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Public servants and Parliament

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In the Westminster model of parliamentary democracy the Executive is drawn from the elected members of Parliament. While distinct in terms of the doctrine of the separation of powers – the three branches of government – the Executive is very much a part of the Parliament. In practice this means that the servants of the Executive – the public service – will have a close relationship with the House of Representatives.

This relationship takes a number of forms, both within Parliament's own proceedings and in party politics. Public servants' interactions with parties are controlled by Ministers and frequently influenced by political expediency, as Governments seek to garner support for their legislative proposals. This paper focuses on the ways in which public servants interact with parliamentary proceedings and the implications of these interactions for the public service. However, since MMP has strengthened the role of the party and parties are now formally recognised in parliamentary proceedings, public servants will invariably come up against party politics in their dealings with the House and its committees.

The nature of public servants' involvement with Parliament is determined by the two broad categories of House business:

- scrutiny and
- legislative.

Scrutiny processes

The requirement on the Government to account to Parliament is a fundamental constitutional principle established in law through the Bill of Rights 1688, continued in force as part of New Zealand law by the Imperial Laws Application Act 1988, the Constitution Act 1986 and the Public Finance Act 1989.

Article 4 of the Bill of Rights 1688 establishes the principle that the Government must come to Parliament for the authority to raise taxes and to spend public monies. Section 22 of the Constitution Act 1986 restates the principle of parliamentary control of public finance:

“It shall not be lawful for the Crown, except by or under an Act of Parliament,— ...

(c) To spend any public money.”

Section 4(1) and section 5, of the Public Finance Act 1986 set out the principle in public sector accounting terms:

“The Crown ... must not incur expenses or capital expenditure except as expressly authorised by an appropriation or other authority, by or under an Act ”

“The Crown ... must not spend public money except as expressly authorised under an Act”.

The purpose of these legislative requirements is to ensure:

- that Parliament has control over how public money is used
- that the Executive is held accountable for its use of public money.

The House has established procedures to give effect to the legislative requirements. The control exercised through Appropriation bills and Imprest Supply bills is long established. Following the public sector financial management reforms of the 1980s, enhanced financial scrutiny procedures were put in place.¹ These remain intact today with some fine tuning and place considerable requirements on Government to provide information for the House and for that information to be examined and reported upon.

Financial procedures

The House’s financial procedures follow a very comprehensive annual cycle:

- Budget Policy Statement examined by the Finance and Expenditure Committee and debated
- First Imprest Supply Bill – introduced and passed
- Budget – the main Appropriation (Estimates) Bill - debated
- Fiscal strategy report and economic and fiscal update examined by the Finance and Expenditure Committee
- Estimates examinations by select committees
- Estimates debate in the committee of the whole House
- Passing of the main Appropriation (Estimates) Bill
- Second Imprest Supply Bill – introduced and passed
- Departmental annual reports and annual financial statements of the Government presented to House
- Appropriation (Financial Review) Bill introduced
- Financial reviews by select committees of the performance and current operation of departments, State enterprises, Crown entities and other public organisations

¹ *Report of the Standing Orders Committee on a New Financial Procedure for the House of Representatives, 1991, I.18A*

- Finance and Expenditure Committee examination of the annual financial statements of the Government
- Half-year economic and fiscal update and statement of long-term fiscal position referred to Finance and Expenditure Committee
- Financial reviews and annual financial statements of the Government debated and Appropriation (Financial Review) Bill passed
- Appropriation (Supplementary Estimates) Bill introduced
- Supplementary estimates examined by the Finance and Expenditure Committee
- Appropriation (Supplementary Estimates) Bill passed.

The House's authorising of expenditure and holding of the Government to account is a year round activity. In addition, the House must pass legislation annually confirming the income tax rates that are to apply before the tax year commences on 1 April each year.

Other scrutiny procedures

The House's accountability activity is not limited simply to financial accountability. The House and its committees have available to them other procedures to scrutinise Government activity and hold the Government to account:

- Oral question time in the House
- Debates on the Prime Minister's statement
- General debates each Wednesday
- Debates on matters of urgent public importance
- Questions for written answer, which average 18,000 per year
- Select committee inquiries
- Select committee consideration of petitions
- Select committee examination of international treaties
- Complaints about the operation of regulations to the Regulations Review Committee.

These scrutiny procedures will almost all involve public servants in one way or another. Where select committees are undertaking examinations or inquiries, public servants may be appearing before committees as witnesses in public to answer for the performance or actions of their departments. In other procedures Ministers themselves must account and public servants play a support role, providing the information Ministers require. Before analysing this involvement in more depth I will examine the role of public servants in the legislative process.

Legislative process

Broadly speaking, an equal amount of the House's time is now spent on scrutiny and legislative activity. The New Zealand Parliament leads amongst Westminster parliaments in terms of public participation in the legislative process through advertising bills and inviting submissions. All bills except Appropriation bills, Imprest Supply bills and bills passed under urgency are referred to a select committee for consideration.

Instead of focusing simply on their own scrutiny of the Government's legislative proposals, committees have over a long period adopted the practice of systematically offering the public an opportunity to take part in the legislative process. This has created a special role for public servants in the House's legislative procedures.

To assist in managing this broadening of legislative scrutiny, select committees use public servants in an advisory role,² analysing and commenting on public submissions, making recommendations for amendments to bills and briefing committees on the general policy, public consultation undertaken, and benefits and impacts. They may also be invited to address issues that are required to be outlined for the Cabinet Legislation Committee, including constitutional and legal implications, such as consistency with the New Zealand Bill of Rights Act 1990, delegated law making powers, granting of coercive powers, and so on.

Role of public servants in the legislative process

Acting as an adviser gives a public servant a privileged role, taking part in the committees' private consideration, rather than simply giving evidence to the committee. While a true separation of powers approach would suggest that committees should take advice that is totally independent of the Executive, the advisory role of public servants reflects a practical pragmatic approach to the need for advisory resources. This approach acknowledges that it is the departmental officials who will have had a strong hand in developing the policy behind the legislation and have the understanding of how it is administered. This knowledge is invaluable to committees and cannot readily be sourced elsewhere. The House would be hard pressed to amass for itself an independent, expert source of advice to rival that of the public service.

Independent specialist advisers may be provided

Committees have sources of independent advice available to them and do from time to time use these in the consideration of legislation. The Finance and Expenditure Committee has routinely used a specialist tax adviser to provide an independent source of advice for the consideration of tax legislation. This has not precluded the receipt of advice from The Treasury and the Inland Revenue Department, but has provided the committee with an independent sounding board, on technical legal issues, such as avoidance and evasion and issues of policy and administration where the two departments may hold differing views.

Advisory role can have tensions

This legislative advisory role can create tensions for public servants. Public servants' primary responsibility is to their Minister. The appointment to an advisory role by a select committee does not alter that fact. However, public servants do have a duty to assist committees to the best of their abilities and in good faith consistent with their duty to their Ministers. MMP and minority government have added to the tensions, with the Government no longer holding all of the committee chairpersonships or having majorities on all

² Standing Order 212

committees. Some loose conventions have arisen to assist public servants. Public servants may defer to their Minister, if the committee is seeking comment or reasoning behind policy changes. The policy behind a piece of legislation is the Minister's responsibility. Ministers may attend committee meetings for the consideration of their legislation³ and participate for this very reason. Committees may also request Ministers to appear to answer policy questions.

Opposition members of committees enjoy nothing better than exposing differing views between departments. Collective Cabinet responsibility suggests advisers should speak with one voice regardless of their department. Therefore, where committees have advisers from more than one department, public servants are well advised to sort out any differences before they reach the committee room.

Public servants are in a privileged position

Public servants need to respect the privilege associated with being part of a committee's consideration phase. This gives them forewarning of the amendments a committee is likely to recommend and the content of the committee's report. While public servants may disclose this privileged information to their Minister and other relevant officials, it may not be disclosed more widely, until the committee reports. Early public disclosure may be considered a contempt. This has happened and only an unconditional public apology from the chief executive saved the department in question from the Privileges Committee.⁴ It is for these sorts of reasons that sometimes committees will deliberate (finally agree the commentary, bill and recommended amendments) without public servants present.

Help is available

The waters are not completely uncharted for public servants. The Office of the Clerk has produced a booklet providing guidance for public servants in the role of advisors to select committees.⁵ This provides a parliamentary view of the role. The State Services Commission has also issued guidance for public servants.⁶ If public servants have concerns, the clerk of the committee is in a good position to assist. A good relationship between clerks and departmental advisors can work to facilitate a committee's legislative business. Clerks of committee can be consulted about committee programmes and the possible time frames for considering particular pieces of legislation. Clerks can also give sage advice on the role of advisors and how the possible tensions in this role can be handled. While they are responsible for the services to a particular committee, they also have a wider brief in terms of understanding and advising on the House's procedures more generally.

³ Standing Order 211(2)

⁴ *New Zealand Parliamentary Debates* 1988, Vol. 488, p. 3396

⁵ *Working with Select Committees*, Office of the Clerk of the House of Representatives

⁶ *Public Servants and Select Committees*, State Services Commission

Supporting Minister in charge of bill

The role of public servants in the legislative process does not begin and end with the select committee consideration. They may be involved in drafting the Minister's speeches. They also need to understand the introduction, first reading and committee referral processes and to be able to obtain appropriate advice for their Minister's role in the House. Ministers in their first reading speeches must indicate which committee they propose will consider a bill and whether they intend to give the committee any sort of additional powers by way of instruction. Failure by public servants or advisors to obtain guidance and brief their Minister may lead to embarrassment for the Minister in the House.

Public servants will also be called upon to provide advice to their Minister during the committee of the whole House stage. This may include advice on Opposition amendments and their fiscal implications as the Government determines its position on the amendments and whether or not to issue a financial veto. The Minister may also agree to Opposition members approaching officials for advice on the bill. Here public servants are in effect being asked to enter party politics on the Government's behalf. While not actually part of the House's proceedings, these negotiations may be critical to a minority Government gaining support for its legislative proposals in the House.

While generally members do not comment on the role of officials in the Chamber there is nothing to prevent them from doing so. Ministers' officials need to be careful not to draw attention to themselves, or they may find they are drawn into the debate and commented upon "in severe terms".⁷

Other accountability processes – oral questions

Returning to accountability functions, public servants support their Ministers both directly and indirectly. For procedures in the House, such as questions for oral answer, the public servants' role is to provide Ministers with the information they need to reply in the House. This is the most highly political accountability arena. Ministers require the information to reply to the primary question, notice of which has been given, but also information that allows them to anticipate replies to supplementary questions asked on the floor of the House. While Ministers are expected to be able to inject the politics, addressing Opposition questions within the House's rules is a very testing environment that soon sorts out the capabilities of Ministers. Accurate, politically astute information from public servants can be critical to a Minister's success in this arena.

Select committee scrutiny

Public servants become more directly involved in the accountability procedures undertaken in select committees. For Estimates examinations they may appear in support of their Ministers, but for financial reviews chief executives are held to account directly for the performance and current operations of their departments. Similarly in select committee inquiries public servants may be called to account directly by committees. Here their role is as witnesses appearing before the committee making public submissions.

⁷ NZPD 1979, Vol. 424, p.2294

Who should appear?

Committees have the power to request public servants to appear. However, public servants appear on behalf of their Minister and it is the chief executive and ultimately the Minister who will determine who actually appears before the committee. It is possible for a committee to request that the Speaker issue a summons for a particular public servant to appear, but this is politically unlikely. Political solutions to such situations are usually found and it is questionable whether the Speaker would agree to the issue of such a summons in the face of the convention that it is the Minister's responsibility to determine who appears on his or her behalf. Ultimately, it requires an order of the House to force a Minister to appear. The potential political embarrassment of such a procedure is probably enough to ensure a political solution is found in advance of it arising in the House.

Committees usually request chief executives to appear for the major accountability exercises and expect them to do so. Not to do so may well occasion comment from a committee in its report. Committees see it as part and parcel of a chief executive's role to account for the performance of his or her department and have in the past been particularly critical of chief executives who have sought to rely on legal counsel, for example. However, whom a chief executive brings with him or her to a committee hearing is a matter for the chief executive to determine. This can be difficult. Too many in the team can induce comment about wasteful use of taxpayers' money, while not anticipating a line of detailed questioning and not having the right people at the committee's hearing may frustrate the committee and result in further supplementary questions from the committee.

Dealing with difficult questions

Committee hearings of evidence are conducted in public unless the committee unanimously agrees to a private hearing or to take evidence in secret. Evidence heard in private remains confidential until the committee reports to the House. Secret evidence may be released only by an order of the House. Agreement to hear evidence in private or secret is unlikely for an accountability-type hearing, where public scrutiny is important. However, there are procedures to address difficult and sensitive evidence. Members' questioning during such hearings can pose challenges. Public servants can look to the chairperson for some assistance. There is no absolute requirement to answer the questions of an individual member. Public servants may defer to their Minister on matters of policy. Issues of privacy or commercial sensitivity may be raised. In these circumstances the committee will have to consider whether it wishes to press the question as a committee question. The committee may agree to hear answers in private or secret. Having reached a decision the chairperson will inform the witness accordingly.

Evidence can be contested

Public servants must also expect to have their evidence contested. Where a committee is conducting an inquiry it may well have a specialist adviser assisting it who will be analysing and commenting on the evidence the committee receives. A specialist adviser may also advise the committee on lines of questioning, which may put pressure on the public servant as a witness.

However, the balance is not tipped unduly in the committee's favour. Committees are now required to apply natural justice procedures.⁸ These give protection to public servants as witnesses, if allegations seriously damaging to reputation are made. Serious damage to reputation is a reasonably high test. Senior public servants are expected to be able to account and mere criticism of performance cannot be held to be seriously damaging to reputation. The natural justice procedures also provide that where a committee's report reflects adversely on a party, the party will be given the opportunity to comment before the report is presented to the House.

What does all this mean for public servants?

Public servants have an important role to play in the parliamentary process. They need to be aware of what is happening at Parliament and develop the contacts that can enhance the way in which they carry out their role. The Office of the Clerk as the legislature's secretariat is ready to assist through the provision of information and advice. A new parliament website was launched in August - www.parliament.nz. This provides access to a very much-improved range of information about the proceedings of the House and select committees and the way in which they work. As I have already said, the clerks of the select committees are a valuable liaison point for public servants involved in both legislative and accountability procedures. Other officers are available to advise on procedure at other stages.

Parliament should not be seen as an annoying last hurdle in the development and implementation of policy. It is Parliament that gives the lawful authority for the Government to implement new policy, spend on new initiatives and to exercise any coercive powers that may be required. Along with the granting of such authority goes a requirement for the Government to account to Parliament and ultimately the electorate.

⁸ *Natural Justice Before Select Committees*, Office of the Clerk of the House of Representatives