Enhancing the Role of Select Committees and Other Means to Making Parliament Relevant to the Next Generation

Thirty years on from the Palmer reforms on which I elaborate later in this paper and twenty years since the introduction of MMP with its grafting of a German electoral system on to our basically Westminster parliamentary system it is appropriate to review, update and modernise.

My thinking for this paper started as an examination of the role of select committees but it became clear that one needed to examine the quality of the legislation coming to the select committees and the process for dealing with it afterwards to get meaningful reform.

Gerald Gardiner, later Lord Gardiner, Lord Chancellor in Harold Wilson's UK government wrote in "Law Reform Now" that the public did not campaign for change because *"the system is not an unknown to the community but unknowable".*[i]

In January 1979 Professor Geoffrey Palmer published *Unbridled Power? Interpretations of New Zealand's Constitution and Government*[ii]; later that year he became the member for Christchurch Central and in 1984 Deputy Prime Minister, Minister of Justice, Attorney-General and Leader of the House.

Palmer's reforms to our Parliamentary system were extensive. The Office of the Clerk and Parliamentary Service were set up, reporting to the Speaker, and the Legislative Department which reported to the Prime Minister was abolished and control went from the Executive to the Speaker.

An important part of the reform was the removal of Cabinet Ministers from membership of subject select committees.

The principled changes were not written into Standing Orders but achieved through a reduction in the office of the select

committees and a timetabling clash with Cabinet Committee meetings.

Palmer, now Rt Hon Sir Geoffrey Palmer QC, was later Prime Minister, a Law Commissioner and a tireless worker on international environmental issues. He continues to write, lecture and advise on parliamentary law reform in New Zealand.

I find this part of his work fascinating and important, but I am yet to meet someone who changed their vote because of it.

I will suggest a dual track, one involving the Law Commission and the other white papers, to develop a “well considered” legislation pathway with automatic access to the smooth track extended sittings of the House.

We do pre-introduction consultation very badly.

Sir Peter North described consultation as producing factual evidence as to the practical operation of the law; the provision of detailed technical advice; the creation of a democratic legitimacy for any ultimate solution; the assessment of the weight of public opinion on social issues; and to flush out opposition.[iii]

Parliament and for that matter the public does not get reports which have been through that level of consultation as a precursor to the introduction of Bills.

Issues with developing quality legislation are not new. Chancellor Otto van Bismarck is credited with saying *"What do legislation and sausages have in common? One sleeps better if one does not know how they are made".*[iv]

Statute law in New Zealand is a mess. Notwithstanding years of problem definition and suggestions by Sir Kenneth Keith[v], Sir

Peter Blanchard[vi], Professor John Burrows[vii] and especially Sir Geoffrey Palmer[viii] [ix], development remains ad hoc. Legislation is too often seen as a political or policy device resulting in unnecessary law while at the same time basic housekeeping processes – modernising, simplifying, codifying and repealing are left undone.

Far too often Ministers do not ask the essential first question: is legislation necessary? Far too many are captured by catastrophising Departments and others are like peacocks seeing Bills as ways of asserting their status.
Ministers too often ignore the fact that they have, with their Cabinet colleagues, wide policy making ability. Legislation is the first choice when it should be the last.

Sir Geoffrey Palmer in his 2014 Harkness Henry Lecture[x] identified pointless legislation. The Music Teachers Act 1981, the substance of which has no point because anyone can teach

music in New Zealand. He identifies Callaghan Innovation as a policy that did not need a statute.

I do not totally agree with Sir Alexander Turner who said in 1980 *"The belief is widely held that there is no human situation so bad but that legislation properly designed will effectively be able to cure it"*[xi]. That view is not widely held; it is in fact mainly restricted to some public servants, some politicians and the clients of lobbyists and lawyers specialising in public policy. Most Kiwis are not that naïve.

An often obvious problem is that statute law is generally clumsy at keeping up with changing times. Having policy captured in statute might have particular symbolic and political value – as with, for example the New Zealand Nuclear Free Zone, Disarmament and Arms Control Act 1987, but in most cases the public knows nothing about the fact a Bill has gone through Parliament.

We get it wrong. And time moves on.

I have lost count of the number of occasions when hours of Parliamentary time is taken debating amendments to fisheries legislation, correcting badly drafted earlier amendments to policy that should not be in primary legislation to start with. The amendments compound like a loan shark's interest rates, taking more and more time for no good reason whatsoever.

Cabinet's legislation programme has been generally available since 1985. I think it should be on the internet, have a three year horizon, be updated annually before the end of March and all subsequent changes publicised immediately and simply, say on Twitter.

The Law Commission is a useful organisation but could do better. It should consult with all parties in Parliament on its work programme and further have regard to government priorities.

The programme should be updated, republished and publicised as with the legislation programme.

The Commission should, in my opinion, also develop a focus on rationalising and codifying the law. Lord Scarman's lecture at the University of Hull in 1966, "A Code of English Law?" carefully canvassed the issues and came to a logical position. *"I have in mind enacted law which, while it may cover the whole legal field or only part, yet within the limits of its application is intended, at the moment of its enactment, to supersede all previous law – statute and judge-made. It differs from a comprehensive textbook in that it has itself the authority of law. It is more than a mere re-statement because, where appropriate it will contain provisions modifying and reforming existing law"* [xii].

As Minister of Education I found the Acts an inconsistent minefield, and some of the case law bewildering, but there was neither the spare intellectual horsepower to sort out the

inconsistent principles across the various Acts, nor the legal firepower at the Ministry to do the massive drafting exercise necessary to develop one up-to-date location for our education law.

I am confident that such an approach from the Commission would result in more coherent legislation. Bills with clear principles and purpose and which are not only internally consistent but consistent with any Principal Act and related Acts.

We also need to develop a better system for other legislation. Commentators have periodically suggested a more extensive use of a white paper approach.

A simple approach would involve Ministers tabling a white paper including a Bill drafted by parliamentary counsel. The public would have three months to comment and there would be another couple of months until introduction. That approach

would mean issues could be addressed and problems remedied before the Bill's first reading, often a point of no return or at least considerable political backdown.

With the exception of minor agreed legislation as in the Statutes Amendment Bill, that part of budget legislation including supply or an immediate real and significant risk to the revenue and emergency legislation to which I later refer, all legislation should be subject to either the Law Commission or white paper tracks.

We need to look carefully at the work done offshore and the way Parliaments interact with the population. The most comprehensive work has been done in the United Kingdom where they have had a series of Speaker's Commissions – the latest report "Open Up" issued in January this year addresses the challenges the digital revolution has presented to representative democracy[xiii].

Select committees would be an ideal place to start if we want to test the more interactive approach recommended by the Commission.

But before we begin we have to also accept the behavioural changes identified as necessary. We need to commit to dialogue not broadcasting, and to use plain English or, better still, summaries, diagrams and graphics because people choose not to read massive documents.

While it is hard for some Members of Parliament we will have to learn or relearn the role of the legislator and deal with issues not politics.

For there to be quality dialogue there must be easy ways of responding, for example by using Skype, but most importantly we have to understand that people will only engage and re-engage if they think they can make a difference.

For that to happen will require a major change in mindset from many of my colleagues.

The requirements on Members of Parliament have changed over the years. Being an MP is a full time job. Rather than the House starting in May as it did most years under Sir Robert Muldoon, or something farmers did between tupping and lambing or while the cows were dry not too much before that time.

Even in the mid 1980 some members had employment with significant time commitments. As a result of the Palmer reforms, Parliament sat earlier in the year and more importantly the role of select committees was enhanced. The select committees sat on all but three non-sitting weeks, from February to December, as well as one morning a week.

They were much smaller than before or since, generally with five members and tended to travel more, especially to Auckland, to hear submissions.

Bills were automatically referred to select committees the first time and there was an expectation that submitters who wanted to be heard would be, generally for a time agreed with the staff.

My view is that the effectiveness of select committees dealing with legislation peaked in the decade from 1986 to 1996 and that it has declined as the influence of parties and the executive has increased and the role of the Members of Parliament representing an electorate has declined.

It is no great surprise that when over forty percent of the House depends on the head office list selection systems, heavily influenced by the party leaders, and the Prime Minister for Ministerial preferment that the committee decisions are now

more likely to reflect the views of senior governing party members than what is best for constituents.

I served on a variety of select committees and chaired some before becoming a minister in the Clark government. Recently I have been a member of the government administration and before that education and science committee, chaired by the late Allan Peachey with whom I shared a love of education, albeit with quite different approaches to and definitions of success.

Peachey was a champion of letting people have their say. He was interested. Submissions were not a nuisance to be heard in a pro forma manner but an opportunity to learn. Sometimes he found a nugget of gold within an argument that all the committee disagreed with, that could result in an improvement to a bill. He didn't care too much what the minister or officials thought of proposed changes; if something needed fixing, it got fixed.

Submitters to both select committees were invariably treated politely, even when major issues were at stake and cross examination was intense. They had often put in days preparing for the committee, taken time from paid employment and travelled without reimbursement. They deserved, and got, respect. And good chairing, taking care of process is an important part of that.

In contrast I was appalled that submitters to the select committee on the flag referendum were only given five minutes and that the 747 who asked to be heard were not heard because they used a form submission, not a submission form. It became clear that government members did not read the submissions to ascertain the individual points made.

What compounded Parliament's embarrassment was that government members of the committee chose not to sit the committee during the three recess weeks available.

I just do not understand why so many Parliamentarians do not understand they are paid to work full time and should do so. And being legislators is the core of the work for non-Executive Members of Parliament.

Earlier I was sometimes a substitute member on the finance and expenditure committee, on the Bill that considered the government's sale of State Owned Enterprises. The submissions I read before attending the committee (something I saw no sign of from some members) used a variety of arguments and in some cases used substantive and original research. I was appalled to discover that submitters were allocated only five or ten minutes. Members, including the chair, Todd McClay, showed little interest in submissions but

considerable predetermination. They were not welcoming and alienated both experts and lay people with both their attitude and their jargon. McClay was elevated to the Ministry soon after.

Parliament has been told, including my colleague Hon Annette King, that Simon O'Connor is a good inclusive chair of the Health Select Committee. But the evidence given for that is his apparent willingness to take submitters' or committee members' suggestions to Ministers for their consideration.

That to me is the antithesis of what a good independent committee chair should be doing and also gives credibility to the suggestion that committee chairs meet with Ministers before committee meetings to receive instructions.

Similarly we need to clarify that Departmental officials who are appointed to work on particular projects for select committees are responsible for that work to the committee and not to the

Minister, and that sharing the content of non-public sessions with Ministerial staffers is a breach of privilege.

It is the view of some members that we should build the budget for advice to select committees and substantially increase the use of specialist contract advisors. I do not share that view. New Zealand is too small. The best available advice on legislation and policy resides mainly in government agencies and we should use it. But the officials involved need to understand that for a period of time while a Bill is at a committee their responsibilities change. They are responsible to the committee, not their chief executive or their Minister.

This shambles has caused me to ponder what can be done to improve the process. Finance and expenditure is Parliament's most important committee. It considers the most significant legislation and has the power to direct some of the work of other select committees. It should not be a political plaything.

I think the answer is remarkably simple - give the responsibility for chairing the committee to a senior Opposition member. I'm not suggesting the numbers on the finance and expenditure committee should favour the Opposition, but that someone who is not beholden to or trying to impress ministers should ensure that the public get a chance to have their say in circumstances that are seen to be professional.

The concept is not original, the public accounts committee, the most powerful in the UK parliament, was until recently chaired by Margaret Hodge, a Labour former senior minister. Her replacement is Meg Hillier, another Labour Member of Parliament.

The chairs and deputy chairs of other select committees should be allocated in rough proportion to the Parliament’s non-executive members of the House.

Another issue of process relates to the time available for preparing written submissions. This is ad hoc and should be standardised, probably at forty working days. Any shortening of that and the six month report back period should be dependent on a debateable motion in the House.

If a bill is well written and non-controversial and therefore attracts few submissions the committee should report it back early. Too often the times set by Standing Orders or the House become expectations rather than limits.

There are a couple of changes to Standing Orders that I think would be useful.

First, Members Bills and their selection. At the moment it is totally random, most backbenchers have a bill in the system with the knowledge that it almost certainly will never be drawn. I had one for a long period designed to protect retailers from

oppressive conditions from mall owners. I have never had one drawn from the ballot.

But there are occasions where there is legislation that is not a priority for government but still needs to be debated. Sometimes conscience issues, sometimes not. A recent example was the banning of the use of handheld lasers taken through the house by Cam Calder. Unanimously supported but only got up by chance.

My view and that of many of my colleagues is that if a bill has the support of 61, non-executive, members of parliament by way of written notice or similar then it should be set down for a first reading. That would give us a better chance of dealing with issues that are more important to New Zealanders than to the government of the day. They couldn't be highly party political because that would mean they wouldn't get 61 supporters. And it would depend on back bench government members being

prepared to act with integrity rather than being dictated to by the Executive. Perhaps a forlorn hope.

We need to give the public a chance to indicate particular questions they want investigated and debated. We should adopt the technology of at least the late 20th century and if say 25 or 50 thousand people sign an e-petition with a reasonable question pre-approved by the Clerk of the House, then subject to a light audit process to check enrolments there should be a requirement for a select committee hearing and report, then a House debate for say an hour should be held. I would limit these debates to say four a year and forbid the same or very similar topics being debated twice in the same parliament. They would replace the general debate.

I would also attempt to revive the concept of a back bench debate from which Ministers, Party Leaders and Whips were excluded.

Governments for decades resorted to the use of urgency to progress legislation which may or not have been important but certainly wasn't urgent. This provided an opportunity and a challenge to opposition parties to filibuster. And legislation that was controversial and truly contested was just part of the mix rather than the subject of special focus. Urgency was generally unpredictable. Constituency work suffered and select committees' hearings were cancelled often at great expense to those who had travelled to give evidence. Parliament's reputation suffered.

In adopting the 2011 Report of the Standing Orders Committee[xiv] Parliament decided to make an important, albeit not headline-grabbing change. We gave power to the government to extend the sitting hours of the house for four hours once a week. Notice had to be given. Select committees could sit if members gave leave and there could be a second session if the Business Committee reached 'near unanimity"

which effectively gives the major opposition party the right of veto.

The results have been impressive if not news-making. The majority of bills passed have been minor and technical, with some law reform. But the most time has been spent on legislation flowing from treaty settlements. Extended sittings have been notified well in advance so that iwi have been able to be in the gallery for final readings.

Parliament has focused much more on the important and/or controversial issues and we are all better for it.

The time has come to move to a system of establishing a cross-party agreement that there is in fact an emergency before the normal process of Parliament, ie referral to a committee and one reading per sitting day is abandoned.

One way of doing that would be requiring a seventy five percent majority for an “emergency motion” and then a seventy five percent majority for each question emanating from any bill emerging. Such a system would, on current numbers, allow a major opposition party to veto particular clauses of a bill and therefore require near unanimity in emergency situations. Any party playing politics in such a circumstance would be punished electorally but any legislation emerging would have to meet the urgent and important tests.

Bills flowing from the work of the Law Commission have not always proceeded smoothly through the legislative process, mainly because they are substantial and worthy but without any political priority.

The 1994 Commission Report *“A New Property Law Act”* took until 2007 to become law and the Judicature Modernisation Bill is currently stranded on the Order Paper having been introduced in 2013.

Sir Owen Woodhouse in 1985[xv] and Sir Peter Blanchard in 2011[xvi] suggested that there be a special process for legislation flowing from Law Commission reports that involved bypassing first readings. Blanchard further suggested bypassing second reading and having a truncated committee of the whole and third reading.

I agree that a special parliamentary arrangement could apply to legislation from both Law Commission reports and a full white paper process. However it should not reduce possible scrutiny by bypassing stages or reducing the right of Members of Parliament to speak.

My suggestion is that these “full consideration” Bills get an automatic path to the extended sittings of the House unless the Business Committee of the House decides (on a “near unanimous” basis) otherwise.

Law Commission Bills would receive a first reading between three and six months of tabling, with second readings and subsequent stages at intervals of no more than three months. Progressing the “white paper” bills will be at the government’s discretion.

This stops bills waiting years for priority while not interfering with time available to the government for other business and provided the opportunity to provide more time for members’ business, debates on urgent matters and government motions on topical issues, all of which are higher priorities for our constituents.

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[i] G. Gardiner and A. Martin (eds), Law Reform Now (London: Victor Gollanez, 1963)
[ii] G. Palmer, “Unbridled Power? Interpretations of New Zealand Constitution and Government” (Oxford University Press 1979).
[iii] P.M. North, “Law Reform: processes and Problems” (1985) 101 L.Q.R 338.
[iv] Quoted by Professory Petra Butler from Mario Martini “Normsetzungsdelegation zwischen parlamentarischer Steuerung und legislative Effizienz” (2008) 133 AöR 155 at 156 in Petra Butler “When is an Act of Parliament an Appropriate Form of Regulation? Regulating the Internet as an Example” in Susy Frankel and Deborah Ryder (eds) *Recalibrating Behaviour: Smarter Regulation in a Global World* (Wellington: LexisNexis New Zealand, 2013) at 489.

[v] K. Keith, “A Lawyer Looks at Parliament” in John Marshall (ed) The Reform of Parliament: Contributions by Dr Alan Robinson and Papers Presented in his Memory Concerning the New Zealand Parliament (New Zealand Institute of Public Administration, Wellington, 1978).
[vi]
[vii] J. Burrows, “A New Zealand Perspective on Law Reform” (2010) 10 Canta. L.R. 117.
[viii] G. Palmer, “Law-Making in New Zealand: Is There a Better Way”. The Harkness Henry Lecture. Waikato Law Review Vol 22.
[ix] G. Palmer “The Law Reform Enterprise: Evaluation the Past and Charting the Future”. 5th Scarman Lecture 2015.
[x] G. Palmer, “Law-Making in New Zealand: Is There a Better Way”. The Harkness Henry Lecture. Waikato Law Review Vol 22.
[xi] A. Turner “Steering the Ship of State: Functions of Parliament” (1980). 10 VUWLR 209.
[xii] L. Scarman, A Code of English Law”. (Hull: University of Hull, 1966).
[xiii] “Open Up” Report of the Speaker’s Commission on Digital Democracy. UK, January 2015.
[xiv] “Review of Standing Orders: Report of the Standing Orders Committee”. New Zealand House of Representatives. September 2011.
[xv] G. Palmer, “Law-Making in New Zealand: Is There a Better Way”. The Harkness Henry Lecture. Waikato Law Review Vol 22.
[xvi] P. Blanchard, “Judging and Law Reform” Speech to Auckland University, 5 March 2011, Law Talk No 768 (New Zealand 25 March 2011).