

JO DINSDALE

**LAW MAKING UNDER MMP
(THE LEGISLATIVE PROCESS AND
THE NEW STANDING ORDERS)**

LLM RESEARCH PAPER
ADVANCED PUBLIC LAW (LAWS 509)

LAW FACULTY
VICTORIA UNIVERSITY OF WELLINGTON
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ABSTRACT

This paper examines the changes which the new standing orders have introduced into the legislative process and considers how the legislative process will operate within an MMP elected Parliament. The paper's focus is on the impact of the new standing orders and MMP on legislative scrutiny and quality and on the degree of control which the government exercises over the legislative process. The issues of executive control, scrutiny and quality control under FPP and earlier standing orders are examined to provide a basis for this discussion. The impact of MMP on the legislative process is then considered and the new standing orders are examined within that context.

The paper concludes that the impact of MMP on the legislative process could be quite profound. Government's will generally have less control over the content of legislation and the legislative process than in the past. Legislation as a result will again become the function of the Parliament which will determine its substantive content and not just endorse and legitimise it. The consequences for the scrutiny and quality of legislation are somewhat mixed. The new standing orders enhance procedural safeguards, but the shift in power from the executive to the Parliament will make the passage of legislation protracted and uncertain. As a result legislation is less likely to be coherent and of a consistently high quality.

The text of this paper (excluding contents page, footnotes, bibliography, and annexure) comprises approximately 15,200 words.

I INTRODUCTION

On October 12 1996 New Zealand will hold its first MMP election. The shift to the mixed member proportional representation electoral system ("MMP") will change the composition of Parliament and this will in turn alter the balance of power between the executive and the Parliament. Changes which have occurred during the lead up to MMP indicate that Parliament will become a more significant institution within the New Zealand constitutional framework under MMP.

In preparation for the changes which MMP should bring to the composition of Parliament the Standing Orders Select Committee ("the Review Committee") undertook an extensive review of the standing orders of the House of Representatives ("the House"). The new standing orders recommended by the Review Committee were adopted by the House on 19 December 1995. The House began operating under the new standing orders on 20 February 1996. The new standing orders bring the internal procedures used within the House into line with the reality of a multi-party Parliament elected under MMP.¹

The new standing orders introduced significant changes to the legislative process. These changes reflect a move to proportionality and a consequential reduction in government control over the House and its legislative function. This paper examines the changes which the new standing orders have introduced into the legislative process and considers how the legislative process will operate within an MMP elected Parliament. The paper's focus is on the impact of the new standing orders and MMP on legislative scrutiny and quality and on the degree of control which the government exercises over the legislative process.

¹ *Report of the Standing Orders Committee on the Review of the Standing Orders*, [1995] AJHR I.18A, p10.

The significance of the changes which will result from MMP can only really be understood when placed in context. The paper therefore briefly sketches the background constitutional principles and considers how power was distributed within the New Zealand constitutional framework when the first past the post electoral system ("FPP") was in operation. The paper examines specifically how under FPP the government was able to use its numbers in the House to control the legislative process.

The paper then considers the impact of executive control on legislative scrutiny and quality control, focusing on the inadequacy of procedural safeguards within the standing orders. As a number of commentators have already demonstrated the absence of procedural checks, coupled with strong executive government with an enormous legislative workload, operated in the past to prevent the appropriate scrutiny of legislation. This in turn compromised the quality of new legislation.²

The impact of MMP on the constitutional framework and on the legislative process is then considered and the new standing orders are examined to assess how the legislative process will operate within an MMP elected Parliament. The important question of whether the executive will continue to control the legislative process under MMP is explored here. The impact of the new standing orders and MMP on legislative scrutiny and quality control is then examined. The key issue which is considered here is whether the new standing orders will enhance legislative scrutiny and quality control.

The paper concludes that MMP will produce a more diverse range of election outcomes than the previous system. In particular, MMP will sometimes result in a minority government or an unstable or diverse coalition government which will not command a secure majority within

² J F Burrows & P A Joseph, "Parliamentary Law Making", [1990] NZLJ 306, p307.

the House on all policy issues. Such a government will not exercise the degree of control over the legislative process which New Zealand governments have in the past. The impact of MMP on the New Zealand system of government could therefore be quite profound. A government may not always be able to control the content and passage of legislation because it may not always be able to build or maintaining sufficient support for any particular legislative proposal. Where a government does not command a secure majority within the House the content of legislation will be determined by the House, operating particularly through select committees, rather than by the government. Legislation as a result will again become truly the function of the Parliament which will determine its substantive content and not just endorse and legitimise it.

The consequences in terms of the scrutiny and quality of legislation are somewhat mixed. The new standing orders have enhanced the procedural safeguards and thereby increased the opportunity for appropriate and full scrutiny of legislation by select committees and the House. This should generally result in Bills being more fully considered before they become law. However as a result of the shift in power from the executive to the Parliament, the legislative process itself will become more protracted and uncertain. There will be more opportunity for amendment and modification to Bills during the process. Private members Bills will also increase in number and could become a more significant source of law.

Where the substantive content of legislation is relatively fluid during the legislative process, legislation is less likely to be coherent and of a consistently high quality. It may be therefore that improvements in quality, which could be expected as the result of increased scrutiny and enhanced procedural safeguards under the new standing orders, will be offset by the increased uncertainty which will surround the content of legislation during its passage through the House.

II CONSTITUTIONAL BACKGROUND

The two background constitutional principles which are relevant for the purposes of this paper, are the separation of powers and the principle of responsible government. The separation of powers is both a descriptive and prescriptive doctrine.³ As a descriptive statement the separation of powers recognises that there are three functions of government; the legislative, the executive and the judicial. As a prescriptive statement the doctrine states that when these different functions of government are undertaken by separate institutions each institution operates as a check on the power of the other two.⁴

Within the New Zealand constitution the three functions of government are respectively preformed by the Parliament, (consisting of the Queen in right of the government of New Zealand and the elected House of Representatives), the executive government (including the elected government), and the judiciary. Under the Westminster model of responsible government, which New Zealand subscribes to, ministers who form the political executive are drawn from the membership of the democratically elected House of Representatives. As a result there is not any real separation of power between the executive and the legislative branches of government.

As a matter of constitutional theory the political executive is within the control of the House of Representatives. Parliament not only makes the laws but it holds the government of the day accountable for its management of the apparatus of state. The government must answer to Parliament for the administration and day to day management of the

³ Joseph P A, *Constitutional and Administrative Law in New Zealand*, (The Law Book Company, Sydney, 1993) p208.

⁴ Palmer G, *Unbridled Power*, (2 ed, Oxford University Press, Auckland, 1987) p5.

functions of state.⁵ Under the convention of ministerial responsibility the government and its ministers are ultimately accountable to the Parliament for all the action of the executive.⁶ It is a binding convention that a government may only remain in office while it has the support of the House. The confidence of Parliament is therefore necessary to the maintenance of government.

A *Cabinet Dominance*

However until recently the government in office has in practice effectively controlled both the legislative and executive branches of government. Power within the New Zealand constitution is firmly held by the Cabinet. All Cabinet ministers were until recently drawn from a single political party which enjoyed a cohesive majority within the House.⁷ This meant that once decisions were made by Cabinet, the convention of collective ministerial responsibility and the strict whipping system ensured that those decisions were accepted by the governing party's parliamentary caucus and pushed by the caucus through Parliament. Strong party discipline, operating within Parliament through the caucus system, has long been recognised as an important and distinctive feature of the New Zealand system of government.⁸

⁵ McGee D, *Parliamentary Practice in New Zealand*, (2 ed, GP Publications, Wellington, 1994) p4.

⁶ See n5, p4.

⁷ Earlier this year the National Government entered into a coalition agreement with the United NZ party. As a result of that agreement a member of the United NZ Party, Peter Dunne, was made a Cabinet minister. For the first time in recent history the Cabinet was drawn from more than one political party.

⁸ See Palmer G, *Unbridled Power*, (2 ed, Oxford University Press, Auckland, 1987); Mulgan R, "The Elective Dictatorship in New Zealand", in Hyam Gold (ed) *New Zealand Politics in Perspective*, (3 ed, Longman Paul, New Zealand, 1992).

The FPP electoral system resulted, until recently, in a Parliament dominated by one political party. It has been convincingly argued that the single member, simple-plurality electoral system, (by penalising minor parties), facilitated the development of a two party Parliament and single party government.⁹ A key feature of the form of Westminster government which developed in New Zealand under FPP, was exceptionally strong executive government, driven by a Cabinet drawn from the leading members of a single political party. The result was an incredible concentration of decision making power in the New Zealand Cabinet.¹⁰

As the final decision maker on all important policy issues, Cabinet decided the content of all government legislation which was introduced into the House. The control which the governing party exercised within the House severely limited the scope for policy change once a government Bill was introduced. It is not surprising therefore, that the awesome constitutional power of the New Zealand Cabinet under FPP, was widely condemned by legal and political commentators as unconstrained tyranny, the so called "elected dictatorship".¹¹ It has been persuasively argued, by commentators advocating the imposition of greater controls over executive power, that structural change was necessary to restore the balance between the executive and the Parliament.¹²

The resulting constitutional reform focused on the FPP electoral system which had almost guaranteed the dominance of a single political party

⁹ Mulgan R, "The Westminster System and the Erosion of Democratic Legitimacy" in B D Gray & R B McClintock (eds) *Courts and Policy: Checking the Balance*, (Brookers Ltd, Wellington, 1995) p268.

¹⁰ See n4, p6.

¹¹ See n9, p269.

¹² See Palmer G, *Unbridled Power*, (2 ed, Oxford University Press, Auckland, 1987); Mulgan R, "The Elective Dictatorship in New Zealand", in Hyam Gold (ed) *New Zealand Politics in Perspective*, (3 ed, Longman Paul, New Zealand, 1992).

within the House. The adoption of MMP will alter the balance of power between the executive and the Parliament. Under MMP the strength of each party's representation within the House will be determined by the proportion of the vote which they receive at an election. It is therefore unlikely that any one political party will again win sufficient seats under MMP to ensure numerical dominance over the House and its business.

B Government Control over Legislation

The executive's dominance over the Parliament resulted in legislation becoming a function of the executive rather than the Parliament. Keith Jackson claimed that the passage of law through the Parliament served only to give law legitimacy. Jackson said: "If legislation remains a central preoccupation of parliaments, it is widely recognised today that the principle role of the House of Representatives is in endorsing and legitimising rather than formulating".¹³ Sir Geoffrey Palmer took a similar view in 1987 when he said that the Cabinet and the government caucus essentially thrash out the substantive policy contained in legislation and the Parliament "rubber stamps" the outcome of that process.¹⁴ In his view Parliament determined nothing of substance since the issues which were taken to Parliament had been predetermined within government.¹⁵

Until recently the government could be confident that, due to its control over the procedures of the House and its superior numbers within the House, the substantive policy content of any legislative proposal which it put forward would not be changed without the government's approval

¹³ Jackson K, *The Dilemma of Parliament*, (Allen and Unwin, Wellington, 1987) p38.

¹⁴ Palmer G, "The NZ Legislative Machine" in M Chen & G Palmer (eds) *Public Law in New Zealand*, (Oxford University Press, Auckland, 1993) p622.

¹⁵ See n14, p623.

during its passage through the House. The government exercised considerable control, for the same reasons, over the content of Parliament's legislative programme. In theory all Members of Parliament ("MPs") could, under the standing orders, put forward Bills. In practice the government had near total control over which Bills were debated by Parliament. Within the limits set by the standing orders, the order in which the House dealt with business, including legislation, was determined by the Leader of the House. The government's legislative programme completely dominated the Parliament's legislative agenda.

The government legislative programme, which is put together by the Cabinet Legislative Committee, provides the framework within which a government develops its legislative priorities and manages the progress of legislation through the House.¹⁶ The Cabinet Legislative Committee closely manages and controls the government legislative programme. It checks all government Bills once the policy issues are settled and must approve each government Bill before it can be introduced into the House.

Government bills also must clear the government caucus before introduction. According to both Jackson and Palmer candid debate on a Bill would in the past take place at the caucus rather than in Parliament itself. As a result the tendency was for the government caucus to exercise the role of power and influence which was formally associated with the floor of the House, leaving the House to play the role of an endorser of proposals, something akin to that of an upper chamber.¹⁷

Under FPP the government effectively controlled the legislature. Government sponsored legislation completely dominated Parliament's legislative programme. The content of legislation was determined by the

¹⁶ Cabinet Office, *The Cabinet Office Manual*, (The Cabinet Office, Wellington, 1996) 5/1.

¹⁷ See n13, p30.

Cabinet and to a lesser degree the government caucus. The numerical dominance of the government caucus was utilised to ensure that government sponsored legislation progressed successfully through the House. The government was able to use its numbers and unity within the House to control the legislative process. The implications of government control on the effective scrutiny of legislation and on quality control within the legislative process are discussed next.

A. Barriers to Effective Scrutiny

It has been convincingly argued that, prior to the adoption of the new standing orders this year, the legislative process contained insufficient procedural safeguards to ensure the proper scrutiny of legislation.²⁰ The lack of procedural checks, coupled with strong executive government with an enormous legislative workload, operated to prevent the appropriate scrutiny of legislation and this in turn compromised the quality of new legislation.²¹ Palmer has suggested that the balance of power between the

²⁰ See n14, p618.

²¹ See n4, p159.

²² See n2.

²³ See n2.

²⁴ See n3, p37.

III LEGISLATIVE SCRUTINY AND QUALITY CONTROL

The purpose of the legislative process is to provide checks and balances and quality controls on the content of new legislation.¹⁸ The standing orders determine the legislative process which each Bill goes through before passing into law. The various stages of the legislative process form, in theory, significant hurdles for a Bill to overcome before becoming law. The steps specified in the standing orders are therefore designed to ensure proper consideration of all aspects of a Bill before it is passed into law. It has been suggested that as an ideal lawmaking should allow time for reflection and sober second thought.¹⁹ But, as many commentators have now pointed out, reality has fallen well short of this ideal.²⁰

A *Barriers to Effective Scrutiny*

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¹⁸ See n14, p618.

¹⁹ See n4, p159.

²⁰ See n2.

²¹ See n2.

²² See n2, p307.

executive and Parliament is the issue which is most crucial to scrutiny. Where the executive is able to completely dominate the House and its committees the opportunity to effectively scrutinise legislative proposals is compromised.²³ As was discussed earlier in the paper the government was able under FPP to dominate the House and its committees and was as a result able to exercise almost total control over the passage and shape of legislation.²⁴ Philip Joseph has argued that in the past the rules of parliamentary procedures, (the standing orders), operated to actually entrench the executive's control of the legislative process by securing the government's control over the business of the House.²⁵ The opportunity to effectively scrutinise legislation was compromised under earlier standing orders because the government was able to use its numbers within the House to manipulate the legislative process. It was able to influence both the volume of legislation which was considered by the House, and the speed at which legislation was processed by the House. The procedural shortcomings within the standing orders, which were used on occasion to circumvent the effective scrutiny of legislation, have now been clearly identified by a number of commentators.²⁶ The main issues which these commentators have identified are discussed briefly below.

²³Palmer G, *New Zealand's Constitution in Crisis*, (John McIndoe, Dunedin, 1992) p105.

²⁴See above II B.

²⁵ See n3, p282.

²⁶ See for example J F Burrows & P A Joseph, "Parliamentary Law Making", [1990] NZLJ 306; P Joseph, *Constitutional and Administrative Law in New Zealand*, (The Law Book Company, Sydney, 1993); Palmer G, *Unbridled Power*, (2 ed, Oxford University Press, Auckland, 1987); Palmer G, *The New Zealand Constitution in Crisis: Reforming our Political System* (John McIndoe, Dunedin, 1992); Palmer G, "The NZ Legislative Machine" in M Chen & G Palmer (eds) *Public Law in New Zealand*, (Oxford University Press, Auckland, 1993).

1 *The misuse of urgency*

Urgency, which was originally intended as an exceptional measure, acquired the semblance of normality under earlier standing orders.²⁷ When urgency was taken in relation to a Bill the House proceeded upon and continued debating the Bill until all stages had been completed.²⁸ Joseph has argued that urgency has been abused as a method for truncating the legislative process and thereby avoiding the full scrutiny of the House and select committees.²⁹ Many situations have been documented where the use of urgency has been nothing less than an abuse of process.³⁰

Urgency is used by government to speed up the legislative process. In the past time and volume pressures have resulted in the taking of urgency on a considerable amount of legislation. By taking urgency the government is able to push through greater volumes of legislation. The risk however is that this may leave insufficient time for proper consideration and reflection on the content of Bills. The other effect of urgency, which can be of assistance to the government, is its impact on the agenda of Parliament. According to Palmer the government can, by taking urgency, determine that the business of the House is dealt with in a certain order.³¹

The new standing orders place some important constraints on the use and

²⁷ See n2, p306.

²⁸ *Standing Orders of the New Zealand House of Representatives* (New Zealand House of Representatives, Wellington, 1992), SO52.

²⁹ See n3, p283.

³⁰ For example in 1991 several pieces of legislation were carried through as part of the budget debate and were therefore passed under urgency when there was no substantive case for urgency. This case is documented: Palmer G, *The New Zealand Constitution in Crisis: Reforming our Political System* (John McIndoe, Dunedin, 1992) p120.

³¹ See n23, p120.

effects of urgency. These restraints which reduce the value of urgency to a government will be discussed later in the paper.³²

2 *The effectiveness of select committee scrutiny*

It has been claimed by Palmer that the most important aspects of scrutiny take place during select committee. He suggests that select committees are far more potent engines of scrutiny than the proceedings of the debating chamber.³³ The effective operation of select committees is therefore essential to legislative scrutiny. Despite the significance of scrutiny by select committee, sufficient time has not always been made available for this important stage of the process. The select committee stage is the one stage in the process where interested parties outside the government and Parliament have a formal opportunity to influence the form and content of legislation. Submissions from the public and interest groups can bring forward information which is not known to government. Submissions can result in Bills being substantially changed at select committee.³⁴

Appropriate and adequate public consultation and consideration of Bills at select committee takes valuable times and slows the legislative process down considerably. Allowing adequate time for select committee consultation can sometimes conflict with the government's political desire to get legislation through the House quickly. The sheer volume of legislation which was considered by select committees in the past further compounded the time pressure. As a result select committees have not always had time for adequate consideration of a proposal. There are numerous examples of unrealistic time frames being imposed on select

³² See below V A 6.

³³ See n23, p122.

³⁴ See n3, p290.

committees for the hearing and consideration of public submissions.³⁵ Another and more fundamental issue which has undermined the effectiveness of select committees has been the dominance of select committees by the government caucus. Under previous standing orders select committee composition reflected the executive's dominance of the House. Select committees were chaired by the government which always, until recently, had a majority of members on each committee. The result was that select committee recommendations were largely controlled by the government caucus. Select committee reports tended to mirror the government view rather than reflect the outcome of the committee's hearings.³⁶

According to Hon David Caygill, government members, who were usually in the majority on each committee, would form their views at caucus rather than at the select committee.³⁷ So although it has become the practice in recent years for select committees to conduct major surgery on Bills in light of the submissions received,³⁸ this tended to reflect a government policy shift rather than the truly independent deliberations of the committee itself.

The changes which the new standing orders introduce to the membership of select committees will make it more difficult for the government to dominate select committees. Time and volume pressures on select

³⁵ See n2.

³⁶ For example the Hon Winston Peters has said: "I have never been able to understand how it is that a select committee would sit, hear the submissions and all the evidence from around New Zealand and from experts, and then go off and ask the caucus what it thinks - members who have never heard any of the evidence - and then put what the caucus thinks in the report", (1995) 54 NZPD 10826.

³⁷ Caygill D, "Functions and Powers of Parliamentary Committees: A New Zealand Perspective" in M Chen & G Palmer (eds) *Public Law in New Zealand*, (Oxford University Press, Auckland, 1993) p669.

³⁸ See n14, p622.

committees should also be reduced. These issues are discussed later in the paper.³⁹

3 *Committee of the whole House and amendments*

There is less agreement between commentators on whether previous standing orders compromised scrutiny by allowing undue speed during the Committee of the whole House stage of the legislative process. Under the previous standing orders the House could debate a Bill part by part rather than clause by clause. Joseph and Burrows have claimed that there have been examples of governments adding parts into Bills so they could speed the legislative process up in this way. This they claim was an abuse of process.⁴⁰ Palmer however presents a compelling counter argument. He claims that debate within the House is essentially political in nature and designed to delay and expose the policy of a Bill rather than to improve or stop the Bill. As such there was little real concern, despite the rhetoric, with the detail of the clauses within a Bill and it was unlikely that the provisions would be examined in detail in any bone fide way.⁴¹

If Palmer's argument about the nature of debate in the House is accepted, then the incorporation of major amendments in the form of Supplementary Order Papers ("SOPs") at the Committee of the whole House stage, imposes a serious obstacle to effective legislative scrutiny. SOPs, which were originally intended as a method for amending errors, have been used to make substantive changes to Bills at the last minute. SOPs which are prepared after the select committee stage are considered for the first time at the Committee of the whole House stage. The issues contained in such SOPs have not gone through either a first or second reading, and have not

³⁹ See below V C 4.

⁴⁰ See n2, p307.

⁴¹ See n23, p123.

been exposed to public submission at select committee. Sometimes substantive changes are included in SOPs. In such cases not only has the detail not been scrutinised, but the policy itself has not been examined. Where substantial policy changes are made by SOP without reference to a select committee the role of the select committee in scrutinising the Bill is also considerably undermined.⁴²

The Review Committee considered that SOPs are an essential tool for correcting matters of detail and addressing issues which come up at the last minute. The practice of using SOPs to introduce substantive amendments circumvented most of the procedural safeguards within the legislative process and needed to stop. Their recommendations on this issue will be discussed later in the paper.⁴³

4 *Law Reform Bills*

A new type of Omnibus Bill appeared in the early 1980s. The Law Reform (Miscellaneous Provisions) Bill lumped together a large number of miscellaneous and unconnected reforms and dealt with them in one Bill. The Law Reform (Miscellaneous Provisions) Bill enacted in 1989 for example amended 55 Acts. Joseph has claimed that some of the amendments in the 1989 Bill were substantial reforms.⁴⁴ Palmer however suggests that criticism of Omnibus Bills needs to be balanced against their value as a mechanism for getting relatively non contentious law reform, which would not otherwise be undertaken, on the government's busy legislative agenda.⁴⁵ Further Law Reform (Miscellaneous Provisions) Bills

⁴² J F Burrows & P A Joseph, "Parliamentary Law Making", [1990] NZLJ 306, p307.

⁴³ See below V A 4.

⁴⁴ See n3, p295.

⁴⁵ See n 23, p121.

are broken up when considered at Select Committee.⁴⁶ While both points are obviously correct and provide a general justification for Omnibus Bills, their use and misuse could be better controlled without compromising their legitimate value. The new standing orders impose tighter controls on Omnibus Bills. These improvements will be considered later in the paper.⁴⁷

B Quality Control Standards

A key purpose of legislative scrutiny is quality control. The legislative process should operate to ensure that legislation is effective and technically sound and fits harmoniously into the fabric of existing laws.⁴⁸ Quality control standards within the system are designed to ensure that legislation consistently conforms to an appropriate technical standard. Quality control frameworks have been developed by both the Legislation Advisory Committee and the Law Commission. These frameworks are outlined briefly below and the extent to which the legislative process ensures that legislation complies with these standards is examined.

1 Setting the standard

The Legislation Advisory Committee developed and released guidelines for improving the quality of legislation in 1986.⁴⁹ These guidelines, which

⁴⁶ See n23, p121.

⁴⁷ See below V A 7.

⁴⁸ New Zealand Law Commission, *Legislation Manual Structure and Style – Report 35*, (Wellington, 1996) p1.

⁴⁹ Legislation Advisory Committee, *Legislative Change: Guidelines on Process and Content*, (Department of Justice, Wellington, 1987). A revised edition was released as Legislation Advisory Committee, *Legislative Change: Guidelines on Process and Content*, (2 ed, Department of Justice, Wellington, 1991).

have been adopted by successive governments⁵⁰ and are accepted and used by the House, contain a number of principles which establish a useful framework for ensuring that legislation conforms to an appropriate standard.

The principles which the Legislation Advisory Committee have established are as follows:

- policy development and drafting are informed by the necessary technical expertise;
- draft legislation incorporates the policy objectives of its proponent;
- draft legislation is clear and understandable;
- adequate consultation takes place during the development of draft legislation and following its introduction;
- the draft legislation fits within the general area of law to which it relates;
- the draft legislation complies with the basic legal principles which form the foundation of New Zealand's legal and constitutional system;
- the draft legislation complies with the Bill of Rights Act 1990.

These principles are relevant for all stages of the legislative process and they apply equally to amendments to Bills which are put forward at any

⁵⁰ The guidelines have been accepted by successive governments and are endorsed in the Cabinet Office Manual as government policy. See: Cabinet Office, *The Cabinet Office Manual* (The Cabinet Office, Wellington 1994) Chapter 5/2.

stage of the legislative process.

The Law Commission recently issued a legislation manual on the style and structure of legislation.⁵¹ The Commission has recommended the manual to government as a means of providing rules and guidelines for the drafting of understandable and accessible legislation. The Law Commission provides a similar framework for assessing legislative quality as the Legislation Advisory Committee. The Commission states that if new laws are to gain broad public acceptance and enhance the quality of the statute book, they must:

- be developed through an established and adequate process, one that encourages positive and effective participation;
- comply with the legal principles on which our society is based: the rule of law, fairness, individual liberty, protection of personal and property rights;
- be effective and technically sound and fit harmoniously into the fabric of existing laws, and;
- be accessible and understandable.⁵²

2 *Complying with the standard*

To match the standard identified by both the Law Commission and the Legislation Advisory Council each stage of the legislative process must be informed by high quality legal advice. Quality legal advice is needed during the development stage to ensure correct instrument choice and

⁵¹ See n 48.

⁵² See n 48, p1.

legislative design. Appropriate legal advice is needed on how the legislative proposal fits into the general area of law to which it relates.

Competent legal advice is needed on whether the legislative proposal complies with the basic and underlying principles of the legal system and the Constitution. The Legislation Advisory Committee has identified these basic principles as those which have been established by the courts, Parliament, the rule of law, democratic principles, the Treaty of Waitangi, and natural justice.⁵³ The Law Commission has identified fairness, individual liberty and the protection of personal and property rights as basic and underlying principles of the legal system.⁵⁴ The Parliament as sovereign law maker can modify any one of these principles, but should do so with full knowledge and clear intention. Similarly legal advice is needed on whether a proposed Bill complies with the Bill of Rights Act 1990 and with New Zealand's international law obligations.

High quality drafting is needed to meet and maintain the standard identified by the Legislation Advisory Committee and the Law Commission. Expertise in drafting is necessary to develop the most effective representation of a policy in Bill form. A critical question identified by the Legislation Advisory Committee is whether draft legislation incorporates the objectives of its proponents. Another drafting issue which has been raised is ensuring that legislation is as accessible and understandable as the content permits. The Law Commission advocates the use of plain language drafting to improve the accessibility and clarity of legislation.⁵⁵

⁵³ Legislation Advisory Committee, *Legislative Change: Guidelines on Process and Content*, (2 ed, Department of Justice, Wellington, 1991).

⁵⁴ See n 48, p1.

⁵⁵ See n 48, p33.

The extent to which draft legislation is informed by good quality legal advice can vary. All government Bills are sponsored by a minister and are developed for the minister by a government department. Ministers and departments initiating legislation are responsible for ensuring that draft legislation reflects government policy.⁵⁶ Departments are required to consider the issue of compliance with the Treaty of Waitangi and with the Bill of Rights Act 1990. Ministers are also required to draw attention to any aspects of a legislative proposal which has implications for either the Bill of Rights Act 1990 or the Treaty of Waitangi.⁵⁷

Government Bills flowing out of the government's policy development process have, at least in theory, been informed by the appropriate technical expertise and skill, including legal advice. If the policy development process always worked effectively then it could be assumed that all government Bills were informed by competent legal advice. Reality does not always correspond to this ideal. Political considerations can impact adversely on the development of sound legislation by departments. Ministers may for example impose unrealistic and sometimes unnecessary deadlines that result in rushed and superficial policy analysis.⁵⁸

Time and resource pressures also create problems for legislative drafting. All government Bills and government sponsored amendments are drafted under the supervision of the Parliamentary Counsel Office.⁵⁹ Parliamentary Counsel attend some stages of the select committee process for the

⁵⁶ See n16, Chapter 5/1 A5.

⁵⁷ See n 16, Chapter 5/1 A6.

⁵⁸ M Probine, "The potential impact of MMP on the quality of Legislation" in *Public Sector*, Vol 17, No 1, p8.

⁵⁹ Under *The Statutes Drafting and Compilation Act 1920* the Parliamentary Counsel Office is required to draft all government Bills and amendments. Under *The Statutes Drafting and Compilation Amendment Act 1995* provision is made for the external drafting of taxation legislation.

purpose of advising on and drafting amendments.⁶⁰ Drafting quality will be compromised whenever time pressures intervene so that the drafting resources of the Parliamentary Counsel office are stretched too thinly.

The Parliamentary Counsel office works under considerable pressure against a constant back log of drafting requests and delay.⁶¹ Political pressures can also result in Bills being introduced into the House before the drafting process has been completed. When this occurs the later stages of the legislative process are heavily relied on to improve the drafting quality of the Bill. A number of Bills have had to be rewritten at the select committee stage increasing the pressure on time and resources.⁶² Speed and haste increases the risk that technical flaws will be missed or that wider legislative implications will be overlooked. Substantive change during the later stages of the legislative process reduce the opportunity for adequate scrutiny and potentially compromise the quality of legislation.

Private member's Bills and amendments do not always conform to the appropriate technical standard. Private member's Bills have increased in number over recent years to become an additional, although very minor, source of law. Despite their increased significance, no specialist legal drafting or advice services are provided for Bills or amendments. Members either obtain assistance from the Office of the Clerk of the House, their parties, or draft Bills and amendments themselves. The results in terms of technical quality are mixed. The issue of drafting and advice for this purpose was considered by the Review Committee and will be discussed later in the paper.⁶³

⁶⁰ W Iles "New Zealand Experience of Scrutiny of Parliamentary Legislation" in M Chen & G Palmer (eds) *Public Law in New Zealand* (Oxford University Press, Auckland, 1993) p665.

⁶¹ See n14, p623.

⁶² See n60, p665.

⁶³ See below V C 5.

According to Palmer legislative quality is determined predominately by the policy development process and the technical quality of the drafting. Improvements in quality will be found predominately through slowing the legislative process down.⁶⁴ The legislative process is however driven by political priorities⁶⁵ so there will always be time and volume pressures within the system. As shall be discussed later in the paper MMP is likely to produce political changes which may slow the legislative process down and reduce the volume of legislation in the system.⁶⁶ Such a change could considerably reduce the pressure on legislative drafting.

The Legislation Advisory Committee and the Law Commission both identify consultation as relevant to legislative quality. Undertaking appropriate consultation during the development of the legislative proposal and following its introduction can improve the efficiency and effectiveness of legislation.⁶⁷ Consultation within government is necessary to ensure that a range of perspectives are considered. Problems can then be identified at an early stage and a coherent policy proposal can be put forward for drafting.⁶⁸ Early consultation and identification of problems reduces the need for amendment and rewriting during the select committee stage of the legislative process.

Political considerations have however impacted adversely on consultation during the developmental stage of a Bill. The adversarial nature of the political system has inhibited consultation with community and interest

⁶⁴ See n14, p624.

⁶⁵ See n14, p624.

⁶⁶ See below IV B.

⁶⁷ See n53.

⁶⁸ See n 16, Chapter 5/1.

groups at the policy development and analysis stage.⁶⁹ The Cabinet Office Manual specifically reminds departments that: "at every stage of its development, draft legislation is confidential and should not be disclosed to individuals or organisations outside Government other than by the minister concerned, or with his or her prior approval".⁷⁰ The opportunity for early consultation is therefore somewhat restricted.

The importance of select committee consultation has already been considered. As discussed earlier in the paper select committee consultation may raise issues which had not previously been considered.⁷¹ Where legislation is not adequately scrutinised at select committee because of time and volume pressures flaws and omissions may not be detected and the quality may be compromised.

A. The Form of Government

The four forms which government can logically take under MMP, are in descending order of strength: a single party majority; a coalition majority; a single party minority; and a coalition minority. A single party majority government would be assured of majority support for any Bill which has the full support of MPs who belong to the governing party. A majority coalition government could be confident of support for those legislative proposals which fell within the ambit of matters outlined in the coalition

⁶⁹ See n58, p8.

⁷⁰ See n16, Chapter 5/1 A18.

⁷¹ See above III A 2.

IV THE IMPACT OF MMP

Although MMP will only directly change the way that New Zealand elects its MPs and not the fundamental institutions of the New Zealand Constitution it will indirectly alter the way those institutions operate.⁷² The change to the composition of Parliament which is likely to result from MMP will change the balance of power between the executive and the Parliament.

Changes in the relationship between the executive and Parliament will alter how the legislative process operates. The operation of the legislative process under the new standing orders will depend on the form, strength and stability of the government in power after each election. In order to provide a context for the later discussion of the new standing orders, it is worth considering the changes which MMP is likely to introduce into the relationship between the executive and Parliament, and the impact of these changes on the legislative process.

A *The Form of Government*

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⁷² Palmer, The Rt Hon Sir Geoffrey, "The likely consequences of MMP on the System of Government", Proceedings of an IPA Seminar held at Downstage Theatre Wellington, 5 October 1995, p3.

agreement. Outside this a majority coalition government would need to build an internal consensus before proceeding with any proposal.

Both forms of minority government are inherently weaker. A single party minority government will need to build support within the House around each legislative proposal which it wishes to enact. A coalition minority government will need to build internal consensus and support for each proposal and then sufficient external support from parties outside the coalition before introducing a Bill into the House.

Since the referendum in 1993 adopting MMP the New Zealand Government and Parliament have been in a state of transition between FPP and MMP. A number of new political parties and alliances have been formed within the New Zealand Parliament. This has resulted in the National Government elected in 1993 changing from a single party majority government, with a majority of one, to a single party minority government for a period. As a minority government the National Government had to build support around its legislative proposals.⁷³ One result was a substantial reduction in the volume of legislation which the Government put before the House. More recently the National Party has formed a coalition with the United NZ Party and has now become a majority coalition government.

As was discussed earlier in the paper New Zealand has in the past had single party majority government.⁷⁴ Under FPP a single party has held an outright majority of seats in the House and has as a result had the numbers necessary to control the House and its committees. This was because FPP as a single member, simple-plurality electoral system

⁷³ For example this was the approach taken over the *Tax Reform and Social Policy Bill* introduced in June 1996.

⁷⁴ See above II A.

penalised minor parties and facilitated the domination of Parliament by a single party government.⁷⁵ It is very unlikely that New Zealand will continue to experience single party majority government under MMP. Coalition and minority governments are far more probable under MMP.⁷⁶ This is because a single party would need to win close to 50% of the vote in a general election to obtain over 50% of the seats in the House to form a single party majority government. This has not happened very often in New Zealand's history and there is no reason to believe it will happen under MMP.

The move to MMP will therefore change the form that government will take. This will have a significant effect on the balance of power between the government and the Parliament. There will be something of a shift in power from the executive to the legislature. The government, whether a minority or coalition, may not have majority support on every policy issue which comes before the House. The Prime Minister the Right Hon Jim Bolger, when speaking recently at a conference on MMP, said that governments can not in future expect to have full control over Parliament's legislative programme and must learn to live with defeats on legislation in the House⁷⁷.

This change has already begun to manifest itself in the transition to MMP. On 21 August 1996 an opposition Private members Bill introducing compulsory teacher registration was passed with the support of the Government coalition partner the United NZ Party. The Government opposed the Bill but without United's support it lacked the numbers to

⁷⁵ See n9, p269.

⁷⁶ The State Services Commission, *Working Under Proportional Representation: A reference for the Public Service*, (State Services Commission, Wellington, 1995), p21.

⁷⁷ Opening speech to the Conference on the Constitutional Implications of MMP, held in the Legislative Chamber Parliament Buildings 24 May 1996.

stop the Bill so was defeated in the House on this policy issue.⁷⁸

The shift in power which will occur under MMP should not however be exaggerated. The pattern in almost all western democracies is for the executive to have a considerable level of dominance over the business of Parliament.⁷⁹ This is particularly so when there are reasonably stable coalitions with clear agreements and high levels of party discipline. Under a closely aligned well structured majority coalition Parliament would function much as it has under single party majority government.

Cabinet government is also a feature of almost all western democracies so the continuation of a central role for the Cabinet within the system of government must be assumed. Cabinet is essentially a creature of convention, with few legal rules binding it into any particular process. It has and can continue to evolve and change in order to adapt to the needs of a particular government or a particular situation.⁸⁰ The role and functioning of the Cabinet is likely to be modified by MMP and its nature and operation may change. It is likely that the role and function of the Cabinet will differ between minority and coalition governments. Coalitions will emphasis managing relationships within Cabinet while minority governments will emphasis managing relationships outside Cabinet.

B Enacting Legislation

Under coalition government mechanisms to ensure consultation and coordination within the government could become more important and

⁷⁸ "Nats lose as teacher register bill passed", *The Dominion*, Wellington. New Zealand, 22 August 1996, p3.

⁷⁹ See n76, p23.

⁸⁰ See n76, p20.

may be developed further.⁸¹ Coalition partners will need to agree on the rules for conducting Cabinet business and also dealing with disagreements or controversial issues. In terms of the legislative process the focus within coalitions will be on reaching agreement within government and settling the government's legislative programme. Potential legislative proposals put up by ministers which do not have the support of all the coalition partners will not be included in the government legislative programme.

Under minority government the emphasis will be on managing relationships outside the government, particularly those with other political parties. In times of minority government the procedures for consultation with party caucuses are likely to be more significant.⁸² Consultation with parties outside the government would probably, as a minimum become an informal prerequisite to Cabinet decisions on its legislative programme.

Coalition governments will only introduce in the House as government Bills legislative proposals which fall within the ambit of the Coalition's agreed legislative programme. As a result a Coalition government's legislative programme may consist of considerably less legislation than single majority party governments have presented in the past. However any Bill which has the support of a majority coalition should be assured of majority support within the House once introduced and would be unlikely to face defeat in the House.

Minority governments are much more likely than coalition governments to face the prospect of defeat in the House on their legislative proposals. For this reason minority governments are unlikely to put forward ambitious legislative programmes either. It will also be more likely that government

⁸¹ See n76, p18.

⁸² See n76, p18.

Bills put forward by a minority government which does not have control of the House will undergo substantive modification during their passage through the House.

The opportunities for changing the substantive policy content of legislation during its passage through the House are considerably enhanced where the proponent of the legislation does not command a clear majority of support. Even where support has been build up prior to the introduction of a Bill there will still be greater uncertainty when that support comes from outside a party or a coalition and is therefore subject to other influences. As a result the legislative process will be protracted and the outcome quite uncertain.⁸³ The executive will have diminished autonomy in defining which policy initiatives will become law.⁸⁴ The need for building up support for each Bill will also slow the legislative process down.

A Transparency

⁸³ Chen M "Remedying New Zealand's Constitutional Crisis: Is MMP part of the answer?" [1990] NZLJ 22, p 28.

⁸⁴ Adrian Shields, " Challenges of Change for the Public Service: Issues of Accountability and Responsibility in the lead up to MMP", Unpublished LLM Research paper, (Victoria University, Wellington, 1995) p45.

V THE NEW STANDING ORDERS

In December 1995 the Review Committee presented its report on the standing orders to the House. The Review Committee had undertaken a comprehensive and complete review of the standing orders to ensure that the workings and procedures of the House and its committees were consistent with the reality of a multi-party Parliament elected under MMP. The review resulted in extensive changes to the standing orders. The new standing orders were adopted by the House, with some very minor amendments, and came into force on 20 February 1996.

One of the major issues which the Review Committee focused on was the operation of the legislative process in light of the likely changes MMP would bring to the composition of the House. Significant changes to the legislative process were recommended by the Review Committee. The new standing orders generally enhance both the transparency and the flexibility of the legislative process. Although, as will be discussed below the increased flexibility introduced via the creation and powers of the Business Committee could operate to impede transparency.⁸⁵ The new rules also introduce proportionality into the procedures of Parliament and provide the basis for a more cooperative approach within the House.

A *Transparency*

The new standing orders contain a number of procedural improvements which will generally enhance the transparency of the legislative process. Transparency within government is now a well established principle. It provides the basis for much of the accountability of ministers and their officials. Transparency within the legislative process requires access to

⁸⁵ See below V B 1.

information and the opportunity for informed debate and participation in law making. Many of the changes introduced by the new standing orders are designed to ensure that members of the House do not debate or vote on legislation before they have had an opportunity to fully consider its consequences. Enhancing transparency greatly increases the opportunity for effective scrutiny of legislation which also has positive implication for the quality of legislation. The areas in which transparency are enhanced are examined below.

1 The first reading

Under the new standing orders there is no longer a first reading debate and no vote on the introduction of a Bill. The Review Committee recommended the complete abolition of the first reading debate because the debate often took place before members of the House, particularly non government members, had had time to develop any real understanding of the content of the Bill under consideration.⁸⁶ Under the previous standing orders the first reading debate had been little more than a political exchange over a controversial Bill or a technical questions and answer session on the content of a non controversial Bill.⁸⁷

Under the new standing orders the first time a Bill will be debated will be the second reading which will not take place until the third sitting day after a Bill has been introduced. This timetabling will ensure that the House has an opportunity to consider any Bill before it is debated so that the government will not be able to take the House by stealth.

As a consequence of the abolition of the first reading debate, all Bills introduced will automatically pass their first reading. This change is not

⁸⁶ See n1, p10.

⁸⁷ See n5, p 257.

particularly significant for government Bills which invariably passed their first reading anyway. The change is significant for private members Bills, now called members Bills, which previously would only proceed with government support. The impact of the new standing orders on members Bills will be discussed in more detail later in the paper.⁸⁸

Under the new standing orders information on the policy and intent of legislation will be made more explicit. The Committee's report advocated the inclusion of a policy statement within the explanatory notes which accompanied the introductory copy of a Bill.⁸⁹ The policy explanation should explain the intentions behind the introduction of the Bill and set out in detail precisely what the Bill is intended to achieve. It will thus serve much the same function as the proponent's introductory speech of the past.

The inclusion of policy statements should assist the process of quality control. Where the intent of legislation is explicitly stated it will be much easier to ensure that the intention is captured within the draft Bill. It will be easier to see whether the statement and the legislative expression of it actually match. The Legislation Advisory Committee identified in the guidelines discussed earlier,⁹⁰ the importance of ensuring that the wording of a Bill encapsulates the policy objectives of its proponent. Mai Chen has suggested that policy explanations may not only be helpful in elucidating the meaning of legislative provisions for the law-makers themselves, but may also be helpful for the purposes of statutory interpretation in the Courts.⁹¹

⁸⁸ See below V C 5.

⁸⁹ See n1, p54.

⁹⁰ See above III B 2.

⁹¹ Chen M, "Parliament and Law-Making Under MMP: The New Standing Orders", paper of the NZ Law Society Conference in Dunedin, April 1996, p136.

It should be noted that the Review Committee's recommendation concerning policy explanations, although strongly stated, was not formally incorporated into the text of the standing orders. The recommendation has been adopted by the Government and all government Bills introduced since 20 February 1996 have contained a policy explanation which complies with the review Committee's recommendation.⁹² The Cabinet Office Manual was updated recently and now provides instruction to government departments on preparation of policy explanations.⁹³

2 *The second reading debate*

Under the new standing orders the second reading debate, which is the debate on the principles of a Bill, will now be the first debate on a Bill. The second reading has been described as the most important stage through which a Bill passes because "its whole principle is then at issue and is affirmed or denied by a vote of the House".⁹⁴ In passing a Bill at the second reading the House essentially commits itself to the policy or principles within the Bill.

Two changes which have been made to the second reading debate, are its place in the legislative sequence and the imposition of a two hour time limit on the debate. The time limit will apply unless the Business Committee reaches an alternative agreement. The new standing orders impose time limits on most stages of the legislative process. The significance of these time limits⁹⁵ and the role of the Business Committee⁹⁶

⁹² For an example of a policy statement see the Introductory Copy of *The Tax Reform and Social Policy Bill*.

⁹³ Cabinet Office, *The Cabinet Office Manual*, (The Cabinet Office, Wellington, 1996), p57.

⁹⁴ See n14, p624.

⁹⁵ See below V A 5.

are discussed later in the paper.

The second reading now takes place before a Bill is referred to select committee. The Review Committee recommended this change in sequence to increase the effectiveness of select committees. This change in sequencing will improve select committee scrutiny because the prior debate within the House on the principles of a Bill will provide the select committee, and those intending to make submissions, with "an understanding of the mind of the House"⁹⁷ and will highlight the controversial issues on which the select committee and public submissions should focus. Select committee resources and time will be conserved for Bills which are most likely to become law. Where the House does not support the principles contained in a Bill it will now be discharged before select committee. Scheduling the second reading debate before select committee will mean that the political parties represented in the House will need to determine their stance on all Bills prior to the first debate instead of waiting until each Bill returns from select committee.

3 *Select committee consideration*

Select committees will continue to consider all Bills, (except Appropriation and Imprest Supply Bills), which are not accorded urgency. Select committee reports, when completed, will not be set down for debate until at least two days after they have been tabled. In the past reports became debatable immediately and without notice. The result was that MPs who were not on the particular select committee which had examined the Bill, had very little opportunity to personally consider the report and recommended amendments prior to their debate.⁹⁸ In fact MPs didn't

⁹⁶ See below V B 1.

⁹⁷ See n1, p54.

⁹⁸ See n1, p55.

always know what amendments had been recommended. By allowing two days between the tabling of the select committee report and any debate on that report the opportunity for input is greatly increased. The reprinted Bill and the report itself will be available to MPs and the public before the report is debated.

Changes have been made which result in more comprehensive reports from select committees. Reports now must include a narrative explaining any proposed amendments which are put forward. Many reports in the past consisted of no more than an amended Bill and an oral report from the chairperson of the committee. The written report usually consisted only of the amendments which the select committee recommended. Any explanation for the recommended amendments or discussion on the principles of the Bill was given verbally by the chairperson in the House. The opportunity for MPs who had not been involved in the select committee to participate in the debate was quite restricted as a result.

Under the new rules as adopted by the House on 19 December 1995 select committees were required to report back with their recommendations on all Bills within six months of the referral. However, following a minor amendment which was adopted by the House on 22 August 1996, this rule has now been modified to allow the Business Committee to extend the report back time on government Bills.⁹⁹

If a select committee fails to comply with the specified time limit on a Bill then, the Bill will automatically be discharged from the committee and set down for its next stage. This report back requirement will preclude the practice of sending Bills to select committee to be buried. It was in the past

⁹⁹ The Review Committee, following its monitoring of the new standing orders during 1996, issued a further brief report. This minor amendment was among those proposed by the Review Committee in that report. See *The Report of the Standing Orders Committee on the Review of the Operation of the Standing Orders* [1996] AJHR I.18B, p18.

a reasonably common tactic for the government to support a member's Bill through its first reading for political reasons and then bury the Bill and the issue along with it at the select committee. With no set time frame the government could use its superior numbers and control over select committees to ensure that Bills, which it preferred not to consider further, remained before the select committee almost indefinitely.

The new standing orders do not directly address concerns over the adequacy of select committee consultation. As discussed earlier both the Legislation Advisory Committee and the Law Commission have identified select committee consultation and scrutiny as an important check on the quality of legislation.¹⁰⁰ Unrealistic time constraints have in the past undermined the ability of select committees to undertake effective consultation and scrutiny.¹⁰¹ Although the new Standing Orders do not directly address this issue by, for example including minimum time limits for public submissions as some commentators have recommended¹⁰², scheduling select committee consideration later in the process should result in less legislation actually reaching select committee.

As discussed in the previous section of the paper there is also likely to be less legislation on the government's legislative programme under MMP. These changes will increase the amount of time available for the consideration of each Bill. The standing orders therefore do indirectly improve the opportunity for scrutiny at select committees. Important changes to select committee composition, which will also impact on scrutiny will be discussed later in the paper.¹⁰³

¹⁰⁰ See above IV B 2.

¹⁰¹ See n2.

¹⁰² For example: Palmer G "The NZ Legislative Machine" in M Chen & G Palmer (eds) *Public Law in New Zealand*, (Oxford University Press, Auckland, 1993).

¹⁰³ See below V C 4.

4 *Amendment by SOPs*

The effectiveness of select committee consultation and scrutiny has in the past been undermined by the improper use of SOPs which make significant amendment to a Bill during the Committee of the whole House stage. This problem was discussed earlier in the paper.¹⁰⁴ Legislative scrutiny is undermined particularly where the policy matters contained in an SOP have not been considered by a select committee or the House before.¹⁰⁵

The Review Committee took the firm view that this practice should stop. The approach which they outlined but did not actually incorporate into the new rules, is that only amendments which have the general support of the House because of their importance, or are of a technical or drafting nature, should be permitted at the Committee stage without prior select committee study. The Review Committee recommended that government SOPs which fell outside the scope of the original Bill, or proposed material changes to the Bill, should be referred to a select committee and full public hearings should be held if time was available. If time was not available then the select committee should hold limited public hearings or at the very least be fully briefed on the changes by officials.¹⁰⁶

These recommendations have not been included in the standing orders so it is at this stage uncertain whether or not the recommended practice will be followed. The inability of the Review Committee to deal effectively with the abuse of SOPs is not surprising as restricting SOPs is a complex problem. The issue has been considered in earlier standing orders reviews

¹⁰⁴ See above III A 3.

¹⁰⁵ See n1, p55.

¹⁰⁶ See n1, p56.

and has been the subject of considerable submissions.¹⁰⁷ Essentially the problem is drafting a standing order which would limit SOPs to technical issues only. No standing orders committee has yet felt confident enough to define what is a technical change as opposed to a substantive change.

5 *Notice of debate*

As will be clear from the above discussion the new standing orders already include provisions which require advance notice to be given during the various stages of the legislative process. Members will now get notice as to when Bills will be debated. Time limits have been imposed on when Bills can be set down for debate at each stage. This change is clearly designed to make the process more transparent and to enhance the opportunity for scrutiny. It will also reduce the executive's ability to take the House by surprise and to push a matter through without Opposition MPs finding out about it or having a chance to consider it.¹⁰⁸

6 *Misuse of Urgency*

In the past, time and volume pressures have resulted in the regular taking of urgency on various stages of a considerable amount of legislation.¹⁰⁹ As discussed earlier urgency has been abused as a method for truncating the legislative process and thereby avoiding the full scrutiny of the House and the select committee system.¹¹⁰ Recognising this problem, the Review Committee has placed some constraints on the use of urgency. Under the new standing orders the government can continue to move for urgency on

¹⁰⁷See *Report of the Standing Orders Committee on the Review of the Operation of the Standing Orders*, [1992] AJHR I.18B, p15.

¹⁰⁸ See n 91, p133.

¹⁰⁹ See n2.

¹¹⁰ See n3, p283; and see above III A 1.

a Bill at any stage but where urgency is taken it will not commence until the day following the day on which the motion for urgency was accepted.¹¹¹

This change will preclude the enactment of a Bill within a single sitting of the House which is an obvious improvement. The provisions for extraordinary urgency remain and under these there is no similar constraint. However to take extraordinary urgency the House must already be sitting under urgency and the Speaker must be satisfied that the move is justified. These changes substantially reduce the value of urgency. This should address the worst excesses which were identified earlier in the paper.¹¹²

7 *Omnibus Bills*

The Review Committee proposed tighter controls on the use of Omnibus Bills for other than technical or non controversial amendments.¹¹³ Omnibus Bills have been criticised for unduly truncating the consideration of proposals and for "hiding" amendments to different pieces of legislation.¹¹⁴ Law Reform (Miscellaneous Provisions) Bills in particular have in the past included large numbers of sometimes substantive miscellaneous and unconnected reforms.¹¹⁵

The Review Committee took the view that as a matter of principle each Bill introduced into the House should relate to one subject only unless the

¹¹¹ *Standing Orders of the New Zealand House of Representatives*, (NZ House of Representatives, Wellington, 1996) SO 57.

¹¹² See above III A 1.

¹¹³ See n1, p 49.

¹¹⁴ See n2; and see above III A 4.

¹¹⁵ See n2.

Bill fitting into one of a limited number of specific categories of Omnibus Bills which the new standing orders would permit.¹¹⁶ The revised standing orders codified the acceptable practices with regard to omnibus legislation.

The different types of Omnibus Bill which are recognised and regulated by the standing orders include Law Reform Bills and Statutes Amendment Bills. The requirement that Statutes Reform Bills include only amendments which have the support of all members of the House is actually stated in the standing orders for the first time.¹¹⁷ The use of Law Reform or other Omnibus Bills is severely restricted. Under the new orders Law Reform or other Omnibus Bills may amend more than one Act where those Acts deal with an inter-related topic so that the amendment can be regarded as implementing a single broad policy or alternatively where the amendments being effected to the different Acts are of a similar nature.¹¹⁸

These new rules for Omnibus Bills are quite strict and should stop the inappropriate use of Law Reform bills by government. The Speaker has been given the role of scrutinising each Bill on its introduction for compliance with the new requirements. Any Bill that does not comply is to be either ruled out of order or printed with such amendments as the Speaker directs.¹¹⁹ It should be noted however that the rules relating to Omnibus Bills can be waived by the Business Committee if it agrees to the introduction of a particular Bill which does not comply with the rules.

¹¹⁶See n1, p49.

¹¹⁷See n1, p50.

¹¹⁸See n1, p49.

¹¹⁹ See n1, p50.

8 *Bill of Rights Act compliance*

The Review Committee took the view that incorporation of the procedure for compliance with section 7 of the Bill of Rights Act 1990 should be made more specific than it had been under previous standing orders. Section 7 of the Bill of Rights Act 1990 requires the Attorney General to bring to the attention of the House any provision in a Bill which appears to be inconsistent with any of the rights and freedoms contained in that Act. In the case of a government Bill this obligation was normally complied with on introduction and in the case of a Members Bill it was complied with as soon as practical after introduction.¹²⁰

Under the new standing orders the Attorney General's report, including the reasons behind the certification, will be tabled in the House before a Bill's second reading.¹²¹ The tabling of a written report complete with reasons will obviously enhance the transparency of the process. It will lead to better scrutiny on the issue of whether or not a Bill complies with the Bill Of Rights Act 1990.

A serious omission which has not been addressed by the new standing orders is the assessment of whether amendments, which are made to a Bill following the second reading, comply with the Bill of Rights Act 1990. Where a Bill is substantially amended at select committee the Attorney General's report may no longer address the necessary issues. There is no mechanism within the standing orders for obtaining an updated report during the later stages of the legislative process. The standing orders do not for example allow select committees to refer a matter back to the Attorney General for consideration. Select committees, as shall be discussed later, may be in a position to obtain their own verification on the

¹²⁰ See n1, p51.

¹²¹ See n111, SO 258.

implications amendments pose for the Bill of Rights Act but they are not required to do so.

B Increased Flexibility

The new standing orders introduce a greater degree of flexibility into the legislative process through the creation of the Business Committee. The Business Committee, which is in effect the House's executive, has responsibility for directing the flow of work through the House. The Prime Minister the Hon Jim Bolger said during the debate on the Review Committee's report that the Business Committee is designed to find broad agreement amongst political parties for the workload of Parliament in the week ahead.¹²²

Under the standing orders the Business Committee has scope to vary the standard process prescribed by the standing orders to match any piece of legislation under consideration. Flexibility within the legislative process is enhanced by the Business Committees ability to alter the legislative process. As will become apparent from the following discussion the increased flexibility the Business Committee will provide will arguably work to reduce transparency within the legislative process.

1 Fast tracking legislation

With the agreement of the Business Committee a Bill may be introduced during a time when the House is in adjournment. The Bill is deemed read on the day on which the Business Committee agrees to its introduction. The Bill then stands referred to the select committee nominated by the Business Committee. This means that the Bill will go to select committee

¹²² (1995)54 NZPD 10787.

without having had a second reading or any debate on its principles. In such cases the Bill will receive its second reading after the debate on the select committee's report. It was envisaged by the Review Committee that this process would be most relevant for non contentious Bills.¹²³

Where Bills are introduced during an adjournment and go straight to select committee before their second reading the Business Committee can agree that debate on their second reading is not required. The second reading is then put without debate. This means that the first opportunity for debate on such Bills will be the debate on the select committee's report. Again this fast track procedure appears to be designed for non contentious legislation.

The Business Committee can also agree to omit the Committee of the whole House stage for any Bill including one introduced during an adjournment. Where it decides to do so the Bill can then go directly from the debate on the select committee's report to the third reading. In practice the combined impact of all three of these fast tracking procedures could result in a Bill first being debated by the House at the third reading. A nominated select committee would still consider the Bill and the House would still debate the select committee's report on the Bill.

It should be noted that the new rules do not specifically restrict the availability of these fast tracking mechanisms to non contentious Bills. It would seem unlikely though that the Business Committee would readily reach agreement to fast track a contentious Bill. The ability to fast track, even non contentious legislation, could impede transparency. As discussed above transparency within the legislative process requires the opportunity for informed debate and participation in law making.¹²⁴ It is uncertain whether this will occur when Bills are fast tracked through the process by

¹²³ See n1, p54.

¹²⁴ See above V A.

the Business Committee.

In any event there are obviously risks in terms of scrutiny and quality control in permitting the Business Committee to fast track legislation even where the procedure is only utilised in relation to non contentious Bills. Scrutiny and quality control are still important in relation to non contentious legislation. It should not be assumed that non contentious legislation will be better drafted or less technically complex. As has been discussed earlier in the paper, all the stages of the legislative process contribute something towards the scrutiny and quality control of each Bill, even though the select committee stage, which cannot be omitted, is clearly the most important.¹²⁵

2 *Modifying time frames*

The Business Committee has the power to alter the notice period for debates and the length of debates. The Review Committee took the view that the times for debates set out in the standing orders were essentially a fall back position for situations where the Business Committee could not agree to an appropriate time frame.¹²⁶ A major role of the Business Committee is to determine equitable arrangements for debates. The fall back position under the standing orders for debates is very short. The second reading for example, which is the main debate on any Bill, is set at a two hour maximum. If the Business Committee is unable to reach agreement on an extended period then two hours would be quite insufficient for the major debate on a contentious piece of legislation.

The ability to vary the legislative process through the Business Committee provides considerable flexibility where there is cooperation between the

¹²⁵ See above III A 2.

¹²⁶ See n1, p20.

political parties in the House. Such flexibility however is dependant on the success of the Business Committee. If the Business Committee is able to operate effectively and remain focused on facilitating the business of the House, rather than political disagreements, there is potential within the new standing orders to shape the legislative process to the needs of the legislation under consideration. This may reduce the time and quantity pressures on the legislative programme. However such flexibility poses risks in terms of the transparency of the process and the opportunities for scrutiny and quality control.

C Introducing Proportionality

The new standing orders are designed to bring the procedures used in the House into line with the reality of a multi-party Parliament. The new rules provide for participation proportionate to party representation within the House. This move to proportionality is likely to result in a substantial reduction in executive control of the legislative process. Previous standing orders had not recognised individual political parties. Instead the House had been divided into the Government and the Opposition and procedural rights within the House were distributed on that basis. The Review Committee saw this as something which needed to change with the adoption of MMP.

1 Operation of the House

The new standing orders include for the first time specific recognition of parties. Under the standing orders a party will be recognised once it's leadership has informed the Speaker of the party's existence, its name and parliamentary membership. The Speaker must also be informed of any

coalitions which may be formed within the House.¹²⁷ Any changes in any of these matters must also be reported to the Speaker. The recognition of parties signals a significant move away from the old formation of the Government and the Opposition. Recognition is particularly significant for the allocation of speaking rights during debates and to the composition of the new Business Committee, which will be discussed later in the paper. The Office of the Leader of the Opposition continues to be recognised under the new standing orders although the functions of that office have become more limited than under the previous standing orders.¹²⁸

The voting system which was put in place by the new standing orders also specifically recognises political parties. Modelled on the system that is used in the Netherlands, the standing orders provide for a new three tiered voting system. Questions are initially decided on a voice vote. When a party wishes to record its dissent or when there is some doubt about the numbers for or against on a voice vote, any MP may call for a party vote. Under a party vote a representative of each party states the direction and the number of votes the party is casting. Independent members and MPs not voting with their party, if there are any, do the same.¹²⁹ The third tier, which is a personal vote, is only available where the issue is so close that it could make a difference, or where the issue is a conscience matter.

Combined with the introduction of party voting are new rules on proxy voting and new quorum requirements. The quorum requirement for the House has been abolished. Proxy voting has been introduced to replace the pairing system. The Review Committee for obvious reasons took the view that the pairing system could not work effectively with a greater number of parties in Parliament. The system of proxy voting is designed to allow

¹²⁷ See n111, SO 34.

¹²⁸ See n1, p17.

¹²⁹ See n1, p28.

some flexibility for MPs to be absent from the House.

Under the new standing orders as adopted by the House on 19 December 1995 Members are required to give proper written authority for a proxy vote stating who is able to exercise the proxy. A member not wishing to vote with their party can give a proxy to another party. The rules permit any party to exercise proxy votes for up to 25% of its members at any one time. Explaining the rationale of the proxy voting system the Hon Wyatt Creech said in the debate on the Review Committee report that: "the proxy system offers a Parliament that will be able to hold the position in terms of strength of members of parties that the public established at the previous proportional representation election."¹³⁰

However significant concern has been expressed suggesting that the rules on proxy votes are too lenient because they allow MPs to be absent from Parliament too often. David Lange said that in his view the new voting system works to the "awful detriment" of the House. He said: "I haven't voted this year. I could be in Brazil and be an MP. In fact under this new system I think some MPs probably will live in Brazil".¹³¹ Further criticism has been directed at the combination of the party and proxy vote.

Margaret Austin during the debate on the new standing orders claimed that the new system essentially disenfranchised individual MPs in favour of their parties. She claimed that: "what we will get now is not the vote of a representative at all; it will be the vote of a party...the whip has the right to cast a vote on behalf of the party."¹³²

Her criticism, although perhaps overstated in relation to the system

¹³⁰ (1995)54 NZPD 10811.

¹³¹ "The Warrior of Mangere plots fight to normality", *The Dominion*, Wellington, New Zealand, 6 June 1996, p5..

¹³² (1995)54 NZPD 10810.

contained in the standing orders, is certainly justified in regard to the proxy voting system which was implemented by sessional order on 21 February 1996. That order states that: "the leader or senior whip of each party ... may exercise a proxy vote for each member of the party, subject to any express direct from a member to the contrary."¹³³

Under the sessional order the whip and not the representative does appear to have the right to cast the vote. The leader of the party is assumed to have a proxy for each member of their party as and when required. It is up to the member to take back the vote to either exercise it directly in the House or give a proxy to another party. On 22 August 1996 the standing orders were amended so that the wording of the sessional order. This change was among those recommended by the Review Committee in their brief follow up report.¹³⁴

2 *The role of the Business Committee*

The establishment of the Business Committee, its composition and role strongly reflects the principle of proportionality. The rules setting up and governing the functioning of the Committee allow for representation and influence proportional to membership of the House. Most parties will be represented on the Committee and through that representation will have some say in the administration and operation of Parliament. As was outlined earlier in the paper the Business Committee is designed to function as the executive of the House. The standing orders provide that the Committee may determine the order of business to be transacted in the House and the time spent on each item.

¹³³ *Sessional Order of New Zealand House of Representatives, Adopted 21 February 1996, (1996) 55 NZPD 10978.*

¹³⁴ See n99, p7.

The Business Committee can determine the allocation of speaking time among the parties represented in the House and even the speaking times of individual members on any particular item.¹³⁵ The Business Committee may also decide whether a Bill is to be debated part by part rather than clause by clause. Business Committee determinations have the effect of overriding any standing order to the contrary.¹³⁶ The provisions in the standing orders which determine the order of business in the House and the time frame and rules of debate on any matter are essentially a fall back position which can be overridden or modified through agreement at the Business Committee.

This represents quite a significant shift in the relationship between the House and the government. In the past the government through the Leader of the House determined, within the limits set by the standing orders, the order in which the House dealt with business. The Business Committee has taken over this role and has the power to prescribe the order of business. In order for the Business Committee to effectively exercise this role, it must be able to reach agreement and make decisions. If it fails to reach agreement then the government regains the ability, within the confines set by the standing orders, to set the agenda of the House. The extent to which the Business Committee will take over this function will depend on the ability of the parties to work cooperatively through the Business Committee.

3 Business Membership of the Business Committee

The members of the Committee will represent all parties represented in the House. Each party with six or more MPs in the House is entitled to have their own member on the Business Committee. Parties with less than six

¹³⁵ See n111, SO78.

¹³⁶ See n111, SO79.

MPs who are part of the government coalition will also be jointly represented by one member chosen by the group. Similarly those parties with under six MPs who form part of the Opposition will be represented by an MP chosen by that group. The size of the Business Committee will therefore depend slightly on the composition of the House.

Decisions of the Business Committee are reached on the basis of unanimity, but where this is not possible near unanimity based on the number of MPs each member of the Business Committee represents will suffice. Near unanimity means the agreement of the overwhelming majority of MPs. The Speaker, who chairs the Business Committee, determines whether or not there is near unanimity on any matter before the Business Committee.

Since the new standing orders were adopted on 20 February 1996 a "pseudo" Business Committee has been operating. Membership of this "pseudo" Business Committee has recognised the transition between an FPP Parliament and an MMP Parliament and does not strictly comply with the rules determining proportional membership of the Business Committee. Each of the following parties have one representative on the Committee: National, Labour, United, New Zealand First and the Alliance. There is also one representative for the two single member parties, (the Christian Democrats and the Conservatives), and the independent member, all of whom are essentially on the Government side.¹³⁷ To date this trial Business Committee has taken its role on rather tentatively. It has acted mainly to prescribe the order of business in the House and has set debate times which differ very little from those prescribed in the standing orders. The Committee has also generally followed the recommendations of the

¹³⁷ Minutes of the Meeting of the Parties to discuss the establishment of a Business Committee, dated 14 February 1996.

government.¹³⁸

The tentativeness and caution with which the Committee is currently approaching its role is probably a reflection of the ambiguity in its current composition and the respective voting strength of each member. Committee decisions are currently being taken without a vote also probably for this reason. It is therefore difficult to predict at this stage how effectively the Business Committee will operate within an MMP Parliament when its membership truly reflect proportionality within the House.

One thing which is clear is that the Business Committee will essentially be a party machine which represents party points of view on the issues which come before it. The fact that all parties are not directly represented on the Business Committee is therefore difficult to reconcile with the Committee's function. Small parties and independent MPs, with potentially conflicting policy and ideology, will under the membership rules be represented through the same member.¹³⁹ In view of the proportional voice which each member of the Committee has and the five percent electoral threshold which applies under MMP, there appears to be no real justification for not allowing all parties separate representation on the Business Committee. This issue is potentially quite significant given the power which the Business Committee has over the passage of legislation through the House.

4 *Select committee membership*

New rules on select committees will come into force following the first MMP election on 12 October 1996.¹⁴⁰ Allocation of membership of select committees presents a further area where the standing orders now reflect

¹³⁸ This is clearly demonstrated in the minutes of the Business Committee as at May 1996.

¹³⁹ Opposition parties in particular may have quite dissimilar ideologies and policy.

¹⁴⁰ See (1995)54 NZPD 10811.

proportionality. Standing Order 189(2) provides that "the overall membership of select committees must, so far as reasonably practicable, be proportional to party membership of the House".¹⁴¹ The government may not as a result have a majority on every committee or indeed on any particular committee. The chairperson of each select committee will not necessarily be drawn from the same party as the government. Where the government does not have control of a select committee, either through the chair or through a majority, the select committee will be free to take a more independent position when examining legislation.

The overall membership of select committees will increase under the new standing orders to eight members. With the increase in MP numbers from 98 to approximately 120, most MPs will probably only be on one committee. MPs from smaller parties may still need to cover more committees, even if not actually members of them. This change should reduce the workload of MPs and as a consequence reduce substitution and increase the level of specialist knowledge on each committee. All of these changes will improve the scrutiny of legislation.

Following the substantial revision of the select committee system which took place in 1985, select committee powers were considerably extended. The extension of select committee powers was seen as the most effective way to increase the accountability of the government and its officials to the Parliament.¹⁴² Some commentators have expressed the view that select committees are not yet fully utilising their enhanced powers.¹⁴³ It may well be that with increased independence from government select committees will begin to explore the extent of their powers and potential influence

¹⁴¹ See n111, SO189(2).

¹⁴²The Royal Commission on Electoral Reform took this view. See Report of the Royal Commission on the Electoral System: Towards a Better Democracy, Wellington, 1986.

¹⁴³See n23.

more zealously.

The new rules provide for the inclusion of minority views within the narrative of select committee reports.¹⁴⁴ It is expected that there could be greater desire in an MMP parliament for dissenting views to be known.¹⁴⁵ This change increases the relevance of minority views on select committees and by doing so encourage participation by members from minority parties whose views are less likely to prevail. Reports must also distinguish amendments that are unanimous from those that have majority support. Amendments which have majority support are now voted on separately during the committee's report back. This change seem specifically to recognise that the majority view of the select committee may not reflect the view of the majority in the House.

The Review Committee anticipated that ministers in charge of Bills may wish to attend and participate in select committee more when their Bills are under consideration.¹⁴⁶ Such a change reflects the probability that select committees will increasingly be the place where legislation is developed and its contents determined. Ministers or other proponents of Bills may well use select committees as the forum for negotiating support for the detail of their Bill, particularly when the chair of the select committee is not a member of the government party.

The Review Committee recognised that select committees will require an enhanced level of independent advice to assist them in both their scrutiny and legislative functions. The Review Committee recommended that the Clerk of the House prepare an analysis of the services required by select committees and the resources and cost implications of these services for

¹⁴⁴ See n111, SO246.

¹⁴⁵ See n1, p59.

¹⁴⁶ See n1, p59.

consideration as part of the budget process.¹⁴⁷

In terms of advice on legislation the Review Committee confirmed that a select committee's first source of advice on policy in a government Bill and the application of the proposed law should still be the minister and his/her departmental officials.¹⁴⁸ However, recognising their potential independence and enhanced role in legislative scrutiny, a select committee may wish to contest the governmental advice and may want access to independent sources of policy and legal advice on matters such as:

- implications of the Treaty of Waitangi;
- consistency with the rights and freedoms contained in Bill of Rights Act 1990;
- consistency with the general principles of administrative and constitutional law;
- the application of international law; and
- the drafting of amendments.

The Review Committee envisaged that the need for contesting government advice could be addressed through the purchase of external services for select committees. However the need for more general legal advice and for drafting assistance should be catered for through the development of an in-house legal resource within the Office of the Clerk of the House. The report stated that: "an in house resource will allow all legislation to receive

¹⁴⁷ See n1, p45.

¹⁴⁸ See n1, p46.

a constant level of scrutiny".¹⁴⁹

The Review Committee essentially reached the conclusion in its report that Parliament requires its own source of legal advice and drafting to function well under MMP. The Committee recommended that this should be provided through the office of the Clerk of the House. This strong call for additional resources and an improved advice capacity indicates that select committees will become more confidence and independent in the future and will wish to undertake their own analysis and pursue their own policy agendas in a way that they have not done to date. Providing services of these kinds would directly address some of the issues of quality at the select committee stage which were raised earlier in this paper.¹⁵⁰ The issue of access to expert legal advice and drafting services in relation to members Bills is discussed further next.

5 *Members Bills*

The new standing orders enhance the rights of members to introduce legislation. Under the new standing orders members may initiate proposals for the first time which involve taxation and expenditure. Under the financial veto procedures set out in the standing orders the government of the day has an absolute right to veto any legislative proposal involving taxation or expenditure put forward by a private member if the government considers that the proposal would have more than a minor impact on any of the Crown's key fiscal aggregates.¹⁵¹

The financial veto provisions replaced the appropriation rule which was

¹⁴⁹ See n1, p46.

¹⁵⁰ See above III B 2.

¹⁵¹ See n1, p61. Note that the standing orders do not deal with the question of what level of expenditure may or may meet the definition of being of "more than minor impact".

contained in the previous standing orders. Under the appropriation rule all non-government Bills or amendments involving increases in expenditure or taxation were ruled out of order and prohibited by the standing orders unless supported by the government and by a recommendation from the Crown. Under the previous standing orders private members Bills involving appropriations or imposing taxation were simply not set down for a second reading.¹⁵² The appropriation rule was a very effective barrier which a government could utilise to prevent the advancement of a great number of private members Bills not to mention amendments.

The new standing orders concerning balloting and the introduction and first reading of members Bills reduce the restrictions on the number of such Bills which can be introduced and read a first time.¹⁵³ Excluding the ballot requirements, the distinction between members and government Bills has essentially been dropped. All members Bills will now get through a first reading and will therefore be published and circulated. As a result they are likely to attract more public attention. Whether or not they proceed any further though will depend primarily on the support of the Business Committee.

It is likely given these rule changes that members Bills will continue to grow in number and importance. The Review Committee described members Bills since 1994 as a growth industry.¹⁵⁴ An increase in members Bills will have considerable implications for the quality and consistency of legislation. The Review Committee, concerned to ensure a consistent and high standard in drafting of legislation that adhered to the rules and guidelines established by law reform bodies, recognised the need to

¹⁵² See n 28, SO 218.

¹⁵³ See n91, p138.

¹⁵⁴ See n1, p59.

provide specialist legal drafting services for drafting members Bills.¹⁵⁵ The Review Committee discussed a number of options in its report but did not reach any clear conclusions or put forward a firm proposal for the future of legislative drafting services.

The Review Committee may have felt that it was premature to take up a position during the current transition phase. Instead it recommended that Parliament further examine the issue of whether or not it should have its own drafting and legal advice service which would be able to draft members Bills and amendments and give independent contestable advice on government legislation. Until this issue is taken further and resolved members Bills will continue to be of varying quality, drafted in an ad hoc fashion, using whatever resources and assistance MPs are able to obtain. Unless some consistency and quality assurance is introduced into this area, the growth of members Bills could represent a significant risk to the technical quality of legislation.

¹⁵⁵ See n1, p59.

VI CONCLUSION

Until recently the government effectively controlled both the legislative and executive branches of government. Once decisions were made by Cabinet, the convention of collective ministerial responsibility and the strict whipping system ensured that those decisions were accepted by the governing party's parliamentary caucus and pushed by the caucus through the Parliament. A government could therefore be confident that the substantial policy content of any Bill which it put forward would not be changed without the government's agreement.

The executive's domination over the House meant that legislation was a function of the executive rather than the Parliament. The balance of power between the executive and the Parliament raised doubts about the effectiveness of scrutiny within the legislative process. The various stages of the legislative process are designed to ensure that legislation is properly considered before it is enacted. The legislative process contained insufficient procedural safeguards which allowed the executive to completely dominate the House and its committees. This compromised the opportunity for effective scrutiny of legislation.

The legislative process should also operate to ensure that legislation is of a consistently high quality before it is enacted. A key purpose of legislative scrutiny is ensuring that legislation is effective and technically sound and will fit harmoniously into the fabric of existing law.

MMP and the new standing orders have introduced significant changes into the legislative process. These changes reflect a move to proportionality and a consequential reduction in government control over the House and its legislative function. The changes also have a considerable impact on the scrutiny and quality of legislation within the legislative process.

A Government Control

MMP will change the balance of power between the executive and the Parliament and this will alter the way that the legislative process will operate. MMP will produce a more diverse range of election outcomes than the previous system. In particular MMP will sometimes result in a minority government or an unstable or diverse coalition government which will not command a secure majority within the House on all policy issues. Such a government will not exercise the degree of control over the legislative process which New Zealand governments have in the past. There will be a shift in power from the executive to the legislature. The government will not have full control over Parliament's legislative programme.

Initiating legislation will still principally be the role of the government. Although the relative strength of the government of the day in terms of support within the House will significantly influence the type and amount of legislation which it will put forward. Where the government is not reasonably confident of support less legislation will be put forward and its passage through the House will be more problematic. The opportunities for changing the substantive policy content of legislation during its passage through the House will be considerably enhanced. As a result the legislative process will be protracted and the outcome less certain.

The new standing orders bring the workings of the House and its committees into line with the reality of this shift in power away from the government. The new rules enhance transparency in most areas of the legislative process which reduces the opportunities for executive manipulation and control of the process. Although it should be noted that the Business Committee's ability to fast track legislation may well work to impede transparency in some areas. The imposition of notice periods for debates, the changes to urgency, the restrictions on Omnibus Bills and the

tentative attempts to curb the misuse of SOPs are all changes which are designed to reduce the executive's ability to take the House by stealth and push through Bills without proper scrutiny.

The new standing orders provide for participation proportionate to party representation. This will result in a substantial reduction in executive control of the legislative process. Speaking rights within the House are distributed on the basis of the strength of party representation. The new proxy voting system and quorum requirements maintain proportionality. The Business Committee, which has been set up to function as the House's executive, represents a significant shift in the relationship between the House and the government. The Business Committee has taken over much of the role of the Leader of the House.

Private members also have enhanced rights over the introduction of legislation. Members Bills can now legitimately incorporate a far wider range of proposals. The shift in power away from the government and the reduction in the government's legislative programme will greatly improve the prospect of enactment for members Bills. This increase in members Bills will further loosen the government's control over the legislative programme.

Select committee membership has also been significantly altered in a way which will change the relationship between select committees and the executive. As a result select committees are likely to be more independent from the government than has previously been the case. They will be more confident in their approach to modifying legislation. Ministers and other proponents of Bills may well be required to attend select committee and use it as a forum for negotiating support for the detail of their Bill. The strong call for additional resources and an improved independent advice facility for select committees indicates that select committees will become more confident and independent. Select committees will in future

undertake their own analysis and pursue their own policy agendas in a way that they have not done to date

The impact of MMP on the New Zealand system of government could therefore be quite profound. The government may not always have control over the content or passage of legislation as it passes through the House. Where the government does not command a secure majority within the House the content of legislation will be determined by the House operating particularly through select committees, rather than by the government. Legislation as a result will again become truly the function of the Parliament which will determine its substantive content and not just endorse and legitimise it.

B Scrutiny and Quality Control

The consequences in terms of the scrutiny and quality of legislation are somewhat mixed. The new standing orders have enhanced the procedural safeguards and thereby increased the opportunity for appropriate and full scrutiny of legislation by select committee and the House. This should generally result in Bills being more fully considered before they become law. Although the Business Committee's ability to fast track legislation may work against adequate scrutiny in some cases.

The new standing orders incorporate a number of additional procedural safeguards which should generally work to enhance the degree of scrutiny which legislation is subjected to within the legislative process. In particular the inclusion of policy statements, the changes to the legislative sequence and time frames, the introduction of requirements for notice of debate and the imposition of stricter rules on Omnibus Bills and urgency should all operate to improve the scrutiny and quality of legislation. These changes address many of the issues which have been identified by commentators

as barriers to effective scrutiny.

There are obvious risks in terms of scrutiny and quality control in permitting the Business Committee to fast track even non contentious legislation. It should not be assumed that non contentious legislation will be any better drafted or less technically complex than other legislation. All stages of the legislative process contribute towards the scrutiny and quality control of each Bill, although select committee scrutiny, which has been enhanced under the new standing orders, is clearly the most important.

The legislative process itself will however become more protracted and less certain under MMP. There will be more opportunity for amendment and modification to Bills during the process. Members Bills will also increase in number and could become a more significant source of law.

Where the substantive content of legislation is relatively fluid during the legislative process legislation is less likely to be coherent and of a consistently high quality. It may be therefore that improvements in quality, which could be expected as the result of increased scrutiny and enhanced procedural safeguards under the new standing orders, will be offset by the increased uncertainty which will surround the content of legislation during its passage through the House. It is therefore extremely difficult to predict whether the overall result will be an improvement in the quality and coherence of legislation.

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