

J&F: JAMES, G. Opportunities for opposition parties ...

GILL JAMES

OPPORTUNITIES FOR OPPOSITION PARTIES TO
INFLUENCE THE LEGISLATIVE PROCESS, WITH
EMPHASIS ON THE SELECT COMMITTEE STAGE

LLM RESEARCH PAPER
ADVANCED PUBLIC LAW (LAWS 509)

LAW FACULTY
VICTORIA UNIVERSITY OF WELLINGTON

1996

e
AS741
VUW
A66
J27
1996



VICTORIA
UNIVERSITY OF
WELLINGTON

*Te Whare Wananga
o te Upoko o te Ika a Maui*



LIBRARY

OPPORTUNITIES FOR OPPOSITION PARTIES TO INFLUENCE THE
LEGISLATIVE PROCESS, WITH EMPHASIS ON THE SELECT
COMMITTEE STAGE

TABLE OF CONTENTS

Acknowledgments.....

Abstract.....

Introduction..... **GILL JAMES**

**OPPORTUNITIES FOR OPPOSITION PARTIES TO
INFLUENCE THE LEGISLATIVE PROCESS, WITH
EMPHASIS ON THE SELECT COMMITTEE STAGE**

1. The New Standing Orders.....

IV Legislative Process – Government Bills..... 10

A Brief Overview of the Legislative Process..... 10

B The Pre-Parliamentary Legislative Stage..... 11

C Primary and Extraordinary Legislation..... 12

D First and Second Readings..... 13

E Debates..... 14

F Select Committees..... 15

**LLM RESEARCH PAPER
ADVANCED PUBLIC LAW (LAWS 509)**

V Select Committees..... 15

A Introduction..... 15

B Party Proportional Membership..... 20

C Size and Representativeness of Select Committees..... 22

D Substantive..... 23

E Circumstances..... 23

F Chair..... 23

G Ministers and Select Committees..... 24

H Powers and Operation of Select Committees..... 27

I Report of Select Committees..... 27

**LAW FACULTY
VICTORIA UNIVERSITY OF WELLINGTON**

1996

**OPPORTUNITIES FOR OPPOSITION PARTIES TO INFLUENCE THE
LEGISLATIVE PROCESS, WITH EMPHASIS ON THE SELECT
COMMITTEE STAGE**

TABLE OF CONTENTS

	Acknowledgments	iii
	Abstract.....	iv
I	Introduction	1
II	The Impact of MMP	4
A	The Changes to Membership of the House	4
B	Coalition or Minority Government	6
III	The New Standing Orders	8
IV	Legislative Process – Government Bills	10
A	Brief Overview of the Legislative Process	10
B	The Pre-introduction/ -legislative Stage.....	11
C	Urgency and Extraordinary Urgency	13
D	First and Second Readings	14
E	Debates.....	15
F	Referral to Select Committee	16
V	Select Committees	19
A	Introduction.....	19
B	Party Proportional Membership.....	20
C	Size and Representativeness of Select Committees	22
D	Substitution	23
E	Subcommittees.....	24
F	Chairperson of Select Committees.....	25
G	Ministers and Select Committees.....	26
H	Functions and Operation of Select Committees	27
I	Report of Select Committees.....	29

VI	Relationship between Party Caucuses and Select Committees	31
A	Party Caucuses	31
B	Relationship between the Government Caucus and Select Committees Pre-MMP	32
C	Party Cohesion and Select Committees in Multi-Party Parliaments	34
D	Anticipated Effect of MMP on the Relationship between Caucuses and Select Committees.....	36
E	Outcome for New Zealand	39
VII	Implications for the Legislative Process and Legislation	42
A	Members' Bills.....	42
B	Government Bills	44
C	Circumventing the House.....	47
VIII	Prerequisites for Effective Participation by Opposition Parties	50
IX	Conclusion.....	53
	Appendix.....	56
	Bibliography	57

ACKNOWLEDGMENTS

I would like to thank Sir Geoffrey Palmer and Mai Chen for their advice and comments, and my fellow students for useful comments and discussion and for rounding out my understanding of MMP and the new Standing Orders beyond the scope of my topic. Thanks are also due to Elizabeth McLeay for reading a draft and providing helpful comments, and my colleagues in the Office of the Parliamentary Commissioner for the Environment, Kirsty Woods and Camilla Cox for comments, suggestions and moral support.

I would especially like to thank Helen Hughes for allowing me the opportunity to undertake this course of study, and for her encouragement and support.

ABSTRACT

This paper considers the new Standing Orders which have been revised in anticipation of the adoption of the MMP electoral system and New Zealand's first election under that system in October 1996. In particular, the paper focuses on the Standing Orders as they apply to the legislative process, with emphasis on the select committee stage and the opportunities for opposition parties to make a valuable contribution to that process. The anticipated impacts of MMP on the membership of the House and the composition of government are described and against that background the Standing Orders relevant to the legislative process, and select committees, in particular, are analysed.

The main themes of the new Standing Orders are identified as proportionality of membership and speaking opportunities in the House, and the promotion of consensus decision-making, thus furthering the trend to open government.

The paper identifies the relationship between party discipline and select committees as crucial to the effectiveness of the select committee stage of the legislative process. In addressing that relationship, the paper draws on and discusses research undertaken by the Standing Orders Select Committee into proportional representation systems in Europe (including Ireland) and Scandinavia, and considers other research undertaken in respect of Germany, the United States, and Ireland. New Zealand's political culture is considered in the light of this research.

A number of factors identified indicate that select committees will become more independent and powerful, while caucuses are likely to be influenced by their members to a greater extent than in the past. Select committees are likely to develop as the fora for inter party negotiations. The implications of this outcome for the legislative process are likely to be –

- a slower process and therefore less legislation overall;
- greater use by governments of its prerogative powers as an alternative to legislation;
- a small increase in the number of members' Bills successfully enacted;
- more care taken by governments in characterising matters as confidence matters.

WORD LENGTH

The text of this paper (excluding contents page, footnotes, bibliography and appendix) comprises approximately 14,800 words.

Opportunities for opposition parties to influence the legislative process, with emphasis on the select committee stage

I INTRODUCTION

On 12 October 1996, New Zealand will, for the first time, elect its government on the basis of mixed member proportional representation (MMP). The prevailing view is that a government elected under this system is more likely to be a minority (coalition or single party) or coalition majority government than it is to be a single party majority government. Initially, there may be a greater number of parties represented in Parliament, but the threshold¹ will keep out the smallest parties and a process of realignment may take place so that in due course there may not be more parties represented in the House than there are at present.² In anticipation of the expected change in New Zealand's political environment, the Standing Orders Committee of the House of Representatives has substantially revised the Standing Orders, which until the revision, reflected the two-party political system to which New Zealand is accustomed.

Under the new Standing Orders and MMP it can be expected that all members of Parliament will be influential in what legislation is enacted and on the final shape of government policy, as the government will probably not be in a position to guarantee the passage of its legislation in the form it desires without the support of other parties. In that context the Standing Orders anticipate the

¹ Section 191(4) Electoral Act 1993: A party must achieve at least 5% of the party vote in order to qualify for any seats in Parliament, unless that party wins a constituency seat.

² J Boston, S Levine, E McLeay & N Roberts *New Zealand Under MMP – A New Politics?* (Auckland University Press with Bridget Williams Books, Auckland, 1996) 61. There are currently (ie as at September 1996) seven parties represented in Parliament: National, United, Labour, the Alliance, New Zealand First, the Christian Democrats, and the Conservative Party. There is also one independent member.

need for government decisions to be arrived at after consultation and, if possible, by consensus.

The new electoral system and the revised Standing Orders combine to provide opposition parties and individual members with new and enhanced opportunities to influence the legislative process and therefore the legislative output – Acts of Parliament. The greatest opportunities will arise in the select committee stage of the process and this paper looks in particular detail at that stage.

Of crucial importance to the effectiveness of opposition parties in influencing the legislative process during the select committee stage will be the relationship between party discipline as exercised by party caucuses and the development of strong and independent select committees. This paper explores the relationship between strong party discipline and independent select committees, and considers how that relationship may change under MMP.

Part II of this paper sets out the likely impacts of the change to MMP on membership of the House and the type of government that is likely. It is anticipated that Parliament will be more representative of the various views of the electorate and that a multi-party Parliament will provide an incentive for parties to negotiate to achieve their objectives in the House and its committees. There will be more parties represented in the House than has been usual in New Zealand and therefore those parties are likely to be smaller with correspondingly smaller party caucuses. There will also be more members and therefore a larger pool of talent from which to select Ministers.

Part III introduces the new Standing Orders and briefly describes the two principles upon which they are based, namely proportionality and the encouragement of consensus decision-making.

Part IV describes and analyses the legislative process for government Bills as set out in the Standing Orders. In particular, this analysis considers the Standing

Orders from the perspective of the influence opposition parties could have on the process through the specific recognition of parties in accordance with their size in the House relative to other parties and the effect on the opposition parties of the development of consensus decision-making.

In Part V the select committee stage of the legislative process is addressed in greater detail and opportunities for opposition members to influence the process at this stage are identified.

Part VI considers the relationship between party caucuses and select committees, both pre- and post the adoption of MMP. This evaluation suggests that select committees may become stronger and more independent while caucuses will continue to have a role, but rather than influencing select committees caucuses are more likely to be influenced by them.

In Part VII the possible implications for the legislative process of more effective opposition parties and members, and strong committees are considered. One possible implication is that members' Bills will have a greater chance of success, although this will depend on resources being made available to opposition members to enable their measures to be competently drafted and rigorously developed from a policy perspective.

Part VIII summarises the prerequisites for effective participation in the legislative process by opposition parties. The conclusions drawn are set out in Part IX.

II THE IMPACT OF MMP

A *The Changes to Membership of the House*

McLeay and Harris identify three important changes to the membership of the House of Representatives flowing from MMP, which will affect how the House carries out its functions.³ These three changes are:

1. The election of party list members who are likely be drawn from across the board. They can be expected to express a variety of views, representative of those of the country;
2. The change from the two-party system to a multi-party system; and
3. The different composition of the Government, that is, that it will very likely be a minority government (single party or coalition) or a majority coalition government.

In addition to these three changes, there will also be more members in the House, about 120 in total.

The election of party list members of Parliament can be expected to result in a wider range of views being represented in the House, as parties recognise the advantage in placing individuals who may appeal to minority or under-represented groups high on their lists. Lists can be used to address the imbalance of gender and ethnicity and to provide for the election of people with expertise in useful areas who might otherwise not appeal to the constituency. List members, in theory, may be more able to devote themselves to parliamentary work since they will not have the demands of a constituency. However, their parties may require them to share the constituency work with electorate members, both to raise or maintain their public profiles and to make electorate members available for other duties. In particular, electorates represented by Ministers would benefit from the involvement of other members.

³ Paul Harris and Elizabeth McLeay "The Legislature" in GR Hawke (ed) *Changing Politics? The Electoral Referendum 1993* (Institute of Policy Studies, Wellington, 1993) 103.

The dynamics of multi-party politics will be different from that of two-party politics. The traditional New Zealand political culture is one of confrontation, which is commonly associated with majoritarian (effectively two-party) systems.⁴ In such systems the policies of the two dominant parties tend to differ along only one dimension, for example socio-economic policy.⁵ In a multi-party system there tend to be differences among the parties along multiple dimensions, such as religion, race or culture. In an MMP Parliament, more than the two main parties may be effectively represented and, where this is so, there is a greater need for parties to negotiate in order for a government to be formed and policies to be implemented.

This need to negotiate may lead to the development of the much vaunted "culture of consensus" in the House. It appears that this is already developing in the present quasi-MMP period as the Government, reliant as it is on the support of the United Party, has had to consult with other parties to ensure that its legislation is enacted.⁶ However, some current members are sceptical, for example, David Caygill commented in the debate on the Standing Orders that "[t]here is no greater myth about MMP than that it will lead to a kinder, gentler, nicer, more harmonious House."⁷

With more parties represented in the House, it is likely that, proportional to the size of the House, each party so represented will be smaller than in the past. This will mean that there will also be more party caucuses and that they also will be smaller than formerly.

There will be approximately twenty more members in the House after the election on 12 October 1996 than is currently the case. The Electoral Act 1993,

⁴ SE Finer argues that "adversary politics is the fruit of the two-party system". SE Finer (ed) Preface to *Adversary Politics and Electoral Reforms* (Anthony Wigram, London, 1975) 3.

⁵ A Lijphart "Democratic Political Systems: Types, Cases, Causes and Consequences" *Journal of Theoretical Politics* Vol 1 1989 pp 33 - 48, 36 as cited by Harris and McLeay. See n 3 above, 104.

⁶ "Nine to Noon" Public Radio Broadcast 20 August 1996, transcript of interview with Sir Geoffrey Palmer by Kim Hill, 4.

⁷ (1995) 552 NZPD 10829.

which implements the decision to adopt MMP, provides for the increase in the number of members from 99 to approximately 120. The Royal Commission on Electoral Reform was of the view that MMP would not be practical with the existing number of members.⁸ This increase should provide a larger pool from which Cabinet can be appointed, provided the size of Cabinet is not increased commensurately.⁹ Assuming the number of executive members is not increased, there will be more members available to sit on select committees; and a larger pool of potential select committee chairpersons, party spokespersons and whips.

There will be an infusion of new blood into Parliament at the next election due to the increase in the number of members and the introduction of party lists, as well as the retirement of a relatively large number of sitting members.¹⁰ New members may have less entrenched attitudes and may be more prepared to work towards consensus government, especially as some of them will owe their seats to the new system.

B Coalition or Minority Government?

According to Dodd,¹¹ the ideal type of government likely to eventuate under MMP is the "minimum winning coalition", that being a coalition just big enough to ensure a parliamentary majority and containing no party that is not essential to the achievement of a majority. The larger a winning coalition is, the more likely it is that party discipline will be a problem. A minimum winning coalition is ideal in the sense that it is most likely to produce a relatively durable cabinet. Failing a minimum winning coalition, for reasons such as ideological incompatibility, there may be a single party minority government or there may

⁸ Report of the Royal Commission on the Electoral System *Towards a Better Democracy* [1986] AJHR H.3, 43.

⁹ Jackson argues that it is not clear that increasing the number of members of Parliament will of itself strengthen the select committee system. He agrees that increasing the number would supply a bigger pool of talent but argues that this advantage would be lost if the committees and Cabinet increased in size. He suggests a smaller Executive in a larger House: "Electoral Reform: An Academic Perspective" *Legislative Studies* Vol 3 No 1 Autumn 1988, 12, 15.

¹⁰ Among them are former Labour Prime Minister David Lange, and a number of former Ministers.

¹¹ Lawrence C Dodd *Coalitions in Parliamentary Government* (Princeton University Press, Princeton, New Jersey, 1976) 12-16.

be a majority coalition which is not minimum winning, but is what Dodd describes as oversized. If the opposition parties are also unable to unite, a minority may be able to govern successfully.

Minority government means that the government may be out-voted in the House and will be in a minority on the powerful Business Committee and in select committees overall. A minority government will not be able to govern unless it is able to gain the support of enough other members or parties to ensure its confidence measures are enacted.

Yet, even if a party succeeds in forming a single party government for one term of Parliament, it may not necessarily succeed in doing so the following term and will need to keep in mind the possibility of forming a coalition. This is likely to affect the type and manner of expression of its policies so that it does not preclude coalition with preferred parties.¹²

New Zealand has been regarded as a fairly extreme example of the Westminster system of government.¹³ According to Strøm, such systems incline towards single party minority governments rather than majority coalitions when their two-party systems disintegrate.¹⁴ It does not appear likely that the New Zealand system will behave in this way as New Zealand already has a coalition government in exactly the situation where Strøm would predict a single party minority government.

¹² Harris and McLeay, above n 3, 103.

¹³ Arend Lijphart *Democracies: Patterns of Majoritarian and Consensus Government in Twenty-one Countries* (Yale University Press, New Haven, Conn, 1984) 16-19; Matthew S R Palmer "Collective Cabinet Decision-making in New Zealand" in Michael Laver and Kenneth A Shepsle (eds) *Cabinet Ministers and Parliamentary Government* (Cambridge University Press, Cambridge, 1994) 226.

¹⁴ K Strøm *Minority Government and Majority Rule* (Cambridge University Press, Cambridge, 1990) cited in Harris and McLeay, above n 3, 106.

III THE NEW STANDING ORDERS¹⁵

The Standing Orders are Parliament's basic code of rules of procedure, adopted by the House itself.¹⁶ The new Standing Orders have been adopted in anticipation of the first MMP election and the report of the Standing Orders Committee acknowledges that changes may be required once the Standing Orders have been in use for a period. Indeed, the Standing Orders Committee reported again in August 1996 and a number of changes were made prior to the House rising for the election.¹⁷ Some changes recommended by the Committee will require legislation and others, the development of conventions.

Acknowledging that MMP means a more important role for opposition parties, the new Standing Orders are based on two principles: proportionality in the membership of committees and allocation of speaking opportunities; and the need to achieve consensus wherever possible. This second principle entails the provision, on a timely basis, of adequate information to members, and genuine consultation with members of all political parties represented in the House. The Standing Orders Committee itself currently reaches its decisions by consensus.

On their own Standing Orders provide for a fairer distribution of speaking times and representation on select committees, however, if one party achieves an outright majority at an election, that party will still outnumber the other members on select committees and be allotted most of the speaking time. Opposition parties will not be in a position to make or break a government, negotiate the amendment of legislation to moderate government policy, nor will their scrutiny be as effective. To this extent it should be noted that the changes to Standing Orders reflect more than the coming change in the electoral system.

¹⁵ *Report of the Standing Orders Committee on the Review of Standing Orders* [1995] AJHR I.18A.

¹⁶ David McGee *Parliamentary Practice in New Zealand* (2 ed GP Publications Ltd, Wellington, 1994) 81.

¹⁷ *Report of the Standing Orders Committee on its Review of the Operation of the Standing Orders* [1996] AJHR I.18B.

Some changes have been mooted for some time and would have been desirable improvements even if MMP had not been adopted.

Although New Zealand's system of MMP is modelled on the German system, the Standing Orders Committee did not recommend the adoption of a rule similar to Germany's "constructive vote of no confidence", whereby the opposition may move a vote of no confidence in the current Chancellor only if it is able to propose, by an absolute majority, the name of a person it would support as Chancellor. In New Zealand, it is unclear whether or not the Governor-General *must* grant a dissolution of Parliament to a Prime Minister who has lost the confidence of the House, and if a dissolution is not required, how the Governor-General is to determine whether an alternative government can be formed.¹⁸ New Zealand has no experience of how to deal with a government falling during its term, but it is more likely to occur under proportional representation.¹⁹ The German rule is conducive to greater stability as it would enable the government to continue in office even if the opposition parties managed to unite and pass a motion of no confidence, provided that they could not agree on who should form the next government.

The position as to dissolution is clearer in Germany, where the Chancellor may move a positive vote of confidence which, if lost, enables him or her to secure a dissolution of the Bundestag, unless the Bundestag is able to elect a successor to the Chancellor before the dissolution takes effect 21 days after the motion is passed. In New Zealand the convention has been for a government to continue in office until it loses a vote of no confidence. "Negative parliamentarianism", such as the New Zealand system, tends to be associated with minority government.²⁰

¹⁸ State Services Commission *Working under Proportional Representation: a reference for the Public Service* (Wellington, 1995) 89.

¹⁹ State Services Commission, above n 18, 96.

²⁰ Kaare Strøm, Ian Budge & Michael Laver "Constraints on Cabinet Formation in Parliamentary Democracies" *American Journal of Political Science* Vol 38 No 2 May 1994, 303, 320. See also Boston et al, above n 2, 100.

IV THE LEGISLATIVE PROCESS – GOVERNMENT BILLS

*A Brief Overview of the Legislative Process*²¹

Prior to the revision of Standing Orders, Bills were introduced, debated at the first reading and referred to a select committee. The first reading debate provided no real opportunity for a useful contribution from the opposition members as few, if any, were likely to have seen a copy of the Bill prior to introduction.

Under the new Standing Orders all Bills, with the usual exceptions of money Bills and Bills accorded urgency, will be referred to a select committee for consideration following the second reading.²² The committee of the whole House stage will follow the debate on the select committee report, unless that stage has been dispensed with. Prior to 1996, all Bills were required to go through the committee of the whole House stage, except with leave of the House where there were no amendments to be moved. Now, however, the Business Committee may decide that the Bill does not require consideration in committee, in which case the Bill is set down for its third reading.²³

In the committee of the whole House, Bills are generally examined clause by clause. This provides opportunities for technical amendments to improve the quality of Bills, and supplementary order papers may introduce amendments at this stage. However, as a time-saving device the government has often moved for a Bill to be considered part by part instead. This has the disadvantage of curtailing the detailed scrutiny of each clause and the quality of a Bill may suffer as a result. It is now within the power of the Business Committee to determine whether a Bill should be debated part by part at the committee stage rather than requiring a motion of the House. Both the taking of a Bill part by part and the

²¹ The Appendix to this paper compares the legislative process as it was prior to 1996, with that provided for in the new Standing Orders.

²² Standing Order 279.

²³ Standing Order 291(2).

decision of the Business Committee to dispense with the committee stage altogether may have serious consequences for legislation depending on the criteria upon which such decisions are based. The Business Committee could decide to omit the committee stage of a non-contentious Bill even though it is a complex and important piece of legislation, thus robbing such legislation of the benefits of the detailed scrutiny of the House in committee.

Following the committee of the whole stage the Bill will be read a third time. The final stage of the legislative process is the endorsement on the Bill of the Royal Assent by the Governor-General.

B The Pre-introduction/ -legislative Stage

Traditionally, government proposals for legislation were developed with the assistance of departmental officials, who would sometimes be authorised to consult with outside groups or individuals. The actual legislative programme was and still is confidential to the government.²⁴ The *Cabinet Office Manual* sets out the basic process for the development of government legislation from the policy stage through to enactment. This process involves consultation within government circles as a matter of course, and may involve wider consultation where the appropriate Minister directs or approves such consultation. The *Cabinet Office Manual* does not specifically address consultation with opposition parties, although it envisages that it will be necessary for the government to consult with other political parties to the extent that that is necessary to ensure sufficient support for its legislation.²⁵

Early consultation by a minority government with opposition parties would help build support for government proposals and be a further advance on the trend for major reforms to be preceded by the publication of discussion papers and the canvassing of views of key interest groups. To the extent that opposition

²⁴ See the recently revised *Cabinet Office Manual* (Cabinet Office, Wellington, August 1996) para 5.6.

²⁵ *Cabinet Office Manual*, above n 24, paras 5.34 -5.36.

parties can put forward their views in a non-adversarial context and before the government has publicly committed itself to a draft Bill, they are more likely to influence the policy reflected in the Bill. On the other hand it may be easier for the government to enter into negotiations with other parties once it has a draft Bill which sets out its starting position. If this should be the way the process develops, it may be in the interest of better quality legislation to involve select committees before the Bill is introduced to consider the policy and its formulation without being hampered by the outcome of the second reading debate on the purpose and principles of the Bill, and before the government has become publicly committed to the Bill.²⁶

A pre-legislative stage involving select committee consideration of legislative proposals would help to ensure that the policy behind legislative proposals and the detail of those proposals was adequately worked through before introduction.²⁷ This in turn would mean that members of the public who make submissions would do so on the basis of a Bill which fairly represents government policy. There is nothing in the Standing Orders which would preclude select committees from considering policy issues before legislation is drafted, and there has been at least one occasion when this has occurred.²⁸

In Ireland there is no formal pre-legislative consultation with the opposition parties prior to the introduction of a Bill. There is scope, however, for the Joint Committee on Legislation to undertake an information-gathering exercise to establish the views of interested parties. The members on the committee can contribute their own ideas on the proposed legislation through their choice of

²⁶ Geoff Skene *New Zealand Parliamentary Committees: An Analysis* (Institute of Policy Studies, Wellington, 1990) 12. Burrows argues that there is no evidence that the adoption of pre-legislative involvement of select committees would make any difference: JF Burrows *Statute Law in New Zealand* (Butterworths, Wellington, 1992) 42.

²⁷ There has been a tendency in recent years for governments to introduce legislation which has not been given sufficient attention prior to introduction in the belief that select committees and Parliamentary Counsel would remedy any problems.

²⁸ Keith Jackson *The Dilemma of Parliament* (Allen & Unwin NZ Ltd and Port Nicholson Press, Wellington, 1987) 97-99. The Public Finance Bill 1977 was referred to the Public Expenditure Committee. Jackson sees the failure of governments to use this procedure as reflecting the determination of those governments not to relinquish their tight grip upon legislation and implying the jealously guarded dominance of the House over its committees.

questions and selection of witnesses. The Committee makes its contribution before a Bill has been drafted. The expectation was that only 3 to 5 Bills per year would warrant such treatment and they would be the most significant and controversial measures.²⁹ Since March 1995, some Irish committees have been empowered to discuss and draft proposals for legislative change.³⁰

It is established practice in Germany for all draft Bills to be submitted to members of the Bundestag. The members and the Fraktionen (the parties) provide comments on the draft Bills to the ministries. A consequence of this practice is the smoothing of the path of Bills through the Bundestag and its committees.³¹

There would be some merit in a formal pre-legislative procedure being used in New Zealand more frequently than has been the case, although consultation at the pre-legislative stage is developing. Palmer has commented that there has been little legislation introduced in 1996 which wasn't agreed in advance.³²

C Urgency and Extraordinary Urgency

A Minister may move, without notice, a motion to accord urgency to certain business. There will be no amendment or debate on the question but the Minister must explain to the House "with some particularity" why the motion is being moved.³³

Although in the past urgency has been used to avoid the scrutiny of the House, there has been no great abuse of the urgency provisions recently as the

²⁹ David Gwynn Morgan *Constitutional Law of Ireland* (2 edn The Round Hall Press, Dublin, 1990) 98.

³⁰ Standing Orders Report, above n 15, 263.

³¹ Tony Burkett "Developments in the West German Bundestag 1969-80" (1981) 34 *Parliamentary Affairs* 291, 304.

³² Palmer, above n 6, 5.

³³ Standing Order 56.

Government has not had the numbers to enable it to do so.³⁴ However, the Standing Orders Committee saw the need to discourage the taking of urgency.

Previously, urgency allowed a Bill to proceed through all stages of enactment at the one sitting of Parliament. Now, however, urgency sitting hours will not commence until the day following that on which the motion for urgency has been agreed.³⁵ The taking of urgency disadvantages the opposition parties as they will not usually have an up-to-date copy of the Bill being debated.

The new rules as to urgency operate to restrain the government in its efforts to bypass the standard legislative procedure and thereby deny opposition parties their opportunity to debate the proposed legislation fully and scrutinise it in select committee. Under extraordinary urgency the sitting at which the motion is agreed is extended to accommodate the business, but the Speaker must be satisfied that the business warrants the taking of extraordinary urgency.³⁶

D First and Second Reading

The Standing Orders Committee recognised the futility of a first reading debate as opposition members had little information upon which to base a useful contribution and recommended that the debate on first reading be dispensed with.³⁷ Instead, there is provision for a second reading debate prior to the Bill being referred to select committee. By the time of the second reading, which can take place no sooner than three sitting days after introduction unless the Business Committee determines otherwise, all members should have a copy of the Bill and have had the opportunity to read and consider it. However, three days is still a very short period in which to read and digest some of the very

³⁴ The Maori Reserved Land Bill was introduced and referred directly to a select committee in the last days of the 44th Parliament, with the agreement of Labour. It will have its second reading on its return to the House.

³⁵ Standing Order 57.

³⁶ Standing Order 58.

³⁷ Standing Orders Report, above n 15, 53.

complex legislative proposals introduced into the House. In fact, because the House sits only three days per week in normal circumstances it is more likely that there will be a full week between introduction and second reading.³⁸ In order to cope with the demand for a quick assessment of Bills, there would be value in parties assigning responsibility for particular areas to specific members who would then have the task of briefing the party caucus on a legislative proposal within that subject area.

To assist members the explanatory note attached to the introduction copy of a Bill is to provide more than just the technical information it has contained in the past. Departmental officials will now draft the explanatory notes of Bills providing discussion of the policy the Bill is intended to implement and matters which the Bill is intended to remedy. The new Standing Orders do not specifically address this matter, but the Standing Orders Committee recommended this course of action in its report.³⁹

E Debates

In the past, the government has been able to pass whatever legislation it wished despite the best efforts of the opposition. This was because it controlled a majority in the House. As a consequence, the power of the opposition was to delay and embarrass, but, in the future, if the government is in a minority and/or dependent on holding a coalition together, the opposition may actually defeat government Bills or succeed with its own.⁴⁰ Before the adoption of MMP, this would have put pressure on the government to make sure that it was adequately represented in the House when Bills of significance to it were being debated. The challenge for a minority government will now be to build support for its

³⁸ For example, for a Bill introduced on a Tuesday, the third sitting day following will be the next Tuesday.

³⁹ Standing Orders Report, above n 15, 54. It appears that this recommendation has already found its mark as a number of government Bills have included the new expanded explanatory note.

⁴⁰ For example, the Education Amendment Act 1996 promoted by Trevor Mallard was enacted in the face of government opposition, a reversal of roles which saw an acrimonious exchange in the House between Mr Mallard and the chairman of the select committee, Ian Revell: (1996) 555 NZPD from 13034.

important measures. With the advent of proxy voting, the actual numbers in the House will be less important to the outcome. The provisions for proxy voting allow for a member of one party to give his or her vote to another party, but they must do so explicitly as, in the absence of a member from the House, that member's party may cast his or her proxy vote without specific instructions.⁴¹

Members may now abstain from voting altogether as, where there are a number of parties in the House, there are more likely to be occasions upon which a party or member is neither in favour of, nor opposed to, a particular measure.⁴²

In terms of managing debates, the Business Committee plays the major role. It may decide the amount of time to be devoted to particular debates and how that time should be divided up, that is, the number and length of speeches to be accommodated.⁴³

Not all Bills are confidence issues and the defeat of a government Bill will not necessarily cause more than loss of face to the government. Indeed the government may become less concerned about being defeated on minor measures. As this happens, government caucuses may become more selective about the measures upon which they insist on their members toeing the party line. Likewise opposition parties and their caucuses may become more tolerant of departures from the party line on a wider range of issues than formerly.

F Referral to Select Committee

The second reading debate on the purpose and principles of the Bill effectively sets the terms of reference of the select committee. Following the debate the

⁴¹ See sessional order varying Standing Orders 21 February 1996 in *Parliamentary Bulletin* 96.01. The sessional order provided for the Leader of the party or the senior party whip to exercise the proxy vote of each member of the party subject to any express direction from a member to the contrary; SO 158 to be read accordingly. This order has now been superseded by an amendment to SO 158, adding para (4) in similar terms: refer [1996] AJHR I.18B.

⁴² Standing Orders Report, above n 15, 29.

⁴³ Standing Orders 78, 79(2).

member in charge of the Bill moves a motion nominating the select committee to which the Bill will be referred. The member may include in the motion any special powers or instruction in respect of the committee's consideration of the Bill that the member has indicated in the second reading debate are to be proposed.⁴⁴ Provided notice is given prior to the second reading a motion moving an amendment to substitute another committee or to alter the special powers or instructions may be moved. Depending on the make up of committees and the measure in question, the member in charge of the Bill could well nominate a committee expected to be more amenable to the government's proposal than the obvious subject committee. However, this would alert the opposition parties to suspect the government's motives and even parties sympathetic to the government might vote for an amendment. The motion for amendment would have to be with the Clerk at the Table before the second reading, so the opposition parties would not necessarily have adequate forewarning of the government's intention.

In practice, much negotiation goes on behind the scenes. The opposition parties do have forewarning and will have indicated to the government whether or not they will oppose the motion, which allows the government to take into account the strength of the opposition to the motion when considering whether or not to persevere with its motion. This demonstrates the operation of the law of anticipatory reaction; namely that all governments are conscious of the likely reaction to their proposals, especially the reaction of the opposition parties.⁴⁵

In some circumstances, an opposition party may not wish a Bill to be referred to the relevant subject committee. For example, it may wish the Bill to go to a committee in which it has a majority or certain key members or the chairperson is from that opposition party. Alternatively, there may be a choice of appropriate committees where the subject matter of a Bill crosses boundaries. In these circumstances an opposition member could table a motion for an

⁴⁴ Standing Order 280.

⁴⁵ Jackson, above n 28, 95.

amendment on the assumption that the government will refer the Bill to a particular committee and withdraw the motion if the government acts otherwise.

V SELECT COMMITTEES

A Introduction

This Part will examine the select committee stage of the legislative process in greater depth as it is generally accepted as the most important stage in the enactment of a Bill and the stage which provides the opposition parties and individual members with the most scope to influence the legislative process and outcome.⁴⁶ This examination will take place against the background of MMP and in the context of the new Standing Orders.

The primary purpose of the select committee stage is to permit careful and detailed scrutiny of Bills and policy by the public and the committee. They are also a useful and efficient means of dealing with a large amount of work. Skene notes that "committees deal with matters that are too detailed, too unwieldy, too difficult politically or too mundane for the full House".⁴⁷ Committees are a useful and effective way of enabling the House to get through a large amount of work, and of dealing with complex subject matter.

In the 1960s and 1970s few Bills were referred to select committees and little change was made to legislation between introduction and enactment.⁴⁸ In recent years, however, almost all Bills have been referred to select committees

Writing in 1990, Skene noted changes in the functions of select committees in the period from the 1960s to the 1980s and identified a trend of weakening party control over committees. He suggests that party discipline had been reduced; government backbenchers were growing more independent of the Executive and that ministerial control of the legislative process was in decline. However, party discipline and the government's need to pass its legislation

⁴⁶ See Boston et al, above n 2, 79; and above n 6, 6.

⁴⁷ Skene, above n 26, 2.

⁴⁸ Skene, above n 26, 17.

continued, then, to pervade the committee process and so it was necessary for committees to have both a government majority and a government chairperson, such chairpersons being carefully selected by party leaders to avoid appointing what Skene called "rogue cannons" to committee chairs.⁴⁹

In an MMP environment, the select committee will be the obvious forum for the inter-party negotiation of deals which will be necessary to enable the government to govern.⁵⁰

B Party Proportional Membership

Membership of select committees is determined by the House. The Business Committee will consider nominations put forward by the parties and make recommendations to the House as to appointments. Although there is a requirement that the overall representation of parties on committees should reflect the balance of the parties in the House, there is no requirement that this should be so for each committee. It is conceivable, therefore, that the government may be in a majority on some committees and in a minority on others or in a minority on every committee. A particular opposition party may have sufficient numbers to dominate a particular committee.

It is likely that each opposition party will have fewer seats than the government⁵¹ and, although in the House they may unite to oppose the government on a particular measure, they may not have sufficient identity of interest in select committee to out vote or sway the government members.

With around 20 to 24 government members unavailable for select committee work because they are part of the Executive, the proportional nature of the overall membership of select committees will be disturbed, unless some

⁴⁹ Skene, above n 26, 24.

⁵⁰ Palmer, above n 6, 6 where Palmer said "It is already clear that [select committees] are becoming the primary focus for settling details of legislation in an environment where it is necessary to have consensus to settle them ...".

⁵¹ However, there is no requirement that the leader of the largest single party elected should be asked to form a government.

government members serve on more than one committee.⁵² A single party minority government would have some difficulty in providing enough members to cover all the committees. Other issues arise in a coalition government – presuming that coalition partners will not be large. The relative strengths of the partners will be important in determining how select committee membership is distributed.

As the Business Committee itself should reflect the balance of parties in the House and attempts to reach its decisions by consensus or, failing that, by near unanimity, the government will not necessarily be able to stack the committees to suit itself. This should assist a fair distribution of appointments among the parties, although much will depend on the relative numbers in the House of the government and opposition parties.

The House makes the final decision on appointments and the final result will depend on how the recommendations of the Business Committee are perceived and whether they are unanimous or near unanimous recommendations.

Of the countries visited by the Standing Orders Committee in 1995,⁵³ the membership of committees is determined as far as possible in proportion to the relative size of the party in the House in Germany, Denmark and Norway. However, in Norway, members may sit on only one committee.⁵⁴

In Germany, members compete for appointment to prestigious committees. The *Fraktionen* propose members of committees to the President. The members indicate to the whips which committee they want to sit on, although established members are more likely than new members to be appointed to their preferred committee. Some weight is given to the particular expertise of a member in determining membership. There is relatively high stability in the membership of

⁵² List members would be the most obvious candidates for serving on more than one committee in this situation.

⁵³ The countries visited were Ireland, the Netherlands, Germany, Denmark, Sweden and Norway.

⁵⁴ Standing Orders Report, above n 15, 265.

committees especially on the more prestigious committees (Appropriation and Defence).⁵⁵

In Denmark, the Folketing (the House of Representatives) appoints the members to committees. Several parties will often enter into electoral pacts in order to obtain the maximum number of seats on a given committee.⁵⁶

C Size and Representativeness of Select Committees

Under the new Standing Orders there will be 12 subject select committees with eight members each (an increase from five). In a Parliament with 120 members, assuming around 96 available for select committee work (as did the Standing Orders select committee), no member should be required to sit on more than one committee. In theory, at least, this should give members the opportunity to develop expertise in particular subject areas.

In Germany, with the reduction in the number of committees over several years, there has also been a reduction in the number of members who are needed to serve on more than one committee. However, this has not greatly reduced the workload of the more senior members (party officials and spokespersons and members of the Council of Elders) of the Bundestag who also chair committees.⁵⁷

Opposition parties have an advantage on select committees insofar as their experts, the party spokespersons in particular areas, are members of committees whereas the Government's main experts are likely to be in Cabinet and therefore not available to sit on committees. However, government select committee members will also have the opportunity to develop expertise.

⁵⁵ Nevil Johnson "Committee in the West German Bundestag" in JD Lees and M Shaw (eds) *Committees in Legislatures* (Duke University Press, 1979) 102, 117.

⁵⁶ Standing Orders Report, above n 15, 320.

⁵⁷ Johnson, above n 55, 116.

New Zealand committees are small by comparison with those of Germany (19 to 41 members) and Denmark (17 members). In Denmark, no committee has a government majority. If a small party is not represented on a committee, it may have two members attend and participate, but not vote.

D Substitution

Since 1985, the select committee system has suffered a number of difficulties: members were burdened with positions on more than one committee and substitution was common, leading to a lack of continuity on committees.⁵⁸ Skene attributes the problem of substitution to members themselves who have demonstrated a reluctance to sit on committees due to the lack of political pay-back derived from such work, reflected in the lower level of media attention it attracts relative to other activities open to members. He observed that fewer members attend committees in an election year.⁵⁹

There is a need for continuity in membership and regular attendance of members to assist the development of expertise and the growth of committee loyalty. The development of expertise is hampered if the membership of a committee is constantly changing. The growth of committee loyalty will enhance the non-partisan nature of committee work and increase the independence of committees.

As the new Standing Orders contemplate members having to sit on only one committee, this may reduce the problem of substitution. However, some substitution will be necessary – there will be occasions when it is sensible to allow substitution and the Standing Orders Committee indicated that substitution also has value in exposing more members to a greater diversity of issues. Permanent changes to select committee membership will require the

⁵⁸ Skene, above n 26, 6.

⁵⁹ Skene, above n 26, 9.

approval of the Business Committee; whereas temporary substitutions will be the responsibility of party whips or party leaders.

Members are more likely to attend caucus committees where members are more likely to have an effect on party policy. The detailed work of select committees, though extremely valuable, is time consuming and not always acknowledged by the electorate. Further, members do not always see it as to their advantage to develop expertise in a particular area as they may fear that it limits their options for advancement and their constituents are concerned with the more fundamental issues such as unemployment. Under MMP, the list members will be less constrained in this way and the list is more likely to be a source of expertise as in Germany. This has its disadvantages in Germany, where the Bundestag is considered to be dominated by the educated middle class and is therefore not representative of a cross section of the community.⁶⁰

E Subcommittees

Standing Order 203 provides for committees to appoint subcommittees and to prescribe the procedure of subcommittees provided that it is consistent with Standing Orders.⁶¹ The Committee expressed the belief of its members that subcommittees make efficient use of time. This is another possible avenue of influence for opposition members to explore.

In the United States, senate and congressional committees may establish subcommittees. Lees has noted an increase in the use of subcommittees by US congressional committees due to the pressure of work. The establishment of senate subcommittees is often indicative of the particular concerns of individual senators and may be used to influence public opinion in support of a legislative proposal.⁶²

⁶⁰ Burkett, above n 31, 291.

⁶¹ Standing Orders Report, above n 15, 37.

⁶² John D Lees "Committees in the United States Congress" in John D Lees and Malcom Shaw (eds) *Committees in Legislatures: A Comparative Analysis* (Martin Robertson & Co Ltd, Oxford, 1979) 3, 19.

F Chairperson of Select Committees

Currently committees select their own chairperson at the first meeting of the committee, but prior to that meeting there has usually been some inter-party discussion on who is likely to be selected.⁶³ Traditionally, all chairpersons have been government members except the chairperson of the Regulations Review Committee which, since 1985, has been chaired by an opposition member.

Committees will continue to elect their own chairpersons. However, with the likelihood of committees having different balances of parties represented, it is likely that chairpersons also will come from a variety of parties, but not necessarily the party with the largest membership on the committee, as the chair will be a matter for negotiation. Colin James predicts that a minor degree of independence might develop in select committees insofar as they are chaired by non-government members.⁶⁴

Recognising the greater number of members that committees will have, the Standing Orders Committee recommended that there should also be deputy chairpersons and that, in contrast to the previous procedure, the positions of chairperson and deputy chairperson should not remain fixed for the whole life of the Parliament. A member may move, on seven days notice, that the chairperson or deputy be removed.⁶⁵

As a result of the frustration which Ministers may experience in operating within a multi-party Cabinet, and the shift in power to select committees, the position of chairperson of a select committee may come to be seen as an acceptable

⁶³ Standing Orders Report, above n 15, 35.

⁶⁴ Colin James "The Way It Might Be" in Colin James and Alan McRobie (eds) *Turning Point: The 1993 Election and Beyond* (Bridget Williams Books, Wellington, 1993) 139, 142.

⁶⁵ Standing Order 206(2).

alternative career path to ministerial office. The chairs of the more powerful and prestigious committees may become more sought after.

In Denmark, the chairs of committees are allocated proportionally at a meeting of party leaders. In Germany, chairs are distributed proportionally with the parties usually having come to some agreement as to which committees each will chair.⁶⁶ Committees elect their own chairpersons in Norway, although in practice the elections are decided in advance by negotiation among the parties. In Ireland chairpersons are elected by the committees although the names of those proposed are usually agreed to by the whips. These examples indicate that the election of chairpersons is generally negotiated.

G Ministers and Select Committees

Since 1985 Ministers have not taken part in select committee proceedings. This was an attempt to separate the Executive from Parliament.⁶⁷ It also recognised that Ministers rarely attended select committee meetings. However, the Standing Orders Committee perceived it as essential for Ministers to be directly involved in the legislative work of committees, especially for a minority government.⁶⁸ The Committee recommended that Ministers should be able to participate in proceedings on Bills, but should not be able to vote. In effect, the role of Ministers will be to brief the committee, hear evidence and answer for the policy. However, the presence of a Minister may inhibit government members and encourage them to push the government line more strenuously than they might otherwise.

Ministers are expected to attend if invited by the committee and answer questions concerning legislation they are promoting. The appearance of

⁶⁶ Standing Orders Report, above n 15, 267.

⁶⁷ Geoffrey Palmer *Unbridled Power: An Interpretation of New Zealand's Constitution & Government* (2 edn, Oxford University Press, Auckland, 1987) 138.

⁶⁸ Standing Orders Report, above n 15, 35.

Ministers before select committees should provide opportunities for more intensive questioning of those Ministers than does question time in the House. Select committee procedure is less ritualised than procedure in the House, although it is also less public. Burkett has noted that in Germany Ministers sometimes find themselves facing questions from committee members who are also experts in the relevant policy area.⁶⁹

H Functions and Operation of Select Committees

The House may control the ambit of a committee's scrutiny by setting the terms of reference for the committee in the second reading debate and motion of reference. In any event, the brief of the committee is to attend to the detail of a Bill and determine whether the Bill should be passed in the form in which it was introduced. The purpose and principles of the Bill are debated and agreed by the House at the second reading stage and it is not open to the committee to revisit that decision. This is at variance with the brief of non-Westminster committees, which generally are endowed with a wider range of powers than Westminster committees. For example, United States committees have complete powers over Bills referred to them.⁷⁰

Iles has noted among the advantages of the scrutiny of Bills by select committees, that members generally act in a non-partisan way and consider Bills in a constructive manner. Members obtain a great deal of useful information about, and develop expertise in, the subject matter of Bills referred to them. This has stood them in good stead in the second reading debate and the committee of the whole House stage and in future will continue to be beneficial. The select committee stage is an important quality control stage as Bills are subjected to the most detailed scrutiny that they will encounter and errors and

⁶⁹ Burkett, above n 31, 299.

⁷⁰ Jackson, above n 28, 113.

impracticalities of Bills are often identified during the hearing of public submissions and the consideration of Bills.⁷¹

Although committees have traditionally behaved in a relatively non-partisan way, this is not always the case. As David Caygill described it: "The degree of partisan behaviour on the committees often depends on the political significance attached to the measures".⁷²

Most legislation introduced into Parliament is non-contentious. Much of it is what could be described as housekeeping legislation which keeps the bureaucracy functioning. However, the contentious legislation which is introduced can attract substantial publicity and scrutiny, far out of proportion to its true importance. In Germany, as in New Zealand, committee members tend to vote along party lines if a matter is contentious, but Johnston notes that, in Germany, committees strive to achieve unanimity where possible.⁷³

Although New Zealand, until recently, was one of the most extreme majoritarian systems, its select committee system is considered to be one of the most developed in the Commonwealth, that is, among other majoritarian systems. The Standing Orders Committee noted that governments are coming to rely on the select committee system to provide for public discussion and the refinement of legislation.⁷⁴ For example, in New Zealand, it is usual practice to seek public submissions on Bills referred to select committees, but this is not the norm overseas, although Ireland has recently adopted this practice.⁷⁵

⁷¹ Walter Iles, "New Zealand Experience of Scrutiny of Parliament's Legislation" (1991) 12 Statute Law Review 165.

⁷² David Caygill, "Functions and Powers of Parliamentary Select Committees: A New Zealand Perspective" in Mai Chen & GWR Palmer *Public Law in New Zealand: Cases, Materials, Commentary and Questions* (Oxford University Press, Auckland, 1993) 670.

⁷³ Johnson, above n 55, 120.

⁷⁴ Standing Orders Report, above n 15, 31: It commented that "[n]owhere else in the Commonwealth do committees give such open and in depth consideration to legislation".

⁷⁵ Standing Orders Report, above n 15, 263.

I Report of Select Committee

A select committee is now required to present its report on a Bill to Parliament no later than six months after the Bill was referred to the committee or such later time as the House allows. The intention is to prevent Bills being referred to select committees and never reappearing. If the committee fails to present its report within the required time the Bill goes back into the House and is set down for its next stage.⁷⁶ This provides an incentive for the committee to turn its collective mind to the Bill and how best to improve it as the alternative is to let a Bill, which is likely to be inadequate in some respects, back into the House without the benefit of proper scrutiny. A committee that did not report back on a Bill within the set period and which then found the Bill withdrawn from the committee and back before the House unamended would be unpopular with those sections of the community with a stake in the legislation and which had put time and effort into making submissions to the committee. It has also removed a weapon from the government's armoury for dealing with legislation it does not wish to proceed.

A similar rule applies in Germany, where the originator of a motion to refer a Bill to a committee may demand a report to the Bundestag after six months. This rule was adopted in West Germany, as it then was, in order to prevent legislation being buried in the committee. It has not often been necessary to demand such a report as it appears that committees have found other ways of holding up progress.⁷⁷

A useful innovation is the provision by a committee of a narrative report on a Bill, which it has dealt with. This report is to be attached to the front of the reported-back version of the Bill as an explanatory note.⁷⁸

⁷⁶ Standing Order 284. The Housing Responsibilities Bill is the first and only Bill to have been discharged from select committee and set down for its next stage (28 August 1996).

⁷⁷ Johnson, above n 55, 121

⁷⁸ Standing Orders Report, above n 15, 44. See for example the reported back version of the Fisheries Bill (now the Fisheries Act 1996), which had an explanatory note of 44 pages.

The Standing Orders Committee recommended that there should be more opportunity to debate significant select committee reports in the House and that the Business Committee include such debates on the Order Paper with members' orders of the day on each alternate Wednesday.

The Standing Orders distinguish between amendments to Bills made by a majority of a committee and those made unanimously.⁷⁹ This adds to the incentives for a committee to try and achieve decisions by consensus as, arguably, there is less chance of unanimous decisions being overturned by the House.⁸⁰ Where amendments are recommended by the committee unanimously those amendments are adopted as part of the Bill when the House agrees that the Bill should proceed. Those amendments recommended by a majority of the committee are subject to agreement by the House.⁸¹ If the House does not agree that a Bill should proceed it is discharged immediately.⁸²

⁷⁹ Standing Order 285.

⁸⁰ For example, in the case of the Finance Bill (No 6) 1996, a majority of the select committee recommended that the social security measures included in the Bill should be dropped, but those measures were retained.

⁸¹ Standing Order 292.

⁸² Standing Order 291(1).

VI RELATIONSHIP BETWEEN PARTY CAUCUSES AND SELECT COMMITTEES

This Part will consider to what extent select committees may become more powerful and more independent. A counterweight to the development of powerful and independent select committees is the constraint of party discipline as imposed by party caucuses.

A Party Caucuses

The system of party caucuses, although not unique to New Zealand and Australia, has been developed and refined to a greater extent in these two countries than anywhere else in the world.

Each party represented in the House will have a caucus. Parliamentary caucuses comprise all the parliamentary members of a party, from Ministers (in the governing party) to backbenchers. From a practical point of view, it has always been the government party caucus which has been most influential in affecting the legislative outputs of Parliament. Under MMP it is likely that there will be more than one party in government and therefore there may be two or more government caucuses. Similarly, there are likely to be a number of opposition party caucuses.

Caucuses traditionally meet in private, and their deliberations are not made public. The government caucus has, in recent years, assigned a caucus committee to shadow each select committee of the House. Caucus committees undertake a substantial amount of work. They may become involved at an early stage in the formulation of legislation and approve draft Bills before introduction.

B Relationship between the Government Caucus and Select Committees pre-MMP

Traditionally the government caucus, through its committees, has effectively controlled select committees as the government had a majority in the House and in the select committees.⁸³ By convention, select committees do not deliberate on a Bill until the respective party caucuses have considered it. Control by the government caucus means control by the Executive as Ministers are generally a significant proportion of the government members and they have greater experience in politics and in Parliament than most backbenchers. The influence of the Executive over caucus is enhanced by their better access to information and advice.

Party control over its members is not absolute, however. There are from time to time issues upon which there is no strong party view and other issues which are considered to be matters for a member's own conscience to determine how he or she will behave or vote. Free voting is usually permitted on local issues which are generally not party political, on moral issues (eg Michael Laws' Death with Dignity Bill) and on occasional issues where politics are not relevant.⁸⁴

Even though New Zealand's system of party control over members is strong it is actually relatively relaxed when compared to the level of discipline in the Parliaments visited by the Standing Orders Committee. In Germany, where the electoral system is MMP, and in the other countries visited, the Committee found that party discipline is generally tighter than in New Zealand,⁸⁵ some systems not permitting even conscience votes.⁸⁶ New Zealand members of Parliament are accustomed to a certain level of independence when undertaking their select committee duties, and are unlikely to be willing to give up that independence, because of the change to the electoral system.

⁸³ Harris and McLeay, above n 3, 127.

⁸⁴ Alan Robinson *Notes on New Zealand Politics* (School of Political Science and Public Administration, Wellington, 1970) 85.

⁸⁵ Wyatt Creech, comment in *MMP Newsletter for Chief Executives* July 1995.

⁸⁶ Nicola White, personal communication.

The leader of the New Zealand First Party, Winston Peters, has been highly critical of the exercise of party discipline and his party has made a point of emphasising that its members should vote in accordance with the wishes of their electorates.⁸⁷ A stand against the pre-eminence of the party may be attractive to voters who are generally uncomfortable with party discipline.

In 1970 Robinson identified six reasons for the existence of strong party discipline in New Zealand, summarised here:⁸⁸

1. It is impossible for a member to rebel and then to survive outside one of the main parties. Members are elected largely because of the party they represent;
2. Each of the major parties is highly centralised in its leadership functions. The views of the party leader carry a lot of weight;
3. Members of the small Parliamentary parties in New Zealand have a strong loyalty to their group and a strong community of spirit. The fact of loyalty produces an impulse to conformity;
4. In caucus varying opinions are expressed and given due weight, therefore a member can expect to lose out on some issues but expect to win on others;
5. The possibility of rewards of some kind for good behaviour eg Cabinet office, appointments or overseas travel;
6. The nature of the party system – that the purpose of the parties is to win a majority in Parliament and so gain control of the power exercised by the Executive. To govern, a party needs to maintain solidarity within its ranks. A unified party appeals more to voters than one that has open divisions.

The doctrine of mandate provided one of the traditional justifications for the need to maintain party discipline.⁸⁹ The manifestos of party policy published during election campaigns allowed the electorate to choose which of the two main parties it wanted to form the government. Once elected the government

⁸⁷ (1995) 552 NZPD 10809, where Mr Peters expressed his opposition to the introduction of proxy voting, and at 10826.

⁸⁸ Robinson, above n 84, 85.

⁸⁹ Mai Chen, Geoffrey Palmer & Trevor Roberts *Practical Issues for Lawyers arising from MMP* (New Zealand Law Society Seminar Paper, Wellington, 1995) 4.

was expected to implement its "election promises" and to do this it needed to be sure of the support of its parliamentary members. As a result, a majority government is more vulnerable to dissent within the ranks of its members than from attack from the opposition parties.⁹⁰ However the doctrine of mandate has been eroded over recent years as both main parties when in power have acted contrary to election promises contained in their manifestos.⁹¹

C *Party Cohesion and Committees in Multi-Party Parliaments*

Shaw has put forward a general rule on the relationship between party control and strong committees. He states that "control by a single cohesive party tends to be associated with weak committees" and vice versa.⁹² The number of parties in Parliament tends to influence the conventions and rules as to the composition of select committees.⁹³ Other factors affecting the strength of select committees suggested by Harris and McLeay are the permanence or otherwise of the select committee system (permanence tending to cement the powers of committees and positions of leadership), and the formal power of committees.

Shaw has found that committees are strongest where there is the lowest level of party control over them, either because of the lack of party cohesion or where a single party is unable to dominate the committees.

The United States has the strongest committee system (although it has been suggested that it is a deviant case because of its undisciplined party system and its separate executive).⁹⁴ Lees points to the federal nature of the US political

⁹⁰ Crossman notes that the important debates take place in caucus rather than in the House: RH Crossman "Introduction" in W Bagehot *The English Constitution* (Fontana, London, 1977) in Chen & Palmer 221. And Jackson also comments that "insider pressure groups, the public service and caucus" may be more influential with the Government than the Opposition: see above n 28, 95.

⁹¹ Alan McRobie "The Electoral System" in PA Joseph (ed) *Essays on the Constitution* (Brookers Ltd, Wellington, 1995) 312, 321.

⁹² M Shaw "Committees in Legislatures" in P Norton (ed) *Legislatures* (Oxford University Press, Oxford, 1990) 246.

⁹³ Harris and McLeay, above n 3, 125.

⁹⁴ Jackson, above n 28, 113.

process as a major reason "for the relatively weak nature of American political parties and the relative absence of party discipline in Congress".⁹⁵ He notes that the US Congress makes most of its legislative decisions in committees or subcommittees.

In Germany, the specialist committee system provides opportunities for close cross-questioning of Ministers on policy and administration. The committee stage provides opportunities for opposition members to influence the final form of Bills, even to the extent of so amending them that they emerge in a different form and indeed with different intent from that planned by the government. A Bill's original provisions may then have to be restored in the plenary session where, in Germany, party discipline is more effective than in committee.⁹⁶ However, the amendment of a Bill after the committee stage is generally unwelcome, as, according to Johnston, it implies a rejection of the committee's laboriously engineered compromises.⁹⁷

For a majoritarian system, New Zealand select committees have exercised a relatively broad range of powers. They are able to undertake inquiries on their own initiative, receive submissions on Bills and hear evidence from the public. Bills, other than urgent or financial measures, have been referred to select committees compulsorily since 1979.⁹⁸

New Zealand committees, under MMP, are likely to continue to focus on the detail of Bills as Standing Orders provide for the second reading debate to set the parameters of the select committees jurisdiction, in effect, its terms of reference.

⁹⁵ Lees, above n 62, 11.

⁹⁶ Burkett, above n 31. This has occurred recently in New Zealand, with the Finance Act (No 6) 1996 where the committee, by a majority, removed provisions amending the Social Security Act only to have those provisions restored by the House.

⁹⁷ Johnson, above n 55, 125.

⁹⁸ Geoff Skene "Parliament: Reassessing its Role" in H Gold (ed) *New Zealand Politics in Perspective* (3 ed Longman Paul, Auckland, 1992) 252.

D Anticipated Effect of MMP on the Relationship between Caucuses and Select Committees

The Standing Orders have at last recognised what has been a political reality for many years, namely that political parties are an integral part of New Zealand's constitutional and electoral systems;⁹⁹ individual members have little recognition. Members will continue to be elected because of the party they represent, especially list members. List members will be especially vulnerable to control by the party since the party controls the list. Recalcitrant members may find themselves moved lower down the party list for the next election.¹⁰⁰

Given that it is unlikely that New Zealand will have a single party majority government after 12 October 1996, it is also unlikely that a single party will be in a position to dominate select committees as have government caucuses in the past. There may be a coalition majority government which could exert substantial influence over select committees if it were of one mind. However, it is probable that where there are two or more parties in government, there will also be two or more government party caucuses and those caucuses may pull in different directions, except on confidence matters, or matters specifically agreed in the coalition agreement.

As a consequence parties will have to be prepared to negotiate the outcome of select committee deliberations. The members of the select committees are likely to have developed some knowledge and expertise in the relevant area and are in close contact with each other, making the select committee the obvious forum for party negotiations to take place. This being so, individual members are likely to be in a better position than prior to MMP to influence their caucuses and

⁹⁹ Wyatt Creech, one of the members of the Standing Orders Committee, has noted that parties are the focus of the MMP system: *MMP Newsletter for Chief Executives* July 1995.

¹⁰⁰ The President of the National Party, Geoff Thompson, has expressed the view that party influence will "continue at an increasing level ... [b]ecause the Party controls the formation of the List": "The Role of a Political Party in Policy Development and Policy Decisions" Paper given at AIC Conference, April 1996 *Strategic Policy Developments in an MMP Environment*, 9-10.

their members in Cabinet (if applicable), rather than being influenced by their caucuses. It is likely that there will be less control of committees by caucuses in a multi-party environment because negotiations will be required "between rather than within" parties.¹⁰¹

The Royal Commission noted in its Report¹⁰² that the small size of caucuses under MMP may weaken the channel of influence from the public through the backbench members who are likely to be more in touch with their constituents. This weakening may allow Ministers to dominate the government caucus or caucuses too easily and reduce the influence of backbenchers. However, as noted above, government members are less likely to be in a majority on committees than formerly, and it can be expected that committee members who have become specialists in an area will be influential in their caucuses.

The doctrine of mandate is no longer a valid justification for parties to exert discipline over their members, since both main parties have ignored promises made to their electorate in their manifestos. The doctrine of mandate generally works better in a two-party majoritarian system under which voters can choose between manifestos and have a reasonable expectation that the policies for which they voted would be implemented.¹⁰³ In a multi-party system, manifestos are likely to contain less detail and more philosophy than in the past as parties wishing to form a coalition will not wish to be constrained by detailed statements of policy when negotiating coalition agreements. Greater flexibility is necessary in party policy, although it is also necessary for members to adhere to such policies as are fundamental to their party and any agreements it may have entered into.

The need to negotiate and adhere to coalition agreements will reinforce party cohesion as parties involved in a coalition or other parliamentary agreement will

¹⁰¹ Harris and McLeay, above n 3, 127.

¹⁰² *Towards a Better Democracy*, above n 8, 122.

¹⁰³ Vernon Bogdanor *Multiparty Politics and the Constitution* (Cambridge University Press, Cambridge, 1983) 82.

need to be able to ensure that their members can be relied upon to vote in support of such arrangements.

The need to maintain a coalition agreement may not be as strong an incentive to conformity as was the doctrine of mandate. Members may have felt a stronger commitment to policies endorsed by the electorate than they are likely to feel under MMP where policies may be more fluid to allow parties to manoeuvre when making deals with other parties.

It is useful to consider whether, once MMP is a reality, Robinson's six reasons for strong party discipline in New Zealand are likely to continue to apply.¹⁰⁴ Reason 1 is likely to be even more true of the New Zealand situation as discussed earlier in this section.

1. As a party system, members will continue to be elected because of the party they represent. This will be especially so for list members.
2. There is no obvious reason for the centralised nature of party leadership to be affected by MMP, since this is more a result of New Zealand's unitary status than an effect of its electoral system .
3. Caucuses, being smaller, may in fact be more cohesive than in the past, as they may be more focussed on what are significant issues for them and therefore attract members who sympathise with the party policy on those issues. Therefore, there should be a lesser tendency for individual members to dissent from the party line, especially on issues fundamental to the philosophy of the party.
4. Individual members are likely to continue to find that they win on some issues in their respective caucuses and lose on others. However, with smaller caucuses, winning a point in one's caucus is less likely to mean winning it in the House.
5. Rewards for loyalty will still be available although some may change – some may become more sought after than they have been in the past, such as the

¹⁰⁴ Refer section VI B above.

chairs of select committees. But the granting of some rewards may be less sure where the Government is a minority or part of a coalition.

6. The nature of the party system will be profoundly altered. The winning of a clear majority in the House in an election may become an almost attainable goal. Although it will still be desirable it may not drive the behaviour of members and parties in the same way.

E Outcome for New Zealand

A number of commentators have warned against predicting what will happen in New Zealand on the basis of the experience of other countries, especially Germany; New Zealand's new electoral system being most closely based on the German model.¹⁰⁵ Germany has had two different experiences of proportional representation, namely under the Weimar Republic and the Federal Republic.¹⁰⁶ Culture is an important factor and the German experience is a result of a combination of a number of factors, including German culture, its recent traumatic history (the Weimar Republic followed by Hitler and the Second World War), as well as its MMP electoral system.

New Zealand's individual political culture must be considered. Don Hunn wrote that it should not be expected that New Zealand's experience of MMP will reflect Germany's "since it is unlikely the political alchemy of New Zealand will produce identical outcomes to those of ... Germany".¹⁰⁷

New Zealand is a unitary state with a unicameral Parliament. It still has a relatively small population, and until fairly recently its political culture was essentially Pakeha and derived from Westminster. More recently there has been a growing politicisation of Maori which adds a unique New Zealand dimension.

¹⁰⁵ James, above n 64, 139; Vernon Bogdanor "Conclusion" in Vernon Bogdanor and David Butler (eds) *Democracy and Elections - Electoral systems and their political consequences* (Cambridge University Press, 1983) 251.

¹⁰⁶ Bogdanor, above n 105, 251.

¹⁰⁷ Don Hunn *MMP Newsletter for Chief Executives* (June 1994).

A dramatic indication of New Zealand's unique political culture is that it is prepared to countenance changing its electoral system so that it moves from being one of the most majoritarian states to a multi-party state. Also to be considered are the degree to which members are used to some measure of independence and the tradition of relatively impartial select committees.

It is unclear whether caucuses will be able to maintain control over their members in the House in an MMP environment. On the one hand, party discipline may be seen as essential to the ability of governing parties to hold a coalition together, as a maverick MP may be in a position to destroy a coalition agreement single-handedly. On the other hand, New Zealand members are accustomed to a greater degree of independence than the members of Parliaments visited by the Standing Orders Committee, and are unlikely to give up such independence as they have.¹⁰⁸

A number of factors suggest that select committees will become stronger and more independent under MMP.

- The multi-party environment will be more conducive to stronger committees than was New Zealand's plurality system.
- Relative to other Westminster systems, New Zealand committees have a broad range of functions and powers.
- If consensus is to be achieved in select committee, members must have the authority to negotiate. Consensus will be much more difficult to achieve if party caucuses can veto the decisions taken by the committee.
- The doctrine of mandate is no longer valid.
- Committee members will have the opportunity to develop expertise in specialist areas, making them more influential in their caucuses.

However, the position of party caucuses is less clear. Some factors point to an increase in power, namely –

- The need to honour coalition arrangements.

¹⁰⁸ Nicola White, personal communication.

- The Standing Orders recognise the importance of the party.
 - Smaller caucuses are generally more cohesive and it is easier for the Executive to dominate small caucuses.
- and some factors suggest a loss of influence in favour of committees—
- No one caucus will be able to dominate select committees.
 - Negotiations will be required between rather than within parties.

Whatever happens to party discipline under MMP, party members are likely to have more leeway to differ from the party line, but will be required to support their party absolutely on the matters of principle which the party as a whole considers to be basic to its existence, or, in relation to governing parties, on matters of confidence. Such matters of principle or confidence may be very narrowly defined so that members have a lot of freedom, but no disloyalty may be accepted in that narrow area. For example, absolute loyalty may be demanded on matters basic to a coalition agreement, but coalition partners may well feel free to vote against each other on less important issues.¹⁰⁹

Party cohesion need not hinder the development of independent select committees as members of a cohesive party will make their contribution to the work of the select committee from their party point of view. This is different from a committee making a decision and having it overturned by government caucus.

It is not possible to predict with certainty what changes may occur in the relationship between party caucuses and select committees under MMP but that relationship will be different from what it was under FPP.

¹⁰⁹ For example, Trevor Mallard's Education Amendment Act 1996 which will require the compulsory registration of teachers. The enactment of this Bill in the face of Government opposition is an unusual and possibly unique event in New Zealand's parliamentary history and was made possible because the National Party's coalition partner, the United Party, voted for the Bill.

VII IMPLICATIONS FOR THE LEGISLATIVE PROCESS AND LEGISLATION

A Members' Bills

There has been much speculation about the possible increased success of members' Bills under MMP, both with the likelihood of a minority government and the removal of the appropriation rule in favour of the financial veto. However, individual members, especially opposition members, do not have access to the specialised drafting services, and legal and policy advice that is necessary to draft legislation with a reasonable prospect of success. There is no indication that this will change very much under MMP, although the budget of the Clerk of the House has been increased to provide for drafting services for members. In the countries visited by the Standing Orders Committee there were few members' Bills introduced. In those countries the initiation of legislation is still very much a function of the government.

In Ireland, only one member's Bill per party may be before the House at a time. The Government will almost always oppose such Bills so there is little chance of enactment

In the past, backbench members have occasionally been successful in securing the support of their caucus and Cabinet for their own legislative proposals. The rate of success in recent years has been the enactment of about one member's Bill a year, with three in 1994 and none in 1995. Members' Bills are controlled by rules as to when they may be introduced and the need for a ballot among the various Bills proposed, so there can be no certainty that any particular Bill will ever be introduced. There is now provision for Bills, including members' Bills, to be introduced during an adjournment subject to the agreement of the Business Committee.¹¹⁰ This rule may allow more members' Bills to be

¹¹⁰ Standing Order 272.

introduced subject to the acquiescence of the Government. While the House is sitting, members' orders of the day, together with private and local orders of the day, are restricted to alternate Wednesdays and even on the allotted Wednesday they may be displaced by certain government business.

Members' Bills have other purposes than the enactment of legislation. They have traditionally been used tactically to make a political point, engender support in the member's electorate, or embarrass the Government into doing something to forestall the Bill gathering supporters in the House. There have been occasions when the Government has either adopted a member's Bill (the Historic Places Act 1954) or introduced its own legislation covering the same subject matter (the Decimal Currency Act and more recently the Protected Disclosures Bill). Members' Bills are also used tactically in Germany, where an opposition member may introduce a Bill on the same subject as a government Bill in order to demonstrate to the FDP (one government coalition partner) that the member's party and the FDP were much closer on the issue than either party was to the SPD (the other coalition partner).¹¹¹ In Ireland, it has been found that, even if a member's Bill does not become law, it is a more useful way of focusing public attention on a topic than a motion on the same topic.¹¹²

Even if a member's Bill is never introduced, but is left waiting to win the ballot, the mere announcement of the intention to promote a Bill on a particular issue attracts media and public interest, as with Jill White's Chemical Trespass Bill, especially since the media appear to be unaware of the need for a ballot and assume that any member can introduce a Bill.

Members' Bills tend to address a single aspect of an issue which has become political and recommend piecemeal legislation without dealing with all the repercussions of the measure that they propose. An example is the Irradiation Plant Public Consultation Bill recently introduced by Mark Burton. This Bill addresses an issue which has become highly emotive in the areas where

¹¹¹ Burkett, above n 31, 292.

¹¹² Morgan, above n 29, 103.

irradiation plants have been proposed and seeks to make piecemeal amendment to the Resource Management Act 1991, which provides an adequate framework for dealing with the problem through the public planning process.

If opposition parties take the initiative in putting forward legislative proposals, those proposals will have a greater chance than previously of being enacted for two main reasons. First, it is less likely that the Government will be able to control sufficient numbers in the House to defeat it.¹¹³

Second, members' Bills will no longer be automatically ruled out of order if they involve government expenditure or the imposition of taxation. How great this change is remains to be seen as the government still has the power to veto a member's Bill if it has a greater than minor impact on its fiscal aggregates. What is a greater than minor impact is a matter for the Government to determine, however, it must state "with some particularity the nature of the impact" and provide a certificate giving its reasons for not agreeing to the Bill. What reasons will be considered adequate and the level of impact which is greater than minor are as yet unclear as the veto power has yet to be tested. The very existence of the veto power may be an incentive for the Government to negotiate since the decision to use or not use it in a particular situation could precipitate a financial or confidence crisis.

Overall, it seems likely that there will be an increase in the number of members' Bills enacted but this may not be a significant number.

B Government Bills

New Zealand has progressively become a more and more legislated for environment, earning the New Zealand Parliament the reputation of being "the fastest lawmaker in the West".¹¹⁴ The Legislation Advisory Committee's injunction that one of the checks involved in deciding to legislate is answering

¹¹³ See above n 109.

¹¹⁴ Palmer, above n 67,139.

the question – is legislation necessary? – appears to be ignored.¹¹⁵ Skene notes, among a number of deficiencies of the House, that it has “a penchant for making too many laws many of which are prepared in haste”.¹¹⁶ Part of the reason for this is that it is too easy to make laws in New Zealand. There are no constitutional constraints on what laws may be enacted in New Zealand, in contrast with the United States where the Courts may strike down legislation which is inconsistent with the Constitution; and there is no second chamber in New Zealand to act as a check on a Parliament which has been dominated by the Executive.

Palmer comments¹¹⁷

There is one school of thought which says that our fast law-making procedures allow our laws to be kept up to date easily and encourage a flexible approach. The other view is that the speed and simplicity of our legislative procedures make it too easy for the executive branch of government to do what it likes, to take power that it does not really need and smother us all in red tape. Both views contain important elements of truth. It is all a question of balance.

It has been suggested that stronger select committees would mean a slower legislative process and therefore that less legislation would be enacted. Certainly, it appears that MMP will slow the legislative process; a negotiated process inevitably being slower than an imposed process. A slower process is likely to result in better quality legislation, at least in terms of the legislation achieving its object. New Zealand's Parliamentary Counsel are under constant pressure to draft complex measures in too short a space of time.

Legislation may not be held up in select committee for very long because of the six month report back requirement for Bills. Much legislation takes a lot longer

¹¹⁵ Legislation Advisory Committee *Legislative Change: Guidelines on Process and Content*, Report No 6 (Wellington, 1991) 6.

¹¹⁶ Skene, above n 98, 247.

¹¹⁷ Palmer, above n 67, 147-148.

than six months for submissions to be sought, heard, considered and for the committee to deliberate. Where six months is insufficient, the committee may make a special report seeking an extension and providing reasons for that request. Clearly there are some pieces of legislation which could not be addressed adequately within a six month period.¹¹⁸ Where complex legislation, which is not opposed by any party, requires longer than six months, it is probable that a extension of time would be granted.¹¹⁹

There may well be less government-initiated legislation, where the government is a minority or where, as at present, the main government party can not be sure of the support of its coalition partner on any but a narrow range of measures. However, most legislation introduced by the government is not contentious in a party political sense and therefore is unlikely to be opposed for other than tactical reasons. It appears more likely that the government will introduce less politically contentious legislation, which probably means less major reform. Indeed, 1996 has been a year of very little contentious legislation. Palmer suggests that the government has managed its legislative programme to avoid confrontation with opposition parties and that "[w]here it strikes obstacles it doesn't introduce the bills".¹²⁰ Even where the government is a minority or unsure of its supporters, it may still succeed with its legislative programme where the opposition parties are divided and unable to combine to oppose effectively.

Governments may confine themselves to housekeeping legislation. Measures proposing major reform may be left to the initiative of opposition parties. However, it may be that the Government will choose to adopt members' Bills which have proven popular, have the policy and financial implications more rigorously analysed than is usual for members' Bills so that the measures can be

¹¹⁸ Two recent examples being the Hazardous Substances and New Organisms Act 1996 and the Fisheries Act 1996.

¹¹⁹ On 27 August 1996, the House granted leave to extend the reporting date to 30 July 1997 for 12 Bills before select committees.

¹²⁰ Palmer, above n 6, 7.

accommodated in the government's financial policies.¹²¹ It may, of course, not suit the opposition member to allow the Government to adopt his or her Bill, if it has sufficient support in Parliament to be passed anyway.

If the government were to leave the legislative initiative to opposition parties, this could have potentially serious repercussions for New Zealand's financial stability as members' legislation is generally not co-ordinated and members do not have sufficient information and advice to be able to integrate their proposals with the government's. A flood of such legislation could prompt the government into using its financial veto which could produce a situation where a confidence vote is proposed. Such a situation could be very dangerous for the government. One way of dealing with such a possibility is to establish a formal pre-legislative stage in which committees could scrutinise all legislation.

Much will depend on the type of government that is in power and the trends that develop in consensus.

C Circumventing the House

It has been suggested that, where a government does not have sufficient numbers in the House or on committees to ensure the passage of its legislative measures and if it meets too much opposition, it may resort to non-legislative mechanisms to achieve its objectives, that is, it may circumvent and thereby marginalise Parliament.

There are many examples from the past of governments legislating to achieve a policy objective which could have been achieved in some other way, although legislation may on occasions have been the fastest way of achieving that outcome. For example, the government does not need to pass legislation in order to set up a government Ministry or Department. It is within the

¹²¹ Standing Order 262.

prerogative powers of the Crown to do so and such a policy may be implemented by Cabinet minute, as was the case with the Government Printing Office. However, a trend developed for the establishment of Ministries and Departments by legislation, eg the Ministry of Works and Development, the Department of Trade and Industry. Legislation is also necessary to disestablish entities set up by legislation. Recent governments have returned to the practice of setting up Crown entities without legislation, which provides the government with greater scope to restructure or disestablish the entities without the need to go to Parliament.

The government may try to make greater use of subordinate legislation as a mechanism to avoid select committee scrutiny of its proposals. Before it can use subordinate legislation, however, there must be a regulation-making power contained in a piece of legislation. Regulation-making power will have been and, in the future, will continue to go through the legislative process and be scrutinised in select committee to ensure that it is a proper power to be delegated to the Executive and that the policy it represents is in accordance with the purposes of the Act. The advantage of using subordinate legislation is that the Government only needs to guide the regulation-making provision through Parliament once, and it may make use of the power on many occasions.

However, a major impediment to the government of the day abusing its regulation-making power is the Regulations (Disallowance) Act 1989. Section 4 of that Act requires all regulations to be laid before the House by the sixteenth day after the regulations were made, and the House, by resolution, may disallow any regulations or any provisions of any regulations.¹²² Alternatively, the House may, again by resolution, amend, or revoke and substitute any regulations.¹²³

The Regulations Review Committee is also a powerful tool in preventing the abuse by Government of its regulation-making power. It examines all regulations and may consider draft regulations referred to it by a Minister. It

¹²² Section 5(1) Regulations (Disallowance) Act 1989.

¹²³ Section 9 Regulations (Disallowance) Act 1989.

may also consider a regulation-making power in a Bill before another committee and report on it to that committee, and consider any other matter relating to regulations and report on it to the House.¹²⁴ Standing Order 196 sets out a number of grounds upon which the committee may draw the attention of the House to a regulation. One of those grounds is that the regulation "contains matter more appropriate for parliamentary enactment".¹²⁵

The Government will have to continue to come to Parliament for supply and taxation as a minimum. However, where the Government has managed to negotiate a coalition or other agreement in order to govern, it is likely that the least such agreements will provide to the Government is the assurance that the members of those other parties will vote with the Government on confidence matters. In order to lessen its vulnerability on confidence matters, the Government is likely to be more selective as to how it defines such matters.

¹²⁴ Standing Order 195.

¹²⁵ Standing Order 196(2)(f).

VIII PREREQUISITES FOR EFFECTIVE PARTICIPATION BY OPPOSITION PARTIES

Opposition parties will need to take the opportunities which present themselves for their individual members to develop areas of expertise so that the work load can be shared around. Party experts should then be able to brief their caucuses on new legislative proposals and agree a position on them, so that all members have at least some understanding of the repercussions of a measure before the second reading debate. Only interested and knowledgeable members are likely to turn up to speak at debates, since there is no longer a requirement for a quorum in the House, and because of the provision for proxy voting.

Opposition parties will need to consider on which committees they might most usefully place their members and lobby for those appointments in the Business Committee and in the House. Few parties are likely to be able to cover all committees adequately and they will need to be selective. Here too strategic alliances will be important, as there will be little value in swamping one committee with like-minded members from different parties if it means leaving other committees without adequate representation.

The move to consensus decision-making is to the advantage of opposition parties as, under First Past the Post, and prior to the enactment of the Official Information Act 1982, the lack of information effectively shut them out of power unless and until their party became the Government. When that happened the new Government would then exclude the former Government from involvement. The Official Information Act addressed the Opposition's lack of information to some extent, although it took some years before the public service bureaucracy adjusted to the principle of making official information freely available, as that represented a complete reversal of the Official Secrets Act philosophy.

MMP will encourage the trend towards open government, as governments realise that they need to share information in order to negotiate support among other parties. As a result there are likely to be more opportunities for opposition parties to obtain information and to be briefed by departmental officials. Opposition parties will need advisers and researchers in order to digest the greater amount of information and then to participate effectively.

In the past the government's pre-eminent position in controlling the legislative process was protected by its control of information. Information-sharing promotes negotiation and consensus decision-making whereas a refusal to share information is counter-productive in that it alienates potential contributors to the debate. Access to relevant and complete information on an issue is a prerequisite to meaningful negotiation and increases the chances of achieving consensus.

Even if the government was not willing to share information with opposition parties, the more parties that are represented in Cabinet, the more likely it is that Cabinet will leak. However, the current Cabinet, which contains one United Party member, has not been particularly plagued with leaks of information. The sole United Party member in Cabinet, Peter Dunne, has been at pains to ensure that he gives no cause for complaint in that respect.¹²⁶

However, there is the danger that Cabinet representatives of junior coalition partners could see some benefit for their parties in selective leaking of Cabinet discussions and decisions, especially where the cabinet decisions had gone against the junior partner's electoral commitments. This could put serious strain on the doctrine of collective responsibility and provide a greater incentive for the party forming the government to find an "ideologically congenial" coalition partner. A strengthening of individual ministerial responsibility under MMP could also cause parties to look for coalition partners with compatible policies.¹²⁷ On the other hand, David Bradshaw suggests that collective

¹²⁶ *The Independent*, 10 May 1996, 19.

¹²⁷ Strøm et al, above n 20, 313.

responsibility may be strengthened by the “pressures of wanting to make the coalition work, in order to remain in Government”. He stressed that for collective responsibility to work effectively “there will have to be good information flows between the coalition partners if mutual trust is to be maintained”.¹²⁸

¹²⁸ *MMP Newsletter for Chief Executives August 1994.*

IX CONCLUSION

Opposition parties cannot help but exert influence over the legislative process in an MMP environment where minority and/or coalition government is likely. These opportunities have always been there to some extent, but will be enhanced where the government is in a minority or part of a coalition, as it will not be in a position to insist on the enactment of its measures, and parties will be represented on committees according to their size. Proportionality works to the advantage of opposition parties only so long as the government does not control a majority.

Under MMP, there will be greater incentive for opposition members to take a more active interest in their parliamentary functions and duties as opposed to their political functions and duties, as they will no longer be able to justify inaction by reference to the futility of their involvement. There is a greater chance of their views being taken into account and actually making a difference.

The most important forum for opposition parties to exercise their influence will be the select committee, where the detailed scrutiny of Bills which is undertaken can significantly modify a Bill. The contribution made by opposition parties will depend on them having developed expertise, targeted the committees where their expertise could be most usefully be deployed and having access to adequate and timely information.

Assuming minority government, the Standing Orders strengthen the representation of the opposition parties on select committees and ensure that all parties will be represented on committees not just the powerful two of the past. The select committees will be where the deals are negotiated between and among parties.

Although the strongest committees tend to be associated with the lowest level of party control, this is not necessarily what will happen in New Zealand with its own unique political culture. Under MMP, select committees are likely to become stronger and caucuses will continue to have a role in the legislative process, although what form this role may take cannot be predicted with any confidence. It may be that instead of caucus influencing its members on a committee, its select committee members, as party experts, may influence caucus and the party attitude to certain policy and legislative proposals. Some party discipline will probably need to be maintained in order to ensure that the deals done in select committee and coalition agreements can be honoured.

Individual members may have a large degree of independence in how they approach many issues, but there may be a small number of issues upon which some parties demand adherence to the party line. The increased independence of members is likely to flow on to increase the independence of select committees, allowing some degree of committee loyalty to develop. If there is less contentious legislation introduced there will also be fewer measures upon which members will be required to produce a certain outcome and therefore more opportunities for independence and committee loyalty to develop.

The legislative process may slow down and produce less legislation providing greater opportunities for opposition parties to have input and improve the quality of the legislation that is enacted.

The arguments for involving select committees in the finalising of policy and the drafting of Bills may become more persuasive, especially if there is a greater number of members' Bills proposed and likely to be enacted, and draft Bills may be referred to select committees twice. Pre-introduction referral would have the advantage of allowing the Government to tap into the collective wisdom of a group of members who will develop expertise in the policy area addressed by the Bill. This may appear to slow the legislative process further but that would probably be beneficial as the deal-making between Government and opposition

parties could be undertaken at an earlier stage and less Parliamentary time spent on legislation that is not likely to proceed.

As there will be a real possibility of the Government being thwarted in its legislative programme, it may turn to other means to try and avoid the need to come to Parliament for legislation. This may be a good thing, as New Zealand has a reputation for legislating where it may not be necessary.

The mechanisms that the Government can employ without Parliament's sanction are limited to those which have developed over many years as prerogative powers, and to subordinate legislation. Those mechanisms have their own safeguards. Overall, the Government's requirement for mechanisms which do not involve legislation may be a benefit rather than a drawback of MMP and the new Standing Orders.

It is likely that there will be less contentious legislation introduced by the government and possibly less legislation overall, leaving the legislative field open to the opposition parties to become the initiators of legislation, and while the Standing Orders constrain the introduction of members' Bills, these rules are not immutable.

It will continue to be necessary for the Government to ensure that necessary but non-contentious housekeeping legislation is enacted as well as the all-important budget legislation (Imprest Supply and Appropriation Bills).

As it is unlikely that the Government will be able to enact whatever legislation it pleases, it may become more careful in characterising proposals as confidence matters. We are likely to see a return to the situation where the Executive proposes its legislative programme but must rely on Parliament to determine what measures will proceed to enactment and in what form.

APPENDIX

Comparison of legislative process before and after adoption of the new Standing Orders

Prior to 1996	From 1996
Bill introduced	Bill introduced and read a first time with no debate on first reading, but a copy of the Bill should be available to each member before the first reading.*
First Reading – Debate on first reading may take place immediately following introduction, although some members would not have seen a copy of the Bill.	Second Reading – which addresses the purpose and principles of the Bill and effectively sets the terms of reference for consideration by the select committee. May take place no sooner than the 3rd sitting day following introduction.
Referred to select committee – for hearing of public submissions and consideration. An instruction to the committee may extend or restrict its order of reference and the committee may consider only those matters referred. No time limit imposed on select committee to report Bill back to the House.	Referred to select committee – for hearing of public submissions and consideration. Committee examines the Bill to determine whether it should be passed in the form in which it has been introduced and may recommend amendments consistent with the principles and objects of the Bill. Bill must be reported back to the House within 6 months unless the House approves an extension.
Bill reported back to the House – with recommendations for change. One hour debate on motion to table the committee's report follows.	Presentation of select committee report – The debate on the report is set down on the third sitting day following. Amendments made unanimously by the committee are adopted as part of the Bill when the House agrees that the Bill should proceed. Those recommended by a majority of the committee must be agreed to by the House before being adopted as part of the Bill.
Second Reading – Bill is set down for second reading on next sitting day following presentation of select committee report. Generally, the only amendment that could be moved was one to delay the second reading. Main debate.	
Committee of the Whole House – Bill is committed to the Committee of the Whole House on next sitting day. Clause by clause, or part by part consideration of the Bill by the whole House in committee. Amendments may be made by Supplementary Order Paper (SOP). This stage could be dispensed with only with the leave of the House if there were no amendments to be moved.	Committee of the Whole House – Clause by clause, or part by part consideration of the Bill, amendments by SOP. This stage may be dispensed with by determination of the Business Committee.
Third Reading – Following adoption of the report on the Bill, it is set down for third reading on the next sitting day following.	Third Reading – Following adoption of the report on the Bill, it is set down for third reading on the next sitting day following.
Royal Assent – endorsed by the Governor-General. Unless otherwise specified in the Act, it takes effect from the date of Royal Assent.	Royal Assent – endorsed by the Governor-General. Unless otherwise specified in the Act, it takes effect from the date of Royal Assent.

* Under the new Standing Orders some Bills, subject to the agreement of the Business Committee, may be introduced during an adjournment. Such Bills are considered to have been read a first time on the date of the Business Committee's agreement and automatically referred to a select committee. They have their second reading following consideration of the select committee's report.

BIBLIOGRAPHY

- Blondel, J *Comparative Legislatures* (Prentice-Hall Inc, New Jersey, 1973).
- Bogdanor, Vernon *Multi-party politics and the Constitution* (Cambridge University Press, Cambridge, 1983).
- Bogdanor, Vernon "Conclusion" in Vernon Bogdanor & David Butler (eds) *Democracy and Elections – Electoral Systems and their Political Consequences* (Cambridge University Press, 1983) 251.
- Boston, Jonathan, Stephen Levine, Elizabeth McLeay & Nigel S Roberts *New Zealand under MMP: A New Politics?* (Auckland University Press with Bridget Williams Books, Auckland, 1996).
- Burkett, Tony "Developments in the West German Bundestag 1969-1980" (1981) 34 *Parliamentary Affairs* 291.
- Burrows, J F *Statute Law in New Zealand* (Butterworths, Wellington, 1992).
- Cabinet Office Manual* (Cabinet Office, Wellington, August 1996).
- Campbell, P W "European Experience: Electoral Systems and Coalition Governments" in Finer, S E (ed) *Adversary Politics and Electoral Reforms* (Anthony Wigram, London, 1975) 151.
- Caygill, David "Functions and Powers of Parliamentary Committees: A New Zealand Perspective" (Paper delivered to a conference in Brisbane, May 1992) in Mai Chen & Geoffrey Palmer *Public Law in New Zealand: Cases, Materials, Commentary and Questions* (Oxford University Press, Auckland, 1993) 668.
- Chen, Mai & G W R Palmer, *Public Law in New Zealand: Cases, Materials, Commentary and Questions* (Oxford University Press, Auckland, 1993).
- Chen, Mai and Geoffrey Palmer, Trevor Roberts, "Practical issues for Lawyers arising from MMP" (New Zealand Law Society Seminar Paper, Wellington, 1995).
- Chen, Mai "Review of Standing Orders of Parliament – Society seeks check on parliamentary privilege within MMP environment" *Lawtalk* 423 Oct 94 11-14.
- Chen, Mai "MMP to expand lawyer influence and increase Parliamentary scrutiny" *Lawtalk* 406 Dec 93 19-23.
- Chen, Mai "Remedying New Zealand's constitutional crisis: is MMP part of the answer?" [1993] NZLJ 22-39.
- Crossman, R H "Introduction" in W Bagehot *The English Constitution* (Fontana, London, 1977).

- Dodd, Lawrence C *Coalitions in Parliamentary Government* (Princeton University Press, New Jersey, 1976).
- Dollimore, H N *The Parliament of New Zealand and Parliament House* (New Zealand House of Representatives, Wellington, 1973).
- Finer, S E *Adversary Politics and Electoral Reforms* (Anthony Wigram, London, 1975).
- Griffith, J A C *Parliamentary scrutiny of Government bills* (Allen and Unwin for PEP and the Study of Parliament Group, London, 1974).
- Grofman, B & Arend Lijphart (eds) *Electoral Laws and Their Consequences* (Agathon Press, New York, 1986).
- Harris, Paul and Elizabeth McLeay "The Legislature" in G R Hawke (ed) *Changing Politics? The Electoral Referendum 1996* (Institute of Policy Studies, Wellington, 1993) 103.
- Iles, W "New Zealand's Experience of Scrutiny of Legislation" (1991) 12 *Statute Law Review* 165, 173-185.
- Jackson, Keith *The Dilemma of Parliament* (Allen & Unwin and Port Nicholson Press, Wellington, 1987).
- Jackson, Keith "Electoral Reform: An Academic Perspective" in *Legislative Studies* Vol 3 No 1 Autumn 1988, 12.
- Jackson, K "Caucus: The Anti-Parliament System" in H Gold (ed) *New Zealand Politics in Perspective* (3rd ed Longman Paul, Auckland, 1992) 233.
- James, Colin "The Way It Might Be" in Colin James and Alan McRobie (eds) *Turning Point: The 1993 Election and Beyond* (Bridget Williams Books, Wellington, 1993) 139.
- Jennings, Sir Ivor *Cabinet Government* (3 ed, Cambridge University Press, Cambridge, 1959)
- Johnson, Nevil "Committees in the West German Bundestag" in John D Lees and Malcom Shaw (eds) *Committees in Legislatures: A Comparative Analysis* (Martin Robertson & Co Ltd, Oxford, 1979) 102.
- Joseph, P A "Constitutional entrenchment and the MMP referendum" (1994) 16(1) *NZULR* 67-81.
- Joseph, P A *Constitutional and Administrative Law in New Zealand* (The Law Book Company Ltd, Sydney, 1993).

- King, Anthony "Modes of Executive-Legislative Relations" in Philip Norton (ed) *Legislatures* Oxford Readings in Politics and Government (Oxford University Press, Oxford, 1990).
- Lees, John D "Committees in the United States Congress" in John D Lees and Malcom Shaw (eds) *Committees in Legislatures: A Comparative Analysis* (Martin Robertson & Co Ltd, Oxford, 1979).
- Lijphart, Arend *Electoral Systems and Party Systems: A Study of Twenty-seven Democracies 1945-1990* (Oxford University Press, Oxford, 1994).
- Lijphart, Arend "Democratic Political Systems: Types, Cases, Causes and Consequences" (1989) 1 *Journal of Theoretical Politics* 33-48 cited in Harris and McLeay.
- Lijphart, Arend *Democracies: Patterns of Majoritarian and Consensus Government in Twenty-one Countries* (Yale University Press, New Haven, Conn, 1984).
- McGee, D *Parliamentary Practice in New Zealand* (2 ed, GP Publications, Wellington, 1994).
- McGee, D, *Parliamentary Reform* Report of the Clerk of the House of Representatives to the Speaker (1992).
- McRobie, Alan "The Electoral System" in P A Joseph (ed) *Essays on the Constitution* (Brooker's Ltd, Wellington, 1995) 312.
- Mitchell, Austin *Government by Party* (Whitcombe & Tombs Ltd, Christchurch, 1966).
- MMP Newsletter for Chief Executives* (State Services Commission, Wellington, June 1994).
- Morgan, David Gywnn *Constitutional Law of Ireland* (2 ed The Round Hall Press, Dublin, 1990).
- Mulgan, R "Political Culture" in G R Hawke (ed) *Changing Politics? The Electoral Referendum 1996* (Institute of Policy Studies, Wellington, 1993) 43.
- Mulgan, R "New Zealand - An Elective Dictatorship?" in H Gold (ed) *New Zealand Politics in Perspective* (2 edn Longman Paul Ltd, Auckland, 1989) 446.
- New Zealand Parliamentary Debates* 1995 and 1996.
- Norton, Philip (ed) *Legislatures - Oxford Readings in Politics and Government* (Oxford University Press, Oxford, 1990).
- Office of the Clerk of the House of Representatives *Parliamentary Bulletin* 96.01 1996.

- Palmer, G W R "The NZ legislative machine" (1987) 17 VUWLR 285.
- Palmer, Geoffrey *Constitution in Crisis: Reforming our Political System* (John McIndoe Ltd, Dunedin, 1992).
- Palmer, Geoffrey *Unbridled Power: An Interpretation of New Zealand's Constitution & Government* (2 ed, Oxford University Press, Auckland, 1987).
- Palmer, Matthew S R "Collective Cabinet Decision-Making in New Zealand" in Michael Laver and Kenneth A Shepsle (eds) *Cabinet Ministers and Parliamentary Government* (Cambridge University Press, Cambridge, 1994) 226-250.
- Roberts, Nigel S "Proportional Representation: Lessons from abroad" in J Stephen Hoadley (ed) *Improving New Zealand's Democracy* (New Zealand Foundation for Peace Studies with Department of Political Science, University of Auckland and Commission of the Future, 1979).
- Robinson, Alan *Notes on New Zealand Politics* (School of Political Science and Public Administration, Wellington, 1970).
- Royal Commission on the Electoral System *Towards a Better Democracy* [1986] AJHR H.3.
- Shaw, M "Committees in Legislatures" in P Norton (ed) *Legislatures – Oxford Readings in Politics and Government* (Oxford University Press, Oxford, 1990).
- Skene, Geoff *New Zealand Parliamentary Committees: An Analysis* (Institute of Policy Studies, Victoria University of Wellington, Wellington, 1990).
- Skene, Geoff "Parliament: Reassessing its Role" in H Gold (ed) *New Zealand Politics in Perspective* (3 ed, Longman Paul, Auckland, 1992).
- Standing Orders Committee *Report of the Standing Orders Committee on the Review of Standing Orders* [1995] AJHR I.18A.
- Standing Orders Committee *Report of the Standing Orders Committee on its Review of the Operation of Standing Orders* [1996] AJHR I.18B.
- State Services Commission *Working under Proportional Representation: A Reference for the Public Service* (State Services Commission, Wellington, 1995).
- Strøm, K *Minority Government and Majority Rule* (Cambridge University Press, Cambridge, 1990).
- Strøm, Kaare, Ian Budge and Michael J Laver "Constraints on Cabinet Formation in Parliamentary Democracies" *American Journal of Political Science* Vol 38 No 2 May 1994, 303.

Thompson, Geoff "The Role of a Political Party in Policy Development and Policy Decisions" Paper presented at AIC Conference *Strategic Developments in an MMP Environment* April 1996.

Whalan, Professor Douglas J "The Potential Power of Committees in a 'Hung' Parliament" FW Guest Memorial Lecture 1994 *Otago Law Review* Vol 8 No 2.

Wood, GA *Governing New Zealand* (Longman Paul Ltd, Auckland, 1988).

	<p>A Fine According to Library Regulations is charged on Overdue Books.</p>	<p>VICTORIA UNIVERSITY OF WELLINGTON</p> <p>LIBRARY</p>
<p>LAW LIBRARY</p> <p>5-12</p>		

VICTORIA UNIVERSITY OF WELLINGTON LIBRARY



3 7212 00494885 5

r James, Gill
Folder Opportunities
Ja for opposition
parties to
influence the
legislative
process

