it was believed that they would have unduly slowed down Parliament. See Palmer, above n 17, p 110. This, perhaps, confirms the statement “Parliamentary procedure . . . is best not seen as a set of impartial rules designed to facilitate the transaction of public and private business, but as a political instrument largely designed to help the governing party to govern.” S A Walkland, *The Legislative Process in Great Britain*, London, Allen & Unwin, 1968, p 68, quoted in Gavin Drewry, “The Legislative Implementation of Law Reform Proposals” (1986-7) Statute LR 161. See also David McGee, “The Influence of Parliamentary Procedure on the Form of Legislation in New Zealand” (1991) 12 Statute LR 135, p 135.

²² SO 345.

²³ See, for example, NZPD, vol 518, pp 4308-9 (1991), cited in McGee, above n 14, p 210.

²⁴ See, for example, [1991-3] AJHR I18B, para 126(b), cited in McGee, above n 14, p 210.

²⁵ McGee, above n 14, p 210.

²⁶ See SO 374 to 377.

²⁷ SO 345.

²⁸ McGee, above n 14, p 210.

have also been appointed from time to time, mainly to scrutinise specific highly technical, complex, or 'conscience' Bills.²⁹

These changes were designed to increase parliamentary scrutiny and control of the executive, and were accompanied by changes to Standing Orders which required all proceedings of select committees during which evidence was heard to be open to the public and the media.³⁰ They also signal a distinction between the work parliamentarians conduct in the House, and the work they conduct in committee. As Geoff Skene puts it, "If the House was preoccupied with the political struggle to win and maintain power, the committees should concern themselves with the less partisan mechanics of legislating."³¹ In other words, the changes signalled that MPs were required to act as parliamentarians while working on committees, and as party politicians when engaged in debates in the House.³² Such a distinction had been recognised by the Standing Orders Committee in 1979.³³ However, it is an important indicator of the limits of select committee scrutiny of legislation. The committees have been recognised as being indispensable for the technical scrutiny of legislation and allowing public input into the legislative process. They are not regarded as places where overtly political battles should be fought. Indeed, committees have only been given extensive powers on the basis that they will be exercised according to the wishes of the governing party and that they will remain under the effective political control of the Government. MMP will not transform committees into arenas in which political negotiations are conducted and compromises reached. However, committees will remain a place for intensive technical scrutiny of legislation and the hearing of public submissions.

Current provisions of Standing Orders

Although all Bills stand referred to a select committee after they have been introduced and read a first time,³⁴ the Minister in charge of a Bill must move a motion nominating a particular committee to consider the Bill.³⁵ He or she may also include in the motion altered terms of reference for the committee, which may limit or extend the powers of the

²⁹ Ibid, pp 207-8.

³⁰ SO 351. See Palmer, above n 19, pp 132-3; and above n 17, p 112.

³¹ Skene, above n 8, p 6.

³² Dr Martyn Findlay noted in 1978: "It pleases me greatly that in committee one can to a very considerable extent put aside party affiliation and all members can work cooperatively.", quoted in Palmer, above n 19, p 136.

³³ Standing Orders Committee, above n 6.

³⁴ SO 217(1).

³⁵ SO 217(2).

committee in relation to the Bill.³⁶ Other members may object to the terms of a Bills referral, and the motion may be amended.³⁷

Standing Orders require committees to have five members, unless otherwise stated in the motion setting up the committee.³⁸ Currently, committees have memberships ranging from five to 12 members.³⁹ A motion appointing a select committee must state the names of the members of the committee.⁴⁰ Standing Orders contain no directions relating to the appointment of members to committees, and it would be valid to appoint a select committee consisting completely of Government or Opposition members. However, party numbers on various committees tend to follow the recommendations the Standing Orders Committee made in 1972.⁴¹ Committee membership generally reflects the constitution of the House, and their exact membership is determined by inter-party consultation.⁴² By convention, Ministers are rarely members of select committees. This is designed to give committees more independence, as well as freeing ministers for other work.⁴³

Changes in the personnel of committees are an administrative matter. Standing Orders empower the Speaker to authorise members to make changes in membership. This is normally achieved by authorising the chief whips or party leaders to make changes in their party's committee members. This ensures that the party balance is not upset, while allowing for maximum flexibility in the allocation of members to particular committees.⁴⁴ One use of the power to substitute members is where parties staff a committee with different members depending on the topic currently before the committee. For example the Health and Social Services Select Committee has a completely different membership when it considers health matters than when it considers social welfare matters. The parties use this power extensively to cope with a lack of available MPs to staff committees, leading to a situation where membership substitution hinders the effective functioning of committees. These various technical rules relating to the operation of committees and their relationship with the House may become increasingly important with the introduction of MMP.⁴⁵

³⁶ See McGee, above n 14, p 261 and examples there cited.

³⁷ Ibid, pp 261-2.

³⁸ SO 342.

³⁹ McGee, above n 14, p 217.

⁴⁰ SO 343.

⁴¹ Standing Orders Committee, *Report for 1972*, [1972] AJHR I19, p 12.

⁴² McGee, above n 14, p 218.

⁴³ Iles, above n 6, p 173.

⁴⁴ McGee, above n 6, pp 218-9.

⁴⁵ These issues are discussed below.

Inquiry role

Of the various functions performed by select committees, the scrutiny of legislation dominates their workload, and has hindered the development of their inquiry role.⁴⁶ Although, over the past few years, the inquiry work has begun to gain in importance,⁴⁷ select committees, on average, still spend two-thirds of their time considering legislation.⁴⁸ This is not a constant figure across all committees and some committees have a much greater legislative workload than others. For example the Foreign Affairs and Defence Select Committee has very little legislation to consider and can therefore devote much of its time to conducting inquiries. At the other end of the spectrum, the Justice and Law Reform Select Committee normally has a workload that concentrates overwhelmingly on the consideration of legislation. This makes it very difficult for that committee to mount effective inquiries, although it has recently completed one into the Race Relations Conciliator.

Committees do not conduct as many inquiries as they should to ensure the accountability of Government. When they do conduct inquiries they are mainly directed at areas which the committee members believe will gain for them the most media coverage and the highest public profile. This is perfectly understandable and tends to come as a result of the subordination of the inquiry function of committees to their function of scrutinising legislation. Committee members have only limited time to spend on inquiries, and so wish to make the most political impact with this time, especially as much of the work they perform on legislation does not will them very much public recognition. This lack of public recognition of members' work on committees naturally makes service on them unattractive to many MPs. Many MPs find their other work, for example in meeting the needs of constituencies, much more personally and politically rewarding than the time they spend staffing committees.⁴⁹ This, of course, may contribute to a lack of effectiveness of committees.

The dominance of the scrutiny function over the inquiry function also limits committees becoming truly effective in scrutinising the Government and Government policy as

⁴⁶ See Geoffrey Palmer, "The New Zealand Legislative Machine" (1987) 17 VUWLR 285, pp 137-8.

⁴⁷ David Caygill, "Functions and Powers of Parliamentary Committees: A New Zealand Perspective" in Mai Chen and Geoffrey Palmer (eds), *Public Law in New Zealand*, Auckland, Oxford University Press, 1993, p 669.

⁴⁸ Iles, above n 6, p 168. This figure is from 1990. The Clerk of the House of Representatives recently estimated that average over all committees, they were spending 60% of their time considering legislation, and 40% of their time on inquiries: Interview with David McGee, Wellington, 19 July 1995. Transcript of interview held by the author.

⁴⁹ Palmer, above n 17, p 113.

contained in legislation. The inquiry function is perhaps the best and easiest way for select committee members to become intimately acquainted with the operation of Government without becoming a cabinet minister. It is a way to gain in depth knowledge of policy and the Government process. Without this development of expertise, the overall functioning of select committees cannot develop to its full potential. This is true both in the inquiry mode and in the scrutiny of legislation mode.

MMP will have a significant impact on the time committees spend on their respective functions. It may be that the volume of legislation passed under FPP will be unsustainable under MMP. In that case, the inquiry role performed by committees will almost certainly increase in importance. Whether committee's inquiries will become more of a political weapon under MMP than they have been under FPP appears to very much depend on the sorts of Government that MMP elections and inter-party negotiations produce.

Committees may also conduct inquiries into the policy behind existing legislation and the administration of the legislation by the Government, and recommend appropriate changes to the legislation. Recently the Health and Social Services Select Committee conducted an inquiry into the provisions of s 11 Social Security Act 1964, and the Finance and Expenditure Select Committee conducted an inquiry into the Parliamentary Commissioner for the Environment.⁵⁰ Both inquiries resulted in recommended amendments to existing Acts, some of which were implemented by the Government. However, committees conducting inquiries have to be careful to ensure that their recommendations are seriously considered by the Government. They must manage their inquiries to ensure that the results are politically acceptable to the Government and are workable and capable of implementation. If committees fail to do so, their recommendations will be ignored by the Government. The inquiry by the Health and Social Services committee is a good example of where a committee was listened to by the Government. However, in that case the committee was in fact conducting an inquiry the Minister had asked them to undertake and were undertaking the policy development work for a reform the Minister was already considering.⁵¹ MMP may see committees conducting more of these inquiries of their own

⁵⁰ See the Social Services Committee, *Inquiry into the Privileges Provisions of Section 11 of the Social Security Act 1964*, [1994] AJHR, I 12A, discussed in 17 TCL 48/4 (the committee's report) and 18 TCL 9/11 (the Government's response). See also the Supplementary Order Paper (No 85) which proposes to introduce those of the committee's recommendations with which the Government agrees into the Social Welfare Reform Bill currently before the House. Note, too, the Environment Amendment Bill 1995 (85—1) which implements the recommendations of the Finance and Expenditure Committee's report on its inquiry into the Parliamentary Commissioner for the Environment.

⁵¹ Interview with David McGee, above n 48.

initiatives in order to provide a proper policy basis for the introduction of reforming legislation, which may also include private members' Bills.

Under MMP committees may not need to be so concerned about the political acceptability of their recommendations as under FPP. This is especially true in the case of a minority Government. However, in order to ensure that its recommendations are seriously considered and implemented, committees will need to pay close attention to the politics of the topics they investigate. This is especially true if a committee wishes its recommendations to be implemented by Government. A committee may also wish to reach conclusions contrary to a Government's stated policy and then have one of its members introduce a private member's Bill to implement the recommendations.⁵²

Scrutiny of legislation

Select committee scrutiny of Bills usually involves three distinct stages: (1) the hearing of submissions from the public and interest groups; (2) the consideration of the submissions, and departmental reports and recommendations on the submissions; and (3) deliberation on the Bill and proposed amendments clause by clause. On referral of a Bill to a select committee, the chairperson of the committee usually requests submissions from the public. This is normally done by newspaper advertisements, although committee chairpersons have sometimes issued invitations to particular persons or bodies requesting submissions.⁵³ Occasionally, when considering a particularly urgent matter, the chairperson will not call for submissions, but this is rare.⁵⁴ In the normal course of events three to five weeks is considered appropriate for Bills where no special factors apply. Special factors can include the urgency of the Bill, when it was introduced, its complexity, and the extent of public interest.⁵⁵ The chairperson and the clerk then organise a series of hearing for those who wish to supplement their written submissions with an oral presentation before the

⁵² Select Committees in the United Kingdom have recognised for some time that they have a continuing responsibility for the recommendations they make. See the Fourth Report of the Home Affairs Committee, HC 744 of 1979-80, quoted in Ian Marsh, *Policy Making in a Three Party System: Committees, Coalitions, and Parliament*, London: Methuen, 1986, pp 92-3.

⁵³ Iles, above n 6, p 169. See for example [1987-90] AJHR, I4C, p 5 (the Public Finance Bill 1989), quoted in McGee, above n 14, p 264.

⁵⁴ An example of submissions not being called for is the Taxation Reform Bill 1987: see [1987-90] AJHR I4A, p 10, cited in McGee, p 264. Note also the Commissions of Inquiry Amendment Act 1995 which was introduced and referred to the Justice and Law Reform Select Committee on 20 July for consideration and report back by 25 July 1995. The Committee was empowered to receive briefings from departmental officials and hear submissions from invited groups. See NZPD, No 39, pp 8029-8038, 20 July 1995 (Introduction), and NZPD, No 49, pp 8083-8091 25 July 1995 (Report stage).

⁵⁵ Iles, above n 6, p 169.

committee.⁵⁶ Sometimes the urgency of the Bill or the sheer weight of submissions may force the committee to attempt to "group" submissions so that those with similar points to make present their views together, impose a time limit on oral submissions, or even refuse to hear some submissions.⁵⁷ Generally, proceedings of committees at which evidence is heard are open to the public and the news media.⁵⁸ However, committees do have power to hear evidence in private,⁵⁹ and also to declare that some of the evidence is secret evidence which cannot be divulged without an express order of the House even after the committee has made its report.⁶⁰

Once the committee has heard all submissions on a Bill, it moves into the consideration stage. At this time the members weigh the submissions and consider departmental reports on submissions and any other departmental reports requested by the committee. The department will usually provide their comments on submissions and recommendations for amendments to the Bill based on submissions or further thinking by departmental officials. This report is very important as it often provides the foundation for the select committee's thinking and discussions on the Bill.⁶¹ It has been noted that this privileges departmental officials and it has been suggested that the consideration process should be more open to allow the officials' advice to be contested by the original submitters.⁶² There is some merit in this proposal as, especially with complicated legislation, there appears to be the danger of committee members being "captured" by departmental officials. Allowing the advice of officials to be further commented on by submitters would guard against this danger and would increase the openness of the policy process.

Following the consideration stage the committee moves to deliberate on the Bill clause by clause. At this stage the committee discusses and decides on amendments proposed by the members at the consideration stage and further amendments proposed by members during the deliberations.

⁵⁶ Committees possess a discretion concerning whether or not they will call submissions. For example a convention appears to have developed that where a private member's bill deals with a topic on which Government legislation is shortly expected, the committee will delay calling for submissions on the private member's bill until the Government bill has been introduced and referred to the committee: see Reply by Chris Fletcher, Chairperson of the Planning and Development Select Committee, to Question from Judith Tizard, MP for Panmure (Question 5186 of 1995), *Replies Supplement*, 28 August 1995 (No 95.19), p 54.

⁵⁷ See McGee, above n 14, p 264; and J F Burrows and P A Joseph, "Parliamentary Law Making" [1990] NZLJ 307.

⁵⁸ SO 351(1).

⁵⁹ SO 351(2)(b).

⁶⁰ SO 367.

⁶¹ Iles, above n 6, p 171.

⁶² Jim Gordon, "The Taxation Law Reform Bill and the Select Committee Process", *Accountants Journal*, July 1991, 36, p 36.

During these three stages of legislative scrutiny, important political relationships are being exercised. Three sets of political relationships are of most importance. These are the relationships between the committee members and the party caucuses, between the committee members (especially the committee chairperson) and the Minister in charge of the Bill and cabinet, and between the various members and parties which make up the committee.⁶³

The relationship between the caucus and its members serving on a select committee is very important to the select committee examine legislation. The relationship differs between Government and Opposition parties. In each case several variables are important, the most important which include the political importance of a particular Bill being discussed, the attitude of the leadership and the party spokesperson or Minister to the Bill, and the pressure of other claims on the caucus' time.

The Government caucus will, of course, always have advance warning of, and will have given its approval to, any Government Bill. The Opposition will generally, if caucus has advance knowledge that a Bill is to be introduced, decide upon a stance which the members as a whole will take towards the proposed legislation. Often, the Opposition caucus will have advance knowledge of the Government's legislative programme. The party spokes-people and the whips devote part of their time to finding out such things. It is an accepted and important part of their respective jobs to closely monitor Government activity and to ask questions concerning the Government's legislative intentions. Any caucus discussion of a proposed Bill will concentrate on whether the Opposition will support or oppose its introduction. In this the caucus will be guided by its manifesto, the leadership and party spokes-people, and matters of basic political philosophy. This discussion normally ends in a vote which decides the caucus' basic position on the Bill.

Once a Bill has been referred to a committee, much depends on its perceived political importance. Naturally, the more important it is the more often the party members on the committee will wish to report to the caucus. A very important matter will see the committee members, lead by the senior party member on the committee, reporting several times to their party. The members may report during the course of hearing public submissions on a Bill as issues begin to be identified from the submissions. These reports during the submissions stage of the select committee's consideration operate as briefings to members of the caucus. Their aim is to advance the caucus' collective understanding of the issues. On

⁶³ The following material on the political aspects of select committees' scrutiny of legislation is, unless otherwise stated, taken from interviews with the Deputy Leader of the Opposition, David Caygill, Wellington, 19 July 1995 (tape of interview held by author) and David McGee, the Clerk of the House of Representatives, above n 48..

less important legislation the committee members will not report back at all during submissions.

Normally there is only one caucus discussion of a Bill. This occurs after the select committee has finished the consideration stage and before it embarks on the deliberation process. At this stage the caucus will decide upon a position for the members to take on the important clauses of the Bill and the issues it raises. Often the decisions will be reached by consensus, and there is seldom a formal vote on any particular matter. The caucus will not decide upon every single issue that will arise in the deliberations on the Bill. There would be insufficient time or interest for it to do so.

This briefing process is, then, a very important part of a select committee's scrutiny of legislation. It is also one which allows members a wide degree of latitude on the issues that they take back to caucus for a decision by that body. There are no firm rules on when committee members should report back: the appropriate level of caucus discussion varies with issues and with members. The deputy leader of the Opposition, David Caygill, phrases the discretion in this manner: "You ought to report on those things people would have expected you to have reported on".⁶⁴ This directs attention to the likely interests of caucus members. If they are interested in particular matters then the caucus should hear about them. This may mean, on politically important Bills, several briefings and a final discussion on the stance the committee members should take during deliberations, including decisions on amendments that the members of the committee. There is typically a caucus resolution that the party's members on a committee are authorised vote a particular way on a certain Bill. Often the discussions lead to a much less formal conclusion. Indeed, on a very minor technical Bill members may decide not report at all. This is a matter of political judgment, which MPs gain as they get more experienced, and sometimes less experienced MPs will take advice from the party leadership on whether to report back on a particular issue.

The interaction with the caucus provides an important political check on the operation of select committees. Although the requirement to report back and seek caucus advice may be seen as limiting their effectiveness, it also ensures that the recommendations of the committee are acceptable to the wider group of MPs and do not come as a surprise to them. Committee members, especially those from the Government, must ensure that the conclusions they reach during the consideration stage will be acceptable to their caucus colleagues. This is especially true on contentious issues where there are likely to be strong opinions held by MPs. On less contentious issues, of course, decisions reached by the

⁶⁴ Ibid.

committee members are effectively final decisions subject to the formality of caucus approval.

This process provides the MPs sitting on a committee with considerable discretion concerning the details of legislation. However, when considering the principles or important clauses of a Bill they are bound to accept the decision of caucus. Under FPP this has normally had the effect of providing the Government caucus with the final say over the principle of a Bill and the shape of the major clauses. In other words, the power to make political, as opposed to technical, decision lies with the Government caucus rather than with the members of the committee. This, however, should not be seen as caucus domination of committee members. The process by which decisions are made is normally consensual, and it is on only a very few occasions that there will be a serious disagreement between the caucus and cabinet and the members serving on a committee.

If a committee were to act more independently, especially on politically important measure, it is likely that they would be less effective. Their recommendations would not have the support of the party caucus and, especially in the case of Government members, would not have the support of a majority of members of the House. If the recommendation of a committee regarding a Bill were politically unacceptable then they would not be accepted by the House. Rather, the Government would undoubtedly wish to make amendments to the Bill in the committee of the whole House, but without the benefit having heard submissions from the public and interest groups on the Bill. This would render committees completely ineffective from the perspectives of making a significant impact on the policy of a Bill, being a safety valve for the public, and easing the workload of the House.

In practice the majority Governments generally produced by FPP allow committees to be politically effective but within strict limits. Committees are very effective at providing a safety valve for the public, and moderately effective in increasing the amount of work the House can get through and conducting technical scrutiny of Bills. They are less effective in truly scrutinising Government, whether by their consideration of legislation or their conduct of inquiries, because of the political relationship between the Government caucus and the majority of MPs on a committee. MMP will change the operation of committees by potentially making it easier for them to make substantial policy changes to politically important Bills. However, MMP may also make it less likely that a committee's changes will be accepted by the House, as was the norm under FPP.

Government members of a committee also have contact with the Minister in charge of a particular Bill. It is quite unusual for the Opposition or non-Government members of a committee to have contact with the Minister. The Chairperson of the committee, if that

person is a Government member, normally fulfils the role of offering advice to the Minister concerning potential changes required to the Bill or issues which appear particularly problematic. Indeed, the relationship between the Chairperson and the Minister is probably the most important relationship in explaining the passage and shape of proposed legislation once it reaches the House. The Minister will possess a power to decide whether changes suggested by the Chairperson will go ahead, as all proposed changes must be examined and vetted by the Minister before they are referred to the Government caucus.⁶⁵

There is nothing wrong, in general, with the Minister taking a close interest in a select committee's consideration of legislation. It is the Minister's Bill, in that the Minister is in charge of it while it is in the House. Further the passage of legislation is one of the most important functions of Government as it is the major way in which they carry out the promises on which they were elected. The Government has a deep interest in ensuring the legislation emerges from select committees in a shape that is politically acceptable to it. It would be naive to imagine otherwise. It is this interest, above all, that reduces committee's ability to act in a bipartisan way and which stifles their ability to act independently. This, of course, flows naturally from the nature of the Parliamentary system with its fused legislature and executive, and is one of the reasons why the United Kingdom Parliament has refused to send Bills to specialist select committees in order to hear public submissions on any more than an experimental basis.⁶⁶

Although, in general terms, ultimate power to accept amendments vests with the Minister, the process of reporting back can have the indirect effect of causing the Minister to reassess his or her position on the basis of public submissions and the thinking of the committee members.⁶⁷ A good relationship will see the Chairperson given considerable independence by the Minister. This relationship will be built upon the confidence of the Minister in the ability of the chairperson. David Caygill cites the relationship which existed between former Minister of Finance Sir Roger Douglas, and the former chairperson of the Finance and Expenditure Select Committee, Trevor DeClene as a classic example of a chairman of a committee being given very great independence by a trusting Minister.⁶⁸ Other Ministers of

⁶⁵ Edwin Micheal Bate, *Health Legislation: The Health and Welfare Select Committee and the Social Services Select Committee*, LLM Research Paper, Victoria University of Wellington, 1990, p 4.

⁶⁶ "If Government legislation were regularly referred to specialised select committees, the party leadership would have a natural and proper interest in influencing the proceedings of those committees, and many of the characteristics which select committees now possess would be lost": *First Report from the Select Committee on Procedure, Session 1977-78*, Report and Minutes of Proceedings, London: HMSO, 17 July 1978 (HC-588-I). See also Michael Jogerst, *Reform in the House of Commons: The Select Committee System*, Lexington, Kentucky: University of Kentucky Press, 1993; and Marsh, above n 52.

⁶⁷ See Griffith, above n 4, p 203.

⁶⁸ Interview with David Caygill, above n 63.

Finance have been very reluctant to see any changes made to their legislation. For example, the Finance and Expenditure Select Committee were unable to convince the Minister and the Government caucus to drop measures implementing an entertainment tax, even though the committee, after considering the submissions, firmly believed the tax should not be enacted.⁶⁹

Important discussions also occur within the committee between the Government and Opposition members of a committee. Many select committees dealing with less contentious Bills, or which are chaired by an MP willing to listen and adopt suggestions by Opposition members can see a large amount of constructive debate. MPs skilled in committee work from both sides can make quite significant progress to the detail of a Bill, and sometimes even to the fundamental principles of a Bill.

Select committees, then, while given some latitude to change aspects of a Bill, are, under FPP, subordinate to the House, and in particular to the Government, which generally commands a majority in the House and a majority on committees. This would suggest that the introduction of extensive committee powers has not altered the central relationship between Parliament and the executive: the former is still effectively dominated by the latter. In this respect committees have not lived up to the all of the intentions of those that introduced the new system.⁷⁰

Select committees do make changes to Bills; most Bills examined will be amended in some way, and it is not uncommon for a Bill to be substantially re-written.⁷¹ The trend, in recent years has been for committees to make more, and more substantial, changes to Bills, and it is clear that select committees "are making substantially more *wholesale* changes than in earlier years, while the number of minor amendments remains about the same. Committees are much more willing to change whole clauses in 1989 (307 on 20 Bills) than in 1977 (163 on 36 Bills)."⁷² However, it is very difficult to provide any sort of way to measure the political importance of amendments made by committees. Qualitative distinctions run the risk of very rapidly being considered arbitrary. Also, apparently unimportant drafting amendments may become much more important because of court interpretations, unintended consequences, or unforeseen circumstances.⁷³ Quantitative measurements, on the other hand, do not provide any analysis of whether a particular amendment is actually important. While select committees may make extensive changes to the text of the Bill,

⁶⁹ Interview with David McGee, above n 48.

⁷⁰ See Caygill, above n 47, p 673.

⁷¹ Ibid, p 669.

⁷² Skene, above n 8, p 21. Emphasis in original.

⁷³ Griffith, above n 4, p 195.

there is no way to tell through quantitative analysis if those changes have altered the central principles of the Bill.

It is an interesting question of the extent to which select committees can alter the policy of a Bill. Common sense suggests that those involved in the earliest stages of the policy process will have the most influence of the policy content of legislation. By the time a select committee comes to consider a Bill, the institutional weight of the Government is already aligned behind the Bill as it presently stands. The Minister in charge of the Bill will have come to a position on its contents, and this will have the support of the Cabinet and the Government caucus. There may also be significant support for the current form of the Bill from both the Government department in charge of the Bill, and any significant interest groups which may have been consulted in the policy formation process. It could be expected that a select committee might find it difficult to make extensive changes to a Bill.

As Palmer notes:

by the time the Bill is actually introduced into the House it has been the subject of considerable discussion, negotiation, and thought in private. Sometimes those negotiations will have included parties outside Government who may be vitally affected by it. The result of this elaborate procedure is to reduce the impact of submissions made to parliamentary select committees considering the legislation. Usually by the time the public has been able to consider the legislation the executive branch of Government has taken a stance upon it. Frequently the Minister in the course of this process will have become committed to important details. The Cabinet itself will have considered the legislation prior to its introduction, as will the Government Caucus.⁷⁴

This appears to be the opinion of a number of Ministers, who believe that committees can have little real input into the substantial policy of a particular Bill. Some members who have served on committees disagree and point to the occasions where committees have made substantial changes to Bills. It does seem that, in general, while committees may have difficulty in changing the substantial policy of legislation, they can change the implementation of particular policies, and ameliorate what they perceive to be the harsher aspects of the policies.⁷⁵

Two examples of Bills being completely re-written are the Children and Young Persons Bill (passed as the Children, Young Persons, and Their Families Act), and the Maori Fisheries Bill.⁷⁶ In the case of the Children and Young Person's Bill, the changes made by the select committee in part reflected changes in attitudes within society as a whole; changes that the

⁷⁴ Palmer, above n 19, p 135; see also Griffith, above n 4, p 14.

⁷⁵ Bate, above n 65, p 7.

⁷⁶ Skene, above n 8, p 20. For part of the political background to the Children and Young Persons Bill, see Bate, above n 65, p 4.

Government caucus and the Minister in charge of the Bill were also receptive to.⁷⁷ In other words, as Iles puts it: “[C]hanges in policy may have resulted not from concern by members of the public but simply from a desire of the Government to change the policy embodied in the Bill or to implement a totally new policy.”⁷⁸

Public submissions

On major attribute of New Zealand’s select committees is that they allow a wide degree of consultation with individuals and interest groups over the policy and implementation of legislation. The extent of public consultation undertaken is unusual in comparison with other Western democracies. New Zealand committees certainly involve the public in the process of legislating more than the parliaments of Australia, the United Kingdom, and Canada, or the parliaments of Western Europe.⁷⁹ Indeed, New Zealand has been regarded as something as a model for other democracies. Although the United Kingdom experiment with Special Standing Committees—which possesses powers similar to New Zealand’s select committees—in the 1981-2 session, the experiment was quickly discontinued.⁸⁰ However, groups and individuals in the UK have continued to advocate the introduction of comprehensive committee scrutiny of legislation, including the hearing of evidence from the public and interest groups.⁸¹

In constitutional and legitimacy terms, the hearing of evidence is undoubtedly the most important aspect of the scrutiny of Bills by committees.⁸² However, the political significance of public submissions is less certain. Although the right and willingness of the public to make submissions on Bills is now deeply entrenched, it is unclear how influential or effective those submissions are. It appears that submissions are most likely to be effective when they deal with the details of the legislation or are tightly focused.⁸³ Even then, those making submissions cannot expect to see changes made to the principles of a Bill. Rather, the most that can be expected is the possible amelioration of aspects of particular policies. It seems that the political impact of public submissions will be little altered by the introduction of MMP. Although members of the public may believe that MMP will increase the impact of their submissions, this is unlikely to be the case.

⁷⁷ Interview with David McGee, above n 48.

⁷⁸ Iles, above n 6, p 178.

⁷⁹ Interview with David McGee, above n 48.

⁸⁰ David R Miers, “Legislation and the Legislative Process: a Case for Reform” (1989) 10 Statute LR 26, at p 30.

⁸¹ See Micheal Rush, “Making the Law: a Review of the Hansard Society Commission on the Legislative Process” (1993) 14 Statute LR 75; and Mitchell, above n 5.

⁸² Caygill, above n 23, p 672.

⁸³ Richard Prebble, “Presentation of a Submission to a Parliamentary Select Committee”, *Council Brief*, October 1983, 4.

Select committees are now seen as the only way in which the public can influence the legislative process. This perception has led to an increasing number of public submissions to committees.⁸⁴ One piece of legislation, the Resource Management Bill, generated over 1000 submissions.⁸⁵ It has also led to the expectation that members of the public will be allowed to comment on all legislation before committees, no matter how ineffectual that comment will be. The National Government was elected in 1990 with a manifesto promise of repealing the previous Labour Government's Employment Equity Act 1990. The necessary legislation was extremely simple and the drafting could not be improved, and there was no suggestion that the Government's policy would be changed on the basis of select committee submissions. Even so, committee hearings were held for 20 to 30 hours for members of the public to argue that the Employment Equity Act should not be repealed. There was an expectation that the public would be allowed to make submissions, no matter how ineffectual, on the Bill, and this expectation was met by the committee.⁸⁶

The public participation in the legislative process provided by select committees increases the popular legitimacy of New Zealand's legislation. Even though the influence of public submissions on legislative policy may be more apparent than real, the belief that interest groups and individuals can alter the content of legislation in a tangible way can result in broad support for legislation. This is not necessarily because the legislation embodies the positions espoused by different individuals or groups, but because they have been allowed to express their opinions and arguments directly to parliamentarians and have those opinions noted and taken into account.⁸⁷

There is no possibility that the number of public submissions to committees will decline under MMP. Indeed, apparent public perceptions relating to MMP suggest that there will be increased attempts to influence the legislative process through submissions. If this is so and no attempt is made to restrict the public's right to make submissions, it will slow further the select committee scrutiny of legislation. By implication this will also reduce the volume of legislation which the House can consider in any year. It should also be noted that public opinion would provide a significant hurdle in any attempt to alter the power of select committees as a consequence of the introduction of MMP.

⁸⁴ See Bate, above n 65, pp 6-7.

⁸⁵ Skene, above n 6, p 17.

⁸⁶ Interview with David McGee, above n 48.

⁸⁷ David Caygill calls this role a "safety valve for the public", above note 47, p 669.

Weaknesses in the current operation of select committees

While New Zealand's select committees have, under FPP, proved to be quite useful tools, some elements of their operation have led to their functioning less efficiently than may have been expected. These concerns relate to staffing and the importance of select committee work among MPs. It has been suggested that the introduction of MMP will go much of the way to alleviating these problems, and this is quite correct in regard of most of them. However, it is less clear that improving the efficient operating of committees will automatically lead to an increase in their political effectiveness. Indeed, there would seem to be only minor links between the ability of a committee to conduct its duties efficiently and its ability to be an effective part of the political process. The nature of the political process, it seems, will overwhelm any advantages efficiency would bring to committees as political entities.

Perhaps the major weakness of the current select committee system is that, for most, if not all MPs, service on a select committee is a low political priority. Many believe that the time spent on committees would be better used on constituency work. MPs also find the work of scrutinising legislation too technical and demanding, and would rather be conducting inquiries into 'hot' political issues.⁸⁸ MMP could see this opinion change. Sixty or more MPs will have seats in Parliament as list MPs without direct responsibility to a particular constituency. Even though these MPs may also wish to take on some of the responsibilities of an electoral MP, it seems clear that they will possess more time to devote to committee work. Further, they will face less political pressure to work in a constituency as they do not have to make a constituency happy in order to continue their careers in Parliament.

Another hindrance on the efficient day-to-day operations of committees is the continual substitution of members. This occurs where, for one reason or another, a party decides to change one or more of the members it has on a particular committee. Substitution works to allow MPs to attend to the other jobs they have to perform while ensuring there are always sufficient numbers on a particular committee to preserve party balance or to meet the quorum requirements. As Caygill notes, "Substitution obviously affects the continuity of committee business and is disturbing to the public and members alike."⁸⁹ It is one of the major reasons, along with the pressure of work, for the slow development of the committees' investigatory role.⁹⁰ Despite the reduction in the average size of committees brought about by the 1985 changes to Standing Orders, in the 1989 session, there was an

⁸⁸ Palmer, above n 17, pp 113-4.

⁸⁹ Caygill, above n 47, p 671.

⁹⁰ Ibid, p 670.

average substitution rate of 1.2 per select committee meeting.⁹¹ The main reason for this is the small pool of members available to staff the committees and the increasing amount of business they have to get through. For example, once the members of the executive are taken from the Government caucus, there may be only 20 to 25 members left to staff all the Parliamentary committees

The Royal Commission on the Electoral System recognised this deficiency in the operation of committees. It noted that strengthening the select committee system was "the best means, consistent with our constitutional tradition, of providing a parliamentary check on executive and administrative power."⁹² In its opinion, the best way to improve the function of committees and to allow them to reach their full potential was to increase the number of MPs available to serve on them. This was the most powerful argument for an increase in the size of the House.⁹³

SELECT COMMITTEES UNDER MMP

MMP may lead to a more protracted and uncertain law-making process.⁹⁴ This will occur because it is very unlikely that any one party will win a sufficient share of the party vote to gain a majority of seats in the House of Representatives. To form an effective Government, whether single-party minority or multi-party majority coalition, parties in Parliament must reach agreement. In other words, Governments in an MMP Parliament will govern or legislate only by agreement. This requirement of MMP—that Governments must make effective and durable political bargains to pass legislation—will be a major factor contributing to a probable increase in party cohesion and discipline. Far from turning the New Zealand Parliament into a Parliament of 120 individual MPs, MMP will see a strengthening of existing party discipline. However, political power spread will diffuse among more parties. That party discipline will remain at its current high levels or will possibly increase suggests that, under MMP, select committees will not be able to exercise an independent political voice. They will not be politically effective in their scrutiny of legislation, in that they will not be able to act independently of the parties to which members of the committee belong in order to have significant influence over the policy content of legislation or to prevent the passage of particular Bills. MMP will pass more power to parties other than a single governing party, but will not transfer power to the floor

⁹¹ Skene, above n 6, p 8.

⁹² *Report of the Royal Commission on the Electoral System. Towards a Better Democracy*, Wellington, 1986, p 124.

⁹³ *Ibid*, pp 124-5.

⁹⁴ Mai Chen "Remedying New Zealand's Constitution in Crisis: Is MMP Part of the Answer?" (1993) 17 VUWLR 22, p 24.

of the House. If power is not transferred to the floor of the House then it is very unlikely that committees will be unable to operate as independent political entities.

Types and formation of Government under MMP

Throughout the international community single-party majority Governments are usually limited to FPP electoral systems such as Britain, Canada, India, and New Zealand.⁹⁵ In Europe, none of the countries with a proportional representation voting system possessed a single-party majority Government. Under MMP, a party will need to win 46 to 47 percent of the vote in order to form a majority Government, as some parties will not gain representation in Parliament because of the 5 percent threshold.⁹⁶ Previous election results show that no political party in New Zealand has won 50 percent or more of the vote since 1951.⁹⁷ The fact that MMP is a proportional system, where a vote for a minor party is less likely to be 'wasted' than under FPP, probably means that existing political parties will struggle under MMP to retain the share of the vote that they had under FPP. This indicates that MMP elections will not result in a single party winning a majority of the seats in the House. Accordingly, Governments will tend to form from a combination of the seat distribution decided by the election and the outcome of negotiations between parties represented in the House.

The type of Government formed as a result of this process will be a major factor influencing the political effectiveness of select committees under MMP. There are four possible types of Government which may be formed; of these only two are likely to occur reasonably often or for a reasonable time. The various options are (1) a single-party majority Government; (2) a majority coalition Government; (3) a single-party minority Government; and (4) a minority coalition Government. It appears likely that only options (2) and (3) are likely to occur with any frequency. It is not part of this essay to speculate on which of the two likely options will predominate under MMP, but it is important to discuss how these types of Government will operate and how they are formed.

If a coalition were to be formed, the most desirable coalition for the parties concerned and the most conducive for political survival will be a "minimum winning connected coalition". Such a coalition will possess a majority of seats in the House, and therefore be a winning coalition. It will also be as small as possible to the extent that this is consistent with it

⁹⁵ Jonathon Boston, *The future of cabinet government in New Zealand: The implications of MMP for the formation, organization and operations of the cabinet*, Wellington, Victoria University of Wellington, Graduate School of Business and Government Management, Working Paper Series 3/94, 1994, p 3.

⁹⁶ Section 191(4) Electoral Act 1993.

⁹⁷ Boston, above n 95, p 3

holding a majority. That is, it will contain only the minimum number of parties necessary for it to obtain a working majority. Finally, the coalition will be as ideologically cohesive as possible.⁹⁸

The success of a particular Government, be it a single-party minority or a majority coalition can be measured in two ways: its viability and its durability. A viable Government is one which is able to enact a significant proportion—although not necessarily all—of its proposed legislation, and is also survive votes of confidence in the House. A Government's durability is measured by its ability to survive for the whole of a Parliamentary term.⁹⁹ Obviously the two measurements are very closely linked. In particular a Government which lacks viability is unlikely to be particularly durable. Even if a Government has sufficient support in the House to survive a vote of no confidence, it may still be unable to enact particular pieces of legislation which it considers vital to its continued existence. In this case, although a Government may be reasonably viable, it is unlikely to be particularly durable.

Any majority coalition must be formed on the basis of a degree of trust and agreement between the parties involved. Parties will need to work on building that trust by careful negotiation and consultation on legislative matters. Agreements, it appears, will normally be reached in private, but it is probable that normally they will not be kept secret and their contents will become public knowledge.¹⁰⁰ It appears likely that several agreements will be signed between parties in the Government. The foremost of these will be the overarching coalition agreement which will set forth the parameters of the Government. Subsidiary to this arrangement will be several agreements relating to the passage of particular pieces of legislation. These agreements will normally be in writing.¹⁰¹ It is unclear how detailed either the coalition agreement or the agreements on individual Bills will be. It would seem reasonable that the coalition agreement will be reasonably detailed, while those relating to legislation may be more informal. It also appears likely that no single party in the coalition will introduce legislation without gaining the support of the other party or parties. Nothing seems more likely to upset an agreement between parties than for one party to introduce and promote legislation without the support of the other coalition parties.

⁹⁸ M Franklin and T Mackie, "Familiarity and Inertia in the Formation of Governing Coalitions in Parliamentary Democracies", *British Journal of Political Science*, 1983, Vol 13, pp 275-298, cited in Boston, above n 95, p 2.

⁹⁹ Boston, above n 95, p 3.

¹⁰⁰ Note, however, that the recently dissolved coalition agreement between the Right of Centre Party and the Government was never made public.

¹⁰¹ Speech by Don McKinnon, Deputy Prime Minister, Auckland, 21/7/95, reported in (1995) 18 TCL 18/27.

A minority Government, on the other hand, requires at least the tacit support of other parties to the extent that they will support the Governing party in a no confidence motion. In order to be a viable and durable Government, it will also wish to have some commitment from other parties to elements of its legislative programme. It is likely that a minority Government would prefer to have such agreements in writing clearly stating the circumstances in which support for legislation and matters of confidence will be forthcoming. A minority Government will also enter into agreements on an ad hoc basis regarding the passage of particular items of legislation.¹⁰² Such agreements will be considered vital if a minority Government were to avoid embarrassing defeats in the House on matters it considers politically important. A failure to be able to negotiate such agreements will threaten the viability and therefore the durability of a particular Government.

It appears, then, that agreements will be negotiated in the pre-legislative stage. In order to secure agreement it will be necessary for more than one party to be involved in the policy process. Further, the agreements will normally be made between the party leaders and spokes-people and on the basis that the party they represent is cohesive enough to deliver the votes that the leadership promises. Such agreements will be formed completely independently of the select committee process. Indeed, such agreements must undermine the ability of select committees to be politically effective. First, the agreements will be entered into in the pre-legislative stage, which suggests that by the time a select committee comes to examine a bill, it will have quite a large degree of institutional and political inertia behind it. Second, for a committee to make a change to the bill will require the agreement of the caucuses of a sufficient number of parties to constitute a majority on the committee. This may be very difficult to achieve. Third, it must be remembered that the people who will broker the agreements regarding legislation will be the senior members of the party. These members are less likely to sit on committees, meaning that the people who make the agreements will not normally be those which sit through the committee scrutiny of the bill concerned. Fourth, even if a committee were able to effect changes to a bill, there is no guarantee, as exists under FPP, that the committee's amendments will be accepted by the House. This will occur because there is no reason for the composition of a particular committee to reflect the composition of the House. The pre-legislative agreement, which will be negotiated on a more open basis, will not normally be subject to this problem, as the legislation in question will not progress until a reasonably firm majority has subscribed to it.

¹⁰² Ibid.

It must be remembered that the requirement to gain support from other parties is also a requirement for the operation of the FPP system. Even under FPP a Government can only govern effectively with the tacit agreement of the Opposition. If the Opposition were debate every point to closure at every possibility and ensure that all possible divisions were taken, legislating would be impossible. The Opposition's power of delay would ensure that the Government would not be able to pass very much legislation at all. Mostly, however, the relationship between the Government and the Opposition operates on a fairly harmonious level. As Griffith puts it: "The Opposition normally acquiesces to its minority role; it accepts the conventions that bind it in defeat."¹⁰³ It is only where the Opposition vehemently opposes to a particular Government act that it will use its weapons of delay, and it is very seldom indeed that an Opposition will use all of its possible weapons.¹⁰⁴ To do so would irrevocably damage the working relationship between the parties, and its actions would be remembered the next time the then Opposition sat on the Government benches. Even so, this relationship can be easily soured and may be more difficult to forge in the first place under MMP where there are more parties involved. This will be especially true if protest or non-system parties manage to overcome the 5 per cent threshold and gain representation in the House.

It appears likely that pressures within the political system will push political parties towards the formation of a majority coalition Government. Not the least of these is the force of public, market, and interest group opinion. Parliament is under continual supervision by the whole of society, and if a minority Government becomes ineffective because of obstruction from other parties, then public opinion will begin to stir. Politicians will be placed under enormous pressure to make the system work, and parties will, it appears, need to be seen to be constructive in order to retain support. In other words, all parties will need to work towards fostering stability, and a party that appears to the public to be encouraging instability will almost certainly lose support at the next election.¹⁰⁵

If the parties in Parliament cannot negotiate a coalition agreement then a single party, probably but not necessarily the largest, will attempt to form a minority Government. Such a Government may need to avoid introducing controversial legislation into the House in order to avoid potentially embarrassing defeats. Certainly, the legislative programme of the present minority National Government has been relatively unadventurous. It has decided against introducing legislation to implement policies which it had earlier proposed, for

¹⁰³ Griffith, above n 4, p 21.

¹⁰⁴ See for example the Maritime Transport Bill 1994. The opposition used its full powers of delay, but refused to withdraw the pairs option.

¹⁰⁵ Interview with David Caygill, above n 63.

example postal deregulation, and has declined to introduce legislation on a range of matters which it otherwise would have wished to address. However, this need not always be the case. Even a minority Government will be in some sort of arrangement with other parties, if only in able to survive a vote of confidence in the House. So long as that minority Government retains the tacit support of other parties, it should be able to introduce politically controversial legislation. What will be required is more consultation within the parties that make up the Government block.¹⁰⁶ Supporting this is the fact the New Zealand electorate appears to prefer strong Governments. If MMP means that minority Governments act in a timid manner, then there will be severe pressure for some sort of majority coalition to form.¹⁰⁷ Also in the favour of minority Governments is the ease with which they may be able to secure a dissolution of Parliament:

Broadly, the easier it is for the Prime Minister of a minority government to secure a dissolution, the easier it will be for his government to survive. For the Prime Minister will be able to threaten his opponents with dissolution if he is defeated in the legislature. He will be under no pressure to negotiate with other parties to secure a coalition agreement if he believes he has a dissolution 'in his pocket'.¹⁰⁸

This would be a case of the Government 'forcing the hand' of the parties which provide it with basic support in Parliament. They would have to choose between supporting the Government on matters they were not entirely in agreement with, or facing the prospect of either an early election or a new Government inimical to their beliefs.¹⁰⁹ In a recent, non-legislative example, the National Government decided to make all items in the budgetary estimates matters of confidence, thereby forcing the United New Zealand Party to support the Government rather than risk facing an early election.¹¹⁰

Even so, a minority Government must be wary of not pushing its tacit supporters too far. It must always be remembered that a minority Government, by definition, does not have the support of the majority of the community. For this reason alone it, therefore, ought to be cautious in the programme it wishes to implement. It cannot, by reason of the fact that it is a minority in the House, promote contentious issues. Contentious matters must either be dropped from the legislative programme or pursued in a non-legislative way. This does not

¹⁰⁶ Ibid

¹⁰⁷ Ibid.

¹⁰⁸ V Bogdanor, "Introduction", in V Bogdanor (ed), *Coalition Government in Western Europe*, London: Heineman, 1983, p 6, quoted in Boston, above n 95, p 4.

¹⁰⁹ Interview with David Caygill, above n 63.

¹¹⁰ See "Labour issues warning to Govt", *The Evening Post*, Wellington, New Zealand, 11 September 1995, p 3; "Confidence move foils Budget tinkering plans", *The Dominion*, Wellington, New Zealand, 16 September 1995, p 2; and "United strikes deal on confidence votes", *The Evening Post*, Wellington, New Zealand, 16 September 1995, p 4.

mean that a minority Government will not have legislation to introduce. There are many ideas waiting to be introduced to the House and the number of possible areas for reform will not decrease.¹¹¹ Indeed, it has been suggested that the main impediment on a Government seeking to introduce legislation is not the House, but the resources of the Parliamentary Counsel Office.¹¹²

As under FPP, a majority Government under MMP will have no need to avoid introducing politically controversial legislation. However, in order to do so a coalition Government would require the agreement from the caucuses of all coalition partners. Once this is achieved, there is little or no need for further consultation or negotiation with the other parties represented in the House. Indeed, as under FPP, there would be significant disadvantages concerning delay in the legislative process and in giving opponents political ammunition were a Government to provide too much advance warning of its proposals.

Party cohesion

The evidence from other Parliaments elected by proportional representation suggests that party cohesion and discipline under MMP will be as strong as it was under FPP, if not stronger. The MMP electoral system will see at least 50 percent of MPs selected from party lists. This effectively includes political parties in the constitution. It also suggests that list MPs will find it very difficult to disobey the dictates of party leaders because they may find themselves removed from the list at the next election because of their perceived disloyalty.¹¹³ It is vitally important that parties retain strong degrees of cohesion under MMP, and it is inevitable that any outward shows of disunity will be treated very seriously by the party leadership. In order to strengthen party cohesion, it is also a possibility that New Zealand may implement so-called "anti-hopping" legislation. Such laws state that if a sitting MP resigns from a party, he or she is deemed to have resigned from Parliament and immediately loses their seat.¹¹⁴

It also appears that the thinking among politicians has also changed regarding the impact of MMP on party cohesion. Following the recent study trip of the members of the Standing Orders Committee to several European Parliaments, all of which were elected by some form of proportional representation, the current thinking, at least among members of that committee, is that MMP will not result in a Parliament of 120 individual MPs. Rather, there

¹¹¹ Interview with David McGee, above n 48

¹¹² Interview with David Caygill, above n 63.

¹¹³ Note also s 71 Electoral Act 1993, which requires parties to adopt democratic procedure in their candidate selection.

¹¹⁴ Interview with David McGee, above n 48

will be 4 or 5 parties in Parliament.¹¹⁵ Minister of Revenue, Wyatt Creech said in a recent speech: "Contrary to the expectations of some MMP advocates,¹¹⁶ party discipline of members by their parties in the European PR jurisdictions is far tighter than in New Zealand".¹¹⁷

Changes to the strength of party cohesion will also affect the career structure of MPs. The current career structure for MPs is very simple. An MP is elected, serves an apprenticeship in the backbenches, and eventually, all things going well, is promoted to a frontbench position, and the party is successful, a cabinet post. There is no alternative for the gifted and ambitious MP. One of the key attributes that will see an MP promoted to the frontbench is loyalty to the party and the party leadership. Those inclined to show independence will not advance their careers, and may even be removed from the party entirely. Indeed, given that party loyalty may increase under MMP, the position of so-called 'maverick' MPs in parties may become even more tenuous. This conclusion contradicts the expectations of some MMP advocates who believed that increasing the number of MPs in the House would strengthen committees and offer an alternative career ladder of MPs. If the job of committee chairperson was rewarding enough, it was argued, MPs would be drawn to that position as the possible culmination of their parliamentary career rather than as a position which assisted in their quest for a frontbench position. This would lead to a virtuous circle in which, as committees became more powerful, MPs would become more likely to wish to be members of them and, because they have an alternative to sitting on the frontbench, no longer need to show unthinking loyalty to the party and its leadership.¹¹⁸ However, this is unlikely to happen under MMP as the number of new MPs introduced by the change of voting system will be insufficient to allow the position of committee chairperson to develop as a viable career option. It seems likely that party caucuses will be of the same size, if not smaller, than those which usually occur in the major parties under FPP. A position on the frontbench will still be the preferred position for any MP because it will still be attainable. The position of committee Chairperson only becomes attractive when a frontbench place becomes an impossibility or highly improbable. Further, as the size of party caucuses will not rise significantly, if at all, under MMP, all MPs of the same party will still be able to meet in the same room. This face-to-face meeting is a power tool for the socialisation of MPs and orientating them to seeing the pinnacle of their political careers as achieving a

¹¹⁵ Interview with David Caygill, above n 63.

¹¹⁶ See, for example, Chen, above n 94, p 25.

¹¹⁷ "Rebel MPs face tighter discipline under MMP", *The Dominion*, Wellington, New Zealand, 31 August 1995, p 2.

¹¹⁸ See, in the context of the United Kingdom Parliament, Jogerst, above n 66, p 7.

frontbench spot.¹¹⁹ Indeed, even in the United Kingdom Parliament, which has much larger parties and presumably has MPs who would be more willing to see committee work as a viable career structure, most MPs see a committee position as a stepping-stone to a frontbench position and most MPs serving on committees would, if offered the chance of joining the front bench, would take the opportunity.¹²⁰

Select Committees' consideration of Bills

The process of a committee's deliberation on a Bill will become more complex under MMP. Consider the case of a majority coalition Government. The Government members of the committee will need to win the support of two caucuses rather than one for the changes they wish to make to a Bill, as it appears unlikely that coalition partners will wish to have a joint caucus.¹²¹ There appears to be no reason for the advent of MMP to change the convention that members of select committee will report back to their respective caucuses between the consideration and deliberation stages of the committee scrutiny of a particular Bill. Indeed, it is quite probable that the strength of this convention will increase as under MMP parties are recognised in the constitution for the first time.¹²² There is also the real prospect that less discretion will be delegated to members of committees, especially Government members—whether they are part of a minority or a coalition Government—or members of parties which give tacit support to the Government. If the passing of a certain Bill is governed by a written agreement between parties, it is quite likely that a Government and its supporters will be less likely to accept amendments to the Bill because they may feel that the agreement will be undermined. The relatively free way in which committees currently alter the text of Bills may be altered by strong inter-party agreements formed before a Bill is introduced. The parties may consider it too difficult to renegotiate the original agreement or to win support from all of the relevant caucuses and therefore refuse to allow significant amendment to the text of the Bill as introduced.¹²³

Where a minority Government holds power select committees may be able to insist on more widespread policy changes to Bills. In doing so, however, they must weigh the political consequences of their actions. To the extent committees make large changes to Government legislation they jeopardise the Government's effectiveness. This could have long-term effects such as the forcing of an early election or a change in Government.¹²⁴ The mere fact

¹¹⁹ Keith Jackson, *The Dilemma of Parliament*, Allen & Unwin/Port Nicholson Press, Wellington, 1987, pp 46-49.

¹²⁰ Jogerst, above n 66, pp 172-3.

¹²¹ Interview with David McGee, above n 48

¹²² Ibid.

¹²³ Ibid.

¹²⁴ Interview with David Caygill, above n 63.

that a committee has produced recommendations contrary to the Government's stated policy places immediate pressure on the Government. It must decide its attitude to the proposed changes. Probably its first question will be whether it will wish to seek to reverse the recommendations in the Committee of the Whole House. If the Government chooses that option it must also assess the support it has in the House over this matter and, if it is unsure of its support, determine whether it will make its proposed amendments a matter of confidence. It is to be expected that a minority Government will be reasonably sure of support for legislation it regards as politically important. To ensure it avoids an embarrassing defeat a Government will normally enter into agreements with other parties for the passage of particular Bills. This will normally avoid the need for a Government to be concerned about the effect of adverse recommendations from select committees

Under MMP the House may need to more clearly delineate the time at which a committee's recommendations are adopted. Standing Orders currently state that committee recommendations on a Bill are deemed to have been adopted by the House when the Bill is read a second time.¹²⁵ The Clerk of the House, David McGee, suggests that there should be a definite stage in the passage of legislation where the House explicitly accepts or rejects a committee's suggested amendments.¹²⁶ This further requirement could assist where a particular committee has a majority of members opposed to the position of a minority Government on a particular Bill. Those members could well introduce amendments to alter the Bill's central purpose. If the Government possesses a majority able to support its own position, it should be able to insist on a stage in the House's consideration of the Bill where the committee's recommendations are approved or rejected by the House.

Committees could improve also their ability to effectively scrutinise legislation through greater scrutiny of draft Bills. However, Governments have referred draft Bills to committees on only a very few occasions, and it appears that these experiments are unlikely to be tried again. Governments, when draft legislation, prefer to complete the work and introduce a Bill into Parliament rather than engage in a further scrutiny by a committee.¹²⁷ Indeed, given that the need arising from for inter-party negotiations on legislation will mean more discussion, albeit between parties rather than among committee members, before Bills are introduced, there appears to be no obvious reason why Governments under MMP would wish to subject their Bills to pre-legislative scrutiny.¹²⁸ In this context, issues also arise concerning the relationship of the House with the Government. It is the House's role to

¹²⁵ SO 375.

¹²⁶ Interview with David McGee, above n 48

¹²⁷ Interview with David McGee, above n 48

¹²⁸ Interview with David Caygill, above n 63.

critically examine Government initiatives. This process would become much more difficult if the House, by virtue of its select committees, has been involved in the basic policy formulation stage.¹²⁹

One important change to come from MMP in the day-to-day operation of the committees is that the relationship between the Minister and the Chairperson of the select committee will change. A minority Government will be unable to insist that it holds the chairs of all committees. It would probably only be able to insist that it had a number of chairperson positions which approximated its representation in the House.¹³⁰ A majority coalition Government would almost certainly wish to share the committee chairs between the parties in proportion to the number of members each party brings to the coalition. However, there are exceptions to this proportionality rule. A small party which is crucial to the formation of an effective coalition may be 'overpaid' in terms of committee chairperson positions. Also, if two large parties form a coalition, they may share the chairperson positions evenly, even though one party may have more seats.¹³¹ It is also likely that coalition partners will wish to prevent the other parties concentrating their power in particular portfolio areas. In that event, it is unlikely that one party would be allowed by its coalition partners to control the ministerial portfolio and have the select committee chairpersonship in the same policy area. This, again, is another way in which committees will be controlled by parties. The respective party strengths on committees will be decided by inter-party negotiations for ratification by the House.

That, under MMP, committee chairs and Ministers will often come from different parties will redefine the relationship that has previously existed. No longer will there exist a senior-junior relationship with the chair being taken into the Minister's confidence or vice versa.¹³² This will lead to a distancing of the relationship, especially if the Minister and the chairperson come from politically antagonistic parties. It would be foolish to say that under the FPP system as it previously existed that there were not cases where the relationship was strained. This occurred because the National and Labour political parties attempted to appeal to the greatest possible number of voters in order to maximise their percentage of the vote. This at times led to a situation where a Minister and a committee Chairperson could come from the same party but possess widely differing political views.¹³³ Even so, the MPs were still bound by their party ties. This will not be the case under MMP; and will necessarily lead to a greater distance between the Minister and the committee chairperson if

¹²⁹ Griffith, above n 4, p 238-9.

¹³⁰ Interview with David McGee, above n 48

¹³¹ Boston, above n 95, pp 8-9.

¹³² Interview with David McGee, above n 48

¹³³ Interview with David Caygill, above n 63.

they come from different parties. This greater distance may leave greater opportunities for the chairperson to take greater political initiatives than are possible at the moment.¹³⁴ However, it must be remembered that it is in the interests of both that they develop a sound working relationship, and that the development of this political relationship is also a matter of personality as well as ideology.¹³⁵ The Minister must have confidence in the chairperson for it to test the Government's legislation against public opinion and for the committee to be able to make recommendations which the Government will seriously consider and potentially agree with. In other words, the system of select committee of scrutiny of legislation cannot and will not work unless a working relationship exists between the chairperson and the Minister.

That a committee chairperson and the Minister in charge of a Bill may come from different parties adds strength to the argument that Ministers ought to sit on committees when they consider legislation. The traditional role of the chairperson as the Minister's representative will undoubtedly change under MMP. However, there will still need to be a committee member of sufficient authority advocating and defending the Government's position. Undoubtedly, that function will fall to be discharged by the senior Government member on the committee as Ministers are very unlikely to want to devote their time to committee service. However, despite the obvious demands on Ministers' time, there still remains an argument that the Minister ought to be the main advocate for legislation he or she has proposed at all stages of the legislative process. At the very least, as occurs in the United Kingdom Parliament, junior members of the executive should sit on committees during their scrutiny of Bills. One situation which may see Ministers sitting on committees is where negotiations between parties produce a minority Government that lacks sufficient members outside of cabinet to fully staff the committees. It is quite possible that, under MMP, a party with less than 40 seats in the House could form a minority Government. Aside from increasing the power of the Cabinet over caucus,¹³⁶ in that case some Ministers may be forced to sit on committees, if only to keep up the party's presence on them. Another possible solution to this problem would be to allow the Prime Minister to appoint some cabinet Ministers from outside the legislature.¹³⁷ This would require an amendment to the Constitution Act 1986,¹³⁸ and would significantly change New Zealand's constitution in a manner legally and politically more significant than New Zealand's adoption of the MMP electoral system.

¹³⁴ Interview with David McGee, above n 48

¹³⁵ Interview with David Caygill, above n 63.

¹³⁶ Cf Chen, above n 94, p 26.

¹³⁷ See Boston, above n 95, p 14.

¹³⁸ Section 6 Constitution Act 1986.

The relationship between select committees and the department officials that advise them will also change under MMP. This will occur most clearly where a Minister and a committee chairperson are from antagonistic parties. The officials' first duty is to the Minister, but they must also attend committee meetings and can be drawn into serving the Chairperson as well. If there is more distance between the Chairperson and the Minister, officials may need to tread more delicately. Committees may also become increasingly wary of advice offered by departmental officials and may demand increased funding to acquire independent advice from other sources. They may also adopt a practice of releasing for public or interest-group comment advice that officials have tendered during the consideration stage of a Bill in an effort to increase the contestability of that advice.

If, under MMP, Governments become less durable departmental officials could gain more sway over committee scrutiny of legislation. At the moment, officials have considerable input into drafting a committee's amendments to a Bill.¹³⁹ If Governments were to change with greater regularity, it is likely that, because of the rearrangement of power between parties, the membership of individual committees would also change to reflect the new balance of power. For example if a majority coalition were able to form where previously there had been a single-party minority Government, the membership of committees will need to change to ensure that the new Government was in the majority in every committee and also possessed the chairperson's position. This would result in officials giving more briefings to incoming committee members who may also have less experience in their positions and in the subject area of the committee. This will have implications for the role of officials and their influence over the way in which committees examine legislation.¹⁴⁰

Private Members' Bills

Although individual MPs and minority parties may believe that there will be more prospect for success for private members' Bills under MMP, much depends on the time allocated to them for parliamentary debate. Currently only one day per fortnight is available for debate on private members' matters. This is a reduction from the one day per week that existed immediately after the reform of standing orders in 1985. While that system was in operation the one day per week open for private members' Bills was quickly dispensed with by the Government as it sought more time in the Parliamentary schedule for its own legislation.¹⁴¹ It is possible that under MMP, where Parliament is no longer dominated by a single party, it may be feasible to move back to the House devoting one day every week to private

¹³⁹ Bate, above n 65, p 7.

¹⁴⁰ See Boston, above n 95, p 13.

¹⁴¹ Interview with David Caygill, above n 63.

members' Bills. This suggestion is one which has the support of the Clerk of the House.¹⁴² More likely is that the entire system of time allocation in the House will change. One way to achieve this would be through the introduction of a Business Committee to allocate time for business in the House a week in advance. This would provide certainty for both individual MPs and their parties. Such a device would also remove from the Opposition much of the current power it has to frustrate the Government's business.¹⁴³ This would need to be compensated by giving the Opposition parties a reasonable say in the formulation of the parliamentary timetable, including allocating a reasonable time for private members' Bills.¹⁴⁴

If a Private Member's Bill is able to make it on to the Order Paper its chances of success increase dramatically in the case of a minority Government. A majority Government, if it does not agree with the principle of the Bill will be able to refuse its introduction, or, at the very least, make certain that it is 'buried' in a select committee. It is to be remembered that a majority Government will almost certain possess a majority on all committees, and therefore will be able to direct that the committee delays indefinitely its consideration of a particular bill.

On the other hand a minority Government will not have this luxury. Rather, power in this instance passes to the other parties in Parliament, provided they are able to form a majority in support of a particular private member's measure. A minority Government must expect, it appears, to be defeated reasonably regularly on votes relating to the introduction of private members' Bills. Of course, a Government may see a particular private member's Bill as inimical to important parts of its political philosophy, and is entitled in that case to make the Bill a matter of confidence.

A minority Government may also be unable to 'bury' a private member's bill in a select committee. Quote clearly, it will not have a majority on all committees. If the Bill is referred to a committee on which the Government does not possess a majority, it will be unable to control the select committee's consideration of it. Even if a minority Government does control to particular committee to which a Bill is referred, it may be prevented from burying the Bill by directions from the House. The other parties, when agreeing to the introduction of the Bill, may include some requirements in the motion referring the bill to a committees. Such requirements may include a stipulation that the committee report back by

¹⁴² Interview with David McGee, above n 48

¹⁴³ See, for example, the debate on the Maritime Transport Bill, *Hansard* (1994), vol 540, pp 1610-1624; vol 541, pp 2090-2136, 2217-2136, 2599-2754, and 2773-2787; vol 542, pp 3618-3624, 3660-3662, and 3677-3680.

¹⁴⁴ Interview with David Caygill, above n 63.

a certain date. This is an important mechanism by which parties in the House can control the operation of select committees, and is likely to become more widely used in the future, especially when committees consider private members' Bills.

Arrangement of committees

The introduction of MMP will provide more MPs to staff committees. It may also see rearrangement of the current subject areas covered by each committee in order to even the workload among the committees. There could also be further changes to the size of committees consequent upon the greater number of parties which will probably be represented in an MMP Parliament. The current workload of legislation and inquiries is currently spread very unevenly about the select committees. The Justice and Law Reform Committee spends up to 95% of its time considering many technical pieces of legislation. Other committees, especially the Foreign Affairs and Defence Committee, spend most of their time conducting inquiries as there is very little legislation enacted in their subject area. The Health and Social Services Committee is currently very over-worked with both legislation and inquiries. There is also a natural separation in the subject matters considered by the committee, so much so that its membership changes depending on whether it is discussing a health or a social welfare matter. This suggests that there should be two committees in this case instead of one.¹⁴⁵

A trend may also develop which attempts to have committees representing as far as possible the composition of the House. The convention by which the Government has one more member than the Opposition party on each committee is inappropriate for an MMP Parliament.¹⁴⁶ Accordingly, it is suggested that the House may move to a system where party representation on a committee is approximately proportionate to that party's representation in the House. This would require an increase in the average size of committees. Of course, this will not be possible on every committee, and there will be some political bargains struck regarding the representation of small parties on individual committees. A small party will not have the members to sustain representation on every committee and may wish to enter into some arrangement to have a representative on those committees which it considers most important.

Another way in which the membership of committees is likely to change is in the background of the MPs staffing them. It is likely that, although MMP will see more women and Maori MPs elected due to parties placing such candidates in good positions on the party

¹⁴⁵ Interview with David McGee, above n 48

¹⁴⁶ See above. The current membership of select committees suggests that this convention has already been abandoned.

list, Parliament will become more representative of the professional middle classes. Such a change in membership could increase the overall ability of select committees by including more MPs who are what may be called professional politicians and who are committed to the select committee process. Further, list MPs may be able to devote more of their time to committee work as they may not need to do much electorate work.¹⁴⁷ Such MPs are likely to want to have an active role in formulating policy may wish to specialise in particular policy areas. They are also likely to look at work in particular committees as increasing the personal value of the work they do as MPs and providing them with substantial input into policy.¹⁴⁸ However, these MPs are still likely to wish to advance their careers into Ministerial or frontbench positions in order to increase their individual input into policy decisions. Accordingly, it is unlikely that the essential career structure of the House will change as a result of the introduction of MMP. MPs will still generally see the culmination of their careers in rising to the front bench, and select committee service will be seen as one element to help further an MP's career.

Inquiry role of committees

If MMP proves to be an impediment to Governments enacting legislation then it appears clear that committees will devote more of their time to conducting inquiries. They may begin to become more policy devisors rather than the recipients of policy decisions that they are at the moment.¹⁴⁹ This cannot occur until the legislative workload is reduced and spread more evenly among committees, and until that occurs most committees will remain absorbed in scrutinising legislation. The increase in the number of MPs available to staff committees may also allow committees to conduct more inquiries. It is unlikely that inquiries will be any more critical of the Government and its policies than they are at the moment. The central matter which will determine the attitude of committees to the Government is the number of Government members on each committees. If the Government is a minority, there will be more opportunity for committees to conduct inquiries which reach conclusions critical of the Government. In the case of a majority Government, this is unlikely to occur as the current political arrangements which restrict the political independence of committees in relation to legislation also exist when committees conduct inquiries.¹⁵⁰

¹⁴⁷ Compare Chen, above n 94, pp 26-7 with the comments of the Opposition Chief Whip, Jonathon Hunt reported in "Under MMP the lobbyist will be king", *The Independent*, Wellington, New Zealand, 9 June 1995, p 13.

¹⁴⁸ See Jogerst, above n 66, pp 12-13.

¹⁴⁹ Interview with David McGee, above n 48

¹⁵⁰ Interview with David Caygill, above n 63.

MMP, if it results in increased time for committees to conduct inquiries, will inevitably see committees investigating the policy behind existing legislative provisions and acting more generally in a law reform role. Committees, however, must, to ensure their political effectiveness, make certain that the Government heeds their recommendations. This requires committees to ensuring that the recommendations they formulate are politically acceptable to the Government. Indeed, committee members may need to enter into negotiations with the appropriate Minister and department. Although committees should be prepared to make unpalatable recommendations if they truly believe in them, they cannot afford to continually antagonise the Government if they wish their recommendations to receive more than merely bland replies without further action being taken.¹⁵¹ Committees will need to work hard in order to make certain that they build respect within Parliament, and develop an expectation that their recommendations will be seriously considered and more often than not implemented by the Government.¹⁵² The introduction of MMP will assist this process by allowing committees to have a more permanent membership and providing them with more time with which to conduct inquiries. These two factors will allow committees to acquire more expertise, both in their subject areas and in the conduct of inquiries, which in turn will lead to committees earning more respect from the Government and the departments.

CONCLUSION

The introduction of MMP will cause major changes to the New Zealand political landscape. However, it will not alter the fundamentals of the constitution or the fundamental relationship between select committees and the House of Representatives. In particular it will not see greater power to act independently devolve to committees. While MMP may provide some opportunities for committees to act more independently—and this will especially be the case under a minority Government—that independence will be more the independence from the control of a majority Government rather than independence from party control. Select committees will not be able exercise independent political control because they will not, under MMP, be able to operate independently of party considerations. Further it should not be suggested that committees will be the arena in which political negotiations occur, as that ignores the current structure. MMP will devolve power to parties not individual MPs and as such will not allow those MPs, when serving on committees, to steer the committees in a direction independent of party control.

¹⁵¹ Interview with David McGee, above n 48

¹⁵² *Ibid.*

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