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Too Secret to Scrutinise?
Executive accountability in foreign policy

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TOO SECRET TO SCRUTINISE? SELECT COMMITTEES AND EXECUTIVE ACCOUNTABILITY IN FOREIGN POLICY

The scrutiny of Executive action in foreign affairs is a constitutional function for which the Foreign Affairs, Defence and Trade Select Committee is primarily responsible. To this end Parliament has, in principle, unlimited inquiry powers. Yet our foreign affairs select committee, and those in other Anglo-Commonwealth jurisdictions, have in recent years experienced serious and on-going challenges to the fulfilment of their investigatory role. The public interest is being pulled in opposite directions: the Executive relies on national security considerations to justify confidentiality, whereas Parliament can (and should) demand disclosure in order to hold the Government accountable. This tension will be explored through examining if the recent work of FADT achieves the "robust scrutiny" envisaged by the 1985 select committee reforms, followed by a detailed analysis of the validity of one common limitation on inquiry powers, statutory secrecy provisions. Possible options for reform, namely processes for public interest immunity claims, independent arbitration and increased use of secret evidence, will be considered as possible means of strengthening the accountability of the Executive for its foreign policy activities. Political remedies are unsatisfactory to resolve this tension in the context of constitutional obligations and responsibilities.

Key words: foreign affairs; inquiry; Parliament; parliamentary privilege; select committees

I Introduction

Executive accountability to Parliament is at the core of our democracy. The Legislature and the Executive fulfil distinct functions; the "Grand Inquest of the Nation"[1] and the "Defender of the Realm"[2]. What happens when these roles conflict? Does national security limit parliamentary sovereignty, or does that principle require that accountability mechanisms are altered rather than avoided?

Select committees are often described as the "engine rooms"[3] of Parliament. These committees are tasked with the scrutiny of draft legislation and Executive activity. In 1985 there were significant changes to the select committee system in New Zealand

1 Neil Laurie "The Grand Inquest of the Nation: A notion of the past?" (2001) 16 Australasian Parliamentary Review 173.

2 Robin Creyke "Executive power – new wine in old bottles?" (2003) 31 FL Rev i at iv; "Memorandum of Understanding between the Right Honourable Stephen Harper, Prime Minister and the Honourable Michael Ignatieff, Leader of the Official Opposition and Gilles Duceppe, Leader of the Bloc Québécois" (14 May 2010) at [3].

3 Jonathan Boston and others *New Zealand Under MMP: A New Politics*? (Auckland University Press, Auckland, 1996) at 79.

following a review of the Standing Orders.[4] Thirteen subject-specific select committees were created, mirroring government departments. These committees were given the power to initiate their own inquiries.[5] The objective of the reform was to increase public accountability through systematic scrutiny of Government activities.[6] The architect of these reforms concluded that parliamentary control has been greatly enhanced as a result.[7] However that might not be equally true for all select committees. The Foreign Affairs, Defence and Trade committee (FADT) is responsible for: customs, defence, disarmament and arms control, foreign affairs, trade, and veterans' affairs.[8] There are a number of characteristics of its subject matter which may frustrate effective scrutiny.

FADT is charged with scrutinising areas of Government activity that are often sensitive for reasons of national security. The Executive might have good reason for wishing such matters remain outside the public forum of a committee evidence hearing. There are mechanisms to accommodate these circumstances, namely the ability to hear evidence in private or secret[9], however these are not often used.[10] Security concerns are cited by officials to justify non-disclosure, restrictions that appear to have no legal application to select committees yet remain largely unchallenged by members. This article explores the constitutional implications of this practice.

The remedies so far advanced to deal with the tension between the Executive and the Legislature are political. However political consolations are unsatisfactory given the centrality of Executive accountability in our democratic system and the legal nature of the issue. The sensitivity of issues under inquiry may require some compromise between these two branches of government as to how the competing public interest claims are to be balanced. This compromise should not alter the level of scrutiny of the Government, rather it concerns how this accountability will be achieved. Select committees should not accept dictation from the Government as to the issues for which it will be held accountable. With an increasing amount of Executive activities occurring at an

4 Standing Orders Committee *First Report: Part I* (July 1985) at 29.
5 Standing Orders of the House of Representatives 2014, SO 189.
6 Standing Orders Committee, above n 4, at 4.3.4.
7 Geoffrey Palmer and Matthew Palmer *Bridled Power* (4th ed, Oxford University Press, 2004, Oxford) at 169.
8 SO 188.
9 SO 218 – 219.
10 Interview with James Picker, Select Committees Operations Manager, Office of the Clerk (the author, 12 August 2015) final transcript on file with author (Wellington).

international level, it is important that these policies are equally subject to scrutiny by Parliament.

To explore the constitutional answers to this question, the article is divided into four main parts. First, the powers of the House and function of select committees will be briefly described. The activities undertaken by the FADT committee will then be outlined, along with a description of the challenges it has faced in holding the Executive to account. Obstacles faced in comparable jurisdictions will then be canvassed to illustrate why clarification and reform might be an important step in New Zealand. The application of statutory secrecy provisions to Parliament will then be discussed in detail, in order to understand whether there is a legal basis for the reasons not uncommonly cited to FADT to justify non-disclosure. Finally, options for reform will be considered, namely: clarification of the guidelines for officials, increased use of secret evidence, formalising accepted grounds for non-disclosure, and the possibility for arbitration of public interest immunity claims.

In coming to these conclusions, the reports and supporting evidence of FADT of the 50th and 51st Parliament were analysed. A number of interviews were also conducted with former and current MPs, including former Deputy Chair of FADT and the current Chair. This primary research provided insights into the political and practical context in which this important constitutional question is situated. The details of these interviews are contained in Appendix 1.

II The powers and functions of the Legislature

Besides passing legislation, one of the House of Representatives' core functions is to scrutinise the Government. In order to fulfil its constitutional role effectively, Parliament possesses certain powers, privileges and immunities, together known as "parliamentary privilege".[11] These include the power to inquire, the power to obtain evidence, and the power to punish for contempt.[12]

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11 David McGee *Parliamentary Practice in New Zealand* (3rd ed, Dunmore Publishing Ltd, Wellington, 2005) at 605; AV Dicey *Introduction to the Study of the Law of the Constitution* (5th ed, MacMillan and Co. Limited, London, 1987) at 357; Malcolm Jack (ed) *Erskine May's Treatise on The Law, Privileges, Proceedings and Usage of Parliament* (24th ed, LexisNexis, London, 2011) at 181.

12 McGee, at 606.

There is no legal definition of contempt of the House.[13] The Standing Orders provide some examples, which include failing to attend before a committee after being ordered to do so[14] and hindering a witness from giving evidence to a committee.[15] In 2006 the House punished a contempt of Parliament through ordering payment of a $1000 fine and a formal apology,[16] something which had not been done in 103 years.[17] This power was recently confirmed in legislation but limited to $1000.[18] The Parliamentary Privileges Act 2014 made clear that this provision in no way limits other powers to punish a contempt of the House.[19]

The status of these other sanctions is not clear. This is because New Zealand committees have not attempted to utilise their full constitutional powers and thus define the existence of any boundaries that might circumscribe them.[20] The power to seek persons has only been invoked once, and only partially. The Justice and Law Reform Committee in June 1996 required three witnesses to attend and the New Zealand Police issued summonses to that effect.[21] The witnesses did not in any case appear before the committee and the matter was not pursued further.[22]

The State Services Commission has produced a document called "Officials and Select Committees – Guidelines" (hereafter "*Guidelines*") which outline how public servants should interact with these committees.[23] The *Guidelines* acknowledge that the House may require a Minister to produce information and that it is open to the House to punish a Minister for continued refusal to supply information.[24] It is noted that this would be an "extreme step".[25] It seems that, in practice, committees are reliant on cooperation.[26]

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13 At 645.
14 SO 410(s).
15 SO 410(u).
16 Privileges Committee *Final Report: Question of privilege on the action taken by TVNZ in relation to its chief executive, following evidence he gave to the Finance and Expenditure Committee* (October 2006) at 4. The Privileges Committee found that TVNZ, by penalising an employee exclusively on the basis of the employee's evidence to a select committee, had acted contemptuously.
17 Privileges Committee *Interim Report: Question of privilege on the action taken by TVNZ in relation to its chief executive, following evidence he gave to the Finance and Expenditure Committee* (April 2006) at 7.
18 Parliamentary Privileges Act 2014, s 2.
19 Section 2(4).
20 Kirstin Lambert "Limits to Select Committee Investigations – A New Zealand perspective" (2007) 22 APR 169 at 182.
21 At 182.
22 At 181.
23 *Officials and Select Committees – Guidelines* (States Services Commission, 10 August 2007) ['*Guidelines*'].
24 At [34].
25 At [34].

There are significant ramifications for Executive accountability if the foundation of Parliament's scrutiny powers are better characterised as matters of theory. If the powers of contempt, which reinforce the legislature's inquiry function, are never invoked, there appears to be few consequences for a Government that does not cooperate with an inquiry.

A The power to send for persons, papers and records

A select committee may request relevant papers or that any person give evidence before the committee.[27] Only the Privileges Committee has the power to send for persons and papers; all other committees must apply to the Speaker. A summons will be issued if the Speaker is satisfied that the committee has taken all reasonable steps to obtain the evidence and that the evidence is necessary for the committee's proceedings.[28] If Ministers do not attend voluntarily, only the House itself can compel them to do so.[29] There may be limitations to the exercise of the House's power of inquiry which is, in principle, unrestricted.[30]

As these powers of the Legislature are in practice almost never invoked, the idea that they reinforce parliamentary inquiry powers is questionable. It is arguable that the mere potential for a sanction to be imposed by the House might encourage voluntary compliance, perhaps more so for non-governmental witnesses. Yet for Ministers this might be different, as the political reality is that Government members are unlikely to vote to punish one of their senior party officials.

B Foreign affairs as a prerogative power

Parliament has not traditionally had an active role in foreign affairs. As external relations are conducted under the prerogative power, there is no equivalent of the parliamentary scrutiny which occurs before a statutory power is created under legislation. Moreover, unlike the framework provided by statute, there are no such constraints laid down in

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26 Lambert, at 181.
27 SO 196.
28 SO 197(2).
29 *Guidelines*, at [52].
30 McGee, above n 11, at 434.

writing from which to then judge the use of prerogative power.[31] In foreign affairs, Parliament holds the Government to account after decisions have already been made. Further, the courts tend to distance themselves from ruling on foreign policy matters. Yet this deference is based on the premise that there is an existing accountability mechanism for foreign policy performed by Parliament.[32] FADT's subject matter primarily concerns areas conducted via prerogative power. Because the committee has a lighter legislative workload, FADT committee has a greater role in holding the Executive to account through inquiries. However inquiring into the prerogative can present distinct challenges.

It must be noted that over the past decade the New Zealand Parliament has developed a more active role in foreign affairs through examination of international treaties prior to ratification.[33] This now forms a significant part of the workload of the FADT committee. Entering into treaties is only one foreign policy activity of the Executive. The examination process itself can be criticised for occurring only once the treaty text has been finalised, raising questions as to the depth of scrutiny achieved. Formulating policy and setting priorities, opening Embassies, distributing overseas development assistance, campaigning for a non-permanent seat on the United Nations Security Council, deploying troops – all of these activities occur outside the legislative and treaty framework, with no consent required from Parliament. Inquiries form an important, and perhaps overlooked, part of the Legislature's constitutional role in holding the Government to account, especially in context of FADT.

C Select committee inquiries

The work of committees is meant to be more effective than debate in the House, by virtue of the expertise of committee members and the capacity to conduct longer, more detailed inquiries.[34] Inquiries form a more important role in FADT's scrutiny function given the nature of foreign affairs. One of the strengths of committees is the ability to compile a

31 Campbell McLachlan *Foreign Relations Law* (Cambridge University Press, October 2014) at 153.
32 At 189; AV Dicey, above n 11, at 393.
33 SO 2014 397 – 400.
34 McLachlan, above n 31, at 182.

body of diverse information.[35] Public questioning of senior officials and ministers is an integral part of the committee's role, as such detailed public accountability does not take place elsewhere.[36] It is important that select committees are able to perform their inquiry functions, as they are the superior mechanism of doing so.

The ability of the Executive to refuse requests for information could stifle inquiries potentially embarrassing for the Government. It is precisely these areas of Government activity which are in most need of scrutiny. An inquiry might expose systemic issues or investigate a particular event, and could result in a change of Government policy. This will only be the case, however, if the possibility of a select committee inquiry, with the requirement to provide evidence when requested, presented a powerful and real demand from the Legislature to the Executive.

III Foreign Affairs, Defence and Trade Select Committee

In the 50th Parliament, FADT considered three bills, received 21 briefings, examined 23 treaties, considered 8 petitions, and initiated one inquiry.[37] It also complete five annual reviews and five estimates each year. At the time of writing, the committee of the 51st Parliament has considered two bills, had 13 briefings, examined 5 treaties, considered two petitions, and has also conducted one set of five annual reviews and five estimates. Briefings are information-gathering exercises for the committee. If an incident happens overseas, the members may want to educate themselves from a source other than the news media. They are often one-off briefings, however the current committee has two standing items of business: briefings on the United Nations Security Council and disarmament. FADT members are able to educate themselves about the committee's subject areas and thus better scrutinise Government policy. Briefings are part of the inquiry function of a committee. A full inquiry can involve a large number of briefings from different stakeholders. It is important for the committee to form an assessment of the situation independent of the information provided by the Executive. An inquiry can

35 Meghan Benton and Meg Russell "Assessing the Impact of Parliamentary Oversight Committees: The Select Committees in the British House of Commons" (2013) 66 *Parliamentary Affairs* 772 at 789.

36 House of Commons Liaison Select Committee *Select committee effectiveness, resources and powers: Written evidence from the International Development Committee* (7 November 2012) at [9].

37 Interview with John Thomson, Clerk of the Foreign Affairs, Defence and Trade Select Committee (the author, 14 August 2015) final transcript on file with author (Wellington).

be into the formulation and implementation of Government policy or into the facts of a particular incident. These inquiries are different in nature and this distinction has some important constitutional implications.

While FADT might have a smaller number of bills referred to it given the nature of its subject area, this may be compensated by its unique treaty examination function. Treaties are referred in the first instance to FADT.[38] The committee is to retain the treaty for examination if it falls primarily within its own subject-matter. In the 50th Parliament, FADT retained all but one treaty.[39]

Annual reviews relate to the performance in the previous financial year and the current operations of each department.[40] Select committees send upwards of one hundred written questions to the ministries under review, which are responded to by those ministries and provided as evidence to the committee. Estimates relate to the appropriations for the upcoming financial year. It is through these two processes that the most comprehensive scrutiny occurs. However, as detailed below, the annual opportunity to examine Executive conduct within the subject area of FADT is hindered by non-disclosure of information.

There is no expectation that Ministers attend select committees outside of the one hour hearing during Estimates.[41] Unless accorded secrecy or privacy, the hearing of evidence is a proceeding open to the public.[42] Ministers can and do attend select committees at other points during the year, and Minister of Trade did brief FADT a number of times in the 50th Parliament, however it is still a rare occurrence. The written questions to the department and the short time available to directly question the Minister must be effectively used to secure accountability in this annual opportunity for the systematic scrutiny, which was the objective of the 1985 reforms.

In the Estimates conducted in 2015, the Minister of Foreign Affairs declined to provide a copy of legal advice, claiming legal professional privilege. The advice related to the multimillion dollar payment to establish a demonstration sheep farm in Saudi Arabia.

38 SO 399.
39 Interview with John Thompson.
40 SO 344(1).
41 Interview with Dr Kennedy Graham, Member of FADT (the author, 10 August 2015); Interview with Hon Trevor Mallard, Assistant Speaker of the House of Representatives (the author, 19 August 2015); Interview with Mark Mitchell, Chair of FADT (the author, 30 July 2015) – final transcripts on file with author (Wellington).
42 SO 222(1).

The Prime Minister declined to comment in detail on the issue in the House as the matter "will bear the scrutiny of the Auditor-General".[43] The Greens Co-Leader called for the resignation of the Minister of Foreign Affairs, but he did not call for an investigation by FADT, instead stating that the "confusion and contradiction" surrounding the issue highlighted the need for an investigation by the Auditor-General.[44] This indicates that FADT may not be seen as the most appropriate scrutiny mechanism for foreign policy, although the payment seems to fall squarely within the committee's terms of reference.

The evidence provided by the various government departments in response to FADT's written questions during the previous and current Parliaments are replete with indications of the practical limitations on this committee's investigatory powers. As recently as this year the Chief of the Defence force was not prepared to provide the logistical details of the New Zealand personnel deployed to Iraq.[45]

The Ministry of Foreign Affairs and Trade also declined to comment on the issue of a waiver of the diplomatic immunity of the Malaysian Defence Attaché because it was sub judice.[46] While matters sub judice are listed as possibly justifying hearing the evidence in secret,[47] officials are expected to be as helpful as possible in responding to committee requests.[48] The Ministry should have applied to give the particular evidence in secret rather than simply decline the request.[49]

In response to the committee's request for a copy of the Crown Law opinion on the release of the Whitehead Report[50], the Ministry wrote they could not release it to the committee because it was legally privileged.[51] Moreover, the Ministry informed the FADT committee that the advice provided to the Minister regarding the deployment of personnel to Iraq was subject to legal professional privilege.[52] Maintaining both the confidentiality of advice from officials and legal professional privilege can constitute

43 (19 August 2015) 707 NZPD at 1.
44 (19 August 2015) 707 NZPD at 14.
45 Foreign Affairs, Defence and Trade Committee *2013/14 Annual review of the Ministry of Defence and the New Zealand Defence Force* (8 April 2015) at 5.
46 Foreign Affairs, Defence and Trade Committee *2013/14 Annual Review of the Ministry of Foreign Affairs and Trade* (8 April 2015) at 5.
47 *Guidelines*, above n 23, at [37].
48 *Guidelines*, above n 23, at [31].
49 SO 220.
50 Ministerial inquiry by John Whitehead into the events surrounding the request for waiver of the diplomatic immunity of a Malaysian Defence Attaché.
51 Ministry of Foreign Affairs and Trade " FADTC: Vote FAT Financial Review 2013/14 – Additional Questions" at question 300.
52 At question 303.

good reasons for withholding information under the Official Information Act 1982.[53] Even if this Act did apply to select committees, non-disclosure is only justified if not outweighed by other considerations which render disclosure desirable and in the public interest.[54] There is great public interest in committees being able to effectively scrutinise Government decisions in their subject areas. Disclosure of legal advice underlying a foreign policy decision would serve the public interest in upholding accountability. Any harm to the public interest that could result from disclosure could be minimised through receiving the evidence in private or in secret.

In response to a written question regarding risk assessment of deployment of personnel to Iraq, the New Zealand Defence Force stated that to protect those personnel such information was not disclosed.[55] Further, in regard to New Zealand frigates boarding suspected pirate vessels in the Gulf of Aden, the same justification for non-disclosure was made: disclosure of NZDF rules of engagement would compromise operational security.[56] In response to a question for detailed information regarding external contractors, NZDF outlined the individual firm engagements but did not disclose the maximum hourly and daily rates charged, as that would "unreasonably prejudice the commercial position" of such firms.[57] This was stated to be in accordance with accepted practice.[58] When the committee asked what specific recommendations were made in the Court of Inquiry into the suicide of Corporal Doug Hughes in Afghanistan in 2012, certain provisions in the Coroners Act 2006 and the Armed Forces Discipline Act 1971 were relied on to justify non-disclosure.[59] NZDF did not answer how many Official Information requests required clearance for prior to release.[60] The committee has also received copies of the briefing to the incoming Minister with sections blanked out under the Official Information Act and "commercial sensitivity" has been used to justify non-disclosure.[61]

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53 Respectively, Official Information Act 1982, s 9(f)(iv) and s 9(h).

54 Section s9(1).

55 New Zealand Defence Force "Evidence provided to the Foreign Affairs, Defence and Trade Committee 2013/2014 Financial Review – Vote: Defence Force (questions 2.131 – 2.165)" at 2.139.

56 At 2.153.

57 New Zealand Defence Force "2012/13 financial review of the New Zealand Defence Force – Response to questions 1 - 267 (Complete set)" at 1.18.

58 Interview with James Picker, above n 10.

59 New Zealand Defence Force, above n 57, at 1.210; Coroners Act 2006, s 71; Armed Forces Discipline Act 1971, s 200T(a).

60 New Zealand Defence Force, at 1.68.

61 Interview with John Thomson, above n 37.

Lastly, in 2014 the Chief of the NZDF responded negatively to the committee's request for a briefing on the situation in Afghanistan, as the situation was too sensitive.[62] While such outright refusals to briefing requests are rare, it can be described as the most extreme version of a trend of Executive self-restraint.[63] A qualitative, rather than quantitative, approach is more appropriate in this context. The routine provision of non-sensitive information to select committees does not demonstrate the full accountability of the Executive. It is how a system responds in a crisis that is important.[64]

A committee can decide to follow up a refusal and could choose to request a summons from the Speaker, but that has never happened in FADT. There is an understanding that the Opposition will be in Government one day, thus "do unto others as you would have them do unto you".[65] It is always open to include adverse comments regarding the lack of cooperation in the committee's report to Parliament. This is a political consequence for which the Minister is accountable. The committee may expose the issue this way rather than through the select committee process itself; this is where the accountability lies.[66] The truth will surface in time; accountability might come later after sensitivity of the issue has passed.[67]

If adverse comments represent the highpoint of Executive accountability in foreign policy, this demonstrates the weakness of the scrutiny. First, select committee reports are rarely debated in the House. The practice is for the reports to sit on the Order Paper for fifteen sitting days, after which they are considered dealt with.[68] The Estimates for the departments in FADT's subject area are debated for approximately one hour during the Budget debate as the “External Sector”. Secondly, adverse comments are likely to be included in the minority view of a report, which is not guaranteed to be included in the final report. While not common practice, minority views have been blocked from the official reports of FADT.[69] Thirdly, the making of adverse comments is a *political* consequence. This may result in a question to the Minister in the House and some

62 Interview with Dr Kennedy Graham, above n 41; Interview with John Thomson.

63 Interview with Dr Kennedy Graham.
Interview with Sir Geoffrey Palmer, Former Prime Minister of New Zealand, (the author, 4 August 2015) final transcript on file with author (Wellington).

65 Interview with Dr Kennedy; Interview with James Picker; Interview with Hon Trevor Mallard, above n 41.

66 Interview with James Picker.

67 Interview with Hon Trevor Mallard.

68 SO 74(4).

69 Interview with Keith Locke, former FADT member, (the author, 16 August 2015) final transcript on file with author (Wellington).

attention in the media. In these contexts the Executive is more likely, and more entitled, to use justifications for non-disclosure such as national security or pure political deflection. In the end, even if there is a short period of uncomfortable attention on the Government, the information with which the committee was concerned remains secret. Thus, at best, there can be some shallow scrutiny for non-disclosure of information *if* the matter is brought to the attention of the House or the media, yet the robust scrutiny envisaged by the 1985 reforms remains unrealised.

The only way to receive highly sensitive information is in secret, yet that mechanism does not appear to be used often. There is a high threshold for secrecy: it must be shown that there is no other way to get the information and it is a matter of leave, so all members must agree.[70] The Office of the Clerk advises against it in part because the security concerns it raises.[71] Yet it is said to be one of the powers that facilitates very deep scrutiny.[72] In the 50th Parliament and so far in the 51st Parliament, private and secret evidence have been received collectively seven times by FADT.[73] The greater use of private and secret evidence would cut across the objective of direct public engagement. However it might be the mechanism which allows Parliament to accommodate the Executive's role as "Defender of the Realm" instead of abandoning its scrutiny role. As the following examples will show, full public disclosure might not be in the public interest.

IV Challenges faced in Comparable Jurisdictions

Recent experiences in Australia, the United Kingdom and Canada illustrate two particular challenges which limit these committees' investigatory powers: access to official documents and the ability of committees to summon ministers, or their staff, to give evidence.[74] Due to similar constitutional arrangements, such a discussion allows insights into the potential weaknesses of our own accountability mechanisms.

70 SO 219.
71 Interview with James Picker, above n 10.
72 Interview with James Picker.
73 Interview with John Thomson, above n 37.
74 McLachlan, above n 31, at 185

A United Kingdom

The Foreign Affairs Committee of the House of Commons conducted an inquiry into the Government's decision to go to war in Iraq in July 2003.[75] The committee faced a distinct lack of cooperation from the Government. Officials did not to attend[76] and the committee was refused access to intelligence assessments, precluding the committee from judging the veracity of Government claims.[77]

The Government responses were unsatisfactory in view of the constitutional function of select committees. When asked to provide information demonstrably relevant to the inquiry, the Government response was that it will consider how to appropriately brief the committee when intelligence is requested.[78] The Government stated that allowing access to intelligence as part of a committee inquiry would establish "competing jurisdictions".[79] However the creation of the Intelligence and Security Committee was not intended to limit the existing responsibilities of select committees.[80] This is relevant to New Zealand given the similar structure of our statutory Intelligence and Security Committee.[81] It is not constitutionally sound that the Government itself decides what amount of information is "appropriate" in order for *it* to be held accountable. It should be the select committee who judges whether they know enough to scrutinise the Executive.

The issues raised in 2003 were the focus of a more general inquiry into select committee effectiveness by the Liaison Committee in 2012.[82] The Defence Committee and the International Development Committee gave evidence of similar challenges. The Defence Committee noted how its work had been obstructed by the Department's continued unwillingness to provide estimated costs of military operations.[83] Similarly, the International Development Committee stated that they were disappointed with the

75 House of Commons Foreign Affairs Committee *The Decision to go to War in Iraq* (7 July 2003).
76 At [6].
77 At [27].
78 Secretary of State for Foreign and Commonwealth Affairs *Response to the Ninth Report of the Foreign Affairs Committee The Decision to go to War in Iraq* (November 2003) at 7.
79 At 7.
80 House of Commons Foreign Affairs, at [160].
81 See Intelligence and Security Act 1996, s 5-6.
82 House of Commons Liaison Select Committee *Select committee effectiveness, resources and powers* (8 November 2012).
83 House of Commons Liaison Select Committee *Select committee effectiveness, resources and powers: Written evidence from the Defence Committee* (7 November 2012) at 1.

Department's refusal to provide certain documents, which had impeded their work.[84] Interestingly, the Foreign Affairs Committee did not raise issues around seeking information.[85] However, the continued executive-imposed limitations on these committees' investigatory powers indicates that the issue is more systemic in nature.

B Australia

The accountability relationship between the Executive and Legislature in the foreign affairs context has been challenged in a jurisdiction closer to home. A Senate Committee inquired into false allegations that children had been thrown from boats carrying asylum seekers in Australian waters. The report concluded that there was an accountability vacuum within ministers' officers, with ministerial advisers appearing to possess their own executive authority.[86] During this inquiry there was a Cabinet decision prohibiting the attendance of the ministerial staff in question.[87] The committee decided not to summon the staff as their non-attendance was due to the instruction of their Minister.[88] The report concluded that Government involvement with the inquiry had "been characterised by minimal cooperation and occasionally outright resistance… "[89]

Further, in a 2009 inquiry, the Australian Foreign Affairs, Defence and Trade References Committee faced challenges in obtaining the necessary information from the Ministry of Defence. The inquiry concerned the removal of two sailors from a naval ship and subsequent naval investigation. The committee was at pains to highlight the distinction between the character of their inquiry, where the objective was to ascertain what had happened in this particular workplace, and the nature of an inquiry into Government implementation of policy.[90] The committee inquiry was into the conduct of specific individuals. It was thus inappropriate for the Government to approve submissions before

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84 House of Commons Liaison Select Committee, above n 36, at [13] – [14].

85 House of Commons Liaison Select Committee *Select committee effectiveness, resources and powers: Written evidence from the Foreign Affairs Committee* (7 November 2012).

86 Senate Select Committee on a Certain Maritime Incident (Australia) *Inquiry into a Certain Maritime Incident* (23 October 2003) at 33.

87 At 34.

88 Senate Select Committee on a Certain Maritime Incident, above n 86, at 35.

89 At 37.

90 Senate Standing Committee on Foreign Affairs, Defence and Trade (Australia) R*eport on parliamentary privilege: Inquiry into matters relating to events on HMAS Success* (18 March 2010) at 3.

they were sent to the committee or to deter staff from appearing as witnesses.[91] The committee considered the guidelines for officials witnesses, which state that approval of submissions will generally, but not always, be required.[92] The potential dissuasion of witnesses was noted in the committee's report as a possible contempt of the Senate.[93] The New Zealand guidelines for officials lack any such distinction, a concerning omission which will be returned to in the latter part of this article.

C Canada

The tension placed on the accountability relationship in the foreign affairs context was also brought to the forefront in a ruling of the Speaker of the Canadian House of Commons in April 2010. He ruled that there had been a prima facie breach of privilege in denying the Special Committee on the Canadian Mission in Afghanistan access to documents relating to the treatment of Afghan detainees by Canadian personnel. The objective of the inquiry was to determine if those personnel were aware of the risk of mistreatment.[94] In 2011 a FADT member called for a select committee inquiry into the same issue as it related to NZDF.[95] This was not actioned due to lack of support.[96]

In Canada, the majority of officials refused to provide the necessary information to the committee. The option to hear evidence in private did not alter the position of the officials.[97] Documents were denied on the basis of the priority of solicitor-client privilege and also by virtue of the Canada Evidence Act 1985.[98] When the House of Commons ordered the production of documents, the Government tabled thousands of heavily redacted documents.

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91 At 3.

92 At 4; See also *Government Guidelines for Official Witnesses before Parliamentary Committees and Related Matters* (Department of the Prime Minister and Cabinet, February 2015) (Australia) at 1.5.3.

93 Senate Standing Committee on Foreign Affairs, Defence and Trade (Australia), above n 90, at 4.

94 Heather MacIvor "The Speaker's Ruling on Afghan Detainee Documents: The Last Hurrah for Parliamentary Privilege?" (2010) 19 *Constitutional Forum* 129 at 130.

95 Interview with Keith Locke, above n 69; "Locke to push for Select Committee Inquiry on SAS" (1 May 2011)
Green Party of Aotearoa New Zealand <https://home.greens.org.nz/press-releases/locke-push-select-committee-inquiry-sas>.

96 Interview with Keith Locke.

97 MacIvor, above n 94, at 130.

98 At 130; see also Canada Evidence Act RSC 1985 c. C-5, s 38; analogous to section 6(a) of the New Zealand Official Information Act.

The Speaker ruled that the production of documents by the House was more than an indisputable privilege, it was also an obligation.[99] The production of papers is a "broad, absolute power that on the surface appears to be without restriction".[100] The existence of sufficient grounds to justify non-disclosure was ultimately a decision for the House.[101] He gave the parties themselves the responsibility to reach a compromise within two weeks of his ruling.

The Government, while negotiating with the Opposition parties, insisted on its ability to withhold documents based on Cabinet confidentiality and solicitor-client privilege.[102] This was accepted by two of the Opposition parties and the accord was accepted by the Speaker. An ad hoc committee of parliamentarians was established and given access to all the relevant information. [103] If the committee decided the information was necessary to the inquiry, the information in question was referred to the Panel of Arbiters, composed of three "eminent jurists". [104] The Panel would determine how to disclose the necessary information without compromising national security. It was to be guided by the principle of maximum disclosure conditioned by the exceptions required by the Government.[105] This result does not reflect the absolute powers of the House to request documents referred to in the Speaker's ruling. After one year of work, 4,000 less-censored documents were released to the House of Commons.[106]This left an estimated 36,000 documents that will not be publically released.[107]

Whether or not there are established restrictions to the House's inquiry powers is an unsettled question in New Zealand. The next section will explore whether secrecy provisions apply to Parliament so as to limit the scope of information that committees may request. The difference between committees' technical powers and actual powers may have serious implications for Executive accountability.

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99 (27 April 2010) 034 CPD HC 1520.

100 At 1525, quoting Robert Marleau and Camille Montpetit (eds) *House of Commons Procedure and Practice* (2nd ed, Chenelière McGraw-Hill, Montreal, 2000) at 978-979.

101 At 1525.

102 At 134; "Memorandum of Understanding between the Right Honourable Stephen Harper, Prime Minister and the Honourable Michael Ignatieff, Leader of the Official Opposition and Gilles Duceppe, Leader of the Bloc Québécois" (14 May 2010) at [7].

103 At [1].

104 "Memorandum of Understanding", at [6] and [8].

105 At [7].

106 Laura Payton "Afghan detainee records still hold questions, MPs say" (22 June 2011) CBC News <http://www.cbc.ca/news/politics/afghan-detainee-records-still-hold-questions-mps-say-1.980794>.

107 Laura Payton.

V Statutory Secrecy Provisions

The passing of the Official Information Act 1982 signalled a shift towards more open government. The Act's guiding principle of availability is, however, tempered by a significant qualification: information will be withheld if there is a good reason for doing so. There are a number of conclusive reasons for withholding official information which relate to FADT's field of inquiry. For example, information can be justifiably withheld if its disclosure would be likely to prejudice the country's security or international relations.[108] There are other secrecy provisions in New Zealand legislation that only provide for disclosure in very limited circumstances.[109] The important question is whether statutory secrecy provisions apply to the House so as to limit select committee inquiry powers. In practice, there seem to be real restrictions to the information the committee can access, as evidenced by the written answers in FADT's annual reviews. This question is particularly pertinent to FADT, not only because the issues under inquiry tend to be sensitive, but also because the Executive can have an effective monopoly over the provision of defence or foreign affairs-related information.[110]. Thus a refusal to disclose requested information is a very significant barrier to scrutiny.

The State Services Commission *Guidelines* have no formal status and have not been accepted by Parliament. These *Guidelines* acknowledge that the Official Information Act "does not formally constrain the powers of the House" yet information should be released to committees in accordance with the principles of the Act.[111] The *Guidelines* state that certain statutes may contain restrictions on the disclosure of information.[112] The ambiguous advice contained in these *Guidelines* reflects, or at least creates the perception of, an uncertain legal position of secrecy provisions in relation to select committees.

The effect of statutory secrecy provisions has previously been raised by FADT.[113] In 1994 the committee requested a copy of a Serious Fraud Office (SFO) report into a military court of inquiry. The committee was informed that the Serious Fraud Office Act 1990 prevented the report being released to them.[114] Following meetings with the SFO

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108 Official Information Act, s 6(a).
109 For example: Tax Administration Act 1994, s 81.
110 Benton and Russell, above n 35, at 790.
111 Guidelines, above n 23, at [13].
112 At [30].
113 Foreign Affairs, Defence and Trade Select Committee *Financial Procedures at RNZAF Ohakea* (1994).
114 At [3].

Deputy Director, the committee later received the report with certain personal details deleted, with an acknowledgement that the power of the committee to request papers was not limited by the Act.[115] However this incident might raise more questions than answers as to the application of secrecy provisions to select committees.

While warning all public sector organisations that they could be scrutinised by the House,[116] the committee's comments also indicated a willingness to accept that secrecy provisions may in some instances justifiably preclude the disclosure of information. They wrote that the public interest would sometimes be served better through non-disclosure, particularly in cases where personal reputations or commercial operations were at risk.[117] This does not seem to fully account for the possibility of secret evidence. The committee noted that it did not want its push for the disclosure of the report to be "…interpreted as an automatic precedent for a 'backdoor' means of gaining access to and publicising information otherwise protected by statute..."[118] Information subject to a secrecy provision was not seen as information that the committee was entitled to as a matter of parliamentary privilege.

This case study may be of limited use given the nature of the discretion given to the SFO Director under the Act. The relevant section provides that the Director may release information to any person who the Director is satisfied has a proper interest in receiving such information.[119] Thus the request from the FADT committee cannot be characterised as the direct prioritisation of parliamentary privilege over statutory secrecy provisions. Rather, it was a public servant exercising discretion under the governing legislation.[120]

Five years later, the secrecy provisions of the Tax Administration Act 1994 were said to limit the Finance and Expenditure Committee's inquiry into the Inland Revenue Department.[121] The Solicitor-General advised the committee that select committee inquiries did not constitute an exception to the officials' obligation to maintain confidentiality.[122] The committee concluded that it must obey the law and somehow

115 At [3].
116 At [4].
117 At [4].
118 Foreign Affairs, Defence and Trade Select Committee, above n 113, at 4.
119 Serious Fraud Office Act 1990, s 36(2)(e).
120 Peter McHugh and Russell Keith "Statutory Secrecy Provisions" (seminar presented to Australian and New Zealand Association of Clerks-at-the-Table, Wellington, January 2005) at 5.
121 Lambert, above n 20, at 179.
122 At 179.

reconcile its request for information with any applicable secrecy provisions.[123] Yet the committee added, ambiguously, that while not "strictly bound by the law" there was an obligation to take statutory secrecy provisions into account.[124] This position may be justified in that committees are part of the Legislature which made this policy decision, and thus may feel bound to guide their activities accordingly, even if not strictly required to. For example, the Privileges Committee noted that Parliament could be brought into disrepute if select committees encouraged witnesses to disclose information where there were more appropriate processes that could be used.[125]

These two examples relate to information about specific individuals rather than material informing Government foreign policy. Perhaps there is more justification for committees exercising restraint when it comes to personal information and the protection of privacy. Arguably Parliament is not the best mechanism for scrutiny of such issues, where there are superior institutions to look into individual claims, such as the judiciary. The same justification could not be made for information concerning the deployment of troops, for example. Parliament can and must look into more systemic issues and policies and decisions of Ministers.

There does not appear to be a conclusive answer as to the application of secrecy provisions to select committees. The Standing Orders Committee in 1995[126], despite receiving expert evidence on the question[127], did not include the topic in their final report. In his evidence, Phillip Joseph stated that the search for a single answer will be inconclusive, as the character and wording of the provisions, and thus their effect, are varied.[128] However as parliamentary privilege is part of the general law of New Zealand, privilege can be modified by statute. An example this is the New Zealand Bill of Rights Act, which applies to the House.[129]

Thus a secrecy provision that explicitly stated that it bound the House would limit Parliament's access to the information protected by the provision. In such a case it would

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123 Finance and Expenditure Select Committee *Inquiry into the powers and operations of the Inland Revenue Department* (October 1999) at 10.

124 Lambert, at 179.

125 For example the Protected Disclosures Act 2000; Privileges Committee, above n 16, at 6.

126 Standing Orders Committee Report of the Standing Orders Committee on the review of ' standing orders (1995).

127 Philip Joseph, Part 3a Report of the Standing Orders Committee on the review of standing orders Appendices (1995) at 237.

128 McGee, above n 11, at 435.

129 New Zealand Bill of Rights Act 1990, s 3(a).

be unlawful for the House to use its coercive powers to try to obtain the information, despite the general power to inquire.[130] However, secrecy provisions do not generally contain reference to parliamentary inquiries. When read in light of the constitutional role of the House, it seems unlikely that secrecy provisions would limit the powers of the House by implication.[131]

In Canada, parliamentary privilege may only be abrogated by express words.[132] In Australia, an "express statutory declaration" is required.[133] However something less than express words may be sufficient in New Zealand.[134] The statutory interpretation principle of necessary implication applies to parliamentary privilege.[135] The constitutional significance of such an implication may however require a higher threshold.[136] It must be clear that Parliament intended to limit its own powers. The legislation which in practice is used to justify non-disclosure does not expressly or by necessary implication apply to select committees. While it is possible that the inquiry powers of committees could be legally circumscribed in the future, the current practice does not appear to have a legal basis. Great clarity regarding the application of statutory secrecy provisions is one way to reinforce the inquiry powers of select committees.

IV Possible reform in the New Zealand context

The experiences of our own Parliament and that of comparable jurisdictions have shown that there are inevitable tensions between the Executive's claim to confidentiality and the Legislature's right to know. Public interest is being pulled simultaneously in opposite directions. If, in practice, there are accepted grounds the Government can claim to justify non-disclosure, should these limitations be acknowledged in some way? Moreover, if the Legislature and Executive disagree whether disclosure is in the public interest, should

130 McGee, at 435.
131 At 436.
132 *Re House of Commons and Canada Labour Relations Board* (1986) 27 DLR (4th) 481 at 490 (per Pratte J); *Harvey v New Brunswick (Attorney-General)* (1996) 137 DLR (4th) 142 at [70] (per McLachlin J) as per footnote 25 in McGee at 610.
133 Legal and Constitutional Affairs References Committee Determination of Public Interest Immunity Claims Appendix 4: Evidence from the Clerk of the Senate (7 January 2014), second attachment at 5.
134 McGee, at 610.
135 Peter McHugh and Russell Keith, above n 120, at 3.
136 At 4.

there be an independent arbitration process to resolve the dispute? In addition to these two questions, reform of the guidance to officials must also be considered in order to bring the advice in line with constitutional principles.

A Justifiable grounds for non-disclosure

Currently in New Zealand there appears to be no clear grounds on which the Executive can legally withhold information requested by the House. There are no statutory secrecy provisions which apply expressly to Parliament, yet FADT has accepted those limitations on their inquiry powers. A refusal in response to a request from a select committee like FADT is different to a refusal to an order of the House. Only the latter may be found to be a contempt of Parliament.

The reason why committees are reluctant to press for information and request summons is unclear. Perhaps Government members are motivated by political considerations, accepting whatever information is given in order not to embarrass the Executive and disrupt their own career progression. Perhaps Government departments and select committees members do not understand what they are, respectively, constitutionally obliged to disclose or entitled to receive. Or perhaps Parliament has grown to accommodate the Executive in its pursuit of foreign policy and agrees that Government claims of national security exclude certain activities from scrutiny. However it does seem that receiving evidence in secret is seen as a solution to the impasse given its infrequent use. A model based of the 2009 Australian Senate process described below might be useful in clarifying what, if any, limits to scrutiny powers may be accepted by the House in accommodating the distinct tasks of Government and Parliament.

The Australian Senate[137] set out a process for the Executive to claim public interest immunity. This Order consolidated existing practice. In 1975 the Commonwealth Senate had resolved the power for the Senate to summon documents was "subject to the determination of all just and proper claims of privilege".[138] Rather than a limitation on the Legislature's power, the Order represents an acknowledgement that some information

137 Order of the Commonwealth Senate (Australia) J.1941-2 (13 May 2009).
138 Resolution of the Commonwealth Senate (Australia) J.831 (16 July 1975).

should not be disclosed, signalling that such claims will at least be entertained.[139] The responsible Minister must provide the committee with the ground justifying non-disclosure, specifying the harm to the public interest which could result.[140] If the committee finds this unsatisfactory, it can report the matter to the Senate, which may order the production of the documents.[141] The Senate makes the ultimate decision regarding disclosure. The Order itself does not list what may justify non-disclosure. There are, however, a number of accepted grounds outlined in the Australian guidelines, including national security.[142]

In New Zealand there is limited guidance of what may justify non-disclosure. Committees have accepted limitations from time to time, but this is not the same as a consistent and clear resolution from the Legislature. The *Guidelines* state that "legitimate concerns" should be communicated to the committee which may agree to receive the information in a different form. [143] There is no explanation of what may constitute a "legitimate concern", and who is to be the judge of the claim's legitimacy. Each committee much approach non-disclosure on a case by case basis[144], uncertain as to whether the committee is legally entitled to the information.

A statement from Parliament similar to that of the 1975 resolution of the Australian Senate would be useful in clarifying each parties' rights and obligations. It would acknowledge and formalise a practice that already seems to occur in FADT. It would force Ministers to articulate the reasons for their refusals and limit the reasons that could be relied upon. Ministers would need to outline the harm to the public interest that would follow disclosure, making it more difficult to withhold information for purely political reasons. At the very least, this process could make the issue of Executive compliance with select committee requests more transparent to the public. Currently this is only exposed through the rare adverse comment in a committee report, whereas in Australia statistics are available.[145]

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139 Harry Evans and Rosemary Laing (eds) *Odgers' Australian Senate practice* (13th ed, Department of State, Canberra, 2012) at Chapter 19 <http://www.aph.gov.au/About_Parliament/Senate/Powers_practice_n_procedures/odgers1>.

140 Senate Order, above n 137, at s c(3)

141 *Government Guidelines for Official Witnesses*, above n 92, at [21].

142 At [11].

143 *Guidelines*, above n 23, at [32].

144 Lambert, above n 20, at 178.

145 "Orders for production of documents not complied with" Commonwealth Parliament of Australia

Such a resolution could also note the ability to receive secret evidence as a mechanism to avoid harm to the public interest through open disclosure. While public participation in select committees is one of the strengths of our democracy, one cannot deny that there is some information which cannot be made public. Sensitive Government activity that concerns national security must still be scrutinised. Not all scrutiny has to be public in order to be effective. While trust (or lack thereof) of non-Government members may be a concern,[146] the Office of the Clerk does have mechanisms in place to manage secret evidence, by keeping the material in their custody and collecting numbered copies of the documents to prevent leaks. If select committees are not seen as an effective place to receive sensitive evidence, such briefings might be pushed into the side-lines, excluding some committee members and moving the process further away from democratic accountability.

However this is only part of the answer. There also needs to be a process to manage disagreement over where the public interest falls in a particular case.

B Process in case of disagreement

What if national security concerns are said to prohibit disclosure, but the committee refuses to receive anything but the information in full? Recent events foreign affairs has raised this question in the Commonwealth Senate of Australia. In New South Wales (NSW) there is a process for independent arbitration of public interest immunity claims, which may serve as a model for breaking the stalemate between the Legislature and the Executive.

The NSW Legislative Council, following a refusal to a summons for the provision of documents, suspended the responsible Minister from the House, resulting in that Minister challenging the powers of the Council in the courts.[147] The information at issue was Government consent to a proposed goldmine and the environmental impact of the project.[148] The subsequent decision in 1996 of *Egan v Willis* of the NSW Court of Appeal

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<http://www.aph.gov.au/Parliamentary_Business/Statistics /Senate_StatsNet/documents/opds/Orders_for_production_of_documents _not_complied_with>.

146 Interview with Hon Trevor Mallard, above n 41.

147 Legal and Constitutional Affairs References Committee, above n 133, at 3.

148 Bannister, Appleby and Olijnyk *Government Accountability: Australian Administrative Law*

held that the Council had an inherent power to require the production of documents and impose sanctions in cases of non-compliance.[149] While the basis of the powers of the NSW Parliament is different to that of New Zealand, the focus of the courts' reasoning was on the function rather than the foundation of the powers. The power to demand papers was characterised as an inherent power of the House which exists to the extent that it is reasonably necessary for the proper exercise of its functions.[150] It was held that the Legislature had an imperative need for access to material in order to effectively consider both the introduction of new laws and the operation of current laws.[151] The Court's reasoning shows that this power is crucial in enabling the Legislature to fulfil its constitutional function and is equally applicable to New Zealand.

The question to be resolved by the NSW process is whether the information should enter the public domain.[152] Where a claim is made, a description of the document is prepared along with reasons for the privilege claim. The documents are then delivered to the Clerk to be made available only to members of the Legislative Council.[153] Any member may dispute the validity of the claim to privilege; the Clerk will then submit the document to an independent arbitrator, who submits an advisory report within one week.[154]

The important issue of asylum-seekers recently forced the consideration of whether such a process is necessary in the Commonwealth Senate. In November 2013 the Senate ordered the production of all communications relating to recent "in water operations".[155] The documents were not disclosed due to national security risk.[156] The Senate rejected this claim of public interest immunity and called again for the documents.[157] The Minister defended the immunity claim.[158] It was at this point that the Senate referred the matter for inquiry to the Legal and Constitutional Affairs References Committee. The Government did not produce any further information, although presentation could have

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(Cambridge University Press, Cambridge, 2015) at 165.

149 John Evans "Orders for Papers and Executive Privilege: Committee Inquiries and Statutory Secrecy provisions" (2002) 17 APR 198 at 211.

150 *Egan v Willis* (1996) 40 NSWLR 650, per Gleeson CJ at 664.

151 *Egan v Willis* (1998) 195 CLR 424 per Gaudron, Gummow and Hayne JJ at 454, referring to (1996) 40 NSWLR 650, at 692-3.

152 Finance and Public Administration References Committee (Australia) *Chapter 2: Background to the inquiry: Independent Arbitration of Public Interest Immunity Claims* (February 2010) at 15.

153 Standing Orders of the Legislative Assembly of New South Wales 2010, SO 52(5).

154 SO 52(6) (NSW).

155 Senate Standing Committee on Legal and Constitutional Affairs *Chapter 1 Introduction: A claim of public interest immunity made over documents* (6 March 2014) at 1-2.

156 At 3.

157 At 3-4.

158 At 3-4.

been *in camera* or in an altered form. The committee was precluded from assessing the validity of the Government's national security concerns, concluding that the lack of cooperation only heightened their suspicions.[159] The committee could only suggest the Senate follow political remedies such as it had done in the past.[160] As Executive non-compliance is an on-going obstacle to Senate effectiveness, the committee recommended consideration of reform. Their report proposed that the Senate Standing Committee on Procedure consider the process of independent arbitration adopted in NSW. On 6 March 2014 the Senate adopted the recommendation. The inquiry is being considered at the time of writing. The Australian Senate Standing Committee on Finance and Public Administration considered a similar proposal in 2010, ultimately recommending against adoption of an independent arbitration model.[161] The recommendation was based on a specific proposal, details of which served as a basis for criticism from the majority report.[162] The inquiry currently underway has a broader terms of reference.[163]

C Reform of the New Zealand Guidelines

There is a lack of clarity in the *Guidelines* for official interacting with select committees. The principal fault is the lack of distinction drawn between fact-based and policy-based inquiries.[164] The *Guidelines* relate exclusively to the latter without noting that these procedures may differ with the nature of the particular inquiry. It is true that, in general, officials who appear before select committee do so in support of Ministerial accountability.[165] Committees will sometimes require a different type of evidence from the officials they request to appear before them. The *Guidelines* thus do not give an accurate description of the powers of select committees in relation to the Executive.

The equivalent Australian document states that secrecy provisions only limit committees' powers if it applies to the House.[166] An example of such a section is given.[167] If there are

159 At 16.
160 At 17.
161 Finance and Public Administration References Committee (Australia), above n 152, at vii.
162 At 3.
163 "Third party arbitration of public interest immunity claims" (6 March 2014) Parliament of Australia < http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Procedure/ thirdpartypiic>.
164 *Guidelines*, above n 23, at [20].
165 At [9].
166 *Government Guidelines for Official Witnesses*, above n 92, at 4.11.
167 Auditor-General Act 1997 (Australia), s 37.

statutory restrictions on committees' inquiry powers contained in New Zealand legislation, they should be listed in the *Guidelines*. If none exist, then that paragraph should be removed from the document as it is misleading.[168]

Also following the Australian document, the New Zealand *Guidelines* should be reformulated to take the parliamentary context into account. There may be greater public interest in providing information to a parliamentary inquiry than with other requests under freedom of information legislation.[169] The ability to disclose the information confidentially also increases the scope of what can be released. These changes should also be reflected in the *Cabinet Manual*, which does not mention secret evidence.[170] It is important that these documents accurately reflect the constitutional relationship.

V Conclusion

When it comes to accountability in foreign affairs, there is significant inconsistency between the technical powers of the House and actual practice. It does not appear that FADT is willing or able to fulfil its scrutiny function effectively.

Statutory secrecy provisions restrict the inquiry powers of FADT. Evidence is regularly withheld during the Estimates process, which is meant to represent the highpoint of scrutiny. These limitations are not legally justified but remain unchallenged by the committee. The House has not clearly acknowledged any limitations to parliamentary privilege but practice shows that there are currently Government activities beyond scrutiny.

Parliament and the Executive need to accommodate one another in their sometimes competing constitutional functions. If the House is prepared to limit its inquiry function to accommodate claims of public interest immunity, this should be clearly formulated so as to keep the restrictions within tight boundaries. If there are accepted grounds to justify non-disclosure, independent arbitration might need to follow, to resolve any disagreements as to the validity of claims. Mechanisms exist to allow scrutiny without compromising national security. Private and secret evidence need to be used more often

168 *Guidelines*, at [30].
169 *Government Guidelines for Official Witnesses*, above n 92, at 4.9.1.
170 Cabinet Office *Cabinet Manual 2008* at 8.66.

to ensure that there is no accountability vacuum. While there is a public interest in openness, there is a greater public interest in achieving effective scrutiny. Advice to officials must be clarified as the present ambiguity contained in the *Guidelines* does not facilitate inquiries.

Political remedies are an unsatisfactory answer to a constitutional question of such significance. Adverse comments in committee reports and possible debate in the House was not the robust scrutiny envisaged by the 1985 reforms. Foreign affairs and defence policy is unique due to its prerogative basis and potential sensitivity. This may result in some differences to the Legislature's scrutiny measures, but does not justify putting certain issues beyond the reach of inquiry. The idea that the level of investigation into foreign affairs is to be determined by the Government's own political judgment[171] is antithetical to democratic accountability. Parliament has a duty to scrutinise the Executive and must reform itself to enable the realisation of its constitutional function.

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[171] Harry Evans and Rosemary Laing (eds), above n 139.

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APPENDIX 1

The Pipitea Victoria University of Wellington Human Ethics Committee approved the interview process for this research.

Interviewee	Date of interview (2015)
Sue Kedgley Former Green MP (1999-2011) Chair of the Health Committee (2005-2008)	27 July
Mark Mitchell Current National MP (2011-present) Chair of FADT (2014-present)	30 July
Diane Yates Former Labour MP (1993-2008) Chair of FADT (2005-2008)	31 July (via email)
Rt. Hon Geoffrey Palmer QC Former Prime Minister of New Zealand (1989-1990) Former Labour MP (1979-1990)	4 August
Dr Kennedy Graham Current Green MP (2008-present) Current member of FADT (2014-present) Deputy Chair FADT (2011-2014)	10 August
James Picker Current Select Committee Operations Manager Office of the Clerk	12 August
John Thomson Current Clerk of FADT Office of the Clerk	14 August
Keith Locke Former Green MP (1999-2011) Member of FADT (1999-2011)	16 August (via email)
John Hayes ONZM Former National MP (2005-2014) Former Chair of FADT (2008-2014)	21 August (via email)
Hon Trevor Mallard Current Labour MP (1984-1990, 1990-present) Current Assistant Speaker	19 August
David McGee QC Former Clerk of the House (1985-2007)	request for interview declined