Parliamentary Business: A Critical Review of Parliament's Role in New Zealand's Law-Making Process†

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I INTRODUCTION

This article focuses on the place of the legislature in New Zealand's law-making process. Parliament's role in making the law might appear rather obvious. Parliamentary sovereignty is a fundamental constitutional doctrine of New Zealand's legal system. One does not have to be a lawyer to understand that the statutes produced by Parliament are the nation's highest form of law. Yet, in a 2008 speech to the Maxim Institute, Jeremy Waldron deplored the "reckless" and "dysfunctional" state of New Zealand's legislature.[1] He argued that New Zealand has gradually stripped away the checks and balances from inside its Parliament, to the point where Parliament merely exists to support the executive's agenda obediently. Waldron raised two concerns. First is his claim that Parliament, New Zealand's highest law-making body, has lost its dignity and effectiveness as a body for scrutinising proposed legislation. Second is the lack of academic attention given to the process of making legislation in New Zealand. This article aims to examine critically the first concern, while attempting to make a small impression on the second.

Waldron is a well-known advocate of parliamentary sovereignty and a critic of strong American-style judicial review of legislation. He argued that such review weakens democratic government by removing the right of citizens to participate on equal terms in important social decisions.[2] Yet, Waldron claimed, his attacks on judicial review have always been comparative.[3] Waldron stated that the production of democratic legislation requires two things from parliaments: "multi-layered deliberation among the

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1 Jeremy Waldron "Parliamentary Recklessness: Why we need to legislate more carefully" (Annual John Graham Lecture, Maxim Institute, Auckland, 28 July 2008) at 28 and 33. See also: Jeremy Waldron "Compared to what? Judicial activism and New Zealand's Parliament" [2005] NZLJ 441 ["Compared to what?"]; Jeremy Waldron "Parliamentary Recklessness" [2008] NZLJ 417; Jeremy Waldron "Parliamentary Recklessness – II" [2008] NZLJ 458.

2 Jeremy Waldron "The Core of the Case Against Judicial Review" (2006) 115 Yale Law Journal 1346.

3 Waldron "Compared to what?", above n 1, at 441; for a response to this article, see James Allan and Andrew Geddis "Waldron and opposing judicial review — except, sort of, in New Zealand" [2006] NZLJ 94.

representatives" and "successive rounds of voting among representatives".[4] He argued that these elements are at serious risk of being lost in New Zealand through a gradual and deliberate shift in power from the legislature to the executive. Indeed, Waldron argued that New Zealand's Parliament has become so impoverished that judicial review may be justified as it provides an extra layer of review for legislation. Waldron used the examples of the abolition of the second chamber, urgency, closure motions, lack of quorum, and the use of party votes in debate to demonstrate his point.

Waldron's concerns are of particular importance in New Zealand, where Parliament is entrusted with the protection of rights. A deliberate decision was made not to entrench the New Zealand Bill of Rights Act 1990 (NZBORA), nor to allow the courts to strike down legislation that is inconsistent with the Act.[5] In a Common Law system with a parliamentary executive, no written constitution or a final appellate court that can strike down legislation, there is a heavy responsibility on Parliament to ensure that Bills are workable, well-drafted, effective and do not breach important legal or constitutional principles without due consideration. New Zealanders place immense value on an efficient and timely law-making process. Yet at the same time, it is necessary that deliberative and careful law-making is essential to maintaining the rule of law.

In light of these concerns, the objective of this article is to assess New Zealand's legislative process, identifying areas of both strong and weak performance. This article will proceed on the premise that greater transparency, deliberation and consultation will generally lead to better quality legislation, while recognising the need to balance scrutiny with efficiency. In doing so, this article will draw upon examples from other major Commonwealth jurisdictions: Australia, Canada and the United Kingdom. In particular, it will examine the merits of publishing draft Bills prior to their introduction to Parliament; the select committee process; human rights reporting inside Parliament; the management of time inside Parliament; and the impact of the Mixed Member Proportional (MMP) electoral system on the relationship between the legislature and executive. Ultimately, the article will suggest ways in which Parliament can take a greater role in scrutinising and advising the executive with regard to primary legislation, leading to more responsible government.

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4 Waldron "Compared to what?", above n 1, at 445. Waldron also stated that democracy requires general and multifaceted deliberation among the people and voting among the people for representatives.

5 Justice and Law Reform Committee "Final report of the Justice and Law Reform Committee On a White Paper on a Bill of Rights for New Zealand" [1987–1990] XVII AJHR I8C at 3 ["Report on a Bill of Rights for New Zealand"]. For general commentary on the enactment of the New Zealand Bill of Rights Act 1990 (NZBORA), see Geoffrey Palmer and Matthew Palmer *Bridled Power: New Zealand's Constitution and Government* (4th ed, Oxford University Press, Melbourne, 2004) at 316–332.

II THE NEW ZEALAND PARLIAMENT

Basic Organisation

New Zealand is a constitutional monarchy. For a Bill to become law it must be passed by the House of Representatives and signed by the Governor-General.[6] Local representation was first established through the New Zealand Constitution Act 1852 (UK)[7], which provided for a Westminster-style bicameral Parliament. The first election for members took place in 1853 using the 'first-past-the-post' (FPP) electoral system, inherited from the United Kingdom.[8] Today, New Zealand's Parliament contains only a single chamber, elected every three years using the MMP electoral system.[9] The executive continues to be drawn from the House and is responsible to the members of the legislature.

An Overview of New Zealand's Legislative Process

Each stage of New Zealand's legislative process has an allocated purpose and is separated from the other stages by specified periods of time, in order to allow for the proper consideration of a Bill and proposed amendments.[10] Once a Bill is introduced to the House, it is set down for first reading on the third sitting day following its introduction.[11] In the case of a Government Bill, the Attorney-General is required to report any inconsistency with the NZBORA at this introductory stage.[12] The first reading is viewed as an opportunity for the Bill's sponsor to explain the overall objectives of the Bill.[13] Following the first reading, the Bill is referred to a select committee, which examines the objectives and text of the Bill in detail. The select committee must report back within six months, unless the House alters this timeframe.[14] The Bill is set down for its second reading on the third sitting day following the committee's report.[15] The second reading is an opportunity to debate the policy of the Bill.[16] Once the Bill passes its second reading, unanimous select committee amendments are adopted,

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6 Constitution Act 1986, s 16.

7 New Zealand Constitution Act 1852 (UK) 15 & 16 Vict c 72.

8 Andrew Geddis *Electoral Law in New Zealand: Practice and Policy* (LexisNexis NZ, Wellington, 2007) at 26.

9 Constitution Act 1986, ss 10 and 17; Electoral Act 1993.

10 For a detailed description of the legislative process, see David McGee *Parliamentary Practice in New Zealand* (3rd ed, Dunmore Publishing, Wellington, 2005) [*Parliamentary Practice*] at 341–390.

11 Standing Orders of the House of Representatives 2008, SO 277(1).

12 NZBORA, s 7; Standing Orders of the House of Representatives 2008, SO 261. In the case of all other Bills, this duty must be performed "as soon as practicable after the introduction of the Bill", as per s 7(b) of the NZBORA.

13 George Tanner "Confronting the Process of Statute-Making" in Rick Bigwood (ed) *The Statute: Making and Meaning* (LexisNexis NZ, Wellington, 2004) 49 at 78.

14 Standing Orders of the House of Representatives 2008, SO 286(1).

15 Standing Orders of the House of Representatives 2008, SO 287.

16 Tanner, above n 13, at 78.

while majority recommendations are voted on separately.[17] The Bill is then set down for consideration by a committee of the whole House on the following sitting day.[18] The committee examines the Bill part-by-part, aiming to ensure that it gives effect to its policy at a technical level.[19] Once the committee reports back to the House, the Bill is set down for its third reading on the following sitting day. The third reading debate is confined to general principles, and is in the nature of a summing up.[20] Once read a third time, a Bill has passed the House and is presented for royal assent.

III PRE-LEGISLATIVE SCRUTINY AND DRAFT LEGISLATION

Policy is normally developed inside government departments within the framework of three guides: the Cabinet Manual, the CabGuide and the Legislation Advisory Committee Guidelines.[21] These encourage consultation with interested parties and Māori, promote awareness of existing legal and constitutional principles, and emphasise the importance of creating accessible and coherent legislation. This process will often involve the circulation of draft Bills to various interested private organisations. However, the process is entirely confidential and managed by the executive. The government can restrict public involvement in the policy development process as it sees fit and members of Parliament will not view the proposed legislation until it is introduced to the House. It is generally considered that consultation with those affected by proposed legislation improves the quality and effectiveness of decision-making. Yet while documents like the Legislation Advisory Committee Guidelines promote structured policy development, consultation by the executive is discretionary and lacks transparency.

A number of studies in the United Kingdom have encouraged the publication of draft Bills prior to their introduction to Parliament. This process is referred to as "pre-legislative scrutiny" and involves the referral of a draft Bill to a parliamentary committee before the government brings forward a formal Bill.[22] The scrutiny offered by the committee allows increased public and parliamentary involvement in the policy development process. In 2004, the House of Lords Select Committee on the Constitution

17 Standing Orders of the House of Representatives 2008, SO 291.

18 Standing Orders of the House of Representatives 2008, SO 290.

19 Standing Orders of the House of Representatives 2008, SO 292(1) and 293.

20 McGee, above n 10, at 390.

21 Department of the Prime Minister and Cabinet *Cabinet Manual 2008* (Cabinet Office, Wellington, 2008); Department of the Prime Minister and Cabinet "CabGuide: Guide to Cabinet and Cabinet Committee Processes" <cabguide.cabinetoffice.govt.nz>; Legislation Advisory Committee "Guidelines on Process and Content of Legislation — 2001 edition and amendments" <www2.justice.govt.nz>.

22 Alex Brazier "Hansard Society Briefing Paper — Issues in Law Making 5: Pre-Legislative Scrutiny" (2004) Hansard Society <www.hansardsociety.org.uk> at 2.

recommended that publication of draft Bills should become the norm,[23] and in 2006 the Select Committee on Modernisation of the House of Commons described draft Bills as "one of the most successful parliamentary innovations of the last ten years".[24]

Weighing up the Benefits of Draft Legislation

A number of advantages emerge from pre-legislative scrutiny. From a parliamentary perspective, the scrutiny of draft Bills allows government policy to be influenced and possibly changed before it is firmly entrenched.[25] It is argued that ministers tend to commit less political capital to draft legislation than legislation before the House.[26] Consequently, accepting recommendations at this stage may not be regarded as a political defeat. Indeed, from the government's perspective, the additional public and parliamentary consultation may permit smoother passage during the formal legislative process.[27] The pre-legislative process can also resolve potential points of conflict and remove contradictions or impractical suggestions.[28] At the same time, Smookler has noted that pre-legislative scrutiny may also cause a Bill to be challenged on a greater number of occasions because of the increased level of knowledge gained by Parliament through the pre-legislative process.[29] In this way, pre-legislative scrutiny continues to influence the development of a Bill once it has been formally introduced to Parliament. It is widely accepted that Bills published in draft promote a higher quality of debate in Parliament and more informed scrutiny at the select committee stage.[30] Pre-legislative scrutiny will always have varying levels of influence over the content and ease of passage of a Bill. However, it enables non-government members to have real influence over policy, provides guidance for parliamentary debate and contributes towards more widely accepted and coherent legislation.

While "[t]here is almost universal agreement that pre-legislative scrutiny is right in principle," the process will require greater use of

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23 Select Committee on the Constitution *Parliament and the Legislative Process* (HL Paper 173–I, 29 October 2004) at 15–16 [*Constitution Committee Report*].

24 Select Committee on the Modernisation of the House of Commons *The Legislative Process* (HC 1097, 2006) at 3 [*Modernisation Committee Report*].

25 Jennifer Smookler "Making a Difference? The Effectiveness of Pre-Legislative Scrutiny" (2006) 59 Parliamentary Affairs 522 at 523.

26 Brazier, above n 22, at 2.

27 Smookler, above n 25, at 522. See also Brazier, above n 22, at 2; *Constitution Committee Report*, above n 23, at 14; *Modernisation Committee Report*, above n 24, at 11; Greg Power *Parliamentary Scrutiny of Draft Legislation 1997–1999* (Research Paper No 63, Constitution Unit, 2000) at 21.

28 Lewis Moonie MP, Chairman of the Joint Committee on the draft Civil Contingencies bill, 2003, as quoted in *Constitution Committee Report*, above n 23, at [25].

29 Smookler, above n 25, at 533.

30 Power, above n 27, at 40; Smookler, above n 25, at 532; *Constitution Committee Report*, above n 23, at 14; *Modernisation Committee Report*, above n 24, at 13–14.

parliamentary time and resources.[31] Pre-legislative scrutiny has the potential to overload government departments and select committees if it is not properly implemented. Additional help will be required to manage the increased workload. In 2002, the United Kingdom Parliament set up the Scrutiny Unit in order to deal with this issue. The Scrutiny Unit has a staff of 18 public servants who provide specialist help to select committees in their scrutiny of draft Bills and the government's financial performance.[32] The Scrutiny Unit has received positive feedback on its role from both Parliament and the government in the United Kingdom, and the establishment of a similar unit in New Zealand should be considered.[33] As well, the membership of the pre-legislative committee and the select committee that examines a Bill inside Parliament should overlap significantly.[34] This should ensure that knowledge gained in the pre-legislative process is not lost and would significantly smooth the deliberations of the committee inside Parliament.[35] While pre-legislative scrutiny will consume greater parliamentary resources, the added layer of scrutiny would significantly improve the quality of legislation.

Is the Publication of Draft Bills Appropriate for New Zealand?

In the United Kingdom, the practice of publishing consultation drafts of legislation arose at a time when parliamentary standing committees had fairly weak powers of inquiry. These committees held a similar place in the legislative process to select committees in New Zealand. However, standing committees were appointed on an ad hoc basis for each Bill, and their function was simply to consider the Bill's text, as they were not empowered to take written or oral evidence.[36] In contrast, the select committees appointed in the United Kingdom to scrutinise draft legislation had evidence-gathering powers comparable to New Zealand select committees.[37] It could be argued that the introduction of pre-legislative scrutiny in New Zealand would simply duplicate the select committee process that currently exists inside Parliament. However, it is not appropriate to rely on the current select committee process to

31 Select Committee on Modernisation of the House of Commons *The Legislative Process* (HC 190, 1997) at [20] as quoted in Richard Kelly *Pre-legislative Scrutiny* (SN/PC/2822, prepared for the House of Commons Library, last updated 2010) at 3.

32 The homepage of the Scrutiny Unit can be found at: Scrutiny Unit – UK Parliament <www.parliament.uk/scrutiny>.

33 The Liaison Committee has noted "the important added value which the Scrutiny Unit has continued to bring to the work of committees", noting feedback from other committees: House of Commons Liaison Committee *The work of committees in 2007* (HC 427, 2008) at [95].

34 *Constitution Committee Report*, above n 23, at [141].

35 Ibid, at [145].

36 These Standing Committees were replaced in 2008 by Public Bill Committees that are empowered to call evidence. These should not be confused with Departmental Select Committees which are of a similar form to New Zealand's select committees, but do not have a formal place in the legislative process.

37 For discussion of New Zealand's select committee system, see Part IV of the article.

correct ill-conceived or poorly drafted legislation.[38] Tanner has argued that pre-legislative scrutiny would allow poor policy analysis or drafting to be corrected before a Bill enters Parliament, saving the time of select committees and concentrating efforts on fewer and more important issues during the formal legislative process.[39] He noted a significant advantage in that the public submission process at the select committee stage would concentrate on a more developed and stable version of the Bill.

It is not unknown for draft Bills to be referred to select committees in New Zealand. As early as 1977, the Public Expenditure Committee suggested that the practice of referring draft Bills to select committees "merits consideration for further use in the future".[40] Prior to the introduction of the NZBORA, a White Paper containing draft legislation was referred to the Justice and Law Reform Committee, which recommended significant changes to the final Bill.[41] In 2005, the Justice and Electoral Committee encouraged the publication of exposure drafts of Bills.[42] It is argued that the government should move to refer draft Bills to select committees where practical. It may be reluctant to do so on politically sensitive issues, yet there is no reason in principle against it, and there are considerable practical advantages during the formal legislative process.[43] Pre-legislative scrutiny will encourage a more transparent policy development process, provide a greater role for Parliament in that process, and will promote more effective and efficient scrutiny at the later stages of the parliamentary process.

IV LEGISLATIVE SCRUTINY

New Zealand's Select Committee System

1 A Comparative Assessment of New Zealand's Select Committee System

Parliamentary committees are generally regarded as a vital part of a modern Parliament. Committees allow focused scrutiny in an intimate environment that encourages consensus rather than political partisanship, and allows members to develop specialised knowledge in certain policy areas. The New Zealand Parliament has used select committees since its establishment, and since 1979, the vast majority of Bills have been referred

38 Legislation Advisory Committee, above n 21, at 7.

39 Tanner, above n 13, at 76.

40 Public Expenditure Committee "Public Expenditure Committee 1977" [1977] H–I AJHR I12 at 22–24.

41 "Report on a Bill of Rights for New Zealand", above n 5; significant changes included that the Bill not be entrenched and not be supreme law.

42 Justice and Electoral Committee "2003/04 Financial review of the Parliamentary Counsel Office" [2002–2005] VIII AJHR I20C 375 at 377–378.

43 Tanner, above n 13, at 76.

to a select committee following their first reading.[44] The present Standing Orders provide for the establishment of 13 subject select committees that reflect areas of ministerial responsibility.[45] Membership of the committees currently ranges from 6 to 13, with members appointed by the Business Committee.[46] The Business Committee is guided by the general principle that overall membership of committees should be roughly proportional to party membership of the House.[47] In performing their role, the committees hear oral and written submissions from the public, can enlist professional assistance and can ask the Speaker to send for persons, papers and records.[48]

From the perspective of this article, the most important function of a select committee is its capacity to scrutinise the actions of the executive. In order to fulfil this role, select committees must be independent from government, have strong formal powers and the electorate must see them as acting legitimately. Due to the multi-party nature of the post-MMP Parliament, the government is no longer guaranteed majority membership on select committees. In the parliaments elected in 2002 and 2005, the government only enjoyed a majority on one select committee.[49] Following a strong election result in 2008, the governing National Party presently holds a majority on five select committees and controls a further four committees with assistance from one of its support parties.[50] In contrast, Public Bill Committees in the United Kingdom House of Commons usually have a government majority due to the use of a FPP electoral system, and in Australia, the General Purpose Standing Committees of the House of Representatives always have a government majority.[51] While the current New Zealand government has an unusually high level of control over committees, the proportional membership of select committees, combined with the absence of ministers from most select committees, gives select committees a significant ability to hold ministers accountable to Parliament.

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44 Elizabeth McLeay "Parliamentary Committees in New Zealand: A house continuously reforming itself?" (2001) 16(2) Australasian Parliamentary Review 121 at 124–125. Standing Orders of the House of Representatives 2008, SO 280 states that all Bills except Appropriation, Imprest Supply and urgent Bills are required to be referred to a select committee after their first reading. Between 1996 and 1999, Bills were referred to select committee after their second reading.

45 Standing Orders of the House of Representatives 2008, SO 184.

46 Standing Orders of the House of Representatives 2008, SO 181. To view the current membership of committees, see: "Select Committees" New Zealand Parliament <www.parliament.nz>.

47 Standing Orders of the House of Representatives 2008, SO 181(1).

48 Standing Orders of the House of Representatives 2008, SO 191, 192, 193 and 207.

49 For 2002 statistics, see Palmer and Palmer, above n 5, at 174 (the Government Administration Committee being the committee with the government majority); for 2005 statistics see Philip Joseph *Constitutional and Administrative Law in New Zealand* (3rd ed, Thomson Brookers, Wellington, 2007) at 327 (the Foreign Affairs, Trade and Defence Committee had the government majority).

50 Mai Chen "Is the MMP referendum likely to result in electoral reform?" (2009) 111 New Zealand Lawyer 12 at 13.

51 Standing and Sessional Orders of the Department of the House of Representatives Canberra 2008, SO 215(d) states that each General Purpose Standing Committee must have six government members and four non-government members.

The select committee system in New Zealand follows an effective structure. McLeay has argued that an independent committee system should be permanent, have a reasonably large number of committees and the individual committees should have a small membership.[52] The New Zealand committee system is permanent, the roles and powers of the select committees are contained in the Standing Orders, and membership remains the same throughout the term of Parliament.[53] This accords with the practices in Australia and Canada, where most select committees are constituted by the Standing Orders and exist for the life of the Parliament.[54] In the English House of Commons, a new Public Bill Committee is appointed for every Bill referred to the committee stage, a practice that tends to discourage the specialisation of members in particular policy areas.[55] New Zealand also performs well in terms of the number and size of select committees.[56] New Zealand has 17 permanent select committees and membership currently ranges from 6 to 13, from a parliament of 122 members.[57] This is encouraging as the greater the number of committees, the more difficult it is for governments to control them, and more Bills can be dealt with at the same time.[58] Smaller committee membership also encourages subject specialisation and promotes a collegial environment that supports consensus decision-making.

New Zealand's select committees also have significant formal powers. Committees must be able to examine witnesses and documents in order to perform their legislative scrutiny function effectively. In New Zealand, committees can request the Speaker to summon persons and documents.[59] However, this power is rarely used: ministers and civil servants are expected to appear before select committees and frequently do so.[60] The ability to hear oral and written evidence is shared by New Zealand, English, Australian and Canadian committees. The power of select committees to recommend changes to Bills is similarly significant. New Zealand select committees are unique as they not only provide

52 Elizabeth McLeay "Scrutiny and Capacity: An evaluation of the parliamentary committees in the New Zealand Parliament" (2006) 21(1) Australasian Parliamentary Review 158 ["Scrutiny and Capacity"] at 170.

53 Standing Orders of the House of Representatives 2008, SO 180, 181, 182, 183, 184 and 185.

54 For comment on the Australian committee system, see Ian Harris *House of Representatives Practice* (5th ed, Department of the House of Representatives, Canberra, 2005) at ch 18. For comment on the Canadian committee system, see Robert Marlean and Camille Montpetit (eds) "House of Commons Procedure and Practice" (2000) Parliament of Canada <www.parl.gc.ca>.

55 See Kaare Strøm "Parliamentary Committees in European Democracies" in Lawrence D Longley and Roger H Davidson (eds) *The New Roles of Parliamentary Committees* (Frank Cass Ltd, London, 1998) 21 at 24.

56 McLeay "Scrutiny and Capacity", above n 52, at 170.

57 Standing orders provide for 13 subject select committees (Standing Orders of the House of Representatives 2008, SO 184) and four specialist select committees (Standing Orders of the House of Representatives 2008, SO 7, 74, 386, 392). Contrast to the English House of Commons where a Public Bill Committee consists of 16 to 50 members from a House of 646 MPs. In the Australian House of Representatives there are 13 General Purpose Standing Committees each of 10 members from a House of 150 members. In the Canadian House of Commons there are 24 Standing Committees of between 11 and 12 members from a House of 308 members.

58 McLeay "Scrutiny and Capacity", above n 52, at 170.

59 Ibid, at 171.

60 Palmer and Palmer, above n 5, at 174.

the House with a report on a Bill but redraft the Bill to incorporate its decisions.[61] Any amendments that are unanimously recommended by a select committee are adopted at the second reading, and if the government wishes to remove them it must do so in a committee of the whole House.[62] Complementing these powers is the obligatory nature of select committee consideration of Bills, the ability of committees independently to conduct inquiries in their subject areas, and the requirement that the government respond to such inquiries.[63] These powers are far-reaching and provide Parliament with a significant weapon against executive control.

McLeay has noted that public involvement and transparency is vital to ensure the accountability of public institutions.[64] In New Zealand, committees regularly advertise for public submissions on the Bills referred to them. Evidence from the public, ministers and civil servants is all heard in public. Although a committee's deliberations are confidential,[65] all committee reports are published online. The ability of the public to comment on Bills and attend select committee hearings is a valuable and important part of New Zealand's legislative process. There is an expectation that some attention will be paid to public submissions as it can be embarrassing for governments to face strong public opposition.[66] The open nature of select committee hearings encourages an impression of legitimacy and the ability of the public to give evidence to committees is common to all the jurisdictions studied in this article.

2 *Possible Improvements to New Zealand Select Committees*

New Zealand's select committees perform their scrutiny function well. They have been described as "a crucial bastion of democracy in [New Zealand's] legislative process".[67] Even Waldron viewed the role of parliamentary select committees as a "hopeful sign" for the New Zealand legislative process.[68] However, there are some overseas lessons from which New Zealand could learn. Dawn Oliver has argued that the use of checklists by committees promotes more structured and consistent scrutiny across committees.[69] The

61 Australian and Canadian committees produce reports with comments on the Bill, but do not redraft the Bill. In the United Kingdom, Public Bill Committees can redraft a Bill, but it should be remembered that they substitute the committee of the whole House stage. Departmental Select Committees in the United Kingdom produce reports without redrafting a Bill.

62 Marcus Ganley "Select Committees and their Role in Keeping Parliament Relevant: Do New Zealand select committees make a difference?" (2001) 16 Australasian Parliamentary Review 140 at 147.

63 In Canada, all Bills are referred to a select committee after their second reading in the House of Commons. In the United Kingdom House of Commons, Bills are referred to either a Public Bill Committee or a committee of the whole House after their second reading. In the Australian House of Representatives there is no requirement that Bills be sent to a Standing Committee, although this can occur after the first reading.

64 McLeay "Scrutiny and Capacity", above n 52, at 175.

65 McGee *Parliamentary Practice*, above n 10, at 298.

66 Ganley, above n 62, at 144.

67 JF Burrows and PA Joseph "Parliamentary Law Making" [1990] NZLJ 306 at 307.

68 Waldron "Compared to what?", above n 1, at 445.

69 Dawn Oliver "Improving the Scrutiny of Bills: The Case for Standards and Checklists" [2006] Public Law 219.

Australian Senate Scrutiny of Bills Committee uses a checklist of important constitutional and legal principles to aid its scrutiny of Bills.[70] In the United Kingdom, the Select Committee on the Constitution has recommended the adoption of a checklist for use by parliamentary committees.[71] In New Zealand, the Legislative Advisory Committee Guidelines contains a checklist, which is used inside government departments when developing policy and could easily be adapted for use by parliamentary committees. This checklist poses questions concerning whether policy objectives are clearly set out, and whether the proposal complies with fundamental legal principles.[72] Such a checklist would promote careful and rational scrutiny of Bills by reference to independent standards and encourage party politics to be left in the chamber. The ability of the government to use urgency and supplementary order papers (SOPs) to bypass select committee scrutiny is also of serious concern and will be discussed in detail below.

3 Unicameralism and Select Committees

It is often argued that the New Zealand select committee system performs the role filled by second chambers in many other parliaments. Second chambers are generally regarded as enjoying greater independence from the executive than the lower house in a bicameral parliamentary system, which strengthens parliamentary scrutiny of the government.[73] Waldron argued that the unicameral nature of New Zealand's Parliament is a significant shortcoming in its ability to scrutinise legislation.[74] However, this author contends that a bicameral system is not appropriate for New Zealand, and that the current select committee system ably fulfils the role that a second chamber would play in New Zealand's Parliament.

Second chambers are typically viewed as providing guaranteed regional representation in federal states. Philip Joseph noted that second chambers in a unitary state suffer from an "irreconcilable tension".[75] By this, he meant that an appointed chamber would not have a democratic mandate to block an elected executive, while an elected chamber would be likely to be a pale replica of the House of Representatives. While New Zealand is not a federal state, arguments have been put forward for a second chamber that would guarantee Māori a role in the scrutiny of legislation.[76] The merits of arguments for greater Māori representation are beyond the scope of this article; however, it is submitted that such representation could be secured inside a unicameral parliament. Indeed, Allan and Geddis

70 Senate Standing Orders of the Parliament of Australia 2009, SO 24(1).

71 *Constitution Committee Report*, above n 23, at [57].

72 Legislation Advisory Committee, above n 21, at 14–18.

73 Meg Russell "What are Second Chambers for?" (2001) 54 Parliamentary Affairs 442.

74 Waldron "Compared to what?", above n 1, at 443–444.

75 Joseph, above n 49, at 340.

76 See for example Whata Winiata "How Can or Should the Treaty be Reflected in Institutional Design" in Colin James (ed) *Building the Constitution* (Institute of Policy Studies, Wellington, 2000) 205.

believed that the New Zealand select committee system was more effective at scrutinising Bills than many upper houses.[77] Certainly, New Zealand's select committees can be compared to the United Kingdom House of Lords, which, while being regarded as providing a useful scrutiny function, lacks a democratic mandate and can only delay legislation.[78] The Canadian Senate is composed of government appointees and is generally regarded as providing a weak check on government.[79] In addition, the New Zealand public favours reducing the membership of Parliament[80] and is unlikely to support any move for a second chamber.

Select committees are one of the most valuable weapons of scrutiny employed by the New Zealand Parliament. The key features of the New Zealand select committee system are: its obligatory nature, the ability of committees to redraft Bills and the invitation for public submissions as a matter of course. The first two of these features align with the role of the second chambers in many jurisdictions, while the involvement of the public adds a layer of democratic legitimacy to the process that is absent from many upper houses. The committee system does, however, suffer from the ability of the government to bypass it using urgency and would benefit from the introduction of checklists. Yet overall, New Zealand select committees have strong powers and operate in a democratic manner. There is a general consensus that select committees do make a significant beneficial impact on the quality of legislation in New Zealand.[81] This role has been strengthened by the move to MMP, which has challenged government control of committees.

Parliamentary Scrutiny of Human Rights

1 Parliament and the New Zealand Bill of Rights Act 1990

The NZBORA affirms and protects a number of civil and political rights. It is not entrenched, nor does it allow the courts to decline to apply any provisions that are inconsistent with the NZBORA, although it does require statutes to be given an interpretation consistent with the Act where possible.[82] The decision to exclude strong judicial review powers from the NZBORA places increased importance on the ability of Parliament to hold the executive to account for potential human rights violations.

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77 See Allan and Geddis, above n 3, at 95–96.

78 The House of Lords traditionally consists of hereditary and appointed peers, although it is currently under reform. The House of Commons can ultimately legislate without the approval of the House of Lords: see Parliament Act 1911 (UK) 1 & 2 Geo V c 13; Parliament Act 1949 (UK) 12, 13 & 14 Geo VI c 103.

79 Peter W Hogg *Constitutional Law of Canada* (looseleaf ed, Thomson Carswell) at 9-17–9-20.

80 A referendum held during the 1999 election proposed reducing the number of MPs from 120 to 99, with 81.5 per cent of respondents voting in favour of the proposal. See "Referenda" Elections New Zealand <www.elections.org.nz>.

81 See for example McLeay "Scrutiny and Capacity", above n 52, at 177; Ganley, above n 62, at 149; Palmer and Palmer, above n 5, at 374; Joseph, above n 49, at 340; Legislation Advisory Committee, above n 21, at 370.

82 NZBORA, ss 4 and 6.

Section 7 of the Act requires the Attorney-General to bring any provision in a Bill that appears inconsistent with the NZBORA to the attention of the House. This duty must be carried out at the introduction of a Government Bill, and as soon as practicable for any other Bill.[83] To assist the Attorney-General to carry out this reporting function, submissions to Cabinet committees on Bills must include a statement of consistency with the NZBORA.[84] Further, as part of the preparation of every Government Bill, an examination is carried out by the Ministry of Justice to advise the Attorney-General whether the provisions are consistent with the Act. The phrase "is inconsistent with" in s 7 has been held by successive Attorneys-General to mean that their duty to report only arises when the Bill is inconsistent with the NZBORA to the extent that it is not a demonstrably justified limit on the protected right or freedom in a free and democratic society.[85] In order to carry out this test, the Attorney-General asks two questions: whether the limit has a significant objective and whether this limit is rational and proportional.[86] This means that any prima facie breach of the NZBORA that the Attorney-General rules is a reasonable limit will not be brought to the attention of Parliament through this process.

The New Zealand requirements can be compared to parliamentary human rights reporting in Canada, the United Kingdom and Australia. The Canadian Minister of Justice is required to alert Parliament when Bills are inconsistent with the rights protected in the Canadian Bill of Rights 1960 and the Canadian Charter of Rights and Freedoms 1982 (Charter).[87] The test that the Minister of Justice applies is whether there is a credible argument to be made for consistency with the Charter.[88] This decision will be made in light of *R v Oakes*,[89] which sets out substantially the same test for reasonable limits on rights to that used in New Zealand. In the United Kingdom, the minister responsible for introducing Government Bills to either House is required to provide a written statement that the Bill is either consistent or inconsistent with the European Convention on Human Rights.[90] The test applied by ministers is whether the balance of arguments favours the view that the Bill will not be issued a declaration

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83 Ibid, s 7; Standing Orders of the House of Representatives 2008, SO 261(2). Note that there has recently been debate about the merits of introducing a similar requirement to vet all Bills for compatibility with 'principles of responsible regulation'. See Regulatory Responsibility Bill 2006 (71-1); Regulatory Responsibility Taskforce *Report of the Regulatory Responsibility Taskforce* (2009) at 55–57.

84 McGee *Parliamentary Practice*, above n 10, at 327; *Cabinet Manual*, above n 21, at [7.60(b)].

85 *Laws of New Zealand* Human Rights at [69]. This is a reference to s 5 of the NZBORA, which states that the rights and freedoms in the Act can only be subject to limits that are shown to be demonstrably justified in a free and democratic society.

86 Legislation Advisory Committee, above n 21, at 113. This test was most recently articulated by the Supreme Court in *R v Hansen* [2007] NZSC 7, [2007] 3 NZLR 1 at [64].

87 Canadian Bill of Rights C 1960 c 44, s 3; Department of Justice Act RSC C 1985 c J-2, s 4.1(1).

88 Janet L Hiebert "Rights-Vetting in New Zealand and Canada: Similar Idea, Different Outcomes" (2005) 3 NZJPIL 63 at 72.

89 *R v Oakes* [1986] 1 SCR 103.

90 Human Rights Act 1998 (UK), s 19.

of incompatibility by the courts.[91] In Australia, the Attorney-General has stated that a procedure will soon be implemented where each Bill introduced to Parliament will be accompanied by a Statement of Compatibility with Australia's international human rights obligations.[92]

2 Should the Attorney-General Bring Prima Facie Breaches to the Attention of Parliament?

As stated, the Attorney-General will only report a potential breach of the NZBORA to Parliament if he or she considers that it is not a reasonable limit under s 5 of the Act. Fitzgerald has argued that this interpretation of s 7 is wrong, both in principle and practice.[93] It is wrong in principle as it shifts decision-making about justified limits inside the executive and away from the public eye.[94] It is wrong in practice as s 5 does not apply to Bills prior to their introduction to Parliament. Section 5 refers to a "reasonable limit prescribed *by law*" (emphasis added) and states that it must be read subject to s 4, which refers only to provisions of an "enactment". In contrast, s 7 refers merely to "provisions".[95] Fitzgerald argued that when the Act is read as a whole, s 5 only applies once a Bill has the force of law, and that s 7 requires the Attorney-General to report any prima facie inconsistency with the NZBORA to Parliament.[96]

Certainly, if Parliament is to play an effective role in the scrutiny of human rights, it seems desirable that it is made aware of all potential human rights issues. However, Huscroft has argued that there has been an over-reporting of inconsistencies to Parliament, resulting in a diminution of the significance of the reports.[97] He argued that as a result of the policy development process becoming dominated by lawyers, s 7 reports are often issued even when there is a credible argument that the proposed legislation is a justified limit. Huscroft stated that this often leads to the situation where the government is willing to promote legislation after an adverse report, sending an ambiguous message to Parliament. Indeed, since the NZBORA came into force, there have been 22 Government Bills with s 7 notices attached, only 2 of which were not passed in their original 'inconsistent' form.[98] A recent example of the relaxed attitude that Parliament has taken towards s 7 notices is the Parole (Extended Supervision Orders) Amendment

91 This is described as the '51 per cent probability test' in David Feldman "The Impact of Human Rights on the UK Legislative Process" (2004) 25 Statute Law Review 91 at 98.

92 Australian Government *Australia's Human Rights Framework* (21 April 2010) <www.ag.gov.au> at 8.

93 Paul Fitzgerald "Section 7 of the New Zealand Bill of Rights Act 1990: A very practical power or a well intentioned nonsense" (1992) 22 VUWLR 135.

94 Ibid, at 138–139.

95 Ibid, at 137.

96 Ibid, at 138.

97 Grant Huscroft "The Attorney-General's Reporting Duty" in Paul Rishworth, Grant Huscroft, Scott Optican and Richard Mahoney (eds) *The New Zealand Bill of Rights* (Oxford University Press, Melbourne, 2003) 195 at 215.

98 These were the Children, Young Persons and Their Families Amendment Bill 1993 (269-2) and the Electoral Amendment (No 2) Bill 2001 (110-3).

Bill 2009, which was introduced and passed in the same sitting with leave of the House, despite an adverse report from the Attorney-General.[99]

It is desirable for Parliament to be made aware of all potential human rights issues in order for it to play an effective role in the scrutiny of human rights. However, reporting procedures have evolved in a way that does not promote parliamentary awareness of potential rights violations in Bills. It is argued that more effective human rights scrutiny by Parliament will not result from greater or fewer s 7 reports, but from more formal attention to human rights throughout the legislative process. When Fitzgerald wrote his analysis of s 7 in 1992, a significant concern was that the advice received by the Attorney-General was subject to legal privilege. This meant that Parliament suffered from a scarcity of information with which to scrutinise the government in debate and select committees. However, since 2003 all advice received by the Attorney-General in making his or her decision has been published once the Bill passes its first reading.[100] This advice can be used by MPs during debate and select committee deliberations, and goes some way to relieving Fitzgerald's concern that Parliament will not be made aware of many human rights issues. At the same time, it does not encourage the overproduction of 'meaningless' reports. As this information is now available to Parliament, the relevant issue is not the frequency with which s 7 reports are made, but how to ensure that Parliament makes the best use of the information now available to it.[101]

3 Should there be Further Human Rights Safeguards in Parliament?

A significant problem with the current NZBORA reporting procedure is that it does not address amendments made to Bills by select committees or SOPs. While all advice given to the Attorney-General is now available to Parliament, such advice only concerns the Bill as introduced to Parliament. As Bills are often changed extensively in Parliament, there is a strong argument for more formal human rights scrutiny procedures throughout the legislative process.[102] This additional scrutiny could take the form of an extended reporting role for the Attorney-General or a specialised Human Rights Committee.

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99 Attorney-General *Report of the Attorney-General under the New Zealand Bill of Rights Act 1990 on the Parole (Extended Supervision Orders) Amendment Bill* (2009). The Bill allowed parole-like conditions to be imposed on child sex offenders after their sentence had finished in full, raising concerns about retroactive penalties, double jeopardy and arbitrary detention.

100 This advice is available at: "New Zealand Bill of Rights Act 1990" Ministry of Justice <www.justice.govt.nz>.

101 In making this argument, it is noted that the Regulatory Responsibility Taskforce recently recommended that a statement of compatibility with the 'principles of responsible regulation' should accompany all proposed legislation, and that this report should indicate any prima facie incompatibility and then consider whether this was justified in "a free and democratic society". See Regulatory Responsibility Taskforce, above n 83, at 52 and 57.

102 Section 2(4) of the Criminal Justice Amendment Act 2004 is often cited as an example of Parliament inadvertently enacting legislation that conflicted with the NZBORA. This section required harsher penalties to be imposed retrospectively for the crime of murder involving home invasion, conflicting with s 25(g) of the NZBORA. The Court of Appeal grappled with the issues arising in *R v Poumako* [2000] 2 NZLR 695 (CA) and *R v Pora* [2001] 2 NZLR 37 (CA). In both cases, the Court observed that Parliament was probably not even aware that the section was contrary to the NZBORA.

(a) Extended Reporting Requirement

There is an argument that the Attorney-General's duty to report should extend beyond the introduction of a Bill. Read on its own, s 7 does not require the Attorney-General to report on human rights concerns after introduction. Fitzgerald argued that s 3(a) of the NZBORA binds the legislature to act consistently with the Act and that consequently, scrutiny for inconsistencies must extend beyond introduction if the House is not to be left open to a breach of the law.[103] He also stated that the purpose of s 7 is to alert the House to potential inconsistencies, and noted that the courts have indicated the importance of adopting a purposive approach to interpretation where human rights are concerned. This article contends that regardless of what s 7 requires, the current approach is seriously deficient as it frustrates Parliament's ability to protect human rights and allows the government to infringe on rights, both inadvertently and deliberately. It is inherently desirable for formal human rights reporting to extend throughout the legislative process.

The most efficient stage to vet amendments made to Bills during the legislative process is between the Bill's consideration by a committee of the whole House and the third reading.[104] Provision already exists within the Standing Orders for Bills to be recommitted to a committee of the whole House before their third reading.[105] It could be required that the Attorney-General vet Bills before they proceed to third reading, with a duty to recommit the Bill if the amendments made are found to be inconsistent with the NZBORA. Tanner has argued that the Attorney-General is the most appropriate person to perform this function.[106] This is because the Attorney-General should already be familiar with the Bill, due to the advice he or she received on the original Bill. However, as a member of the executive, the Attorney-General is not in the best position to produce impartial, independent and consistent advice to Parliament. While the Attorney-General enjoys access to the Ministry of Justice lawyers who vetted the Bill before its introduction, he or she is also subject to strong political pressure to see that government policy is enacted in a timely fashion. It is Parliament, not the executive, that needs greater control over the rights vetting process.

(b) A Human Rights Committee

The examination of human rights concerns in a parliamentary committee has two advantages over Attorney-General reporting. A committee would

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103 Fitzgerald, above n 93, at 152.

104 Tanner, above n 13, at 103. By this stage the Bill has undergone any changes that will be made by supplementary order papers.

105 Standing Orders of the House of Representatives 2008, SO 302.

106 Tanner, above n 13, at 103.

move decision-making about human rights away from the executive and toward Parliament. Committees also provide a more effective forum than the debating chamber for considering human rights issues. It is difficult for MPs to analyse properly human rights concerns in parliamentary debate in the face of tight debating timetables, complex legislative provisions and, often, their own lack of rights expertise.[107] The United Kingdom Parliament established the Joint Committee on Human Rights in 2001 in order to consider "matters relating to human rights in the United Kingdom", including the consideration of s 19 of the Human Rights Act 1998 (UK) compatibility statements.[108] The Australian Government is currently in the process of establishing a similar Joint Committee on Human Rights to report on compliance with Australia's international human rights obligations.[109] In Canada, the Senate Standing Committee on Human Rights has a broad mandate to investigate "matters related to human rights generally".[110] The benefits of committees are that they can develop a body of rights expertise, focus on topics not chosen by the government and provide non-politically partisan advice to Parliament.[111]

In the late 1980s, the Justice and Law Reform Committee recommended the establishment of a "[p]arliamentary select committee to examine bill of rights matters" in New Zealand.[112] However, no specialised human rights committee has ever been formed in New Zealand and only the Justice and Electoral Committee has human rights listed as within its subject area.[113] It is argued that New Zealand should establish a specialised parliamentary Human Rights Committee. However, while the overseas committees mentioned above have the ability to set their own agenda, the New Zealand committee should be allocated a formal place in the legislative process.[114] A New Zealand Human Rights Committee should consider all Bills that have been reported back from a committee of the whole House before their third reading, taking the place of the Attorney-General in the extended reporting procedures outlined by Tanner above. This process ensures that Parliament is aware of any NZBORA concerns raised by select committee or SOP amendments, and shifts the responsibility for this scrutiny away from the executive.

This additional step in the legislative process will delay the passage of legislation. Consequently, such a committee should not duplicate the

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107 Carolyn Evans and Simon Evans "Legislative Scrutiny Committees and Parliamentary Conceptions of Human Rights" [2006] Public Law 785 at 786.

108 Standing Orders of the House of Commons, Public Business (as amended 8 April 2010), SO 152B. For further discussion of the terms of reference of the Joint Committee on Human Rights see Evans and Evans, above n 107, at 796.

109 Australian Government, above n 92, at 8.

110 *Rules of the Senate of Canada*, March 2010, 86(1)(s).

111 David Kinley *The European Convention on Human Rights* (Dartmouth Publishing, Aldershot, 1993) at 134.

112 "Report on a Bill of Rights for New Zealand", above n 5, at 11.

113 Standing Orders of the House of Representatives 2008, SO 184.

114 Second chambers often play a large role in the human rights scrutiny of legislation. Given the absence of an upper house in New Zealand, it seems desirable that there should be a compulsory human rights scrutiny mechanism that will examine every Bill as amended by the House.

select committee stage and should be designed to discourage unnecessary delay and political grandstanding. Interest groups and the public should only be consulted with consent from the House. The Committee could be empowered to employ human rights advisors, who would monitor a Bill's progress through the House and be able to alert the Committee to any legitimate rights issues. Concerned groups and individuals could contact these advisors if they felt their concerns were not being considered, but would not be able to appear before the Human Rights Committee in order to delay the enactment of a Bill where no legitimate issues arise. In this way the Committee could rapidly dispense with most Bills upon being advised that there were no human rights concerns. If NZBORA consistency issues did arise, the Committee would be empowered to recommit the Bill to a committee of the whole House. A Bill should only be recommitted in this way once, in order to avoid unnecessary delay, and debate would be limited to those provisions identified by the Human Rights Committee. Scrutiny by such a committee does not necessarily stop a Bill being enacted, but provides the ability to test Bills against independent standards, inform the House and bring influence to bear on the executive.[115] In addition, the duty of the Attorney-General to report at the introduction of Bills should be retained. These reports are valuable as the Attorney-General will have been involved in the internal government scrutiny processes during the policy development phase. The information provided in the report will also be of use to MPs during debate and in select committees.[116] However, an additional parliamentary check on human rights is needed to ensure impartial and consistent human rights scrutiny.

Legislative Timetabling

Scrutiny is important, but at the same time it is essential that the elected government can function and implement its agenda in a timely fashion. Control of the parliamentary agenda involves a delicate balance between allowing the government to act on its promises to the electorate and the ability of Parliament to produce quality legislation. New Zealanders do not take kindly to minor parties who are perceived to be holding up the business of government; a common complaint is of 'the tail wagging the dog'. However, Waldron has cautioned that a desire for legislative efficiency should not be taken too far. He singled out the use of urgency to rush legislation through the House as an issue of particular concern for the New Zealand Parliament.[117] The passage of legislation in reasonable time should be ensured, but the scrutiny of legislation is equally important.

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115 David Feldman "Parliamentary Scrutiny of Legislation and Human Rights" [2002] Public Law 323 at 332.

116 The adoption of a checklist for use by select committees would also provide some consideration of human rights earlier in the legislative process. However, these committees would not have a developed human rights expertise and could not be expected to provide the same level of scrutiny as a specialised Human Rights Committee.

117 Waldron "Compared to what?", above n 1, at 442–443.

1 Closure Motions and Urgency

Governments often use closure motions and urgency to ensure that they have adequate time to enact their legislative programme. A closure motion ends the immediate debate, even when there are still members who wish to speak in it. The decision whether to accept a closure lies solely with the Speaker. The Speaker will accept the closure if he or she believes it is reasonable to do so, having regard to the length of time spent debating and the number of members who have participated.[118] Where the Standing Orders or the Business Committee have prescribed a time for the debate, a closure motion may not be accepted.[119] This means that closure is now normally only used in a committee of the whole House, as Standing Orders limit debate in first, second and third readings to two hours.[120] Urgency, another means of manipulating the legislative timetable, can only be moved by a minister and must be adopted by a majority of the House. Urgency extends the sitting hours of the day and enables the business for which it has been accorded to be completed before the House rises on that day.[121] Urgency may be taken for one or more stages of a Bill or Bills. If urgency is taken before the select committee stage, this stage will be omitted. The ability of the executive to take advantage of urgency will depend on its capacity to secure support in the House.

A former Chief Parliamentary Counsel and a former Clerk of the House of Representatives have both viewed urgency as a procedural device that is necessary to secure sufficient parliamentary time to pass government legislation.[122] Yet there is little legislation passed under urgency that is actually urgent. Even on non-urgent matters, the longer one Bill takes, the less time is available in the House for other business. Certainly, it is true that much legislation is uncontroversial and does not need to take much of the House's time. However, there is a real unease that urgency is often abused by governments to reduce parliamentary and public scrutiny on contentious legislation. A prominent example is the enactment of the Foreshore and Seabed Act 2004, which continues to be

118 Standing Orders of the House of Representatives 2008, SO 132. See generally McGee *Parliamentary Practice*, above n 10, at 199–202.

119 Standing Orders of the House of Representatives 2008, SO 132(2).

120 Standing Orders of the House of Representatives 2008, Appendix A.

121 Standing Orders of the House of Representatives 2008, SO 55. During urgency, the House is only suspended between midnight and 9:00am, 1:00–2:00pm and 6:00–7:00pm. See generally McGee *Parliamentary Practice*, above n 10, at 153–157.

122 Tanner, above n 13, at 107 (Tanner was Chief Parliamentary Counsel for 11 years before being appointed to the Law Commission in 2007); David McGee "Concerning Legislative Process" (2007) 11 OLR 417 at 420 (McGee was Clerk of the House of Representatives for 22 years before being appointed an Ombudsman in 2007).

an extremely controversial piece of legislation.[123] After the Fisheries and Other Sea-Related Legislation Select Committee reported to Parliament on the Bill, the Bill proceeded under urgency, with its second reading, committee stage and third reading occurring within one sitting day.[124] During this period of urgency, the government tabled numerous SOPs that made significant changes to the Bill, including the 67 page SOP number 302, which Opposition MPs were given during their one hour dinner break to digest.[125] While urgency may be needed to enable the government to carry out its legislative programme, there needs to be reform to ensure that the process is not abused for controversial legislation.

(a) A Main Committee

One way to reduce the need to use urgency is to provide more time for the government to enact its legislative programme. Tanner suggested that urgency is often used to enact routine technical and administrative Bills, which have been left to languish at the bottom of the legislative programme while the government focuses on securing support for controversial legislation.[126] He therefore suggested the use of a "Main Committee" to deal with uncontroversial legislation. A Main Committee has been used in the Australian Federal Parliament since 1994.[127] It acts as an extension of the House, allowing two streams of business to be conducted concurrently.[128] All members of the House are automatically also members of the Main Committee, and its debates are recorded in Hansard. The Main Committee exists to deal with the second readings and committee of the whole House stages of unopposed Bills. It can process Bills through these stages and make amendments to Bills, although any decision it makes must later be

123 The Foreshore and Seabed Act 2004 provoked numerous critical reports both before and after its enactment — see for example: Waitangi Tribunal *Report on the Crown's Foreshore and Seabed Policy* (Wai 1071, 2004); United Nations Committee on the Elimination of All Forms of Racial Discrimination *Decision 1(66): New Zealand Foreshore and Seabed Act 2004* CERD/C/NZL/1 (2005); United Nations Commission on Human Rights *Report of the Special Rapporteur on the Human Rights and Fundamental Freedoms of Indigenous Peoples, Rodolfo Stavenhagen: Mission to New Zealand* E/CN.4/2006/78/Add.3 (2006). There has also been a recent ministerial review regarding the Act that recommended its repeal: Ministerial Review Panel *Ministerial Review of the Foreshore and Seabed Act 2004 – Volume 1* (2009) at 151.

124 (16 November 2004) 621 NZPD 16929–17211. In real time, the second reading, committee stage and third reading of the Foreshore and Seabed Act 2004 took place over a number of days, from 16–18 November 2004. For excellent analysis of the enactment of this Act, see Claire Charters "Responding to Waldron's Defence of Legislatures: Why New Zealand's Parliament Does Not Protect Rights in Hard Cases" [2006] NZ Law Review 621.

125 Supplementary Order Paper 2004 (302) Foreshore and Seabed Bill 2004 (129-1). This supplementary order paper made it significantly more difficult for Māori to prove customary rights, adding that a customary rights order cannot be issued on the basis of a spiritual or cultural association with land unless it is manifested in a physical activity. It also removed the High Court's jurisdiction to develop the common law on aboriginal title, introducing the requirement that exclusive use and occupation of an area is only proved by continuous title to the land since 1840.

126 See Tanner, above n 13, at 107.

127 Chamber Research Office, Department of the House of Representatives *Infosheet: The Main Committee* (No 16, 2008) <www.aph.gov.au> at 1.

128 Ibid.

confirmed by the House.[129] There is no provision for division or voting; if business cannot be progressed by agreement it is referred back to the House and only business on which it is hoped agreement can be reached is referred to the Committee. The Main Committee allows the time of the House to be used more effectively, giving members extra opportunities to speak on uncontroversial Bills and significantly increasing the amount of time available for business. Such a committee could be beneficial in New Zealand. A Main Committee would encourage the timely enactment of uncontroversial legislation and give Parliament additional time to consider more controversial business. The Committee would reduce the need for the government to use urgency in order to achieve its legislative programme and, as will be suggested below, should be accompanied by amendments to the Standing Orders providing for more restricted use of urgency.

(b) The Business Committee and Regulation of Closure and Urgency

The Business Committee is a management committee that helps to direct the flow of the House's work.[130] Each party is entitled to choose one member to sit on the Business Committee.[131] The Committee is chaired by the Speaker and generally consists of the Leader of the House, the shadow Leader of the House and the party whips.[132] The Committee does not vote on matters before it, but makes decisions on the basis of unanimity, or "near-unanimity" having regard to the numbers in the House represented by each of the members of the Committee.[133] The Business Committee's powers include: the power to determine the order of business in the House;[134] time to be spent on an item of business;[135] the allocation of speaking times among parties and individuals;[136] membership of select committees;[137] extension of the reporting times of Bills;[138] and the omission of the committee of the whole House stage of Bills.[139] In addition to these powers, the Leader of the House is expected to outline the government's intended programme for the coming week to the Committee so that members can prepare for debates. While the determinations of the Business Committee have automatic effect, its decisions can be altered by the House. This means that the Business Committee cannot prevent the House taking urgency.

The consideration of parliamentary business by a Business

129 Select Committee on the Modernisation of the House of Commons *First Report: The Parliamentary Calendar, Initial Proposals* (HC 60, 1998) at Appendix 7.

130 See generally McGee *Parliamentary Practice*, above n 10, at 166–170.

131 Standing Orders of the House of Representatives 2008, SO 74.

132 McGee *Parliamentary Practice*, above n 10, at 167.

133 Standing Orders of the House of Representatives 2008, SO 75(1).

134 Standing Orders of the House of Representatives 2008, SO 76(a).

135 Standing Orders of the House of Representatives 2008, SO 76(c).

136 Standing Orders of the House of Representatives 2008, SO 76 (d), (e).

137 Standing Orders of the House of Representatives 2008, SO 181, 183(2).

138 Standing Orders of the House of Representatives 2008, SO 286(2).

139 Standing Orders of the House of Representatives 2008, SO 290.

Committee is a positive development in terms of parliamentary control over the executive. The House of Lords Select Committee on the Constitution recommended the establishment of a Business Committee in the United Kingdom, noting that the practice is common in the parliaments of Western Europe.[140] Such a committee helps to develop consensus about the conduct of business and ensures that a timetable is determined in advance, allowing proper time and preparation for the scrutiny of Bills.[141] It means that the government cannot dominate the parliamentary agenda and must negotiate, or at least discuss, this issue with other parties. The Business Committee could also be used to help implement some of the reforms suggested in this article. Publication of a Bill in draft could be a reason for the Committee to allocate that Bill a high place on the legislative programme. The Committee could also be used to discuss and recommend the referral of Bills to a Main Committee.

The Business Committee should be used to manage the use of closure and urgency. It could prescribe time limits on debate in a committee of the whole House, and this should be encouraged in preference to the use of closure. Taking urgency can currently overturn decisions of the Business Committee. This state of affairs should be reversed. Decisions of the Business Committee are made unanimously, and so should not be overridden without leave of the House. In addition, Standing Orders should be revised to require the government to give notice to the Business Committee of its intention to take urgency in the coming week. The Committee's agreement to taking urgency would not be required. This would not prevent the government from achieving its legislative programme, but would allow the reasons for urgency being taken to be discussed in a parliamentary forum and prevent the Opposition from being surprised by a motion to take urgency.[142] Of particular concern is the control of urgency when NZBORA issues have been raised. If the government is aware that the Attorney-General will be tabling a report under s 7 of the NZBORA and intends to introduce the Bill under urgency, it should be required to attach a copy of this report to the notice of urgency provided to the Business Committee. This would at least ensure that members will have some time to consider the report before urgency is taken. Truly urgent legislation, such as a matter involving state security, could continue to be dealt with under the existing rules for extraordinary urgency.[143]

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140 Select Committee on the Constitution *Devolution: Inter-Institutional Relations in the United Kingdom*, (HL Paper 28, 2003) at [146] as cited in *Constitution Committee Report*, above n 23, at [118].

141 Ibid.

142 Currently, reasons for taking urgency must be given when the motion is taken, but no debate is allowed: Standing Orders of the House of Representatives 2008, SO 54(3).

143 Extraordinary urgency allows the House to sit through the night, breaking only at 8:00–9:00am, 1:00–2:00pm and 6:00–7:00pm. In addition to the consent of the House, extraordinary urgency requires the Speaker to make a judgment on the justification given by the government in asking for extraordinary urgency: Standing Orders of the House of Representatives 2008, SO 56 and 57.

The Effect of MMP on Parliamentary Scrutiny

When New Zealanders chose to adopt MMP in 1993, it was hoped that the new electoral system would work to constrain the executive's ability to dominate Parliament. The previous FPP system had resulted in single party majority governments, which, when combined with a Westminster system of government, effectively allowed the governing party to pass laws as it desired, subject to the usual political vicissitudes.[144] Given this desire from the New Zealand public to place greater checks on executive power, it is worth questioning whether the move to MMP has enhanced the ability of Parliament to scrutinise executive activity.

Certainly, MMP has resulted in a greater number of political parties and social interests being represented in Parliament. Since 1996, New Zealand has seen one majority coalition government, three minority coalitions and two single party minority governments.[145] There are currently seven political parties in Parliament, eight being represented in the last Parliament. The likely combination of having a minority government and a multi-party Parliament makes passing legislation under MMP a much more complex and uncertain exercise than under FPP. Geoffrey Palmer and Matthew Palmer have argued that MMP has undoubtedly made the executive less dominant.[146] They argued that traditional accountability mechanisms such as the confidence vote make more sense in a multi-party environment and that major policy change now requires consensus.

There is an argument that MMP simply promotes covert deal-making and that Parliament still lacks control over the executive, as the government will make sure that it has support for any controversial legislation or any urgency motion before entering the debating chamber.[147] There is some truth in this claim, and it is true that the executive continues to have the advantage that its legislation is far more likely to be passed than that of anyone else in the House. It is to be expected that given the size of the parties in Parliament, the government should generally be dominant.

However, under MMP there are more points at which legislation can be obstructed, and more negotiation is required.[148] A single political party can no longer determine the nature and content of legislation, and minority governments must seek support from wherever they can find it in Parliament. A good example of the greater requirement for multi-party negotiation is the so-called 'anti-smacking' legislation. In 2005, the Crimes (Abolition of Force as a Justification for Child Discipline) Amendment Bill was introduced as a Member's Bill by Green Party MP

144 See generally Palmer and Palmer, above n 5, at 9–18.

145 These were: National–New Zealand First Majority Coalition 1996–1998; National Minority Government 1998–1999; Labour–Alliance Minority Coalition 1999–2002; Labour–Progressive Minority Coalition 2002–2005 and 2005–2008; National Minority Government 2008–present.

146 Palmer and Palmer, above n 5, at 17.

147 Charters, above n 124, at 636.

148 Andrew P Stockley "What difference does proportional representation make?" (2004) 15 PLR 121 at 131.

Sue Bradford.[149] The Bill aimed to amend s 59 of the Crimes Act 1961 by removing the defence of "reasonable force" that was available to parents charged with assaulting their children. The governing Labour Party openly supported the Bill, but with strong public opposition, the Bill appeared to face an uncertain future as the Labour Government's support parties reassessed their backing of the Bill. However, the Bill eventually passed by 113–8 votes after a compromise was struck with the largest opposition party.[150] Given the scope of the question of whether MMP has improved parliamentary scrutiny of the executive, the arguments in this section are admittedly brief. However, they do suggest that forming and maintaining a government is more complicated than in the past, and requires building relationships between all parties in Parliament. The executive retains significant power, but the need for these negotiations is new.[151] Perhaps the greatest impact of MMP has not been to increase the formal checks on government, but to promote a culture of deliberation inside Parliament.

V CONCLUSION

New Zealand's Parliament has the ability to create and change the law on a virtually unrestricted basis. It should therefore be of considerable concern when a well-known academic such as Jeremy Waldron has described New Zealand's Parliament as "reckless", "impoverished" and in "craven submission" to an executive agenda.[152] In light of Waldron's claims, this article has aimed to assess how effective Parliament is at providing scrutiny and accountability to the executive. Encouragingly, New Zealand's Parliament does not perform as poorly as Waldron would suggest. There are areas where Parliament performs exceptionally well; however, there are also areas where reform is required. In recommending these reforms, this author has kept in mind that procedural changes can only go so far. There must be a culture of deliberation and justification, rather than assertion, inside Parliament.[153] The advent of MMP appears to have encouraged the emergence of a culture of negotiation and compromise within Parliament, and it is hoped that the reforms suggested here will help to cement such a culture, in addition to the formal safeguards they provide.

Parliament should become more involved in the policy development process. The publication of draft Bills for scrutiny by a parliamentary committee should be encouraged. This would allow changes to be made to legislation outside of the politically charged atmosphere of the debating

149 In its final form: Crimes (Substituted Section 59) Amendment Bill 2007 (271-3).

150 See (16 May 2007) 639 NZPD 9284–9306.

151 Geddis, above n 8, at 39.

152 Waldron, "Parliamentary Recklessness: Why we need to legislate more carefully", above n 1, at 28; Waldron "Compared to what?", above n 1, at 442, 445.

153 See *Constitution Committee Report*, above n 23, at [154]–[155].

chamber and will lead to more informed scrutiny once a Bill is formally introduced to Parliament. New Zealand's select committees generally perform well. They have formidable powers and their capacity for scrutiny compares favourably to many upper houses. However, the select committee system could be improved through the introduction of checklists and there is significant cause for concern about the ability of the government to bypass committee scrutiny through the use of urgency and SOPs. The duty of the Attorney-General to report on NZBORA inconsistencies provides useful and important information to MPs, and the decision to publish all advice given to the Attorney-General is a positive development. However, this process is controlled by the executive and can be influenced by party political forces. This article has urged the establishment of a specialist Human Rights Committee to provide consistent and impartial advice to Parliament. The use of urgency is also of serious concern in New Zealand. While urgency is often necessary to allow the government to enact its legislative programme in a timely manner, there are legitimate concerns that governments often abuse the use of urgency. This author argues that a notice period should be required for the use of urgency in most cases. In addition, the establishment of a Main Committee would remove much of the need to use urgency, as the Committee will deal with unopposed Bills while the House debates controversial legislation.

Despite the primacy of Parliament in making the law, there has been a pronounced lack of academic attention paid to the ability of Parliament to scrutinise the executive and produce coherent and workable legislation. Debate concerning the relationship between Parliament and the courts is ongoing, both in terms of the role of parliamentary intention in statutory interpretation, and in the ability of the courts to judicially review legislation. Yet the everyday functioning of Parliament itself is often overlooked. The examination of primary legislation is only a small part of Parliament's scrutiny of the executive. Further areas of research include parliamentary scrutiny of delegated and tertiary legislation, examination of government expenditure and post-legislative review.[154] Involvement by Parliament in all of these areas is important to ensure the production of the coherent, workable and accessible law that is required for the rule of law to operate.

154 A prominent proposal for post-legislative review is the recommendation of the Regulatory Responsibility Taskforce to enact provisions in the Regulatory Responsibility Bill allowing the courts to issue 'Declarations of Incompatibility' regarding the consistency of legislation with 'principles of responsible regulation'. A less constitutionally controversial model would be to set up a select committee to examine whether legislation has achieved its objectives. See Regulatory Responsibility Taskforce, above n 83, at 60–63 and 68–69.