

MARCUS GANLEY

**MAKING UNICAMERAL PARLIAMENTS
WORK: THE NEW ZEALAND EXCEPTION?**

LLB(HONS) RESEARCH PAPER

PUBLIC LAW – EXPLORING THE EDGE
(LAWS505)

LAW FACULTY
VICTORIA UNIVERSITY OF WELLINGTON

2002

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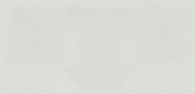
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to be the best design for the committee system. This paper considers the extent to which New Zealand's select committee system empowers the House of Representatives to play an independent role in the legislative process. A first consideration is the nature of the committee system. This is done by measuring the number of changes made to legislation by select committees. This is done by measuring the number of changes made to public bills during the 40th Parliament. This research replicates and extends early analyses undertaken by Payne in 1979 and Stone in 1990. The quantitative analysis is supplemented by case studies of three bills considered by select committees in the 40th Parliament: the Employment Relations Bill, the Misuse of Drugs Amendment Bill (No 4) and the Tax

Administration Amendment Bill. Having established that New Zealand select committees do have a significant legislative impact, the paper considers two possible explanations for this structural design and electoral system change. Factors constraining the influence of the committee system are also examined. The paper concludes that while the institutional and procedural settings were favourable for a strong committee system, the end of single-party government and the increased diversity of views represented in Parliament since electoral system change have greatly diminished the committee

Andrew Dawson, *Parliamentary Democracy in New Zealand* (Wellington, 1994).
 (Members, London, 1967); Lord Hailsham, *The Decline of Democracy* (Collins, London, 1978); Tom McRae, *A Parliament in Crisis: The Decline of Democracy in New Zealand* (Nelson, Wellington, 1994).
 (Melbourne, 1992); Rodney Smith, 'Parliament' in James Stair, James A. G. Reilly and Murray Goot (eds), *Development in New Zealand* (Wellington, 1994).
 The text of the paper focusing on the committee system is available at the following URL: <http://www.parliament.nz>
 For more on the committee system, see: *Parliamentary Democracy in New Zealand* (Wellington, 1994); Miller, *New Zealand's Parliament* (Christchurch University Press, Auckland, 1977); Gordon, *Parliamentary Democracy in New Zealand* (Christchurch University Press, Auckland, 1987); 66; Gordon, *Parliamentary Democracy in New Zealand* (Christchurch University Press, Auckland, 1991); 1992; *Parliamentary Democracy in New Zealand* (Christchurch University Press, Auckland, 1992).
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ABSTRACT

This paper considers the extent to which New Zealand's select committee system strengthens the ability of Parliament to play an independent legislative role. After considering the literature on legislative – executive relations, the paper examines the significance of changes made to legislation by select committees. This is done by measuring the number of changes made to public bills during the 46th Parliament. This research replicates and extends early analyses undertaken by Palmer in 1979 and Skene in 1990. The quantitative analysis is supplemented by case studies of three bills considered by select committees in the 46th Parliament: the Employment Relations Bill, the Misuse of Drugs Amendment Bill (No 4) and Te Ture Whenua Māori Amendment Bill.

Having established that New Zealand select committees do have a significant legislative impact, the paper considers two possible explanations for this: structural design and electoral system change. Factors constraining the influence of the committee system are also examined. The paper concludes that, while the institutional and procedural settings were favourable for a strong committee system, the end of single-party governments and the increased diversity in views represented in Parliament since electoral system change have greatly strengthened the committee system and, in turn, the independence of Parliament from the executive.

STATEMENT ON WORD LENGTH

The text of this paper (excluding contents page, footnotes, bibliography and annexures) comprises approximately 15,185 words.

I INTRODUCTION

Literature on responsible government suggests that the era of effective parliaments has passed and that unicameral parliaments, especially in systems with highly disciplined parties,¹ play little role beyond that of an electoral college for the executive.² This is especially the case in two party systems where single party governments are the norm. Traditionally the pre-eminent role accorded to Parliament is to make laws.³ However, many authors contend that Westminster parliaments no longer perform a significant legislative role.⁴ According to the standard argument, executive dominance means that parliaments are no longer able to perform their traditional roles.

It has been suggested that despite having a unicameral Parliament coupled with a party system marked with high levels of internal legislative cohesion, the New Zealand House of Representatives defies this 'conventional wisdom'. According to some commentators it plays an important legislative role due to its system of select committee scrutiny of legislation.⁵ This is shown by a pattern of significant changes being made to

¹ Fiona Barker and Stephen Levine "The Individual Parliamentary Member and Institutional Change: The Changing Role of the New Zealand Member of Parliament" (1999) 5 *Journal of Legislative Studies* 105, 110.

² Andrew Hill and Anthony Whichelow *What's wrong with Parliament?* (Penguin, Harmondsworth, 1964) 102; Dean Jaensch *Getting Our Houses in Order* (Penguin Australia, Ringwood, Victoria, 1986); TF Lindsay *Parliament from the Press Gallery* (Macmillan, London, 1967); Lord Hailsham *The Dilemma of Democracy* (Collins, London, 1978); Tom McRae *A Parliament in Crisis: the Decline of Democracy in New Zealand* (Sheildaig, Wellington, 1994); Geoffrey Palmer *New Zealand's Constitution in Crisis* (McIndoe, Dunedin, 1992); Rodney Smith "Parliament" in Judith Brett, James A Gillespie and Murray Goot (eds) *Developments in Australian Politics* (Macmillan, Melbourne, 1994) 106; Peter Wilenski "Can parliament cope?" in J. R. Nethercote (ed) *Parliament and Bureaucracy* (Hale & Iremonger, Sydney, 1982).

³ For example, Richard Mulgan "Parliament: Composition and Functions" in Raymond Miller *New Zealand Politics in Transition* (Oxford University Press, Auckland, 1997); Geoffrey Palmer *Unbridled Power* (2 ed. Oxford University Press, Auckland, 1987) 96; Gordon Stanley Reid and Martyn Forrest *Australia's Commonwealth Parliament 1901-1988: Ten Perspectives* (Melbourne University Press, Melbourne, 1989).

⁴ See note 2, above, and, for example, June Verrier "The future of parliamentary research services: to lead or to follow?" (1996) 11(1) *Legislative Studies* 36. Not all authors think this is necessarily a bad thing, for example Peter Duncan "The relevance of parliament: the executive view" (1996) 11(1) *Legislative Studies* 32.

⁵ Geoffrey Skene *New Zealand Parliamentary Committees: An Analysis for the Institute of Policy Studies* (Institute of Policy Studies, Wellington, 1990).

legislation in the select committee process. Burrows and Joseph⁶ go as far as to describe New Zealand's committee system as "a crucial bastion of democracy in our legislative process". The Royal Commission into the Electoral System described select committees as "the best means, consistent with our constitutional tradition, of providing a parliamentary check on executive and administrative power".⁷ Cullen describes the committee system as the "shining light" of the parliamentary system.⁸ Existing and former MPs taking part in the 1996 New Zealand Election Study candidate survey ranked select committee work significantly higher than speaking in the House.⁹

This paper questions the extent to which the select committee system facilitates the New Zealand Parliament in playing a significant legislative role. After a discussion of the arguments regarding legislative-executive relations in Westminster systems in Part II, Part III examines some data on the quantum of amendments made at the select committee stage, followed by three case studies. Having established that the select committee system does make a difference, the paper turns to an examination of why this occurs. Part IV considers internal structural explanations while Part V examines the impact of electoral system change.

II CAN PARLIAMENTS MAKE A DIFFERENCE?

The defining feature of parliamentary government is that the political executive is drawn from, and is responsible to, the legislature. The political executive holds office so long as it has the support of a majority of members of the lower house. If they fail to maintain this support, they

⁶ J F Burrows and Philip A Joseph "Parliamentary Law Making" (1990) NZLJ 306.

⁷ Royal Commission on the Electoral System *Report of the Royal Commission on the Electoral System: Towards a Better Democracy* (GP Print, Wellington, 1986) 20.

⁸ Michael Cullen "Courtiers of the Executive? The New Zealand Parliament's role in policy development" (1998) 12(2) *Legislative Studies* 52, 53.

⁹ Marcus Ganley "Public Perceptions of the New Zealand Parliament" (2000) 14(2) *Legislative Studies* 68, 74. Select committee work was still listed below constituency work as Palmer (*Constitution in Crisis*, above, 113) suggested it would be.

cannot retain office.¹⁰ The rise of disciplined political parties has meant that, in practice, the party (or coalition of parties) that has a majority in the lower house of parliament forms the government. In his seminal work on the nature of the British constitution, Walter Bagehot¹¹ described the nearly complete fusion of legislative and executive power as the 'efficient secret' of the Westminster system. This very ability to form government suggests that the executive controls the legislature. He saw Cabinet as the buckle that fastened the legislative and executive branches; while the political executive is drawn from the legislature, its very formation suggests that the political executive controls the legislature.

A *Party discipline*

The ability of the political executive to dominate the legislature is influenced by the level of internal party cohesion. In the United Kingdom, which from an international perspective has fairly high levels of party discipline, MPs from both parties often defy the party whip.¹² In contrast New Zealand has extremely highly disciplined parties. The Labour party requires its elected representatives to pledge themselves to vote with their party.¹³ The other parties make much of this, though in practice there have been very few cases of any MPs voting against their party. This has recently been strengthened by the enactment of the Electoral (Integrity) Act 1999. The level of discipline is strongly related to the small size of the New

¹⁰ For a summary of the conventions of parliamentary government as they apply in New Zealand see Kenneth Keith "On the Constitution of New Zealand: An introduction to the foundations of the current form of government" in Department of Prime Minister and Cabinet *Cabinet Office Manual* (Wellington, 2001) 3 [subsequently "Cabinet Office Manual"].

¹¹ Walter Bagehot *The English Constitution* (London, Watts, [1867]1964) 11.

¹² See, for example, Robert J Jackson *Rebels and Whips: Dissension, Discipline, and Cohesion in British Political Parties since 1945* (St Martin's Press, New York, 1968); Philip Norton "The Lady's Not for Turning' But What About the Rest of the Party? Mrs Thatcher and the Conservative Party 1979-89" (1990) 43(1) *Parliamentary Affairs* 41.; Philip Norton and P Cowley "Rebels and rebellions: Conservative MPs in the 1992 Parliament" (1999) *British Journal of Politics & International Relations* 84. To some degree Westminster's three-line whipping process does provide a safety valve for unrest by allowing members greater latitude on minor issues.

¹³ As the Alliance party did when it was represented in Parliament.

Zealand Parliament and the comparatively large executives. As Stone¹⁴ has shown where a large political executive is drawn from a small pool of MPs the incentives for MPs to follow the party line is particularly strong. For example, in the recently announced ministry 27 out of 52 Labour MPs have been awarded an executive position.¹⁵ Additionally, three MPs have been awarded the title Parliamentary Private Secretary to assist ministers from outside the executive. This means 30 of the 52 Labour MPs hold a position that requires loyalty to the leadership.¹⁶ With the addition of the two whips, who are responsible for maintaining party discipline, the likelihood that the governing party will act as a single unit is high.

Once Cabinet makes a decision, collective responsibility requires that all ministers¹⁷ support it.¹⁸ This will almost always result in a majority in caucus regardless of backbench opinion. Once caucus has endorsed a decision, all government MPs are expected to support it in the House. When a majority government is in office, this means the legislature supports the decision. The opinions of other parties in Parliament are, by this logic, irrelevant. Together, collective responsibility and party discipline means majority Cabinet decisions are normally translated into unanimous party decisions.¹⁹

¹⁴ Bruce Stone "Size and Executive-Legislative Relations in Australian Parliaments" (1998) 33(1) *Australian Journal of Political Science* 37. See also Harry Evans "Constitutional safeguards, bicameralism, small jurisdictions and Tasmania" (1999) 13(2) *Legislative Studies* 1, 2.

¹⁵ Executive positions include both ministers and undersecretaries.

¹⁶ 'Cabinet criticism' (16 August 2002) *The Press* Christchurch 6; "Jobs for the boys, and nearly everyone else too" (16 August 2002) *New Zealand Herald* Auckland 1.

¹⁷ This applies regardless of whether the Minister is in Cabinet.

¹⁸ Cabinet Office Manual, para 3.20 and 3.21.

¹⁹ Taken to its extreme executive dominance, in systems with highly disciplined parties, has been seen as leading to prime ministerial government. As chair of Cabinet the Prime Minister sets the agenda, calls on speakers and sums up the decisions or 'consensus' reached. This may result in 'decisions' of Cabinet not reflecting the views of a majority of Cabinet ministers, though with careful use of these powers this may not be realised at the time. It would be extremely risky for any prime minister to adopt such an approach frequently.

B Unicameralism

Executive dominance in New Zealand is strengthened by unicameralism. To Lijphart, whether legislatures are unicameral or bicameral is "the most important institutional variable on which they differ".²⁰ The proponents of bicameralism suggest that in such systems there is a greater potential for parliaments to play an independent legislative role.²¹ This potential derives from the possibility that the party (or coalition of parties) that commands a majority in the lower house on confidence and supply is not guaranteed such a majority in the upper house. In such cases Cabinet loses its ability to use collective responsibility and party discipline to translate government decisions into legislative majorities. This in turn could result in greater scrutiny of the executive and greater legislative autonomy.²²

Other commentators are less convinced of the virtues of bicameralism, arguing that upper houses will be controlled either by the government, in which case they are likely to play a minor role, the opposition, in which case they may frustrate the will of a popularly elected government, or minor parties, who will receive disproportionate influence.²³ According to Keith Jackson bicameralism can also become seen as a cure-all – it is a "simplistic solution to complex problems, and as such appeals to politicians as an easy policy to offer the electorate".²⁴

²⁰ Arend Lijphart "Foreword: 'Cameral Change' and Institutional Conservatism" in Lawrence D. Longley and David M. Olson (eds) *Two Into One: The Politics and Processes of National Legislative Cameral Change* (Westview Press, Boulder, Colorado, 1991) ix.

²¹ Evans, above, 2.

²² Electoral and Administrative Review Commission *Queensland Legislative Assembly Electoral System Volume 1 – The Report* (Brisbane, 1990) 95.

²³ Royal Commission on the Electoral System, above, 281; Palmer, *Constitution in Crisis*, above, 123.

²⁴ Keith Jackson "The Abolition of the New Zealand Upper House of Parliament" in Lawrence D. Longley and David M. Olson (eds) *Two Into One: The Politics and Processes of National Legislative Cameral Change* (Westview Press, Boulder, Colorado, 1991) 72.

At least for its last 60 years the New Zealand Legislative Council was seen as largely ineffective.²⁵ For much of its history, the Australian Senate was maligned as a body that had failed to achieve the goals set for it by the founding fathers.²⁶ The Australian state upper houses were long viewed similarly.²⁷ However, it has recently been shown²⁸ that the Australian Senate play a crucial role in the legislative process. The Senate is now clearly regarded as "an autonomous legislative body".²⁹ In the last two decades minor parties and independents have held the balance of power, placing the control of its agenda out of the hands of both the government and the opposition. According to Sharman, this is due to the Senate's power to insist on change.³⁰

Since the introduction of proportional representation in 1949 the power of the Senate has increased significantly. The representation of minor parties and independents that flowed from this, paved the way for the next stage in the development of the Senate, the establishment in 1970 of a comprehensive committee system.³¹ Such committees play a crucial role in allowing the Senate to carry out its legislative functions.³² The emergence in 1977 of the Australian Democrats, as a party committed to the use of the

²⁵ Jackson, above; Keith Jackson *The New Zealand Legislative Council: a study of the establishment, failure and abolition of an upper house* (University of Otago Press, Dunedin, 1972); Lord Cook of Thorndon "Unicameralism in New Zealand: Some Lessons" [1999] *Canterbury Law Review* 233, 244.

²⁶ Campbell Sharman *The Australian triple-E Senate: lessons for Canadian Reform?* (Canada West Foundation, Calgary, 1989) 2. See for example Richard Lucy *The Australian Form of Government: Models in Dispute* (2 ed, Macmillan, South Melbourne, 1993) 191.

²⁷ For example, Peter Coaldrake "Institutional 'Dry Rot'" in *Working the System* (St Lucia, Brisbane, University of Queensland Press, 1989) 57.

²⁸ Rodney Smith "Parliament", above; Campbell Sharman "The Senate and Good Government" in Kay Walsh (ed) *The Senate and Good Government and Other Lectures in the Senate Occasional Lecture Series, 1998 (Papers on Parliament No. 33)* (Department of the Senate, Canberra, 1999) 152, 157; John Uhr *Deliberative democracy in Australia: the changing place of parliament* (Cambridge University Press, Melbourne, 1998); John Uhr *The Senate and proportional representation: public policy justifications of minority representation* (Australian National University Press, Canberra, 1999).

²⁹ Sharman *The Australian triple-E Senate*, above, 6.

³⁰ Sharman "The Senate and Good Government", above, 157-8.

³¹ Lucy above, 194; Alan J. Ward "Redesigning Westminster Legislatures in Australia" (Paper presented to BISA/PSA Political Science Group Workshop conference "The Dominion Concept: Inter-state and Domestic Politics in the British Empire" University of Warwick, July 1998).

³² Ian Marsh *The Senate, Policy-Making and Community Consultations* (Senate Occasional Lecture, Department of the Senate, Canberra, 23 April 1999) 12.

balance of power in the Senate to pursue its goals, has further strengthened the power of the Senate.³³ While the power to insist on change provides the Australian Senate with its ultimate sanction, it has only begun to wield effective power since the introduction of proportional representation and the emergence of a comprehensive system of parliamentary committees.³⁴

C *Electoral system change*

So where does this leave New Zealand with its unicameral parliament and very high levels of legislative party cohesion? Until the electoral system was changed, the New Zealand system was seen as a perfect manifestation of a parliament dominated by Cabinet. According to Palmer and Palmer³⁵ this was due to the following factors:

- A single party is elected to government;
- Cabinet is drawn from the governing party's MPs;
- The governing party acts as one unit;
- The governing party dominates Parliament.

In 1979, Geoffrey Palmer described the power of Cabinet in New Zealand as 'unbridled' and claimed New Zealand had "the fastest law making in the West". Thirteen years later he concluded that executive dominance meant the New Zealand Parliament played a very limited role in law-making; it was "a rubber stamp – it determined nothing".³⁶

Each week MPs of the governing party met in caucus and in secret settled their policy. Once adopted, all members were obliged to vote for it in Parliament. Parliament became a rubber stamp – it determined nothing. ... Cabinet in a small Parliament like New

³³ Sharman *The Australian triple-E Senate*, above, 6.

³⁴ A similar case applies to the recent re-emergence of the upper houses in New South Wales, South Australia and Western Australia all of which have moved to proportional representation in the last 20 years.

³⁵ Geoffrey Palmer and Matthew Palmer *Bridled Power?* (Oxford University Press, Auckland, 1997).

³⁶ Palmer *Constitution in Crisis*, above, 105 – 106.

Zealand's came to dominate the caucus and therefore the Parliament to an extent still not possible in the United Kingdom.

So marked was the lack of any checks and balances that Lijphart³⁷ saw New Zealand as the quintessential example of the majoritarian system.³⁸ However, more recently New Zealand has seen a significant change in its institutional arrangements. In conjunction with the 1993 election a referendum was held on the electoral system. This was the second part of a two-part referendum process. On 19 September 1992 New Zealanders had been asked first, if they wanted to change the electoral system, and second, if the system were to be changed which of four systems would they prefer. Over 55 per cent of electors voted in the referendum, with 85 per cent voting for a change in the system and 71 per cent choosing MMP of the four systems on offer. In the 1993 referendum, voters were given a straight choice between retaining plurality voting in single-member electorates³⁹ and changing to MMP: 54 per cent of electors voted for change.

Until the mid-1990s the Labour and National parties had a virtual monopoly on parliamentary representation. Since 1993 New Zealand has fluctuated between majority and minority governments (both coalition and single party). This has led to a break down in the fusion between legislative and executive power as governments find it more difficult to secure certain legislative support for Cabinet proposals. This is particularly the case for minority governments. While they may have undertakings on confidence and supply, this does not guarantee support on legislation. Even when majority coalition governments are formed, extensive consultation between

³⁷ Arend Lijphart *Democracies: Patterns of Majoritarian and Consensus Government in Twenty-One Countries* (Yale University Press, New Haven, 1984).

³⁸ Similarly Rod Hague and Martin Harrop *Comparative Government and Politics - an Introduction* (2 ed, Macmillan, London, 1987).

³⁹ Popularly referred to as 'first-past-the-post'. This epithet is rather inaccurate as, unlike quota based single-member systems (such as 'preferential voting' in Australian lower house elections) where a 'post' is established and the first candidate to pass it is elected, there is no 'post' under plurality voting in single-member electorates.

the parties in the government are likely to be necessary.⁴⁰ The impact of these changes is revisited in Part V.

III IMPACT OF SELECT COMMITTEES

A How to measure the impact of committees

To assess whether the change that is occurring following select committee consideration of legislation is indicative of legislative autonomy requires both qualitative and quantitative analysis of the changes made. Without being able to point to a significant quantum of change it is easy to dismiss any examples of major politically significant change as anomalies. At the same time, unless it can be shown that the changes committees make are politically significant rather than just technical they can just as easily be dismissed as playing simply a 'tidying' role in the legislative process.

B Quantitative measures of legislative autonomy

Palmer⁴¹ measured changes made to the 36 public bills, nine local bills, and one private bill referred to committees in 1977. Skene⁴² took a random sample of bills referred to committee in 1989 for comparison⁴³ and found that there was much greater amendment of the public bills in 1989 than 12 years earlier. A survey, based on Skene's approach, was conducted for a sample of bills considered during 1997.⁴⁴ A summary of these findings is set out in table 1 below.

⁴⁰ Mai Chen "The new Parliament under MMP" (1997) 11(2) Legislative Studies 13.

⁴¹ Palmer, *Unbridled Power* (1 ed), above, 23.

⁴² Skene, above, 20-22.

⁴³ The sample was made up of 20 public bills, six local bills and two private bills.

⁴⁴ Marcus Ganley "Select committees and their role in keeping Parliament relevant" (2002) 16(2) Australasian Parliamentary Review 121, 124.

	1977	1989	1997
Number of public bills examined	36	20	47
Total changes made at select committee stage	978	830	2008
Average number of changes per bill	27	41.5	43

Table 1: changes to bills at select committee stage, 1977, 1989 and 1997.

The change between 1977 and 1989 is perhaps understated as the 36 bills considered in 1977 were referred to committee at the volition of the minister in charge. As such it was likely that the ministers in charge of these bills were relatively more receptive to changes than would have been the case with other bill considered in that session. However, the similarity between the 1989 and 1997 figures is striking and could suggest that the change in electoral system has had little impact on the legislative role played by select committees.

Another explanation might be the political climate of the time. In 1997 New Zealand had a majority government. While it was a coalition, it can be argued that in effect the Fourth Labour Government was too and by 1989 cracks were showing.⁴⁵ It may be that in 1997 the executive was in a comparatively strong position with regard to the legislature despite the 1996 election being conducted under MMP.⁴⁶

Alternatively the explanation could lie in the nature of the data. While a similar number of changes may have been made, in 1989 ministers had much greater influence over committees and the changes made may have been largely at the instigation of the minister or the department sponsoring the bill. If the changes in 1997 were made largely as a result of the committee process, and not at ministerial suggestion, then even though the number has not changed, the nature of the changes would be dramatically different. It is difficult to quantitatively measure this.

⁴⁵ See, for example, Simon Sheppard *Broken circle: the decline and fall of the fourth Labour Government* (PSL Press, Wellington, 1999).

⁴⁶ Barker and Levine, above, 114, suggest this was the case.

The surveys have been repeated using public bills considered by, and reported back, from subject committees⁴⁷ during the 46th Parliament.⁴⁸ Statutes Amendment Bills were excluded from the sample as Standing Orders provide that if any member objects during the committee of the whole House stage to a clause in such a bill standing part, the clause is struck out.⁴⁹ Given this, such bills tell us little about the relative influence of committees. Also excluded are bills to which the rules on 'bills to confirm agreements' apply. Select committees, and indeed the House itself, are prohibited as a matter of parliamentary procedure, from amending such bills to the extent normally possible.⁵⁰ As such the patterns of amendments for such bills would skew the results. Unlike Skene and Palmer, data for Local and Private bills has not been collected. As Skene found, due to the small numbers of such bills comparisons over time were difficult. Public bills also tend to be of more interest in terms of indicating legislative autonomy from the executive.

In addition to the information recorded by Palmer and Skene, amendments have been separated into majority and unanimous changes. Data has also been collected on changes made at the committee of the whole House stage to amendments recommended by select committee. This allows an assessment to be made of what happens to amendments once they get back to the House. According to Barker and Levine although "select committees have become somewhat more assertive since the introduction of MMP, the willingness of ministers to overturn committee decisions in the House indicates that so far the nature of parliament is little changed".⁵¹ The amount of change to committee changes that occurs in the Committee of the

⁴⁷ The Employment and Accident Legislation Committee has also been included.

⁴⁸ Some evolution was necessary. A small number of the bills considered had been reported from a select committee in the 45th Parliament and re-referred to select committee in the 46th. The convention adopted here was to count only the changes made in the 46th Parliament.

⁴⁹ Standing Order 298(2).

⁵⁰ Marcus Ganley "The Role of the New Zealand Parliament in the Treaty of Waitangi Settlement Process" (Paper Presented to Australasian Political Studies Association Conference, Parliament House, Brisbane, 24 September 2001).

⁵¹ Barker and Levine, above, 126. Unfortunately the evidence they rely on for this is the continued assertion of the long-established rule of parliamentary procedure relating to bills

whole House may also indicate that the changes committees are recommending are more than 'tidying' at governmental behest.⁵²

Number of public bills examined	129
Total changes made at select committee stage	7262 (3691 unanimous/3571 majority)
Average number of changes per bill	56

Table 2: Total changes to public bills in 46th Parliament.

At an aggregate level the data, set out in Table 2, suggests that more changes are being made, with an increase from just over 40 changes per bill in 1989 and 1997 to 56 for the period of the 46th Parliament. This is in keeping with expectations given the minority status of the government during the 46th Parliament.

	Changes of whole clause per bill	Changes of whole subclause per bill	Changes of part of a subclause per bill
1977	4.5	7.3	15.4
1989	15.4	6.5	19.7
46 th Parliament	12.1	14.8	29.5

Table 3: Changes to public bills by type of change, 1977, 1989 and 46th Parliament.

These measures are very rough and attempting to draw conclusion from them is risky. It is possible that the number of clauses per bill has increased, explaining away any change.⁵³ Different drafting styles can also influence the number of amendments recorded. This problem is exemplified by a comparison of the Matrimonial Property Amendment Bill⁵⁴ and the Victims' Rights Bill. In both cases the committee concerned⁵⁵ recommended significant policy changes to the bills. In the case of the Victims' Rights Bill, rather than having a multitude of amendments made to

to confirm agreements, see Ganley "The Role of the New Zealand Parliament in the Treaty of Waitangi Settlement Process", above.

⁵² The government has other tools at its disposal to stymie bills it is unhappy with, such as the financial veto, where there is a financial impact or voting against the adoption of majority amendments at the second reading stage. It is interesting that these blunt instruments have been rarely used.

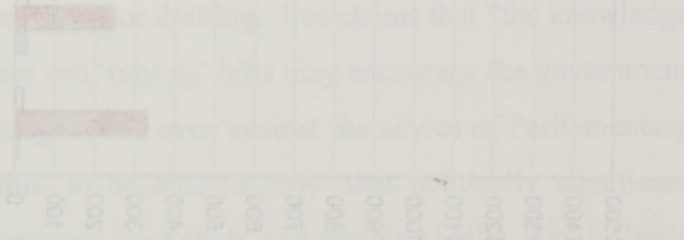
⁵³ Skene, above, 22 at note 23.

⁵⁴ Enacted as the Property (Relationships) Amendment Act 2001.

⁵⁵ Both Bills were reported from the Justice and Electoral Committee.

the existing text, the original clauses were omitted and replaced. A total of 56 amendments were made at select committee stage. In contrast the Matrimonial Property Amendment Bill saw 459 amendments made to the original wording. While the Matrimonial Property Amendment Bill may have been the subject of more significant policy change, the eight-fold difference probably exaggerates the difference. Often changes may be more presentational than substantive. For example, with the Pardon for Soldiers of Great War Bill the committee moved the names of those to be pardoned from the schedules to the body of the bill, while with the Māori Television Service Bill, much detail was transferred from the bill proper to the schedules. These variables may explain the decline (slightly in absolute sense, but marked in relative sense) in changes to whole clauses per bill since 1989 shown in table 3.

Just over half the changes recommended receive the unanimous support of the committee considering the bill. This may indicate committees are operating in a non-partisan manner. Alternatively, it may be the case that about half the changes recommended are merely technical and non-controversial. It is interesting to compare the differences between committees on this variable. Some committees almost never make majority recommendations, while others rarely reach unanimity. Figure 1 highlights these differences. It might be expected that committees that reach unanimous changes are likely to see fewer of their changes overturned in the House. There is some support for this with the highest rate of reversals occurring with legislation considered by the Justice and Electoral Committee. However, the small numbers make drawing conclusions dangerous.



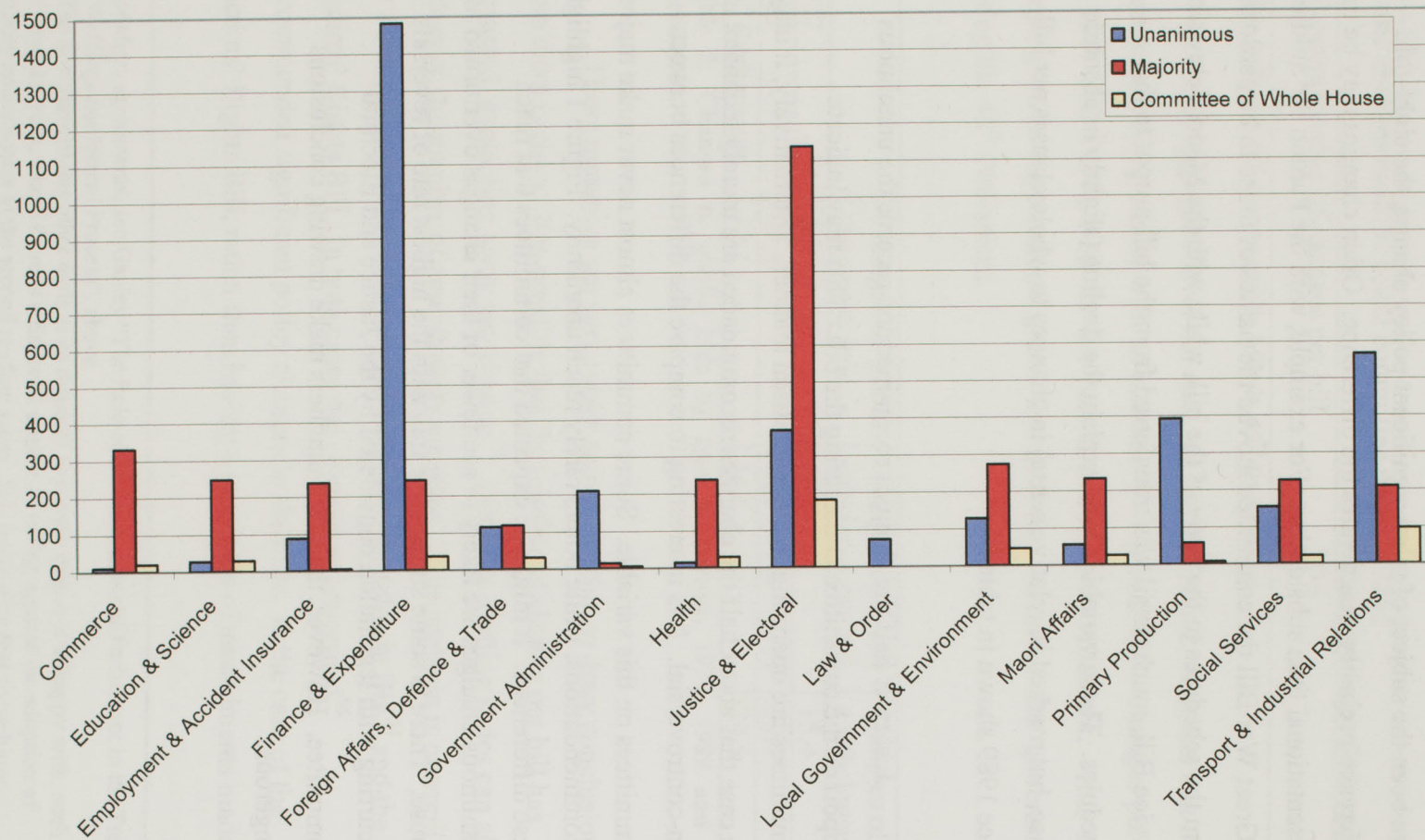


Figure 1 Change by committee

The figures for changes at committee of the whole House level, set out in table 4, record those changes made that significantly impact on a change made by a select committee. With more than one out of every eight changes recommended by a select committee being overturned in the committee of the whole House there is evidence to suggest that select committees do not consider themselves constrained to recommending changes that are supported by the government.

Average number of changes made to select committee changes	Average number of changes to amendments to whole clause	Average number of changes to amendments to whole sub-clause	Average number of changes to amendments to part of sub-clause
13.6	21.9	10.5	13.5

Table 4: Average number of committee of the whole House changes to select committee changes by type of change.

Unfortunately data for committee of the whole House changes to committee changes does not exist for the earlier studies. It would be interesting to compare the rates of change, as this may explain the relatively high number of changes observed in 1989. If there was a very low rate of reversal in committee of the whole House, this might suggest that the changes being made were mainly at the behest of the minister sponsoring the bill.

C Qualitative measures

While these measures will provide evidence of the extent to which bills are amended this does not allow any assessment to be made of the significance of the changes that are made. A large number of amendments may show nothing more than poor drafting. Iles claims that “the knowledge that the select committees can ‘tidy up’ bills may encourage the government to introduce bills in a rough form, even against the advice of Parliamentary Counsel”.⁵⁶ Beyond this, to be able to show that politically significant change is taking place requires close study of a sample of bills. On the basis

⁵⁶ Walter Iles “Parliamentary Scrutiny of Legislation” [1991] Statute Law Review 165, 178.

of such examination authors have found that committees are constantly making significant changes to legislation.

Skene⁵⁷ cites the example of the Children, Young Persons Bill 1986 which had every clause rewritten at select committee. When it emerged two years later as the Children, Young Persons and their Families Bill it was almost twice the size of the original bill. Michael Cullen, reflecting 11 years later on the bill which was introduced during his time as Minister of Social Welfare explains that it was during the hearing of evidence before the select committee that:⁵⁸

it became clear that the fundamental model ... on which the bill was based was both wrong and unacceptable to many. My two senior colleagues on the Select Committee advised me of that fact and the result was a fundamental recasting of the legislation on a totally different model.

Another example from the era of the Fourth Labour Government was the Mental Health Bill, which spent two years at the Social Services Committee.⁵⁹ After considering 152 submissions the committee reported the bill back, with significant amendments, as the Mental Health (Compulsory Assessment and Treatment) Bill. Skene also cites the Māori Fisheries Bill, which was changed to such an extent that the committee considering it decided it need to issue an interim report outlining the proposed changes so that further public submissions could be received.⁶⁰

Iles notes the controversial State Sector Bill 1988 was 48 pages long when sent to the Government Administration Committee and 153 pages long when reported back.⁶¹ Michael Cullen also argues that it was the select committee considering the highly controversial Employment Contracts Act

⁵⁷ Skene, above, 20.

⁵⁸ Cullen, above, 54.

⁵⁹ Skene, above, 20.

⁶⁰ Skene, above, 20.

⁶¹ Iles, above, 172.

in 1991 that successfully ensured the retention of a separate judicial system for industrial relations. He notes that:⁶²

Obviously it is rare for total policy reversal to occur. But it would not be fair to suggest that the power of the select committees is limited to minor matters or that it is essentially negative. It is normally constructive and often significant.

More controversially in the 45th Parliament the Finance and Expenditure Committee removed certain retrospective provisions from the Taxation (Accrual Rules and Other Remedial Matters) Bill 1998 against the will of the government. The Energy Efficiency Bill was a Member's bill initially vigorously opposed by the Minister of Energy. However, the Transport and Environment Committee,⁶³ that had a government majority, recommended that it proceed with amendments.⁶⁴

These examples indicate that significant change is occurring when select committees consider bills. Coupled with the evidence of a significant number of changes being made, this does suggest that select committees are having a significant impact. To test this further four case studies have been conducted of legislation considered by committees during the 46th Parliament. Case studies make it possible to assess: the significance of amendments, who is responsible for them, and how they are brought about.⁶⁵ Case studies also allow Skene's hypothesis,⁶⁶ that there are four variables that affect the likelihood of a committee changing a bill, to be assessed. The variables are:

⁶² Cullen, above, 53.

⁶³ Following the 1999 review of Standing Orders this committee was separated into the Local Government and Environment and the Transport and Industrial Relations Committees.

⁶⁴ For a discussion of the attitude of departmental officials servicing the committee see: Jeanette Fitzsimons (16 Feb 2000) 582 NZPD 541-543.

⁶⁵ Skene, above, 27-29.

⁶⁶ Skene, above, 25-26.

- The existence of divisions within the governing parties on the policy in question.
- The balance of influence with the government caucus.
- The personalities involved in the process, including: the interest groups lobbyists, representatives of the key departments and agency involved, the minister in charge of the bill, the chairperson of the committee and the opposition MPs. The ranking opposition MP, who will often be the most experienced MP on the committee, can be a dominant actor in the process.
- The level of public interest. The committee process opens the legislative process to direct public input. This provides valuable feedback to government on how their proposals are being perceived in the electorate.

D Case Study One: Employment Relations Bill 1999

Even with high priority (and highly political) government legislation there is evidence that committees can influence the final form of the legislation. A government will do its best to see such legislation emerge from the legislative process unchanged. However, there are usually political costs in doing this. Despite trying to minimise the changes to the Employment Relations Bill that occurred at the select committee stage, the government, following concerns raised during the hearings, proposed amendments to the bill to take account of these concerns.

1 Bill as introduced

The Employment Relations Bill was arguably the most contentious piece of legislation considered in the 46th Parliament. In addition to 169 hours of select committee time spent on the bill, it took 54 hours and 52 minutes under urgency including Saturday and Monday sittings of the House to complete its progress through the House.

The legislation repealed the equally controversial Employment Contracts Act and replaced it with a regime that according to the Minister of Labour placed “a greater emphasis on allowing workers who want that protection to more easily engage with a union and to benefit from a collective agreement”.⁶⁷ Furthermore the bill purported to “recognise the often unequal nature of employment relationships and attempt a re-balancing to produce fairer outcomes for all”. The National and ACT parties were strongly opposed to the legislation that they saw as “a huge step back for New Zealand”⁶⁸ and an attack on business and employers.⁶⁹ New Zealand First reserved its position on the bill.⁷⁰

2 *Committee considering the bill*

Rather than referring the bill to one of the 13 subject select committees that normally consider bills,⁷¹ this bill was referred to a special committee established on 22 December 1999 to consider the Accident Insurance (Transitional Provisions) Bill. At the time the Opposition criticised its establishment on a number of grounds. They suggested it was an attempt to avoid sending it to a committee chaired by Harry Duynhoven⁷² or one on which there were members of the Labour Māori caucus.⁷³ However, the criticism that was probably closest to the truth⁷⁴ was that the committee was established with a majority of members representing parties supporting the legislation,⁷⁵ unlike Transport and Industrial Relations, which was tied between the government and the opposition.⁷⁶

⁶⁷ Margaret Wilson “Employment Relations Bill: Productive relations in the workplace” (14 March 2000) Press Release.

⁶⁸ Hon Richard Prebble (16 March 2000) 582 NZPD 1176. Similarly, Rt Hon Jenny Shipley (16 March 2000) 582 NZPD 1167.

⁶⁹ Belinda Vernon (16 March 2000) 582 NZPD 1183; ACT Minority report, Employment Relations Bill 2000, 8-2 (the commentary) 39.

⁷⁰ Peter Brown (16 March 2000) 582 NZPD 1185.

⁷¹ Such as the Transport and Industrial Relations Committee, whose terms of reference are: accident compensation, industrial relations, labour, occupational health and safety, transport and transport safety (Standing Order 190(13)).

⁷² The then chairperson of the Transport and Industrial Relations Committee.

⁷³ See for example Hon Roger Sowry (22 December 1999) 581 NZPD 107-108.

⁷⁴ See Hon Tony Ryall (22 December 1999) 581 NZPD 109-111.

⁷⁵ The Greens had indicated support for both the government’s accident insurance legislation and the repeal of the Employment Contracts Act (Sue Bradford (16 March 2000) 582 NZPD 1172-1174). The membership of the committee was Graham Kelly (Chairperson), Helen Duncan (Deputy Chairperson), Luamanuvao Winnie Laban, Mark

Establishing ad hoc committees allows the government to ensure it has a majority and a chairperson it has faith in when committees are considering controversial legislation. This may allow it to reduce the impact of the select committee scrutiny of legislation. This method was used frequently in the 45th Parliament.⁷⁷ However, the Accident Insurance (Transitional Provisions) Bill and Employment Relations Bill were the only bills sent to an ad hoc committee in the 46th Parliament.

In keeping with the highly political nature of the legislation being considered, the committee operated in an unusually partisan manner. The minutes⁷⁸ reflect the committee often took issues to a vote, a practice not regularly seen on select committees, where it divided on party lines. A high profile example of this was the decision to refuse advice or even evidence from the Treasury.⁷⁹ How partisan the committee became can be seen from the specification of the majority in favour of progressing the bill in the first sentence of the commentary. This is an unusual detail to include in what is a standard sentence in bill commentaries, and was not in the draft prepared by committee staff.⁸⁰ The ill feeling created on the committee also became a matter of debate in the House.⁸¹

Peck (Labour), Willie Jackson (Alliance), Sue Bradford (Green), Peter Brown (New Zealand First), Hon Max Bradford, Gerry Brownlee, Dr Hon Lockwood Smith (National) and Hon Richard Prebble (ACT)

⁷⁶ The membership of the Transport and Industrial Relations Committee was Harry Dunnyhoven, Ross Robertson, Dianne Yates (Labour), Willie Jackson (Alliance), Gerry Brownlee, Simon Powers, Roger Sowry (National), Penny Webster (ACT).

⁷⁷ The following bills were considered by ad hoc committees in the 45th Parliament: Dairy Industry Restructuring Bill, Apple and Pear Industry Restructuring Bill, Kiwifruit Industry Restructuring Bill, Local Government Amendment Bill (No. 6) (ARST Abolition bill), Accident Insurance Bill. In the 44th Parliament the Agricultural Compounds Bill, the Hazardous Substances and New Organisms Bill and the Racing Amendment Bill were likewise considered by ad hoc committees.

⁷⁸ Select committee minutes relating to an item of business are publicly accessible once the committee has reported to the House on that item of business: Standing Order 237(1).

⁷⁹ "Legislators hear no evil" (19 May 2000) *The Dominion* Wellington 8.

⁸⁰ This becomes evident from comparison with draft 2 of the commentary with commentary as reported.

⁸¹ For example, Hon Max Bradford accused the committee chairperson of attempting to 'gerrymander the select committee process' (9 August 2000) 586 NZPD 4044.

The committee recommended nearly 280 amendments to the bill. However, these were predominantly technical.⁸² Perhaps the most significant change made was to the definition of 'employee' and position of contractors. As introduced, independent contractors could be deemed employees if they met a 'control and direction' test and an 'integration in the business' test. This provision drew significant criticism.⁸³ The amended test puts greater emphasis on 'matters that indicate the intention of the persons'. It also specifically excludes volunteers, Real Estate Agents and sharemilkers. The changes did not satisfy the opposition. The National minority report describes the basic notions as "fundamentally bad law".⁸⁴

Another controversial provision was that requiring employers to disclose sensitive information.⁸⁵ The committee recommended changes to protect the confidentiality of sensitive information by referring such information to an "independent reviewer" appointed by mutual agreement.⁸⁶ Other provisions that were changed as a result of submissions included the access provisions, so that it was clear that unions did not have the right of access to dwelling houses,⁸⁷ amendments to more comprehensively cover employees (particularly cleaners) whose business was sold or the work they were doing was contracted out,⁸⁸ and provisions relating to fixed term contracts to add greater clarity and flexibility.⁸⁹

⁸² John McSoriley *Employment Relations Bill 2000 as reported from the Employment and Accident Insurance Legislation Committee Bills Digest No. 682* (Parliamentary Library, Wellington, 8 August 2000) 2. This was certainly the National party's view, the National Party Minority Report, *Employment Relations Bill 2000, 8-2* (the commentary) 34.

⁸³ See, for example, Craig Howie "NZ Post joins employment bill criticism" (31 May 2000) *The Dominion* Wellington 16; Matthew Brockett "Bill 'threatens women's jobs'" (17 May 2000) *The Press* Christchurch 6; Bruce Holloway "Committee hears two very different views of act" (16 May 2000) *Waikato Times* Hamilton 2.

⁸⁴ *Employment Relations Bill 2000, 8-2* (the commentary) 38

⁸⁵ See, for example, David McLoughlin "Utu: The Revenge of the Unions" (July 2000) *North and South New Zealand* 54.

⁸⁶ *Employment Relations Bill 2000, 8-2* (the commentary) 10.

⁸⁷ *Employment Relations Bill 2000, 8-2* (the commentary) 7.

⁸⁸ *Employment Relations Bill 2000, 8-2* (the commentary) 11-12.

⁸⁹ *Employment Relations Bill 2000, 8-2* (the commentary) 13-14.

4 *Genesis of changes*

The committee received 2,305 substantive submissions and 15,064 form submissions and spent 133 hours hearing 391 oral submissions in Wellington, Auckland, Christchurch and Hamilton. It spent approximately 36 hours in consideration. Officials from the Department of Labour were appointed as advisers to the committee⁹⁰ as were Ken Douglas and Steve Marshall.

The changes made did seem to reflect the major concerns raised in submissions. This is particularly true of the changes to the independent contractor provisions and those relating to union access rights. The latter was of particular concern to federated farmers who were worried that as farms are both workplaces and homes, the bill as originally drafted would have allowed union officials the right to enter farmhouses. This would not only raise privacy concerns but could expose farmers to liability for accidents.⁹¹ However, very few substantive changes were made, and those made did not go as far as many submissions had urged.⁹²

5 *Amendments made by the committee of the whole House*

A number of amendments were made that refined amendments recommended by the select committee. These included further changes to the access provisions that could be seen as reversing the changes made by the select committee to mollify the concerns of business.⁹³ Changes were also made on motion of the minister to the fixed-term provisions that address some of the concerns raised by submitters who were concerned the bill as drafted, and indeed as returned from select committee, was too restrictive in relation to fixed-term employment.

⁹⁰ In accordance with Standing Order 210 officials from the government department sponsoring a bill are normally appointed as 'advisors' to a committee considering a bill.

⁹¹ For criticism of this provision as originally drafted see: "Fed Farmers says bill a disaster for rural sector" (19 May 2000) *The Southland Times* 9.

⁹² Dene Mackensive "Trade unions consider ERB 'done and dusted'" (4 July 2000) *Otago Daily Times* Dunedin.

In contrast to the positive picture painted of the role of select committees by authors such as Skene, Mulgan⁹⁴ argues that whenever important political issues arise committees revert to partisan clashes. The example of the Employment Relations Bill supports this contention. The committee operated in a highly partisan manner and the amendments that were made clearly had the approval of the government. It became clear that ministers were involved in decision making outside the committee room⁹⁵ that was translated into committee decisions through party discipline.

In this case, the role of the committee was largely confined to finding drafting errors and generally 'tidying-up' the legislation. However, the benefits that came from having a process for hearing public submissions should not be ignored. This process allowed concerns to be aired in a public forum and under constant media attention. Consequently significant political pressure came on the government to 'allow' changes to be made.

E Case Study Two: Te Ture Whenua Māori/Māori Land Bill 1999

1 Bill as introduced

Te Ture Whenua Māori Amendment Bill⁹⁶ was introduced, under urgency, on the last sitting day of the Forty-Fifth Parliament⁹⁷ by the then Minister of Māori Affairs, Hon Tau Henare and referred to the Māori Affairs Committee. The bill followed a major review of the Act, to which

⁹³ Interestingly, this amendment, moved by the Minister, was itself successfully amended on motion of the Greens' Sue Bradford.

⁹⁴ Richard Mulgan *Politics in New Zealand* (Auckland University Press, Auckland, 1994) 77.

⁹⁵ See, for example, Ian Llewellyn "ERB changes 'superficial' say opposition MPs" (19 July 2000) *The Independent* 3; Graeme Peters "Employment Relations Bill secrecy doing a job on NZ" (22 July 2000) *The Evening Post* Wellington 9.; "Cullen breaks secrecy over employment Bill" (5 July 2000) *The Evening Post* Wellington 2; Howie, above, 16.

⁹⁶ Bill number 336-1.

⁹⁷ Tuesday 5 October 1999. The House actually sat until Friday 8 October but this was one sitting day as the House was in urgency from Tuesday afternoon.

the Minister of Māori Affairs committed when the original Act was passed,⁹⁸ and followed “extensive consultation”⁹⁹.

This bill proposed significant changes to the principal Act,¹⁰⁰ including:

- changes to the rules for the alienation of Māori freehold land and the confirmation of alienations;
- providing a new power to the Court to order access to Māori land that is landlocked;
- requiring consideration of an intended Judges’ knowledge of te reo Māori, tikanga Māori, and the Treaty of Waitangi prior to their appointment to the bench;
- increasing control by owners over the establishment and management of trusts and incorporations by reducing the Māori Land Court (MLC)’s discretion in relation to trusts and incorporations.

Particularly significant were changes to section 30 of the principal Act to extend the MLC’s power to advise or determine the most appropriate representatives of “a class or group of Māori” in proceedings or negotiations, consultations, allocation of funding, or other matters. The amendments originally proposed would allow the court to identify the most appropriate representatives for specific, as well as general, purposes¹⁰¹ and to place an expiry date on advice supplied or a determination made identifying appropriate representatives of a group of Māori.¹⁰²

⁹⁸ Te Ture Whenua Māori/Māori Land Bill 1999, 336-1 (explanatory note) 1.

⁹⁹ Te Ture Whenua Māori/Māori Land Bill 1999 1.

¹⁰⁰ The bill as introduced (336-1) had 62 clauses.

¹⁰¹ Clause 10(1): new section 30(1A).

¹⁰² Clause 10(2): new sections 30(3A) and 30(3B).

2 *Committee considering the bill*

Of the nine members on the Māori Affairs Committee, four¹⁰³ were from the Labour party. Together with Willie Jackson from the Alliance this saw the government parties holding a clear majority on the committee. However, all committee amendments were unanimous. This suggests that the partisan balance was not a crucial factor in the committee's deliberations and that there was room for contribution from opposition members. The opposition MPs¹⁰⁴ brought considerable expertise to the committee's consideration, with three of the four members at the time having served as ministers. The senior opposition member on the committee, Hon Doug Kidd, in addition to bringing considerable parliamentary experience,¹⁰⁵ had been the Minister of Māori Affairs at the time the original bill was passed. His National colleague, Hon Georgina Te Heuheu, as well as having been an Associate Minister for Treaty Negotiations served on the Waitangi Tribunal before entering Parliament.

3 *Amendments made by select committee*

The bill emerged from select committee significantly changed. A number of proposals to introduce Māori definitions into the Act were removed, as was the proposed extension of the class of beneficiaries under a will to include whangai. Provisions relating to wahi tapu were overhauled and the multiple provisions relating to alienation by different types of owners were clarified and, to a large extent, consolidated. The original proposals to amend section 30 were completely overhauled and replaced with wider-reaching changes. According to the committee, the amendments it proposed to section 30 represent "a progressive shift away from the approach taken in the past by the Court in imposing decisions on parties, to a Court interested in facilitating the resolution of differences by the parties themselves or by mediation".

¹⁰³ John Tamihere, Dover Samuels, Joe Hawke and Mahara Okeroa.

¹⁰⁴ Hon Doug Kidd, Hon Georgina Te Heuheu and Wayne Mapp from National, and Hon Richard Prebble from ACT.

¹⁰⁵ He had been an MP for 24 years including six as a Cabinet minister and three as Speaker.

Most of the 38 submissions received by the Māori Affairs Committee were concerned solely or predominantly with the provisions relating to access to landlocked land. Submissions from Māori supported the provisions while they were opposed by those from local authorities (costs), the Department of Conservation (conservation land being used for access), and New Zealand Railways Corporation and Tranz Rail Limited (public safety issues). These resulted in changes to exclude national parks, public reserves and railway lines and require the MLC to have regard to issues of public safety raised by a rail service operator.

The other major issue in the bill was that of representation. Nine submissions touched on this topic.¹⁰⁶ The most substantial submission on section 30 came from the MLC bench, which recommended that the existing adjudicative system be replaced with a system based on mediation.¹⁰⁷ While it is not unheard of for judges to appear before select committees to provide evidence on how proposed legislative changes might work in practice, it does raise questions about separation of powers and whether a 'Court' should be promoting changes to legislation.¹⁰⁸

Also highly influential was a Law Commission advisory report prepared for Te Puni Kōkiri (TPK).¹⁰⁹ This paper highlighted a number of issues with section 30, which will be discussed below. Significantly the

¹⁰⁶ These were the submissions from Te Runanga o Ngāi Tahu, Te Runanganui o Te Pakakohi Trust Inc, Te Hunga Roia Māori o Aotearoa, the New Zealand Māori Council, Tama Nikora, Joe Rua, Rudland Law, Chris Webster, Te Whenua Motuhake o Whaingaroa and the Māori Land Court.

¹⁰⁷ A similar point was made in the brief submission from the New Zealand Māori Council. Chief Judge Joe Williams and Deputy Chief Judge Wilson Isaacs appeared before the committee in private session on 14 September 2000 in support of the submission.

¹⁰⁸ As the reaction to the role played by Court of Appeal judges in the Crimes (Criminal Appeals) Amendment Bill highlighted. See for example, Christine Langdon, "Tanczos defends judges over crimes bill briefing" (13 June 2001) *The Dominion* Wellington 11; Matthew Palmer quoted in Brent Edwards "Judges accused of meddling" (12 June 2001) *The Evening Post* 1.

¹⁰⁹ The advice was later published as a study paper: Law Commission *Determining Representation Rights Under Te Ture Whenua Māori Act 1993: An Advisory Report for Te Puni Kōkiri - Study Paper 8* (Wellington, 2001) para 22.

Commission noted, “long term, we believe that a process-based solution may work better than a court-imposed solution”.¹¹⁰

Some evidence of the independence of the committee from governmental direction can be drawn from the number of departmental reports produced for the committee. Where a committee is simply making changes for the purposes of the minister, it would be expected that the committee’s changes followed very closely those proposed in the report from departmental advisers. However, where the committee has requested various refinements to the departmental advice, and the final report has come through numerous iterations, as happened in this case, it suggests the committee is showing a degree of independence.

5 *Amendments made by the committee of the whole House*

The select committee reported the bill back to the House on 30 November 2000. The House considered the report on 22 March 2001. More than a year elapsed before the bill was considered in the committee of the whole House. When this finally occurred substantial amendments were made to the amendments proposed by the select committee.¹¹¹ Many of these addressed technical concerns with the amendments.¹¹² Other amendments to the process of mediation prohibit a judge who sits as the MLC on a case from being the mediator,¹¹³ limit the ability of the Judge referring the matter to mediation to prescribe the mediation process¹¹⁴ and remove a power for mediators to receive confidential information.¹¹⁵ Proposed section 30G, dealing with unsuccessful mediations, is also substantially redrafted.

¹¹⁰ Law Commission, above, para 42.

¹¹¹ These amendments were set out in Supplementary Order Papers 124 and 273 in the name of Hon Parekura Horomia. The changes are now incorporated into the bill as reported from the committee of the whole House (336-3) and are discussed below.

¹¹² Changes of this nature were made to the following proposed sections: 30B(3)(b), 30C(1), 30C(5)(a), 30D(1), 30D(2) and 30G(2).

¹¹³ New subsection 30D(6) inserted.

¹¹⁴ Proposed section 30E(1) struck out and replaced.

¹¹⁵ Proposed section 30E(2) deleted.

The most significant change to occur in the Committee of the whole House related to the interaction between the committee's proposed changes and Treaty settlement negotiations. In July 2001 the Justice and Electoral Committee commented¹¹⁶ that the Minister in Charge of Treaty of Waitangi Negotiations believed the proposed amendments would allow the MLC to make determinations that are binding on the Crown and that this could override the processes adopted by the Office of Treaty Settlements. According to Simes, while this would not prevent the Crown from deciding to negotiate with different representatives, such a choice would be "transparent and open to political challenge".¹¹⁷ The amendments adopted by the committee of the whole House remove the power to specify who is bound by an order.¹¹⁸ Additionally, a new subsection was inserted to prevent orders binding the Crown in relation to Treaty settlement negotiations without Crown consent.

6 *Assessment of committee's consideration of the bill*

This case study shows that where legislation is not controversial in a partisan sense, a select committee can play a significant role in revising significant policy issues within the legislation. It also shows the importance of submissions from key interests. While some of the changes to section 30 were altered at committee of the whole House, it is clear that the submissions from the MLC and the Law Commission had a significant impact on the changes made to the bill.

An alternative explanation could be that the changes resulted from policy work undertaken by the government between the introduction of the bill in October 1999 and the reporting back of the bill at the end of November 2000. As a change of government had occurred, it would not have been surprising to observe a change in government policy. However,

¹¹⁶ Justice and Electoral Committee "Report on the 2001/02 Estimates Vote Treaty Negotiations" (20 July 2001) para 7.1.

¹¹⁷ Cheryl Y Simes "Deciding who should represent Māori" [2002] NZLJ 100, 101.

¹¹⁸ Section 30H(a) as reported from the Māori Affairs Committee. Also removed is the power to specify that an order is advisory only: Section 30H(a) as reported from the Māori Affairs Committee.

there is little evidence of this.¹¹⁹ In advice to the committee, TPK states that the committee directed TPK and the Parliamentary Counsel Office to draft amendments along the lines of the proposals by the MLC and the Law Commission.¹²⁰

F Case Study Three: Misuse of Drugs Amendment Bill

1 Bill as introduced

Like Te Ture Whenua Māori Amendment Bill, this bill was also introduced under urgency on the last sitting day of the 45th Parliament. The main objective of the bill was to provide for expeditious classification of substances as prohibited drugs rather than requiring amendments to be made to the Misuse of Drugs Act each time a new drug was identified that warranted prohibition. Additionally, the bill as introduced established a 'presumption of possession to supply' threshold for 'extasy' and related drugs and provided a defence for travellers with controlled drugs that have been prescribed to treat their medical condition.

2 Committee considering the bill

The Health Committee had a government majority unless the Greens voted with the opposition.¹²¹ More than any other committee in the 46th Parliament this was an expert committee. Of the eight members two were doctors,¹²² one a former nurse and public health manager¹²³ and two were

¹¹⁹ An examination of the Te Puni Kōkiri Post Election Briefing to Incoming Ministers, reveals only one cursory mention of section 30 of Te Ture Whenua Māori Act 1993: Te Puni Kōkiri, "Post-Election Briefing to Incoming Ministers" (Wellington, 1999).

¹²⁰ Te Puni Kōkiri, "Report to the Māori Affairs Select Committee on Te Ture Whenua Māori Amendment Bill 1999" (2 October 2000) 4.

¹²¹ On one high profile occasion the government lost its majority due to a defection by the Alliance - on the vote to establish the inquiry into Dr Graeme Parry. The membership of the committee at the time was: three Labour (Judy Keall, Steve Chadwick and Mita Ririnui), three National (Wyatt Creech, Paul Hutchison and Lynda Scott) one Alliance (Phillida Bunkle) and one Green (Sue Kedgley).

¹²² Drs Paul Hutchison, and Lynda Scott.

¹²³ Steve Chadwick.

well known public health campaigners.¹²⁴ The chairperson had been chair of the Social Services Committee (which was then responsible for health) during the Fourth Labour Government and a member of the Health Committee since. The senior opposition member was the Minister of Health at the time the bill was developed.

3 *Amendments made by select committee*

The committee made 12 changes to the bill, all unanimously. The original bill proposed that the schedules listing class A, B and C drugs be removed from the Act and placed in regulations. New drugs would become classified and existing controlled drugs reclassified by regulation rather than legislative amendment. However, the regulations would have to be approved by a resolution of the House. The Regulations Review Committee argued that this procedure violated the long-established principle that matters of policy and substance should be dealt with by Act of Parliament rather than regulations that should be confined to dealing with matters of technical detail necessary to implement policy. Under the original proposal regulations would effectively determine the magnitude of an offence committed under the Act.

The committee saw a need to strike a balance between the desire for expeditious scheduling and the need for appropriate parliamentary oversight. To achieve this they recommended that the schedules remain in the principal Act but provision be made for them to be amended by Order in Council.¹²⁵ Provisions were also made to ensure that both the Regulations Review and Health Committees would have an opportunity to scrutinise the Orders in Council.¹²⁶

¹²⁴ Phillida Bunkle and Sue Kedgley.

¹²⁵ This was not without precedent, see, for example, section 11 of the Tariff Act 1988 and section 80 of the Customs Act 1996.

¹²⁶ The Regulations Review Committee would retain the power to draw attention to the regulation under Standing Order 382 (2). The Health Committee's role flowed from following Sessional Order adopted by the House on the committee's recommendation:

- 1) Any Notice of Motion to approve an Order in Council made under section 4(1) of the Misuse of Drugs Act 1975 stands referred to the Health Committee for examination.

In addition to this procedural reform, the committee also felt that there was not enough rigour in the procedure for making the policy decision as to which class a particular drug should fall within. On these grounds they recommended that an expert advisory committee should be established. The committee was not satisfied with departmental advice that such a committee could be established by ministerial fiat and amended the legislation to require the establishment of the committee. Analysis of the advice received by the committee shows that this was not something the Ministry of Health supported. It places a significant restriction on the powers of the Minister of Health.

4 *Genesis of changes*

Clearly the major source of influence for the amendments relating to parliamentary procedure was the report of the Regulations Review Committee. However, this change also highlights the role played by parliamentary officials. Both the Clerk of the House and the legal adviser to the Regulations Review Committee appeared before the Health Committee to advise on this issue. Until this point the committee looked like following a different course.

According to the commentary the decision to establish the expert advisory committee owes much to the submission from the New Zealand Drug Foundation. The Foundation argued that a statutory committee is required to provide the Minister with stable and reliable advice on the classification of drugs.

Like *Te Ture Whenua Māori*, this bill saw departmental advisers asked to provide various alternative recommendations and three

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- 2) The Health Committee must report to the House on any such Notice of Motion within 28 days of the Notice of Motion being lodged.
 - 3) No motion to approve an Order in Council made under section 4(1) of the Misuse of Drugs Act 1975 can be moved until either the Health

departmental reports, before the committee was satisfied with the departmental recommendations.

5 *Assessment of committee's consideration of the bill*

The consideration of this bill by the Health Committee again highlights the policy development role that can be played by a select committee. Despite a government majority, this committee acted contrary to departmental advice. In part this can be attributed to the subject area expertise of the members that enabled them to contest departmental advice. This bill also shows how the select committee process can be used to ensure that the interests of parliament in ensuring scrutiny of executive policy making are protected from incremental erosion. The two committees involved provided forums for the parliamentary officials to provide alternative viewpoints to those put forward from the executive government's bureaucracy.

G *A significant amount of significant change*

While there are dangers in placing too much store in the data collected on the quantum of changes occurring at the select committee stage, they are indicative of a significant amount of change occurring. It is also probably safe to conclude that this is increasing. There is also evidence that the changes being made are more than just 'tidying'. If this were the case then it would be difficult to explain the number of changes made to committee amendments at the committee of the whole House stage. The case studies support this. While on highly partisan legislation such as the Employment Relations Bill, not much significant change occurs, on less partisan legislation committees do seem prepared to make major amendments that effect the policy of the bill, even in the face of opposition from officials representing the Minister.

Committee has reported to the House on the Notice of Motion or 28 days have elapsed since the Notice of Motion was lodged, whichever is earlier.

IV STRUCTURAL EXPLANATIONS FOR THE IMPACT OF THE COMMITTEE SYSTEM

Both in terms of the number of amendments made to government legislation and the significance of the changes made, it appears that the New Zealand Parliament, via its committee system does have significant legislative impact. Commentators outside New Zealand have viewed the structure of New Zealand's system favourably.¹²⁷ This Part considers the argument that it is the structure of the committee system makes it comparatively influential.

A A tradition of parliament committees

Part of the reason parliamentary committees are so strong in New Zealand is their longevity.¹²⁸ As table 5 shows, New Zealand has long had a substantial committee system. This is not true elsewhere.¹²⁹ One of the problems faced by those promoting the introduction of a committee system in the Queensland Legislative Assembly was the lack of any experience with committees in that chamber.¹³⁰ The Australian House of Representatives did not have a substantial number of non-domestic committees until the 1960s¹³¹ nor the Senate until 1970s.¹³²

¹²⁷ Derek Hawes *Power on the Backbenches?: The Growth of Select Committee Influence* (SAUS Publications, London, 1993) 208; Stone, above, 37 and Ken Coghill "Scrutiny of Victorian bills" (1996) 10(2) *Legislative Studies* 23.

¹²⁸ Keith Jackson *The Dilemma of Parliament* (Wellington, Allen & Unwin, 1987), 116-117; Elizabeth McLeay "Parliamentary Committees in New Zealand: A House continually reforming itself?" (2002) 16(2) *Australasian Parliamentary Review* 121, 124.

¹²⁹ Until quite recently some of the Australian State legislatures had only 'domestic' committees dealing with matters to do with the management of the House, library, printing, catering, for example.

¹³⁰ Wayne Goss "Parliamentary Committees in Queensland" (2002) 16(2) *Australasian Parliamentary Review* 73.

¹³¹ See Malcom Aldons "The Growth of Parliamentary Committees of the House of Representatives and Joint Committees" (1991) 6(1) *Legislative Studies* 6, 7.

¹³² Harry Evans *Odgers' Australian Senate Practice* (9 ed, AGPS for the Department of the Senate, Canberra, 1999) 262.

The establishment of the current powerful system is “the product of a long evolutionary process beginning in the nineteenth century”.¹³³ Early committees were mainly domestic. New Zealand also had an early experience with subject select committees. Most were originally set up to undertake particular investigations and later became institutionalised. The quintessential example is the Native Affairs Committee first set up in 1854 to consider problems of vaccination. From 1871 onwards the committee was established on an annual basis. Other subject committees established before 1900 related to lands,¹³⁴ agriculture and pastoral matters, public health, defence and education.

Year	Number of committees	Total number of committee places	Average number of members per committee	Average number of committee places per member
1920	28	285	10.2	3.6
1930	31	234	9.4	2.9
1940	28	195	9.8	2.4
1950	24	224	9.3	2.8
1960	22	207	9.4	2.6
1970	20	200	10.0	2.4
1980	18	151	8.6	1.7
1990	21	114	5.4 ¹³⁵	1.2
2000	19	162	8.5	1.35

Table 5 Size and membership of committees 1850-2000.¹³⁶

The committees were the focus of much parliamentary business. According to an MP speaking in 1964,¹³⁷ before 1928 committees met on Tuesday, Wednesday, Thursday and Friday mornings.¹³⁸ In the 1956-1957 session, four percent of debating time in the House was spent debating such reports. This had declined slightly by the 1966-1967 session (to 3.4 per cent) but by the 1976-1977 session it had fallen to less than one percent.¹³⁹ Today debates on non-legislative reports of select committees are rare.

¹³³ Skene, above, 4.

¹³⁴ ‘Lands’ was the subject of 25 *ad hoc* committees established between 1854 and 1870.

¹³⁵ Corrected – error in original.

¹³⁶ Source: Skene, above, 7 (1920-1990) and 587 NZPD (non numbered facing page).

¹³⁷ Daniel Riddiford MP (1964) 338 NZPD 254-255 quoted in Jackson *The Dilemma of Parliament* 117.

¹³⁸ Since the election of the First Labour Government in 1935 first Thursday mornings then Tuesday mornings were lost to caucus meetings. Standing Orders now require unanimous consent of the committee for a meeting on a Friday, making such meetings rare.

¹³⁹ Geoffrey Palmer *Unbridled Power* (Oxford University Press, Wellington, 1979), 47.

However, as accounts by Lipson in 1948 and McRobie in 1972 indicate even the most influential committee at the time they wrote was not particularly effective. Lipson's examination of the Public Accounts Committee led him to conclude that while the system should allow rigorous parliamentary control of expenditure "as the system now operates in New Zealand, the work of the committee is absolutely inadequate".¹⁴⁰ He saw this as uncontroversial being "conceded on all sides by the officials and the parliamentarians with whom the writer has discussed the matter".¹⁴¹ The Public Expenditure Committee later replaced the Public Accounts Committee. However, McRobie concluded that committee's investigations were largely "superficial and perfunctory".¹⁴² Jackson saw little chance for improvement asking, "What government in its right mind wants the Public Expenditure Committee to have teeth, if it can possibly avoid it?"¹⁴³

B Key features of the system

The strengthening of the committee system initially took place gradually. Parliament has formally reviewed its processes on a dozen occasions since 1950.¹⁴⁴ Until 1968 the impact on the committee system can be characterised as mainly tinkering. From that point on a series of seemingly innocuous changes were made that cumulatively greatly strengthened the committee system. Finally, following the 1984 election, a major review of the Standing Orders was undertaken with a view to significantly increasing the influence of the committee system. The ensuing 1985 report of the Standing Orders Committee recommended many of the changes proposed by Palmer in *Unbridled Power* and was influenced by the 1979 reforms of the

¹⁴⁰ Leslie Lipson *The politics of equality: New Zealand's adventures in democracy* (University of Chicago Press, Chicago, 1948), 324.

¹⁴¹ Lipson, above, 324.

¹⁴² A D McRobie, "The Public Expenditure Committee" (research essay completed in Political Science Department, University of Canterbury, 1972) 28, quoted in Keith Jackson *New Zealand: politics of change* (Reed Education, Wellington, 1973) 136-137.

¹⁴³ Jackson 1973 *New Zealand: politics of change* 138.

¹⁴⁴ Standing Orders Committees were appointed in 1950, 1962, 1967-68, 1972, 1974, 1979, 1984, 1989, 1992, 1994, 1998 and 2000.

Commons.¹⁴⁵ The system as it is now configured has six key features that make it comparatively influential:

- Legislation automatically stands referred to committee;
- Public submissions are heard on bills as a matter of course;
- Committees are not restricted to technical amendments;
- Changes are drafted into the legislation as reported back;
- The committees are subject specialists; and
- The government is not guaranteed a majority on committees, as the overall membership is proportional.

1 Automatic referral of legislation to select committees

New Zealand is unique in the Westminster-world in that almost all legislation is scrutinised by committees, with legislation automatically standing referred to a committee.¹⁴⁶ This is markedly different from many other jurisdictions. In the Australian Senate, for example, committees only consider bills if a member successfully moves to refer them.¹⁴⁷ The Senate refers only around a third of government bills that it considers for committee scrutiny, as shown in table 6 below.

Year	1996-97	1997-98	1998-99	1999-2000	2000-01	2001-02
Bills considered	184	218	167	185	148	153
Bills referred to committees	67	77	94	66	66	46

Table 6: Government bills referred to committees by the Australian Senate legislation 1996-2002.¹⁴⁸

¹⁴⁵ Geoffrey Skene "Parliamentary Reform" in J Boston and M Holland *The Fourth Labour Government: Radical Politics in New Zealand* (Oxford University Press, Auckland, 1987), 76; Skene *New Zealand Parliamentary Committees*, above, 4.

¹⁴⁶ "Appropriation" and "Imprest Supply Bills" are not referred to select committees as such, however the contents of appropriation and imprest supply bills are scrutinised by the committees during their consideration of the budget estimates: David McGee *Parliamentary Practice in New Zealand* (2 ed, GP Print, Wellington, 1994) 262 *contra* McRae, above, 204.

¹⁴⁷ Evans *Odgers' Australian Senate*, above, 246.

¹⁴⁸ Department of the Senate *Annual Report 2001-02* (Parliament of the Commonwealth of Australia, Canberra, 2002) Table 2.

Prior to 1979¹⁴⁹ in New Zealand legislation was referred by government motion. This provided a major limitation to the effectiveness of select committees. In 1976, less than half (52 from 114) of the public bills considered that session were referred to committee.¹⁵⁰ Mitchell estimates that in the 1950s and 1960s between two-fifths and one-third of the total number of bills were referred to select committees.¹⁵¹ Jackson notes Kelson's claim¹⁵² that in the eighteen years to 1964 only one Private Member's Bill had been referred to a select committee. This latter practice changed significantly in the 1970s. In the 1975 session, for example, nine of the fifteen Private Members' Bills introduced were sent to select committees.¹⁵³

According to Jackson, the following considerations were taken into account leading to a "remarkably haphazard" pattern of referrals:¹⁵⁴

- Parliamentary 'tit-for-tat': a government refusing to send a bill to committee because the opposition, when in government, refused to subject some other bill, whether related or not, to committee scrutiny.
- The lack of a corresponding subject committee. This is despite the fact that the vast majority of bills that did receive scrutiny were sent to the Statutes Revision Committee rather than a subject committee.¹⁵⁵
- The belief on the part of the minister concerned that "if he can get the department and the pressure groups to agree on a particular piece of legislation, there is no need for any further consideration of the matter".¹⁵⁶

¹⁴⁹ Skene "Parliamentary Reform", above, 76; Skene *New Zealand Parliamentary Committees*, above, 4.

¹⁵⁰ Keith Jackson "A political scientist looks at Parliament" in John Marshall (ed) *The Reform of Parliament: contributions by Dr. Alan Robinson and papers presented in his memory concerning the New Zealand Parliament* (Institute of Public Administration, Wellington, 1978) 95.

¹⁵¹ Austin Mitchell *Government By Party* (Christchurch, Whitcombe & Tombs, 1966) 72.

¹⁵² Robert N Kelson *The private member of parliament and the formation of public policy: a New Zealand case study* (University of Toronto Press, Toronto, 1964) 86.

¹⁵³ Jackson "A political scientist looks at Parliament" above, 95.

¹⁵⁴ Jackson "A political scientist looks at Parliament" above, 95-96.

¹⁵⁵ Marian L Logeman "Committee Structure and Parliamentary Function" in Stephen Levine (ed) *New Zealand Politics: A Reader* (Cheshire, Melbourne, 1975) 365, 373 n 13.

¹⁵⁶ Kelson, above, 86.

To this list can probably be added:

- Reluctance to subject a bill to scrutiny if it can be avoided; and
- Reluctance to give the Opposition a forum to gather information and criticise the government.

At this stage the powerlessness of the committees was still lamented. Jackson claimed that committees were “essentially ‘tame’ bodies generally reluctant to act in any way which might be construed as embarrassing the Government”.¹⁵⁷ He saw this as a result of the small size of the New Zealand Parliament¹⁵⁸ and the very high levels of legislative party cohesion that marked both major parties.

This reform was fundamental to the institutionalisation of a strong committee system. Any further strengthening of the system was contingent on establishing automatic referral of bills to select committee. As long as the government of the day retained an absolute discretion on whether to refer a bill to committee any further strengthening of the committees would have been, in all likelihood, counterproductive as it would discourage ministers from sending bills to committee.

2 *Public submissions as a matter of course*

When a bill is referred to a select committee public submissions are called for as a matter of course. Committees also hear oral submissions from almost anyone who wishes to be heard and will travel to facilitate oral submissions.¹⁵⁹ While committees in many jurisdictions hear public submissions, there is not the same expectation that submissions will be invited and heard as a matter of course. This public involvement is a key element in the process as it vests significant legitimacy in the committee’s conclusions. The expectation is created that some weight will be given to

¹⁵⁷ Jackson “A political scientist looks at Parliament” above, 1978, 98.

¹⁵⁸ At the time Jackson was writing the New Zealand Parliament had 87 Members.

public submissions. Where there is significant public concern expressed during the hearings of evidence this makes it difficult for a government to press on with the legislation it sent to the committee without any modifications. When government legislation is introduced we can usually assume that considerable work has gone into its development. However, this work goes on behind closed doors. While there is an expectation that consultation will be undertaken,¹⁶⁰ there is a qualitative difference between consultation being undertaken by the proponents of legislation and making submissions to a multi-party committee made up of members with a range of views on the issues.¹⁶¹

Since 1974 the hearing of submissions has been open to the public and the media.¹⁶² This drew much greater attention to the work of select committees and drew more public submissions.¹⁶³ Currently Standing Orders require hearings of evidence to be in public unless the committee unanimously agrees otherwise.¹⁶⁴ Of course when the public (and even more so the media) are present the behaviour of members and the dynamics of the committee are quite different to when members meet behind closed doors.¹⁶⁵ The partisan clashes observed by Mulgan are more likely to occur during hearings of evidence than when committees are in closed session.

New Zealand's legislative process probably provides the greatest opportunity for public participation of any legislature. A recent OECD report¹⁶⁶ found that committees in all of the 28 national legislatures

¹⁵⁹ Recently infrastructure has been put in place to allow videoconferencing where travel is uneconomic.

¹⁶⁰ Indeed, the Legislation Advisory Committee highlights the importance of consultation with interested parties: Legislation Advisory Committee *Guidelines on the Process and Content of Legislation* (Wellington, 2001) 24-26.

¹⁶¹ See Derek Quigley "Select Committees and Multiparty Policy-making" (2000) *The Parliamentarian* 132, 133.

¹⁶² Up to this point the admission of the press required a motion of the House. (Jackson "A political scientist looks at Parliament", above, 96).

¹⁶³ Jackson "A political scientist looks at Parliament", above, 96.

¹⁶⁴ Standing Orders 217 and 219.

¹⁶⁵ Marcus Ganley "Public Perceptions of the New Zealand Parliament" (2000) 14(2) *Legislative Studies* 68 [Republished in (2000) *Parliament and Business Trust Information Bulletin* (3)].

¹⁶⁶ Organisation for Economic Co-operation and Development *Report on Parliamentary Procedures and Relations* (PUMA/LEG(2000)2/REV1, 22 January 2001) 14.

participating in the survey, as well as the European Parliament, could conduct public hearings on legislation. However, New Zealand was singled out both for holding public hearings on almost all legislation and for committees striving to hear most submissions received. While the former is a key element of the process, the latter is perhaps more a function of the size of polity.

The submission process strengthens the ability of government backbenchers to influence decisions within the government caucus. Parties discuss in caucus the way their members on a select committee should vote on legislation before any final votes are taken. However, the MPs that serve on the committee and have read the submissions, witnessed the public hearings and been briefed by the relevant departments will be better prepared than their colleagues to determine what the party line on the legislation should be. If government MPs believe that the minister in charge of the legislation has not properly addressed the issues that have been raised in the submissions, they are in a position to argue the matter in caucus. But for the committee process they might be unaware of such issues.

3 *Ambit of investigation*

Unlike the 'Scrutiny of Bills' committees of the Australian state parliaments, the New Zealand committees are not restricted to technical amendments. A committee can recommend any amendments that are within the scope of a bill.¹⁶⁷ This can include major changes that affect the policy of the bill.¹⁶⁸ The origin of this power lies in a seemingly innocuous change that was made, in the interests of efficiency, following the 1967-68 review of Standing Orders. Provision was made for local bills to be referred directly to the Local Bills Committee during a parliamentary recess. The committee considered the bills without them ever having gone before the House.

¹⁶⁷ The scope rule is discussed further in Part VI.

¹⁶⁸ Depending on the nature of the bill and the nature of the changes, some policy changes may be outside the scope of the bill.

This development was built upon in 1972 by a reorganisation of the legislative process that saw select committees considering bills after their first reading. Traditionally the first reading of a bill is merely the statement of intent. It is only when the House agrees to the second reading of a bill that it indicates an acceptance of the bill in principle. Sending bills to select committee before the second reading has been seen as meaning that the committee is able to make policy changes to the bill as well as technical changes. Herman and Mendel¹⁶⁹ argue that sending bills directly to a committee is a fundamental element of an established committee system. Of the 56 parliaments they examined they found that in 21 Parliaments a bill is considered first in the House itself and that in the remaining countries it is considered first by a parliamentary committee. According to Jackson¹⁷⁰ while the 1972 change “represented a maintenance of the primacy of the House of Representatives in theory,” in effect in New Zealand bills are *considered* for the first time by a select committee. The first reading debate serves a filtering rather than a deliberative purpose.

In 1995 the Standing Orders Committee recommended that the first reading debate be done away and the first reading became a simple formality. Following this change the first debate on a bill took place at second reading. If a bill was agreed to at second reading then it went to a select committee. This should have seen committees lose their ability to make substantive amendments to bills as once the second reading is agreed to the House has agreed to policy of the bill and it should not open to a constituent body of the House to overturn this agreement.¹⁷¹ Despite this committees continued to make both substantive and technical amendments to the bills referred to them and the change was reversed in 1999.¹⁷²

¹⁶⁹ Valentine Herman and Françoise Mendel *Parliaments of the World. A Reference Compendium* (Macmillan Press for Inter-Parliamentary Union, London, 1976) 661.

¹⁷⁰ Jackson “A political scientist looks at Parliament”, above, 96.

¹⁷¹ Mcleay, above.

¹⁷² Standing Orders Committee “Report on the review of Standing Orders” [1999] AJHR I.18A 23-24.

New Zealand is almost unique in the Westminster world in that committees recommend changes that are drafted into the bill as reported back to the House rather than simply reporting findings. On government bills the committee is automatically provided with assistance from the Parliamentary Counsel Office to draft these changes.¹⁷³ It is this redrafted bill, along with a commentary explaining the committee's recommendations, which is reported back to the House. This makes the recommendations much more compelling. In other jurisdictions committees may argue quite persuasively in a report that a bill should be amended in a certain way. However, this would still require a further step to be taken before the recommendation becomes a concrete proposal. Here the committee not only makes a case for a recommended change, it presents the House with a professionally drafted alternative.

In addition to the advantage accruing to drafted amendments, recommended changes that are made unanimously are also procedurally privileged. Standing Orders provide that the House adopts unanimous changes automatically if it agrees to the second reading of the bill. If the government (or any alternative legislative majority) wishes to remove a committee's recommended amendments it must amend the bill again on the floor of the House. The only other alternative is to vote against the second reading of the bill. However, this option is rarely pursued, as it would see the bill discharged completely from the legislative agenda and Standing Orders prevent a bill that is the same in substance as a bill that has previously been considered by proposed in the same calendar year.¹⁷⁴

¹⁷³ With private, local and members' bills drafting assistance from the Parliamentary Counsel Office is not automatic. Committees can request the Attorney-General to make such assistance available, but this will not always occur as the Government will not always wish to make scarce and expensive resources available for non-government legislation. In these cases committees can seek drafting assistance from the Legislative Counsel Office, located within the Office of the Clerk. The Legislative Counsel Office was established following a recommendation of the Standing Orders Committee in 1995 (Standing Orders Committee "Review of the Standing Orders" [1995] AJHR I 18A, 59).

¹⁷⁴ Standing Order 100.

Where amendments are made by a majority of members of the committee these need to be formally adopted by the House in a separate question that precedes the question on the second reading. This would allow the government to prevent the changes being incorporated into the bill if they could muster the numbers on the floor of the House. As such this can be seen as a protection for minority governments.¹⁷⁵

5 Subject speciality

The most significant reform for the committee system following the 1985 report of the Standing Orders Committee was the establishment of subject select committees that are aligned with, and have oversight over, specific government departments.¹⁷⁶ Palmer and others saw such a system as offering substantial benefits for New Zealand. These were in addition to three other permanent select committees: the Business Committee, the Regulations Review Committee and the Privileges Committee. The latter was the only committee that existed prior to 1985 to remain intact.¹⁷⁷ The subject select committees were, at the time, “as powerful as any in the Westminster model”.¹⁷⁸ They were assigned the following roles:

- scrutiny of all legislation introduced within their subject area;
- scrutiny of the financial performance of government departments within their subject area;
- review of the estimates for relevant government departments;
- consideration of all petitions relating to their subject area; and
- the ability to initiate inquiries within the bounds of their subject area.

¹⁷⁵ Mary Harris “Update on Parliament – How is Parliament Performing Under MMP?” (Paper presented to Institute for International Research, 2nd Annual Public Law Forum, Wellington, 25 March 2002), 9.

¹⁷⁶ Such committees are often referred to as ‘departmental committees’ (Gavin Drewry *The New Select Committees: A Study of the 1979 Reforms* (Clarendon Press, Oxford, 1985); Dermot J T Englefield (ed) *The Commons Select Committees: Catalysts for Progress?* (Longman, Harlow, London, 1984).

¹⁷⁷ Geoffrey Palmer *Unbridled Power* (2 ed, Oxford UP, Auckland, 1987) 134.

¹⁷⁸ Skene “Parliamentary Reform” 78.

Since 1999 this list has been extended to include consideration of multilateral treaties and major bilateral treaties of particular significance.¹⁷⁹

The non-legislative roles of the committees are important in their own right. However, they also enhance the ability of committees to effectively scrutinise legislation by developing Members' subject area expertise. The impact of this is noted in the discussion of the Health Committee's consideration of the *Misuse of Drugs Amendment Bill #4*, above. The ability to conduct inquiries on their own initiative also allows committees to develop their subject speciality in a way that would not be possible if, like in many other jurisdictions, committees need an instruction from the House to undertake an inquiry.¹⁸⁰

The advantages of subject specialisation are predicated on fairly stable committee membership. A number of authors have noted the serious challenge to the advantages of subject specialisation that arise from substitution of members.¹⁸¹

6 *Proportional membership*

The next Part discusses the impact of electoral system change. However, as Barker and Levine argue the procedural changes made in the lead up to MMP have independently strengthened the legislative autonomy of the New Zealand Parliament.¹⁸² Following the 1993 referendum on electoral system change a Standing Orders Committee was appointed to

¹⁷⁹ Standing Orders 384-387.

¹⁸⁰ Many of the higher profile select committee inquiries initiated recently would probably not have been initiated. Examples of high profile recent inquiries include inquiries into: Defence beyond 2000; Mental Health Effects of Cannabis; Fire Service Commission; the Inland Revenue Department; CARD and INCIS; Closer Economic Relations; the Visit of the President of China; the Teaching of Reading, auditing and monitoring of 'Closing the Gaps' programmes; student fees, loans, allowances and the overall resourcing of tertiary education; Climate change and local government; the health effects and legal status of Cannabis inquiry; the Crown Forestry Rental Trust.

¹⁸¹ For example, Skene *New Zealand Parliamentary Committees*, above, 7, Palmer *Constitution in Crisis*, above, 115-116, McLeay, above 2000. This issue is returned to below.

¹⁸² Barker and Levine, above, 117, who, in fact, argue that the procedural changes are *more* significant than the change in electoral system.

assess what changes would be needed to prepare New Zealand for MMP. Some two years later, following a consultation process and visits to the parliaments of Ireland, the Netherlands, Denmark, Norway and Germany, the Committee reported back recommending a major overhaul of the ways in which Parliament operated. The major recommendation was the use of proportionality as the guiding principle for managing the House. Previously the Parliament was organised on the basis that there was a party of government and a party of opposition, with speaking time alternating across the House and membership of committees reflecting the majority and minority status of the two parties. This model was seen as inappropriate for a multi-party chamber, where some parties would not fall clearly into one camp or the other. For example, before United entered into coalition with the National party in 1996, they were not part of the government. They could hardly be seen as an opposition party, though. Not only did United support the government on confidence matters; it also supported much of National's legislative program.¹⁸³ The Standing Orders now recognise proportionality between parties as the fundamental organising principle within the House. This principle applies to membership of select committees. Standing Orders require that "the overall membership of select committees must, so far as reasonably practicable, be proportional to party membership in the House".¹⁸⁴ The details of membership are determined by inter-party bargaining at the Business Committee,¹⁸⁵ which is required to make its decisions on the basis of unanimity or "near-unanimity".¹⁸⁶ The partisan composition of committees in the 46th Parliament is set out in Table 7 below.

¹⁸³ Pauline Gardiner (19 December 1995) 552 NZPD 10798.

¹⁸⁴ Standing Order 187(2).

¹⁸⁵ The Business Committee is a special committee, chaired by the Speaker, which makes determinations about the business of the House. It is established under Standing Order 74.

¹⁸⁶ Standing Order 75. While it is not clear what that threshold is, it has been established that when the representative of a party with four MPs (in the 1993-1996, 1999 member Parliament) objected, there was "near-unanimity": Speakers' Rulings 1996, 11/4.

Partisan composition of committees	N	Committees
Government Majority	1	Māori Affairs
Tied ¹⁸⁷	3	Commerce Government Administration Transport and Industrial Relations
Green balance of power	2	Justice and Electoral Social Services
New Zealand First balance of power or tied	2	Education and Science Law and Order
Green balance of power or tied	2	Local Government and Environment Health
Green or NZF balance of power	2	Foreign Affairs, Defence and Trade Primary Production
Green/NZF/United balance of power	1	Finance and Expenditure

Table 7: the partisan composition of committees in the 46th Parliament.

The position in the 47th Parliament is even more complex, as table 8 shows. The Government has a clear majority on the Government Administration Committee. On most committees support from one of the parties with whom the government has a support agreement would be sufficient for a government majority. However, on the Commerce and the Education and Science Committees support of one of the declared 'opposition' parties is necessary for a government majority.

Commerce	4 Labour, NZ First, 2 National, ACT
Education and Science	4 Labour, 2 NZ First, ACT, 2 National
Finance and Expenditure	5 Labour, United, Green, ACT, 2 NZ First, 2 National
Foreign Affairs, Defence and Trade	3 Labour, United, Green, NZ First, Progressive, 2 National
Government Administration	3 Labour, 2 National
Health	4 Labour, United, Green, 2 NZ First, ACT, 2 National
Justice and Electoral	5 Labour, United, Green, ACT, NZ First, 2 National
Law and Order	4 Labour, United, 2 National, NZ First
Local Government and Environment	5 Labour, United, Green, NZ First, ACT, 3 National
Māori Affairs	3 Labour, Green, NZ First, 2 National
Primary Production	ACT, 4 Labour, NZ First, Green, 2 National
Social Services	4 Labour, United, Green, 2 National, ACT, NZ First
Transport and Industrial Relations	4 Labour, Green, NZ First, ACT, 2 National

Table 8: the partisan composition of committees in the 46th Parliament.

¹⁸⁷ On these three committees all members were either from the government or from National and ACT and both sides had exactly the same numbers. In order to preserve proportionality, following the 1995 reforms to the Standing Orders, committee chairpersons lost their casting votes.

Unlike the German system, where committee chairpersons are appointed on a proportional basis,¹⁸⁸ apart from the Regulations Review Committee (always chaired by a senior opposition member as a matter of convention), there is no convention or understanding that chairpersonships will go to opposition members. However, at the start of the last three parliaments a debate on the issue has occurred.¹⁸⁹ In 1996, there was a lengthy debate in the House on the appointment of committees that had to be completed under urgency. This delayed the establishment of select committees for four months.¹⁹⁰ Much of the debate surrounded how chairpersons should be appointed and whether proportionality should be applied to these appointments. In 1999, tied votes resulted in an impasse in the election of chairpersons in three committees that had to be resolved in the House.¹⁹¹ In the 46th Parliament, only one subject committee had a non-coalition member as chairperson.¹⁹² In the 47th Parliament this has increased to four.¹⁹³

C *The importance of New Zealand's structural arrangements*

New Zealand's strong history of parliamentary committees, coupled with the six key features of the modern system, have created a highly influential committee system. Skene's 1989 findings, and the examples cited

¹⁸⁸ See Alan Witcombe "The Berlin Report: Report on the committee system of the Bundestag under MMP and its protection of minority rights for parliamentary groups" (Report prepared in fulfilment of a Winston Churchill Memorial Trust Fellowship, August 2002) Chapter 8.

¹⁸⁹ Ruth Berry "United front on select committee postings" (16 August 2002) *The Dominion Post* Wellington 2.; "Sharing the spoils of power" (5 August 2002) *New Zealand Herald* Auckland; Jonathan Milne "Select committee revamp pushed" (27 September 2002) *The Dominion Post* Wellington 4.

¹⁹⁰ (4 March 1997) 558 NZPD 529.

¹⁹¹ For a description of the impact of this on the operation of the Education and Science Committee, see: Liz Gordon "Radical Democracy on Committees in an MMP Parliament" (2002) 16(2) *Australasian Parliamentary Review* 151, 155.

¹⁹² The Local Government and Environment Committee, which was chaired by Jeanette Fitzsimons.

¹⁹³ Jeanette Fitzsimons continues to chair the Local Government and Environment Committee. She is joined by United leader, Hon Peter Dunne, who chairs the Foreign Affairs, Defence and Trade Committee, New Zealand First's Hon Brian Donnelly, chairperson of the Education and Science Committee and National's Hon David Carter, Chairperson of the Primary Production Committee.

by numerous authors suggest that, even before electoral system change, the committee system was more influential than would have been expected given New Zealand's unicameral parliament and high degree of party cohesion. However, electoral system change has dramatically changed the dynamics of parliamentary politics in New Zealand. While structure is important, the electoral system change has played a crucial role in the continued strengthening of the committee system.

V THE IMPACT OF ELECTORAL SYSTEM CHANGE

The strengthening of the committee system that has followed from electoral system change is primarily due to the break down of the link between government and dominance of the legislature as the major parties have either been forced to enter coalitions with minor parties or govern with a minority in the legislature and form legislative coalitions as issues arise.

According to much of the literature on the impact of electoral systems, this is a natural result of the adoption of proportional representation. Duverger, in his 'hypothesis',¹⁹⁴ argues that proportional representation favours multipartism. However, Bogdanor¹⁹⁵ argues that this reverses the lines of causality and that electoral systems are consequences of party systems more often than causes. While Riker¹⁹⁶ casts doubt on such criticisms, a number of New Zealand authors support Bogdanor.¹⁹⁷ The history of electoral competition in New Zealand supports this second conclusion. The extent to which the New Zealand party system had fractured prior to the first MMP election is considered in appendix 2.

¹⁹⁴ Maurice Duverger "The influence of electoral systems on political life" 3 *International Social Science Bulletin* 314, adopting Riker's description of Duverger's 'law' (William H Riker "Duverger's Law Revisited" in Bernard Grofman and Arend Lijphart (eds) *Electoral Laws and their Political Consequences* (Agathon, New York, 1986) 9.

¹⁹⁵ Vernon Bogdanor "Conclusion: electoral systems and party systems" in Vernon Bogdanor and David Butler *Democracy and Elections* (Cambridge University Press, Cambridge, 1983) 265.

¹⁹⁶ Riker, above, 27.

¹⁹⁷ Jack Vowles, Peter Aimer, Helena Catt, Jim Lamare, and Raymond Miller *Towards Consensus? The 1993 Election in New Zealand and the Transition to Proportional Representation* (Auckland, Auckland University Press 1995) 195.

It is interesting to note that in the last 10 years similar trends in support for major parties in Australia have seen periods of minority government in all six states, despite the use of a majoritarian electoral system.¹⁹⁸ While the introduction of MMP may not, of itself, have led to a break down in the two-party system, it clearly facilitated the meaningful parliamentary representation of minor parties.¹⁹⁹ Previously minor party representation was suppressed by both the mechanical effect of the previous electoral system and the psychological effect, where voters do not vote for their preferred party for fear of wasting their vote.²⁰⁰

The breakdown of the two-party parliamentary system has loosened the link between Cabinet decision-making and parliamentary action. Even if the change in electoral system has not "revitalised and rehabilitated" the New Zealand Parliament as Barker and Levine suggest, many New Zealanders were hoping it would when they voted for electoral system change, it has had a significant impact resulting in significant small party representation.²⁰¹ New Zealand seems to have developed into what is referred to in the party system literature as a 'competing bloc' system.²⁰² The characteristic of such systems is two major parties are each supported by a number of minor parties. There is more explicit intra-bloc dissension now than there was intra-party dissension when the major parties shared parliament with only the odd lonely independent or Social Credit MP. While disagreement within the major parties, which were in effect coalitions, was previously seen as all but fatal to a party's electoral prospects, it is unremarkable that different parties will have

¹⁹⁸ See Jeremy Moon "Minority governments in the Australian states: from ersatz majoritarianism to minoritarianism" (1995) 31 *Australian Journal of Political Science* (Special Issue, Consensus Policy Making) 142. Since Moon wrote there has been minority government in Queensland (1996-1998, 1998-2001) and Victoria (1999 - present) bringing his total from four to six. South Australia has also had minority government since 1997 and while the 2002 election saw a change of government, the new government is also a minority.

¹⁹⁹ Peter Aimer "The Future of the Party System" in Raymond Miller (ed) *New Zealand Politics in Transition* (Oxford University Press, Auckland, 1997) 186.

²⁰⁰ Arend Lijphart *Electoral systems and party systems: a study of twenty-seven democracies, 1945-1990* (Oxford University Press, Oxford, 1994) 71-72.

²⁰¹ Barker and Levine, above, 105.

²⁰² Jonathan Boston, Stephen Levine, Elizabeth McLeay and Nigel S Roberts *New Zealand Under MMP: A New Politics?* (Auckland University Press, Auckland, 1996) 101.

different views on issues. While this does not seem to extend to coalitions, even there the demands for unity are not as great as for single party-governments.

This intra-bloc dissension creates a more fluid legislative environment. In the 46th Parliament we saw the governing Labour party rely on ACT to support sending bills to select committee. They also relied on the National party to pass legislation implementing a treaty that was opposed by all the other parties. Similar events occurred in the House when National led a minority Government in 1998 and 1999. While on politically controversial issues we can expect a degree of 'bloc cohesiveness', on other issues this is not the case.

Barker and Levine²⁰³ argue that "more important than a system of proportional representation" is the relative distribution of power in parliament, that is whether a government has a majority. A comparison of legislative autonomy in the 1993 to 1996 Parliament, the last elected under FPP, and during the National-New Zealand First government from 1996 to 1998, the first elected under MMP, seems to support this. The Bolger Government from 1993 to 1996 was in a state of flux moving from bare majority to minority and back again. During this Parliament the government used its legislative majority with care. During the first coalition government the majority was used regularly to force measures through the House. It could also explain why committees were becoming more active despite Mulgan's argument that on important issues they revert to partisan clashes. Any major changes made to important government legislation could be explained by the minority status of the government, not the committee system.

Barker and Levine's argument becomes less convincing when the counterfactual is considered. As suggested earlier, electoral system change may have been as much a result of party system change as a driver of it.

²⁰³ Barker and Levine, above, 114.

Without electoral system change, we may have seen a prolonged period of minority governments, as South Australia seems to be experiencing. On major political issues similar outcomes could be expected. However, on most issues the practical impact a handful of minor party members would have had in a chamber dominated by the major parties would have been far less than what it is currently. Rather than having significant minor party representation on most committees, the average committee would have been made up of 'government' and 'opposition' MPs. The current picture is quite different, as was shown in the discussion of proportional membership. The fluidity that we see on most issues would simply not occur. Also the minor parties would not have the institutional resources they currently have to be able to cover the full range of activities.

As noted earlier, MMP is having a significant impact in select committees. The lack of government majorities and advent of non-government chairpersons on subject committees has produced quite different dynamics in committees. Ministers can no longer always rely on chairpersons to shepherd government bills and other business through a committee. Scrutiny of executive activity is sharper and more inquiry activity is undertaken.²⁰⁴

In fact it is in the use of this inquiry power that we are seeing the most significant impact of the breakdown of government dominance over committees that has followed electoral system change. For example, in the 45th Parliament, the Foreign Affairs, Defence and Trade Committee conducted an inquiry into Defence beyond 2000²⁰⁵. This was very much an initiative of the chairperson, Derek Quigley, a non-government chairperson who sought to have a considerable influence in the formation of future defence policy.²⁰⁶ Such an inquiry might never have gone ahead in an environment of government chairpersons and government majorities on committees. A chairperson would have had to think carefully about his or

²⁰⁴ Harris, above, 13.

²⁰⁵ Foreign Affairs, Defence and Trade Committee "Defence beyond 2000" [1999] I.4D.

²⁰⁶ Quigley, above.

her prospects before promoting such an inquiry and in any event it might well have been voted down at the outset. In this particular inquiry, government members had to rely on incorporating a minority view in the committee's report to present their position.²⁰⁷

A number of inquiries in the 46th Parliament showed that it was not just non-government chairpersons that were prepared to champion controversial inquiries. This may suggest that a greater independence is starting to become institutionalised among the committee chairpersons.²⁰⁸ The lack of government majorities also saw inquiries pursued that may not have taken place where there was a clear government majority, such as the inquiries into the Inland Revenue Department and the INCIS computer system in the 45th Parliament and the inquiry into the health effects on women of treatments by Graham Parry in the 46th Parliament.

VI CHALLENGES TO THE EFFECTIVENESS OF THE SYSTEM

While New Zealand's structurally powerful committee system²⁰⁹ has become even more powerful since the introduction of proportional representation, challenges to its effectiveness remain. Parliamentary procedures, while allowing much scope for committee independence still allow techniques that undermine the committee process. Most commentators on the committee system have also noted problems with resourcing for committees.²¹⁰ This problem has become more acute since the move to MMP.

²⁰⁷ Harris, above, 14.

²⁰⁸ Possible examples include inquiries into: the teaching of reading, auditing and monitoring of 'Closing the Gaps' programmes; student fees, loans, allowances and the overall resourcing of tertiary education; the Crown Forestry Rental Trust; and the Treaty of Waitangi Fisheries Commission.

²⁰⁹ Previously 'among the most potent among Commonwealth Parliaments' (Chen, above, 15).

A *Procedural limitations*

1 *The exemption for money bills*

There are a number of tactics the government can use to avoid committee scrutiny of its legislation. McRae²¹¹ was particularly concerned about the practice of using the exemption for money bills to avoid select committee scrutiny of legislation. McRae's criticism of the exemption largely ignores the fact that the major money bills, those providing for the annual estimates and supplementary estimates, are scrutinised by select committees as part of their financial scrutiny. So the lack of legislative scrutiny may appear worse than it is. However, a recent report comparing the New Zealand and German practices has again highlighted this point.²¹²

In practice the more concerning point raised by McRae was the 'tacking' of unrelated matters to finance bills and then splitting the bill at committee of the whole stage.²¹³ This allowed controversial matters to enjoy the exemption for money bills. Standing Orders now make it much more difficult for governments to introduce these omnibus finance bills.²¹⁴ However, with the current legislative backlog, there may be further developments in this area.

2 *Urgency*

The urgency provisions provide another means for the government to avoid sending bills to select committees. If the House accords urgency to a bill before it has reached the select committee stage, it will not be sent to a

²¹⁰ Palmer, *Constitution in Crisis*, above, 116 citing David Caygill "Functions and Powers of Parliamentary Committees: A New Zealand Perspective" (Paper delivered to a Conference in Brisbane, May 1992, on file Victoria University of Wellington).

²¹¹ McRae, above, 17-18.

²¹² Witcombe, above, Chapter 9.

²¹³ McRae, above, chapters 7 and 8.

²¹⁴ Standing Orders 256-259; Standing Orders Committee "Review of the Standing Orders" [1995] AJHR I 18A, 49-51.

committee.²¹⁵ This has become more difficult since 1993 with the demise of single-party, majority governments. However, the National-New Zealand First government, even though it held the barest majority in the House, regularly took urgency on controversial legislation.²¹⁶ In the 46th Parliament the Green Party rarely supported urgency before bills had returned from select committee; only eight bills completely by-passed the committee system.²¹⁷ The most controversial was the Local Government (Prohibition of Liquor in Public Places) Amendment Bill.²¹⁸

There have been notorious cases of governments abusing procedure to avoid committee scrutiny of legislation. The use of the omnibus financial bill method in 1990 and 1991 and the taking of urgency on the 'work-for-the-dole' legislation in 1998 stand out.²¹⁹ Despite this well over 90 per cent of all bills go to select committee.²²⁰ This raises a crucial question, why do governments not use these procedures to force all controversial legislation through the House? Is it simply because they are less likely to have the numbers to do so, or is there so great an expectation that legislation will go before a committee and the public will have a chance to comment, that to bypass this stage raises questions of legitimacy? The answer is probably a combination of the two. With a strong public expectation that select committee scrutiny is part of legitimate law-making, it becomes hard for governments to obtain support from smaller parties to support bypassing the

²¹⁵ McGee, above, 262. If a bill has not previously been before a select committee the committee of the whole House holds a wide-ranging debate on the title clause of the bill: (Speakers' Rulings 1867 to 1999, 90/1).

²¹⁶ This tactic was quite controversial; see, for example, Rod Donald "Unicameral parliaments do work!" (1999) 13(2) *Legislative Studies* 30; New Zealand Council of Trade Unions "Parliamentary shambles claims another victim" (8 July 1998) Press Release; Ian Llewellyn, "Why Bother With Standing Orders?" (19 June 1998) *NewsRoom*; Ron Marks "National Management Of House Chaotic" (24 September 1998) Press Release; "Labour whip says urgency a sick joke" (27 July 1998) *Waikato Times* Hamilton; Ian Llewellyn "Why Bother With Standing Orders?" (19 June 1998) *NewsRoom*.

²¹⁷ Local Government (Rodney District Council) Amendment 2000, Local Government (Validation of Reappointments) 2000, Customs and Excise Amendment Bill (2000/13), Customs and Excise Amendment Bill (2002/02), Dairy Industry Amendment No.2 2000, Road User Charges Amendment 2002, Taxation (Tax Rate Increase) 1999.

²¹⁸ A Member's Bill in the name of Rt Hon Winston Peters, which passed through all stages on 18 December 2001.

²¹⁹ The very fact that governments have adopted these tactics to avoid committee scrutiny may indicate that the changes made by committees are significant.

²²⁰ McGee, above, 262.

select committee process. Governments also know that doing so would have political costs.

3 *The problem of Supplementary Order Papers (SOPs)*

Commentary on the decision of the Attorney-General to introduce a Supplementary Order Paper (SOP) at Committee of the whole House stage that would have amended the Electoral Amendment Bill (No 2) by inserting a provision described as 'reintroducing criminal defamation' highlights another problem. By introducing substantive amendments after a select committee has considered a bill, the government can avoid scrutiny of these provisions. In this case the provisions had actually been considered at select committee stage, and rejected. While the primary objection to the change was a substantive one, much of the media criticism focussed on the process. It was characterised as "sneaky",²²¹ "arrogant",²²² "distasteful", "sly" and "underhanded".²²³

Criticism of the use of SOPs is not new.²²⁴ Palmer²²⁵ notes the ability they offer for abuse and suggests that the strengthening of the 'scope' rule could help alleviate the problem. Although the word 'scope' is commonly used in parliamentary practice²²⁶ it does not appear in the Standing Orders of the legislatures of New Zealand, Australia, Canada or the United Kingdom.²²⁷ In New Zealand the rule is outlined in Standing Order 283(2) for select committees and Standing Order 295(2) for the Committee of the whole House. Both provisions read:

²²¹ "Offensive clause axed, but questions linger" (6 December 2001) *The Evening Post* Wellington.

²²² "The trouble with watchdogs that work to agendas" (28 November 2001) *The Daily News* New Plymouth.

²²³ "Making law by stealth" (22 November 2001) *The Press* Christchurch.

²²⁴ J F Burrows and Philip A Joseph "Parliamentary Law Making" (1990) NZLJ 306.

²²⁵ Palmer, *Constitution in Crisis*, above, 121.

²²⁶ L M Barlin (ed) *House of Representatives Practice* (3rd Canberra, 1997) 378, 380; Evans *Odgers' Australian Senate*, above, 262; Donald Limon and W R McKay (eds) *Erskine May's Treatise on the Law, Privileges, Proceedings and Usage of Parliament* (22nd ed, Butterworths, London, 1997) 520, 525-526.

²²⁷ Tim Cooper "In Search of Scope" (2000) 15(1) *Legislative Studies* 33.

The committee may recommend amendments that are relevant to the subject-matter of the bill, are consistent with the principles and objects of the bill, and otherwise conform to Standing Orders and practices of the House.

The principle is elaborated in Speaker's Ruling 91/6, which states, "[a] bill can be amended only in ways that are relevant to the text. It cannot be turned into something that it is not, and did not start out as". However, often the SOPs will introduce changes that *are* within the scope of the bill. The mischief that needs to be prevented is the introduction of changes that could not have been contemplated by submitters at the select committee stage. It is hard to see how such a Standing Order could be drafted.

There is room for procedural reform of the provisions relating to SOPs. Currently if a minister wishes to make major changes to a bill while it is still before a select committee they can introduce an SOP and refer it to the committee considering the bill.²²⁸ The committee could then advertise for submissions on the SOP as well as the bill and ensure that it receives both committee scrutiny and public input. However, to do so requires a two-hour debate in the House. With pressure on government time in the House, such referrals are rare. Ministers work around this by writing to committees inviting them to consider their SOPs, or simply by promoting the changes in departmental advice to the committee. The problem with these approaches is that they do not facilitate public input. If Standing Orders were amended to facilitate the referral of SOPs to the relevant committees, this may encourage ministers to adopt this course of action. This would not prevent the use of SOPs to subvert the process where this was the intent.

²²⁸ In the 46th Parliament, SOPs were referred to committees on a number of bills, for example, an SOP on the Matrimonial Property Amendment Bill was referred to Justice and Electoral Committee and an SOP on the Smokefree Environments (Enhanced Protection) Bill was referred to the Health Committee.

In the lead up to MMP it was realised that as governments may no longer have majorities on select committees a committee could indefinitely delay a government bill that it did not support.²²⁹ To avoid this Standing Orders were amended prior to the first MMP election to provide that bills must be finally reported from committees within six months unless the House orders otherwise or the Business Committee grants an extension.²³⁰ If a final report is not made, the bill is discharged from the committee and set down for second reading in the House.²³¹ On complex legislation this can operate as a significant constraint on committees as the minister in charge of the bill can hold out the prospect of objecting to an extension to force the committee to cut short its consideration.

B Substitution of members

As noted earlier, a number of authors have criticised the rate of substitution that occurs in select committees. According to Skene during the 1980 session committees met on 306 occasions and there were 485 substitutions. He also cited a weekly substitution rate of 13 per cent for Public expenditure and "up to a third" for Defence. The Business Committee investigated the issue of substitution in 1989. They found that for the 254 committee meetings between January and May 1989 there were 303 substitutions.²³² Skene saw the substitutions as being "injurious to efficiency" and impeding specialisation and decision-making: "Decisions made by five people on evidence presented to ten were rightly to be regarded with suspicion by interest groups". As Palmer notes²³³ MPs are often asked by party whips to attend select committee meetings at short notice. This means they will have little understanding of what is being

²²⁹ This is common in the United States.

²³⁰ Extensions were granted for 20% of bills in the 46th Parliament. Harris, above, 9.

²³¹ Standing Orders Committee "Review of the Standing Orders" [1995] AJHR I 18A, 38.

²³² Business Committee "Report on the Committee's Review of the Inquiry Function of the Subject Select Committees" (1989) [1987-1990] AJHR Vol XVII I.14B para 6.2.

²³³ Palmer, *Constitution in Crisis*, above, 115.

discussed. He goes on to describe the rate of substitution as having reached “farical proportions”.²³⁴ He also notes that substitution undermines the credibility of the process for submitters, especially “[c]ompetent professional people”.²³⁵

Substitution in itself does not always undermine subject specialisation. Sometimes it reflects the need to move expertise according to items of business.²³⁶ For example, in the 46th Parliament, Hon Georgina Te Heuheu was regularly substituted onto the Justice and Electoral Committee when it considered the Estimates for Vote Treaty Negotiations. Similarly, National Party broadcasting spokesperson, Katherine Rich, was regularly substituted onto the Māori Affairs Committee for its annual financial review of Te Mangai Paho. She also participated in that committee’s consideration of the Māori Television Service Bill.²³⁷

With the increased size of parliament since the change in the electoral system it could be expected that the rate of substitution might have declined with more members to be spread across the committees. However, new challenges have arisen. Smaller parties have struggled to cover all the meetings they wish to attend, while the size of committees has grown to accommodate the desire of parties to be represented on most committees. For example to achieve proportionality and allow parties representation on the committees they chose the Health Committee now has 11 members and Finance and Expenditure has 12. Currently a large executive means there is considerable substitution on the government side as Labour backbenchers cover absent ministerial colleagues.²³⁸ Most parties see flexibility in committee membership as being crucial to avoid ‘losing the numbers’ when

²³⁴ Palmer, *Constitution in Crisis*, above, 115.

²³⁵ Palmer, *Constitution in Crisis*, above, 116 similarly at 115.

²³⁶ Palmer *Constitution in Crisis*, above, 115.

²³⁷ Subject speciality is also enhanced when committees have experienced staff who can assist them in their consideration. This topic is discussed further below.

²³⁸ While Cabinet Ministers, the Speaker and the Deputy Speaker do not sit on subject committees, all Ministers outside Cabinet currently serve on a committee. Of the 120 members, 102 who served on committees in the 46th Parliament. This was an average of 1.59 committees per member. The Minister in charge of a bill may take part in the proceedings of a committee while it is considering their bill, but cannot vote. This seldom occurs.

their MPs are unavailable. This has seen the Standing Orders revised to facilitate the substitution of members.²³⁹ Conversely, while substitution rates have remained high the larger size of committees has meant that even with a high rate of substitution it is easier to maintain a 'core' of permanent members at any committee meeting.

C Resourcing and effectiveness

Despite being comparatively more influential, the New Zealand committee system is lightly resourced compared to comparable jurisdictions. This is especially so in terms of staff resources.

The tables below show the comparative staff resourcing for a typical committee secretariat in the Australian Senate and the New Zealand House of Representatives.

Title	Salary AUD
Committee Secretary	\$72,819 – \$80,983
Principal Research Officer	\$59,946 – \$64,766
Senior Research Officer	\$48,267 – \$54,101
Research Officer	\$39,095 – \$42,448
Executive Assistant	\$35,077 – \$37,859
Total allocated to staff salaries	\$255,204 – \$280,157

Table 9: Australian Senate.²⁴⁰

Title	Salary NZD
Clerk of Committee	\$42,126 – \$54,516
Parliamentary Officer (Select Committees) ²⁴¹	\$34,901 – \$45,166
Parliamentary Officer (Committee Support) (One between two committees)	\$27,370 – \$35,420 (50 per cent per committee)
Total allocated to staff salaries	\$90,712 – \$117,392 ²⁴²

Table 10: New Zealand House of Representatives.

²³⁹ See Standing Orders Committee "Review of the Standing Orders" [1995] AJHR I 18A, 34. The change is reflected in the contrast between the wording of current Standing Order 188 and Standing Order 344 from the 1992 Standing Orders.

²⁴⁰ Department of the Senate *Annual Report for the year ended 30 June 2001* (Parliament of the Commonwealth of Australia, Canberra, 2001) Table 3.

²⁴¹ The primary report writer for a committee, one Parliamentary Officer (Select Committees) is typically assigned per committee but some are shared between two committees.

²⁴² No attempt has been made to control for different market dynamics or living costs.

The Deputy Clerk of the House recently noted that the growth in select committee inquiry activity has created greater demand for services for select committees. She also notes that greater committee independence brings into question the continued reliance on departments as the principal source of advice on bills. Given these developments, she suggests that even though “the first MMP Parliament saw more resources for select committees, further resources may yet be required to support adequately the level of activity that is developing”.²⁴³

The 1995 report of the Standing Orders Committee states that committee staff should be able to provide the “first-line analytical, research and advisory needs of committees”,²⁴⁴ as an independent and permanent resource for select committees. In its report on the 2000/01 Estimates for Vote Office of the Clerk the Government Administration Committee noted that with the introduction of MMP have come greater demands on committee staff both in terms of heavier workloads and the complexity of much committee business. The Government Administration Committee also drew the attention of the House to the problem of turnover in the select committee office.²⁴⁵ The report notes an acknowledgement from the Clerk of the House that staff turnover in the select committee office “is higher than he would like it to be” and “that ideally he would like a committee to have the services of the same secretariat staff for the duration of a Parliament”.

Since the Clerk’s comments to the Government Administration Committee the position has worsened. Turnover for professional staff servicing committees runs at over 33 percent per annum. Of the 13 subject select committees established under Standing Order 190 only three had the same Clerk of Committee for the entire 46th Parliament. The average Clerk

²⁴³ Harris, above, 14.

²⁴⁴ Standing Orders Committee “Review of the Standing Orders” [1995] AJHR I 18A, 45-46.

²⁴⁵ Government Administration Committee “Report on the 2000/01 Estimates for Vote Office of the Clerk” [2000] 2.

of Committee has spent less than two years in that role and the report writing staff average less than one year servicing committees.

The result of continuing high levels of turnover and lower experience levels of staff servicing select committees is a drop in the quality of services to committees. This is especially the case as most staff members' subject area experience is limited to that learnt 'on the job'. A survey of MPs conducted by the Office of the Clerk in May 2001 showed a significant drop in satisfaction with the services offered by committee staff. This can be seen in figure 2, below.²⁴⁶

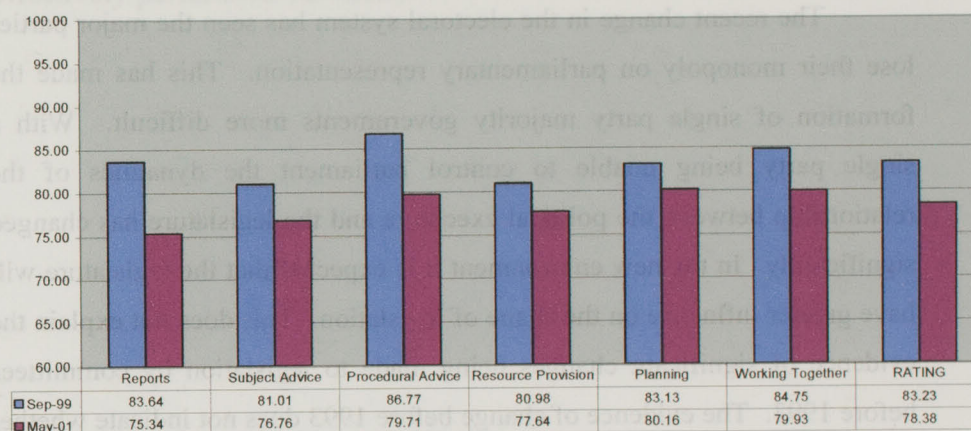


Figure 2: Member satisfaction with select committee services 1999 and 2001 compared.

Areas in which members' satisfaction levels dropped most notably were in the quality of reports and of procedural advice. Both are functions where experience is particularly important. The Appropriations Review Committee reflects an alternative viewpoint, appointed under the Parliamentary Service Act 2000, in its recently released report on funding for Parliament that describes the level of turnover in the Select Committee Office as "healthy".²⁴⁷

²⁴⁶ The results of the survey became part of the proceedings of the Standing Orders Committee's review of services to select committees and became publicly available at the end of the 46th Parliament.

²⁴⁷ Appropriations Review Committee *Resourcing Parliament: Report of the Review Committee on the First Triennial Review of the Parliamentary Appropriations* (Wellington, 2002) 46.

VII CONCLUSION

New Zealand's select committees do have considerable legislative influence. Not only do they play a tidying role that inevitably comes with close scrutiny of bills; they also bring about important changes to legislation. In addition to direct changes made to the draft bill that the committee reports back to the House, governments are prompted to draft their own changes in response to issues arising from select committee hearings of evidence. Through their inquiries, committees also bring pressure on governments to initiate legislative change.

The recent change in the electoral system has seen the major parties lose their monopoly on parliamentary representation. This has made the formation of single party majority governments more difficult. With a single party being unable to control parliament the dynamics of the relationship between the political executive and the legislature has changed significantly. In the new environment it is expected that the legislature will have greater influence on the shape of legislation. This does not explain the evidence of significant changes being made to legislation by committees before 1993. The evidence of change before 1993 does not indicate whether the changes were being made as a result of the committee process or at the behest of the minister. There is now growing evidence that not only are a large number of changes being made, these are being made independently of ministerial direction.

The fact that the New Zealand's select committee process does result in significant changes to legislation, even during periods of single party majority government, suggests the conventional wisdom regarding the legislative capacity of unicameral parliaments is unduly pessimistic. The lesson other Parliaments can learn from New Zealand is that while a powerful committee system might not alleviate all the perils of executive dominance, it can go a long way towards enhancing the strength of a Parliament to act as an effective legislature.

When this is coupled with an electoral system that facilitates multipartism, the ability of Parliament to operate as an effective legislature is enhanced significantly. However, there is room for development. The question of proportional allocation of select committee chairpersonships will continue to arise, as will the concept of applying proportionality more comprehensively and more strictly to all parliamentary procedures and appointments.²⁴⁸ Reform of the processes relating to Supplementary Order Papers is also needed. Beyond these procedural reforms there is a need for fostering greater public awareness of the process to facilitate interested parties taking advantage of the public submission process. There is also a need to enhance parliamentary resourcing to enable the legislature to effectively perform its functions.

Charter Professional Engineers			
Education and Science			
Education Amendment	M-114	M-2109	M-1
Apprenticeship Training	M-3	M-3	M-3
Education Amendment (No 2)	M-40 U-11		
Education Amendment (No 2)	M-14	M-4 U-1 CWB	M-18 CWB-10
Tertiary Education Reform 1	M-31	M-61	M-37
Industry Training Funds			
Employment and Accidental Insurance			
Social Plan			
Employment Relations (Evaluation of Unions)			
Registration & Other Matters Amendment			
Employment Relations PWB	M-60	M-51	M-90-98
Accident Insurance (Transitional Provisions)	M-2 CWB-1	M-11 CWB-2	M-26 CWB-1
Finance and Expenditure			
Medicine (Registered Practitioners)			
Procedure 1	M-1	CWB-1	CWB-2
Taxation (Substance & New Debitors)	M-5	M-5 CWB-4	M-3
Public Trust	U-12 CWB-1	U-9 CWB-2	U-25 CWB-1
New Zealand Superannuation	U-11	U-13	U-16
Taxation (Annual Rates of Income Tax 01-02)			
Taxation (Taxation Amendment & Miscellaneous Provisions)	M-1 U-17	U-6 CWB-3	U-18 CWB-3
Trustee Companies Amendment		U-1	U-4
Government Superannuation Fund			
Amendments	U-7 CWB-1	U-30	U-29
Public Audit	U-4	U-12 CWB-1	U-27 CWB-1
Taxation (Annual Rates of Income Tax 01-02)			

²⁴⁸ See Alan Witcombe "Germany and New Zealand: A comparison of MMP committee systems" (December 2002) *Public Sector Magazine New Zealand* (forthcoming).

When this is coupled with an electoral system that facilitates multipartyism, the ability of Parliament to operate as an effective legislature is enhanced significantly. However, there is room for development. The question of proportional allocation of select committee chairmanships will continue to arise as will the concept of applying proportionality more comprehensively and more widely to all parliamentary procedures and appointments. The factors of the process relating to appointments. Other factors is also needed. The need to enhance parliamentary resources to enable the legislature to effectively perform its functions.

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The fact that the New Zealand's... result in... majority government... The... a... of... Parliament to act as an effective legislature.

²⁴ See Alan Widdows 'Germany and New Zealand: A comparison of MDR committees systems' (December 2002) Public Affairs Magazine New Zealand (forthcoming).

APPENDIX 1 – PUBLIC BILLS CONSIDERED BY, AND REPORTED BACK FROM, SELECT COMMITTEES IN THE 46TH PARLIAMENT.

	Amendments to whole clause	Amendments to whole sub-clause	Amendments to part of sub-clause
Commerce			
Shop Trading Hours Act Repeal	-	-	-
Electronic Transactions	M-5	M-4	M-4
Telecommunications	M-33 CWH-1	M-47 CWH-11	M-17 CWH-5
Commerce (Clearance Validation)	-	-	M-1
Trade Marks	M-25	M-40	M-58
Televisions New Zealand	M-4	M-6	M-6
Business Law Reform	M-26	M-2 CWH-2	M-1 CWH-1
Sale of Liquor Amendment (No. 3)	M-1	M-7	M-14
Economic Development	U-3	U-6	M-1
Commerce Amendment	M-6	M-2 U-1	-
Takeovers Code	M-2	M-3	-
Electricity Amendment	M-17	-	-
Shop Trading Hours Abolition of Restrictions	-	-	-
Charter Professional Engineers	-	-	-
Education and Science			
Education Amendment	M-5 U-4	M-22 U-9	M-11
Apprenticeship Training	M-3	M-3	M-8
Education Amendment (No 2)	M-40 U-14 CWH-14	M-6 U-1 CWH-5	M-18 CWH-10
Tertiary Education Reform-2	M-34	M-61	M-37
Industry Training Levies	-	-	-
Employment and Accident Insurance Legislation			
Employment Relations (Validation of Union Registration & Other Matters) Amendment	-	-	-
Employment Relations 2000	M-60	M-81	M-49 U-88
Accident Insurance (Transitional Provisions)	M-7 CWH-1	M-15 CWH-2	M-26 CWH-1
Finance and Expenditure			
Medicines (Restricted Biotechnical Procedures)	M-1	CWH-1	CWH-2
Hazardous Substances & New Organisms	M-5	M-5 CWH-3	M-7
Public Trust	U-12 CWH-3	U-9 CWH-2	U-35 CWH-1
New Zealand Superannuation	U-11	U-13	U-36
Taxation (Annual Rates of Income Tax 01-02)	-	-	-
Taxation (Taxpayer Assessment & Miscellaneous Provisions)	M-1 U-17	U-62 CWH-3	U-36 CWH-5
Trustee Companies Amendment	-	U-1	U-4
Government Superannuation Fund Amendment	U-17 CWH-1	U-30	U-289
Public Audit	U-4	U-12 CWH-1	U-57 CWH-3
Taxation (Annual Rates of Income Tax 00-01)	-	-	-
Taxation (FBT, SSCWT & Remedial Matters)	U-11	U-25	U-87 CWH-10

Finance and Expenditure (continued)	Amendments to whole clause	Amendments to whole sub-clause	Amendments to part of sub-clause
Taxation (GST & Miscellaneous Provisions)	U-16 CWH-1	U-53	U-140
Taxation (Beneficiary Income of Minors, Service-Related Payments & Remedial Matters)	U-20	U-25 CWH-1	U-44 CWH-1
Construction Contracts	U-22	U-35	U-165
Taxation (Relief Refunds & Miscellaneous Provisions)	U-14	U-46	U-136
Securities Markets & Institutions	M-13	M-59	M-153
Taxpayers Charter	-	-	-
Foreign Affairs, Defence and Trade			
Pardon for Soldiers of Great War	U-11	-	-
Terrorism (Bombings and Financing)	M-73 CWH-8	M-7 CWH-1	M-23 CWH-22
Customs and Excise Amendment No 4	M-1	U-4M-14	U-5M-1
Transnational Organised Crime	U-13	U-28	U-54
New Zealand Nuclear Free Zone Extension	-	-	-
Government Administration			
Parliamentary Service	U-2	U-15	-
Gaming Law Reform	M-8	M-3	M-3
Casino Control Amendment (separated from Gaming Law Reform by select committee)	U-6	U-3	U-13
Fire Service Amendment	-	-	-
Gaming and Lotteries Amendment	-	-	-
Archives Culture and Heritage Reform	-	-	-
Casino Control (Moratorium Extension Amendment)	-	-	-
Crimes (Criminal Appeals) Amendment	U-11 CWH-5	U-5	-
Civil Defence Emergency Management	U-3	U-13	U-68
Recreation and Sport	U-1	U-3	U-3
State Sector Amendment	-	-	-
Citizenship Amendment No3	-	-	-
Responsible Gambling	-	-	-
Racing	U-2	U-31	U-31
Whistleblowers Protection	-	-	-
Films, Videos and Publications Classifications (Prohibition of Child Pornography) Amendment	-	-	-
Casino Control (Poll Demand) Amendment	-	-	-
Cigarettes and Fire Safety	-	-	-
Dog Control (Hearing Dogs) Amendment	-	-	-
Health			
Misuse of Drugs Amendment No.4	U-12	-	-
Alcohol Advisory Council Amendment	M-13 U-1	M-6 U-1 CWH-1	M-4 CWH-2
New Zealand Public Health & Disability	M-26 CWH-5	M-140 CWH-19	M-49 CWH-2
Child Mentality Review Board	-	-	-

Justice and Electoral			
Electoral (Integrity)	-	-	-
Defacto Relations (Property)	-	-	-
Legal Services	U-74	U-44	U-42
Referenda Postal Voting	U-1	U-3	-
Matrimonial Property Amendment (& SOP)	M-86	M-34	M-339 CWH-7
Local Elections (Single Transferable Vote)	-	-	-
Local Electoral	M-14 U-27	M-8 U-38	M-8 U-38
Victims Rights & SOP	M-2 U-53 CWH-5	M-1 CWH-21	CWH-35
Electoral Amendment No.2	M-1 U-29 CWH-1	U-11 CWH-1	M-6 U-10 CWH-7
Court Fees Waiver	M-2	M-3	-
Sentencing & Parole Reform	M-52 CWH-6	M-228 CWH-42	M-246 CWH-51
Human Rights Amendment	M-8	M-35 CWH-1	M-66 CWH-5
			-
Law and Order			
Crown Organisations (Criminal Liability)	U-1	U-4	U-1
Crimes Amendment (No.6) & Supplementary Order Paper No.85	U-33	U-2	U-25
Crimes (Bribery of Foreign Officials) Amendment	U-4	U-3	U-1
Habeas Corpus	-	-	-
Crimes Amendment	-	-	-
Undercover Agents Exemption	-	-	-
Crimes (Publications)	-	-	-
Criminal Investigation (Blood Samples - Burglary Suspects) Amendment	-	-	-
Degrees of Murder	-	-	-
Arms Amendment (No.2)	-	-	-
Police Amendment (No.2)	-	-	-
Truth in Sentencing	-	-	-
Local Government and Environment			
Resource Management Amendment	M-57 U-5	M-101	M-101
Forests (West Coast Accord)	M-5	M-6	-
Hauraki Gulf Marine Park Amendment	-	U-2	U-1
Local Government (Elected Member Remuneration & Trade Enterprises) Amendments	M-1 U-4	U-4	-
Hazardous Substances & New Organisms Amendment (No. 2)	M-1 U-7 CWH-1	U-9 CWH-1	U-1 CWH-3
Local Government (Rating)	M-2 U-28 CWH-7	U-54 CWH-11	U-6 CWH-22
Wild Life (Penalties)	U-7	-	CWH-1
Maori Affairs			
Maori Purposes	U-11	-	-
Te Ture Whenua Maori	U-15 CWH-2	U-9 CWH-10	U-20 CWH-14
Maori Television Service	M-57	M-23	M-153

Primary Production			
Animal Products Amendments	U-21	U-11	U-42
Land Transfer & Cadastral Survey	U-15	U-58 CWH-7	U-19
Resource Management (Aquaculture Moratorium) Amendment	M-12	M-10	U-11
Biosecurity Amendment	-	U-11	U-5
Dairy Industry Amendment	U-1	U-1	-
Fisheries Amendment	M-35	-	-
Fisheries (Remedial Issues) Amendment	U-13	U-7	U-1
Apple & Pear Industry Restructuring Act	U-4	-	-
Dairy Industry Restructuring	U-41	U-61	U-66
Foreign Fishing Crew Wages & Repatriation Bond	U-5	-	M-1
Social Services			
Commissioner for Children	U-3	U-13	U-27
Social Workers Registration	M-7	M-24	M-60
Parental Leave & Employment Protection (Paid Parental Leave) Amendment	U-4	U-8	U-13
Social Security (Working Towards Employment) Amendment	M-2	M-6	M-62
Child Support Amendment	U-1	U-1	U-5
Social Security Amendment	CWH-1	M-8 CWH-4	M-5 CWH-3
Housing Corporation Amendment	U-6 CWH-1	U-25 CWH-1	U-37 CWH-1
Housing Restructuring (Income-Related Rents) Amendment	M-22	M-2 CWH-1	M-19 CWH-6
Children, Young Persons, & Their Families Amendment (No.3)	U-4	U-1	U-4
Social Security Amendment No.3 (formerly Social Security (Residence of Spouses) Amendment)	-	-	M-1
Student Loan Scheme Amendment (No.6)	-	U-2	-
Student Loan Scheme Amendment	M-6 CWH-1	-	M-1 CWH-3
Tattoo (Parental Consent)	-	-	-
Transport and Industrial Relations			
Airport Authorities Amendment (No.2)	-	-	-
Minimum Wages Amendment	-	-	-
CAA2	M-1 U-23	U-6	U-42
Land Transport (Road Safety) Enforcement Amendment	U-1	U-1	U-7
CAA	U-5 CWH-2	M-2 U-2	U-17 CWH-3
Injury Prevention Rehabilitation & Compensation	M-101 CWH-6	M-60 CWH-30	M-45 U-464 CWH-55

APPENDIX 2 – A 'DEALIGNED' PARTY SYSTEM?

New Zealand has long had more than two important *electoral* parties.²⁴⁹ Figure 3 traces the vote of minor parties in New Zealand from 1938 onwards. The beginnings of multipartism are in 1954 when the Social Credit Political League entered the political equation.²⁵⁰ Since the emergence of the Values party in 1972, New Zealand has seldom met Blondel's criteria for being a pure two party system and since in 1993 it has been in Blondel's "genuine multi-party systems"²⁵¹ category.²⁵²

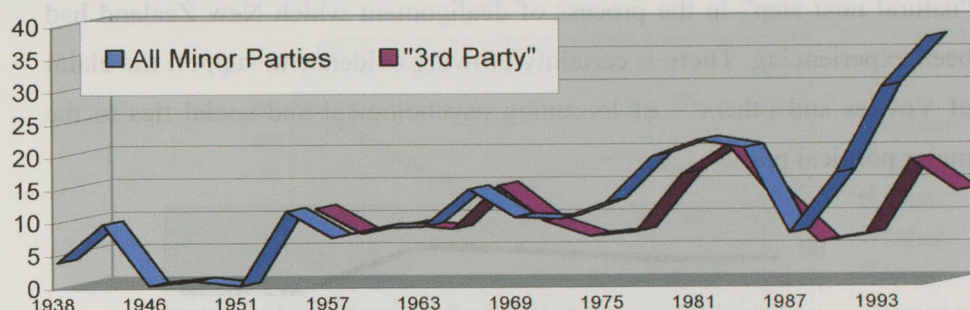


Figure 3 Performance of Minor Parties, 1938-1996

The result of the last election under the old electoral system provides further evidence to suggest that the two-party system had begun to break down before the change to MMP, and that the ability of the major parties to assume the ability to form majority governments was no longer guaranteed. Political scientists have begun to suggest that the changes in voting patterns

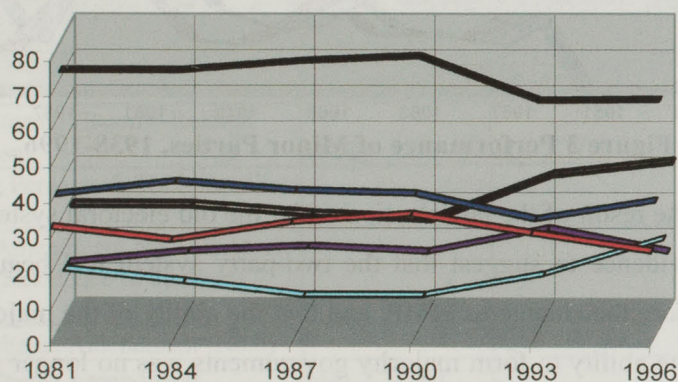
²⁴⁹ Raymond Miller "From Plurality to Proportionality: Some Early Observations on the Impact of Electoral Reform on the Party System in New Zealand" (Paper Presented to Canadian Political Science Association Conference, Brock University, St Catherine's Ontario, 2-4 June 1996).

²⁵⁰ Raymond Miller "The Democratic Party" in Hyam Gold (ed) *New Zealand Politics in Perspective* (2 ed, Longman Paul, Auckland, 1989).

²⁵¹ Jean Blondel *An introduction to comparative government* (London, Weidenfeld & Nicolson, 1969) 184.

²⁵² Peter Aimer "The Future of the Party System" in Raymond Miller (ed) *New Zealand Politics in Transition* (Oxford University Press, Auckland, 1997) 190. See also Rein Taagepera and Matthew Soberg Shugart *Seats and Votes: The Effects and Determinants of Electoral Systems* (Yale University Press, New Haven, 1989) 37; Rein Taagepera and Bernard Grofman "Rethinking Duverger's Law: Predicting the Effective Number of Parties in Plurality and PR Systems – Parties Minus Issues Equals One" (1985) 13 *European Journal of Political Research* 341; Rein Taagepera and Martin Soberg Shugart "Predicting the Number of Parties: A Quantitative Model of Duverger's Mechanical Effect" (1993) 87 *American Political Science Review* 455; and Miki Caul, Rein Taagepera and Bernard Grofman "Determining the Number of Parties in Stable Democracies: Social Heterogeneity and Electoral Institutions" Paper presented to the 1998 Annual Meeting of the Western Political Science Association, Los Angeles, California, March 19-21, 1998.

in New Zealand represent more than short term volatility, and that what we are seeing is the end of stable voting patterns, 'the dealignment' of the New Zealand party system.²⁵³ According to Vowles and others, electoral system change was driven by "continuous demographic, economic, social and political developments".²⁵⁴ Other manifestations of this have been the decline in New Zealand's historically high rates of political participation and "a loosening of the psychological and social ties between individuals and parties." A similar point is made by James²⁵⁵ who argues that while support for MMP may have been motivated by short term protest, it was a "natural next step" in the process of dealignment which New Zealand had been experiencing. There is certainly growing evidence to support the claim of Vowles and others²⁵⁶ of loosening psychological and social ties to the major political parties.



Source: Levine and Roberts 1994a: 147, Levine and Roberts 1998 Figure 2

Legend: Labour (red), National (blue), Major (black), Other (cyan), None (purple), Not Major (white)

Figure 4 Party Identification in New Zealand, 1981-1993

Using data from Levine and Roberts²⁵⁷ we can trace party identification from 1981 to 1996. As figure 4 shows, party identification

²⁵³ Barry Gustafson "Regeneration, rejection or realignment: New Zealand political parties in the 1990s" in Gary R Hawke (ed) *Changing Politics? The Electoral Referendum of 1993* (Institute of Policy Studies, Wellington, 1993) 73; Vowles and others, above, 14.

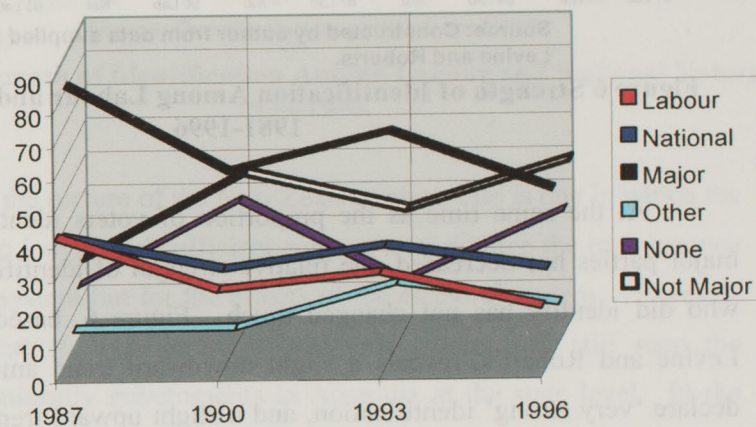
²⁵⁴ Vowles and others, above, 194.

²⁵⁵ Colin James "Pluralism rules, OK?" (December 1997) *New Zealand Books* 34.

²⁵⁶ Vowles and others, above, 194.

²⁵⁷ Stephen Levine and Nigel S Roberts "The Last Hurrah: The New Zealand General Election of 1993- What Happened and Why" in Jack Vowles and Peter Aimer (eds) *Double Decision: The 1993 Election and Referendum in New Zealand* (Department of Politics, Victoria University of Wellington, Wellington, 1994) 147 and Stephen Levine and Nigel S

was fairly steady until 1993 when there was a significant change. At the same time as identification for the two major parties ('major' line) slumped, the proportion of those who either have no identification ('none' line) or identify for a party other than Labour or National ('other' line), increased. Combined ('not major' line), these voters made up 40 per cent of the electorate in 1996. These changes seem to provide evidence of an electorate in which partisan dealignment is, or has been, occurring. That the pattern continued over two elections suggests this is more than electoral volatility.

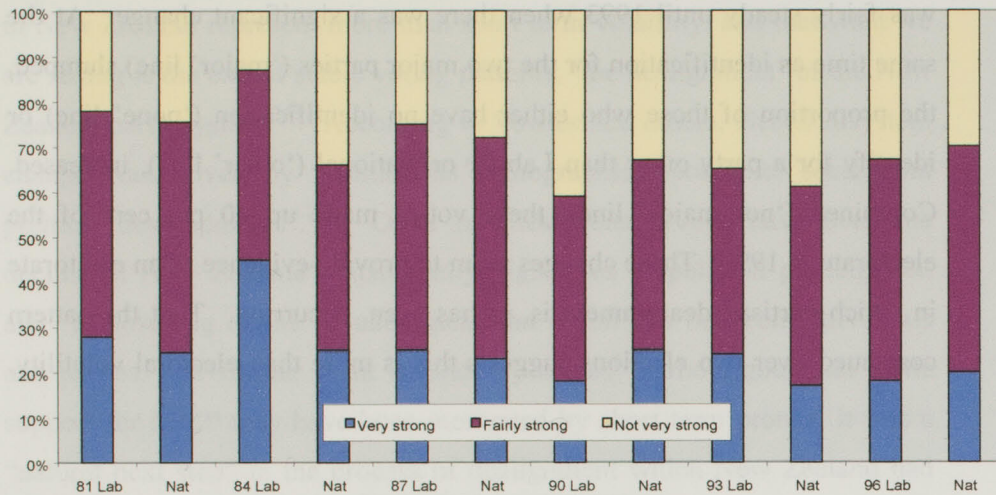


Source: Constructed by author from NZES

Figure 5 Party Identification in New Zealand, 1987-1996

Even more compelling evidence of partisan dealignment can be drawn from the NZES data, shown in figure 5. Over the course of the NZES surveys, identification with the two major parties has fallen from over 80 per cent in 1987 to under 50 per cent in 1996. At this level the proportion of Labour and National identifiers is equal to the proportion of voters who identify with a party other than Labour or National or do not identify with any party.

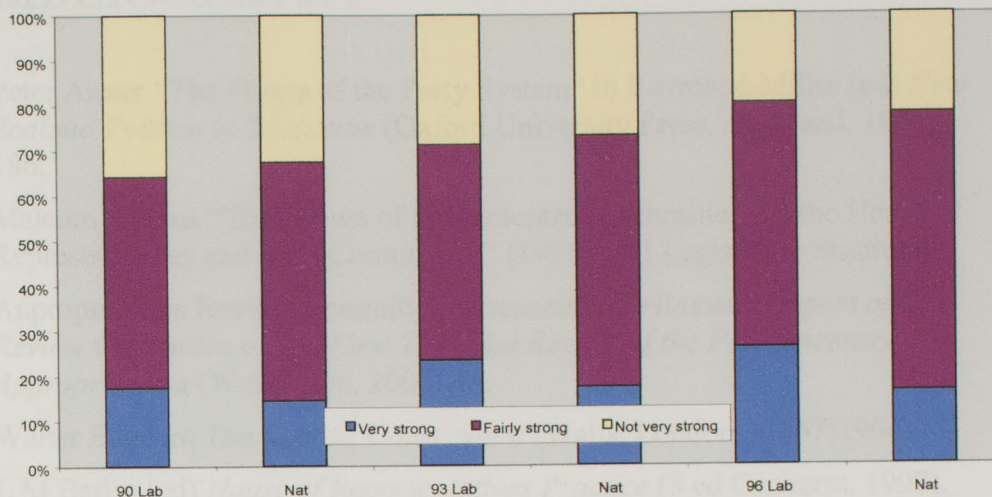
Roberts "MMP: The Decision" in Raymond Miller (ed) *New Zealand Politics in Transition* (Oxford University Press, Auckland, 1997) Figure 2.



Source: Constructed by author from data supplied by Levine and Roberts.

Figure 6 Strength of Identification Among Labour and National Voters, 1981-1996

At the same time as the proportion of voters identifying with the major parties has decreased, the relative strength of identification of those who did identify has not changed much. Figure 6, based on data from Levine and Robert's, reveals a slight downward trend among those who declare 'very strong' identification, and a slight upward trend among those whose identification is 'not very strong'. This is not reflected in the NZES data for the last three elections. As figure 7 shows, according to NZES data, if the proportion of 'very strong' identifiers has not decreased, the proportion of 'not very strong' identifiers has.



Source: Constructed by author from NZES

Figure 7 Strength of Identification Among Labour and National Voters, 1990-1996.

Overall the picture of the New Zealand electorate is one in which the major parties no longer had sufficient support to guarantee the maintenance of a two-party system but for the effects of the electoral system. However, as noted in Part V, a majoritarian electoral system has still seen the emergence of minority governments in Australia at the state level. In the case of South Australia it now appears that this may be a long-term situation. However, the difference between what has happened in the Australian states, and may well have happened in New Zealand if not for electoral system change, is that the major parties still dominate the legislatures. Minor party representation tends to be small. This allows influence on major issues, but does not allow a role for minor parties on all legislation as occurs in New Zealand currently.

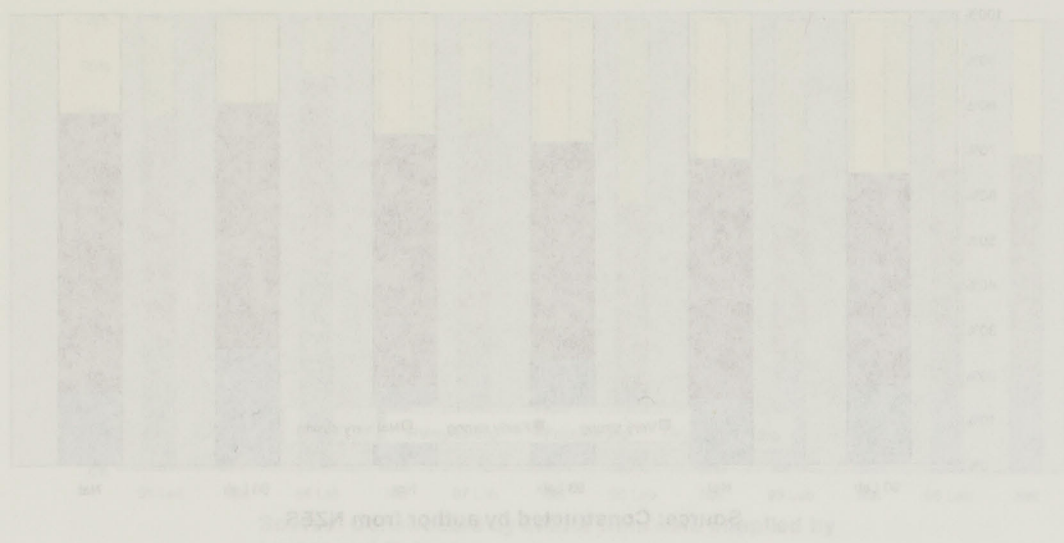


Figure 7 Strength of Identification Among Labour and National Voters, 1950-1970

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