Problems with New Zealand's Legislative Process, and How to Fix Them

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Introduction

The adoption of the MMP electoral system in New Zealand and associated changes in parliamentary procedure have naturally affected the passage of legislation and the way in which the House arranges its sittings and considers its business. There is some concern that it has become more difficult for the Government to progress its legislative programme. As a result, proposals have been put forward to facilitate the process of legislating.

A number of parliamentary interests could be served through a reform of House procedures, and not only the interests of the Government. A reform package that does not take account of these wider interests would, at the least, represent a missed opportunity to address other problems, and potentially could undermine the House's fundamental role in holding the Government to account for its legislative proposals.

This paper identifies aspects of the House's legislative and other procedures that could benefit from improvement, and discusses some proposed solutions. It concludes with my analysis of why the establishment of a second chamber could resolve a number of the issues raised.

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Problems Identified
Implementation of Law Commission Reports

For many years the Law Commission[2] has been frustrated at the lack of progress in the implementation of its recommendations, particularly the passage of law reform bills.[3] In 2000, the President of the Commission reported that 'to date, like Commissions elsewhere, the New Zealand Law Commission has had major problems in securing implementation of its advice.'[4] However, an evaluation of the Commission completed by Sir Geoffrey Palmer in April 2000 provided grounds for optimism that 'energy and efficiency' would be injected into New Zealand's system of law reform.[5] Sir Geoffrey diagnosed that:[6]

> The strike rate of the Law Commission in getting significant law reform enacted on the Statute Book has not been high. It probably has not been high enough to justify the expenditure of public moneys on the Commission.…

He proposed that with better collaboration with departmental officials and with greater involvement of the Parliamentary Counsel Office in the drafting of the Commission's proposals it would be possible for Law Commission reports to include draft bills, ready for introduction.

The Commission raised its concerns with Parliament's Justice and Electoral Committee,[7] which responded by initiating an inquiry into the Law Commission. In its report on the inquiry, the committee stated that it was 'particularly concerned about the backlog of unimplemented reports' and declared its interest 'in mechanisms for addressing these'.[8] The committee supported the imposition of a

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[2] The New Zealand Law Commission is an advisory body established by statute to undertake the systematic review, reform and development of the law of New Zealand (Law Commission Act 1985, s 3). Its purpose is 'to help achieve law that is just, principled, and accessible, and that reflects the heritage and aspirations of the peoples of New Zealand' (Law Commission, Te Aka Matua o te Ture, Annual Report 2005–2006, NZLC R95 (E.31[95]), p 5). It generally does this by reviewing aspects of the law and making recommendations for review or development of statutes.

[3] In 1995, the Commission stated that it was 'disappointed at the slow rate at which its proposals are being introduced into the House as Bills. … People who have responded [to consultation conducted by the Com-mission] frequently express disappointment that the work to which they have contributed has not resulted in change.' Law Commission, Te Aka Matua o te Ture, Annual Report 1995, NZLC R33 (E.31), p 12.

[4] Law Commission, Te Aka Matua o te Ture, Annual Report 2000, NZLC R63 (E.31), p 2.

[5] *ibid.*

[6] *ibid.*, pp 23–25.

[7] The matter was raised in the context of the financial reviews of the Ministry of Justice (through which the Commission is administered) for 1998/99 and 1999/2000.

[8] *Inquiry into the Law Commission*, report of the Justice and Electoral Committee, February 2002, p 2.

stringent requirement for the Government to respond to Law Commission reports within six months, and the Government has subsequently imposed this expectation upon itself as a 'general practice'.[9]

The implementation of Law Commission reports depends partly on the enthusiasm with which a Government moves to take action on the recommendations. However this in turn is contingent largely on whether the Government can find space for Law Commission bills amidst its other business competing for time in the House. When a Government finds it difficult to obtain time to progress its legislative programme, the natural tendency is to prioritise the implementation of policies that are politically important to the Government, and to neglect measures that are technical and uncontroversial, less politically significant and intended more to improve the state of the law-books — such as those proposed in reports of the Law Commission. This phenomenon is not confined to New Zealand. Sir Peter North, a former Law Commissioner for England and Wales has observed that 'law reform priorities are not the same as the political priorities of the Government of the day'.[10]

Legislative Efficiency

From the perspective of Government Ministers and officials the introduction of MMP appears to have made it more difficult for Governments to progress their legislative programmes in a timely fashion. George Tanner QC, prior to his recent retirement as Chief Parliamentary Counsel,[11] cited a 28 percent decrease in the average number of Government bills passed each year since the introduction of MMP,[12] and this analysis was repeated by the New Zealand Law Society.[13] The House's time is a precious resource for the Government, and the Government cannot assume that it will obtain the numbers required to increase the hours available to it by according urgency to business. Urgency is obtained less frequently now — extraordinary urgency is very rare — and overall hours of urgency have

[9] Cabinet Office Circular CO (01) 13, 15 November 2001: Law Commission: New Arrangements for Executive Government in Dealing with the Law Commission.

[10] Sir Peter North, 'Problems of law reform', *New Zealand Law Review*, 2002, p 408.

[11] Tanner retired from this position on 30 June 2007.

[12] George Tanner QC, 'The Legislative Process: observations', paper prepared for the New Zealand Centre for Public Law Second Annual Conference on the Primary Functions of Government, October 2004, p 60, para 198.

[13] New Zealand Law Society, supplementary submission to the Regulations Review Committee on the Inquiry into affirmative resolution procedures (sub 6A), p 2.

reduced considerably.[14] This lack of extra hours is compounded by the fact that ordinary hours have also been shortened.[15]

Of course, it is difficult to derive meaningful generalisations from statistics about legislative activity and sittings of the House, and the number of bills passed does not necessarily tell the whole story. A decrease in the number of bills passed under MMP could be attributable to a number of factors, the most important being the on-going need for minority Governments to negotiate for support from other parties (which is an outcome of the electoral system, rather than the product of procedural rules). Fluctuations in the number of bills passed each year may be attributed to factors other than the amount of legislative time available.

To use another measure, in terms of the average amount of sitting time required to pass each page of legislation, the 9-year average for Public Acts passed since 1996 is lower (15.74 minutes per page) than the average for Public Acts passed in the 17 years prior to MMP (18.02 minutes per page).[16] By that yardstick, the House has to a degree become more efficient under MMP. However, any such findings must also recognise other contributing factors, like changes in drafting style (there has been a shift towards plain English) and the format of legislation (also recently changed). While acknowledging these difficulties of analysis, David McGee, Clerk of the House, has been prepared to venture that:

> it does seem that despite the greater constitutional and political constraints on legislating today compared to the 1970s just as much legislation is passed by Parliament today and in just as short order as when Sir Geoffrey [Palmer] called it the fastest law-maker in the west.[17]

Efficiency gains have arisen from procedural alterations that were adopted in tandem with the change in electoral system. Most notable is the shift to party voting (instead of voting in the lobbies). The imposition of the new omnibus bill rules was also balanced by a new provision that enables the Government to take bills divided from the same bill at the committee of the whole together in a single debate on the

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[14] In the 10 years prior to the introduction of MMP, the House sat for an average of 2 hours and 18 minutes of extra time (urgency) each sitting day; from 1996 to 2005 that average figure was 1 hour 21 minutes of urgency per sitting day. In the year ended 30 June 2007 the House sat under urgency for a mere 23 hours.

[15] See below, note 45.

[16] These figures are based on information presented by David McGee QC, 'Concerning Legislative Process', *Otago Law Review*, Vol 11, No 3, 2007, pp 419, 431, with the addition of my own analysis for the periods 1978 to 84 and 1987 to 93. Note that the above figures do not include the Income Tax Acts passed in 1994 and 2004. These Acts were very large and as they consolidated tax law, rather than reforming it, they were passed with little debate and thus would tend to skew the averages (to show the House as even more efficient).

[17] McGee, *op cit.*, p 418. The reference is to Palmer, *Unbridled Power? — An Interpretation of New Zealand's Constitution and Government*, OUP, Wellington, 1979, Ch 7.

third reading.[18] The House now also devotes a greater proportion of its time to legislation than it did up until the mid-1980s, when major reductions were made to the amount of time spent on non-legislative activities such as Address in Reply debates, and Budget and Estimates debates.[19] Further attempts to make the legislative process more *efficient* would require a sense of balance to ensure that they did not render the House less *effective*.

Finally, it should be noted that the outcome of the electoral reform referenda in 1992 and 1993 (the decision to the adopt the MMP system) was to a degree the result of a public mood for reducing the prospect of further fast-track legislative reform such as occurred under FPP.

Restrictions on Omnibus Bills

Tanner's complaints about the legislative process have focused on restrictions imposed on the introduction of omnibus bills, that is, bills that substantively amend two or more Acts. The Standing Orders preclude the introduction of omnibus bills unless they satisfy certain criteria,[20] and Tanner believes the rules frustrate 'the reasonable objectives of elected governments in bringing about the changes in the law that require legislation'.[21] Even the Regulations Review Committee opined that there appears to be some 'difficulty in passing primary legislation in a timely fashion', and surmised that this difficulty has led to the development of a hybrid procedure for amending primary legislation by way of regulations subject to approval in the House — the 'affirmative resolution procedure'.[22]

In Tanner's view, these rules raise 'unacceptably difficult issues for the Government of the day, its departmental advisers, and drafters in determining how to structure Bills and how to progress them through Parliament'.[23] One difficulty for the Government is that the rule does not facilitate the grouping together of measures in a way that would be 'inherently sensible'.[24] Such packages of measures could include provisions arising from recommendations of the Law Commission. Tanner contrasted the restrictions in place in New Zealand with their absence in other jurisdictions, including the United States of America, Canada and the United Kingdom, and Australia and its States. He also pointed to apparent inconsistencies in the effect of New Zealand's omnibus bill rules, and grumbled that it is

[18] Standing Order 308(2).

[19] McGee, *op cit.*, pp 420f.

[20] See page 125, below.

[21] *ibid.*, p 45, para 145.

[22] *Interim report on the inquiry into the affirmative resolution procedure*, Regulations Review Committee (I.16F), July 2004, p 9. The committee did not reiterate this point in its final report on that inquiry (I.16I, May 2007).

[23] Tanner, *op cit.*, p 26, para 76.

[24] *ibid.*, p 42, para 131.

'regrettable that the constraints of the parliamentary process have got in the way of advancing some valuable law reform initiatives'.[25]

Tanner's proposed solution to these difficulties, naturally, would be for the restrictions on the introduction of omnibus bills to be relaxed. Essentially, his proposal involves shifting the discretion to permit the introduction of omnibus bills from the House to the Government. I will discuss this proposal further below.[26]

Problems with the Committee of Whole House

The committee of the whole House stage (the 'committee stage') has customarily been regarded as the 'nuts and bolts' phase in the life of a bill, with the bill's contents being considered in detail.[27] As Tanner bluntly observed, this 'hardly ever happens'.[28] Contemporary procedures and approaches to the committee stage have pointed it away from this traditional purpose, to the detriment of the legislative process.

Purpose of the committee stage

The functions of the committee stage of the legislative process can be summarised in ideal terms as follows:

a) to provide a further opportunity for members to debate the bill in a public setting, focusing on the detail of the bill

b) to allow for a relaxation of the rules of debate, so as to encourage the exchange of views and observations about the detail of the bill

c) to provide a focal point for the scrutiny of legislation and for holding the Minister or member in charge of the bill to account

d) to give the Government a means to put forward amendments that promote its policy intentions in the wake of amendments incorporated as a result of the select committee stage

e) to provide an opportunity for members (other than the Minister or member in charge) to propose and test the numbers on their own amendments

f) to permit further amendments to be made to fine-tune the text of the bill — the 'final shot at getting it right'[29]

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[25] *ibid.*, p 56 para 182.

[26] See page 125, below.

[27] *Speakers' Rulings* 104/1 (*New Zealand Parliamentary Debates*, 1970, vol 368, p 2805 — Speaker Jack).

[28] Tanner, 'The Legislative Process: observations', paper presented to the New Zealand Centre for Public Law's Second Annual Conference on the Primary Functions of Government, October 2004, p 19, para 59.

[29] Tanner, 'The Legislative Process: observations', 2004, p 35, para 112.

g) to ensure that the text of the bill has been subject to decisions that fully reflect the numbers in the House in a way that select committees cannot under MMP.

These functions have evolved over the years. Prior to 1979, many bills were not referred to select committees, and the committee stage was the point at which members could attempt to conduct the sort of line-by-line examination of legislation that now occurs in select committees. On the other hand, the function of the committee stage in bringing the full proportionality of the House to bear on the text of the bill (item (g) above) has become *more* important under MMP, for two reasons. First, while the Government can generally find a working majority for its legislation amongst the full membership of the House, this often is not possible in the select committee microcosm. Second, several parties are represented in the House but cannot be represented on all select committees because of the application of the proportionality rule.[30] In contrast, under FPP all select committees usually reflected the reality of the numbers in the House: each of them generally featured a government majority. The committee of the whole House stage under MMP therefore is the crucial point at which the overall majority of the House can approve or effect changes to the text of legislation. This, the overriding purpose of the committee stage in the modern context, is achieved under current procedures, but other functions of the committee of the whole House are diminished.

Debate in Committee

The first three functions listed above relate to the committee stage as a setting for debate. The House spends much of its time in committee, almost all of it debating bills. However, the content of speeches at this stage is often hard to distinguish from that heard at the second reading. In theory, when the House resolves itself into committee, it is doing so to 'determine whether the bill properly incorporates the principles or objects of the bill as read a second time by the House'.[31] But members tend to concern themselves with the principles or objects of the bill rather than whether the bill properly incorporates them. Despite the official view that 'Wider debates about the background and policy of bills occur in the House itself [rather than in the committee of the whole House]',[32] the latter stage has essentially become a continuation of the second reading debate. This is largely on account of the shift to Part-by-Part consideration as the norm.[33] Naturally Governments seek to

[30] Standing Order 186(1), which states that 'The overall membership of select committees must, so far as reasonably practicable, be proportional to party membership in the House'. In practical terms, this means that a party with, say, three members can expect only a total of three seats on the 13 subject select committees.

[31] Standing Order 297(1).

[32] Standing Orders Committee, *Review of Standing Orders*, December 2003 (I.18B), p 63.

[33] Standing Order 298.

truncate debate by having bills drafted with as few Parts as possible,[34] and the organisation of bills into a few broad Parts thus causes the debate on each Part to become more wide-ranging. The committee stage therefore often resembles the second reading debate as a general survey of the broad policies the bill may be intended to implement.

A further reason is that backbench members are not necessarily able to speak during debates on the first, second and third reading of bills, and therefore take the opportunity to do so during the committee stage instead. Consider the plight of a backbench member of a large Opposition party. Under FPP, that party would generally have had the benefit of six ten-minute speaking slots on the second reading of a Government bill. Now, with seven or eight parties all competing for twelve available calls, that party would generally expect no more than three of its members to be able to speak. Members who cannot contribute in that context therefore take the opportunity to express their broad views of the legislation during the committee stage instead.

Any exchanges of views that occur tend to have little to do with the detail of the legislation at hand. In terms of the accountability of Ministers, while a Minister must always physically maintain a presence at the Table during the committee stage and some Ministers do make an honest attempt to respond to questions, many do not participate, as doing so can inflame further debate and delay the acceptance of a closure motion.

Moreover the committee stage comprises the primary opportunity for Opposition parties to draw out the House's consideration of a bill. At all other stages, each bill is accorded the same maximum allocation of time (in terms of the permitted number and length of speeches), regardless of its substance or politics. On the other hand, the debate on each question during the committee stage lasts until members no longer seek the call or until the Chairperson considers it reasonable to accept a motion for the closure of debate on the question. This provides an incentive for Opposition members to speak even when they have nothing of substance to say, and a disincentive for Government members to participate at all. Opposition members may also seek to prolong the committee stage through the tabling of large numbers of spurious amendments, each of which may require a party vote.

Decisions by the Chairperson about whether or not to accept closure motions can result in extensive re-litigation through points of order or in subsequent general disorder. This places presiding officers under some pressure. One factor that a Chairperson may consider in deciding whether to accept a closure motion is the proportionality with which calls are shared amongst parties.[35] This may explain

[34] Tanner, 'Confronting the process of statute making', New Zealand Legal Method Seminar, May 2003, p 37, para 116.

[35] Standing Order 102(b), though this is qualified by *Speakers' Rulings* 61/1 (*NZPD* 2001, vol 594, p 11125 — Deputy Speaker Braybrooke): '[this] does not mean that the Chair, in

why, as Tanner observed, 'Each Part gets about the same amount of time regardless of its content. And individual clauses get about the same amount of time as a Part.'[36] A Speaker's ruling that enjoins Chairpersons to take into account the number of subparts in a Part when deciding whether to accept the closure has not noticeably lengthened debates on large, complex Parts.[37]

Quality of Legislation

The move to reduce the number of Parts in bills (and thus the number of debatable questions when they are considered in the committee of the whole House) is a pragmatic one from a government perspective. However, there are some unfortunate consequences. First, the broadening of debate during the committee stage also means that the text may not be adequately analysed. This reduces the value of the committee stage as a mechanism for the scrutiny of legislation.

On the whole, the need under MMP for Governments to engage with other parties over the content of legislation is a positive development, yet it can result in some last-minute uncertainty about which amendments will be agreed to during the committee stage, and in what form. This process of negotiation sometimes is still underway when a bill is being debated in committee, which can place pressure on parliamentary counsel.[38] New amendments can be tabled right up until the moment voting commences on the provisions to which they relate. This lack of notice means members and officials can have little opportunity to ponder the way the amendments are drafted or their implications in wider policy terms (including their consistency with the New Zealand Bill of Rights Act 1990).[39] It therefore may be more desirable for bills to be recommitted to correct errors or improve the coherence of provisions that have been subjected to piecemeal amendments. However, the Government is strongly deterred from recommitting bills, because to do so would require valuable House time, and recommittal rarely happens.

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exercising discretion to accept the closure, must allow the debate to run on until calls are proportional to party numbers'.

[36] Tanner, 'Confronting the process of statute making', New Zealand Legal Method Seminar, Auckland, May 2003, p 36, para 114. George Tanner, QC, was Chief Parliamentary Counsel.

[37] *Speakers' Rulings* 91/2 (*NZPD*, 2003, vol 607 p 4421 — Speaker Hunt).

[38] Tanner, ' "Bills are made to pass as razors are made to sell" — the Legislative Process in the House of Representatives: the role of Parliamentary Counsel', Legislative Advisory Committee Conference, New Zealand Parliament Seminar, 5 & 6 July 2005, p 13, para 38.

[39] McGee, 2007, pp 422f; Tanner, 'Confronting the process of statute making', New Zealand Legal Method Seminar, May 2003, pp 67f, para 213.

Non-Legislative Business in the House

In the last 20 years the House has significantly reduced the amount of time it spends on non-legislative procedures (other than questions for oral answer). Address in Reply debates at the start of each year have been replaced with much shorter debates on a statement from the Prime Minister, the Budget debate is about a third of its previous length, and the Estimates debate has been shortened from about 50 hours to 14 hours.[40] On the other hand, the amount of time the House spends considering legislation has remained relatively constant, and thus the proportion of time spent on legislation has increased.[41] The main explanation for this is that the sitting hours of the House have reduced significantly[42] but legislation must still be passed. Since the House is primarily a legislature, its non-legislative activities have been pared back, and strict limitations have also been imposed on the amount of time spent debating legislation.[43]

Some non-legislative debates should have greater time allocated to them. For example, the two three-hour debates on the financial review of Government departments and Offices of Parliament, and on the performance and current operations of Crown entities, State enterprises and public organisations are too short to provide meaningful scrutiny. There are 45 departments and Offices of Parliament and 116 other agencies covered by these two debates, yet each debate consists of a mere 36 calls of 5 minutes each. Hence many large Government agencies are not

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[40] McGee, 2007, p 420. The figure of 14 hours is the combined total of the Estimates debate, financial review debate and the debate on the performance of Crown entities, State enterprises and public organisations. Previously the Estimates debate covered both proposed expenditure and actual performance, so it was the equivalent of these three debates.

[41] *ibid*.

[42] Regular sitting hours have reduced by 2.5 hours per week since 1995 (from 19.5 hours per week to 17 hours). At the same time urgency has become less frequent under minority Governments. While these reductions have to a degree been counteracted by an increase in the number of weeks of sittings, there has been a 'clear trend towards reduced hours'. See the submission of the Clerk of the House to the Standing Orders Committee on the Review of Standing Orders, May 2003, pp 8 to 12. Extrapolated yearly averages for the last seven Parliaments are as follows:

Parliament	41st (81–84)	42nd (84–87)	43rd (87–90)	44th (90–93)	45th (93–96)	46th (96–99)	47th (99–02)
Average annual hours	800 hours	776 hours	763 hours	501 hours	636 hours	588 hours	607 hours

These figures were obtained by comparing the average sitting hours per calendar year, taking into account the number of hours and sitting days between the first and last sitting days of each Parliament, applied to a nominal calendar year (*ibid*., p 9, with the addition of an average for the 47th Parliament).

[43] As well as the truncation of debates in the committee of the whole House that has resulted from the shift to Part by Part consideration, the number and length of speeches at other stages have been more strictly prescribed.

mentioned and most receive only cursory attention. Most members therefore do not bother, and deliver general speeches only loosely related to the particular financial review in question.

The most glaring deficiency is the lack of time set aside for consideration of select committee reports on inquiries and other matters. Inquiry reports are set down as Members' orders of the day for consideration after Private, Local and Members' bills, and it is very rare for the House to reach them under normal circumstances.[44] In 2003 the Clerk of the House drew the attention of the Standing Orders Committee to the lack of provision for debating select committee reports on inquiries and remarked that 'a genuine expectation that inquiry reports will be debated in the House and the establishment of a transparent mechanism for this to occur would enhance the scrutiny offered by committees'.[45] He proposed a new category of business, to be known as 'select committee orders of the day', which would be accorded debating time in their own right. The Standing Orders Committee agreed that the proposal had merit, but could not reach agreement on where the time for this business would come from.[46]

Poor Incentives

The final difficulty with how the business of the House is arranged is that it provides incentives for poor debate and disorder. The Order Paper comprises a continuous queue of business taken in sequence each sitting day until the House adjourns. If an item is dealt with quickly it enables the Government to move on to its next piece of business. A delay hinders the Government's programme. Government members thus tend to deliver short speeches that consume speaking slots while making as little use as possible of the 10 minutes allocated for each speech, and Opposition members, on the other hand, seek to ensure that as many speaking slots as possible occupy all of the time available. Days on which controversial bills are to be considered often get off to a slow start with question time lengthened by points of order and by the lodging of spurious questions to select committee chairpersons (which are additional to the usual 12 questions to Ministers). An alternative Opposition tactic can be to make sudden, unexpected progress so that business is reached that the Government is not prepared for.

While it is legitimate for Government and Opposition members to tailor their participation in debates in accordance with their respective roles, the ideal would be for members to participate to the extent of their knowledge and interest.

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[44] Between 1996 and 2003 this occurred only once. Special arrangements were made for the House to debate a report on an inquiry an another on a treaty examination, and reports on an inquiry and a treaty examination and a report of the Regulations Review Committee were considered in association with other business (*ibid.*, pp 19–20).

[45] *ibid.*

[46] Standing Orders Committee, *Review of Standing Orders*, December 2003 (I.18B), p 11.

Parliamentary Perspectives for Reform of Legislative Process

Because Governments are elected to implement policies, the Government's interest in progressing its legislative programme in an efficient manner is a legitimate interest. However, Parliament does not exist simply to wave bills through. As a legislature it needs to balance legislative efficiency, proper scrutiny and a style of debate that encourages the expression of diverse views about legislation and other matters of public interest.

Proposals for Reform

Law Commission Bills

In reporting to the House about the lack of action to implement Law Commission reports, the Justice and Electoral Committee raised the issue of how such reports 'can progress through the House in an expeditious manner'.

The committee's suggestion that additional sittings of the House on Thursday evenings be devoted to non-controversial bills arising from Law Commission reports was considered by the Standing Orders Committee in 2003, but went no further.[47] However, the Justice and Electoral Committee had also raised the idea of creating a new category of Government business, that of 'non-controversial bills arising from Commission reports', to which it proposed the attachment of special procedures and sitting times. The Standing Orders Committee dismissed the idea:[48]

> … we do not agree to the introduction of new categories of omnibus bills. Non-controversial matters may already be incorporated into omnibus bills with the agreement of the Business Committee under Standing Order [264(c)], and we encourage the use of this provision for this purpose.

In other words, if a Law Commission bill were truly 'non-controversial' a proposal for its introduction would be greeted with unanimity or 'near-unanimity' when placed before a committee of MPs representing the whole political spectrum. Such general acclaim would tend to require not only that the subject matter be non-controversial, but also that some effort be made to acquaint members with the content of the bill and to reassure them about its implications, or at least to assure them that appropriate perspectives have been involved or consulted during its preparation. Not all Law Commission proposals are non-controversial: among matters dealt with in recent reports have been issues as fraught as legal recognition of parenthood in its different forms, and the structure of the court system.[49] Nor do they necessarily result in non-controversial legislation: the Criminal Procedure Bill

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[47] *Review of Standing Orders*, Report of the Standing Orders Committee, I.18B, 2003, p.53. Other submissions also proposed additional sitting hours, and these are discussed below.

[48] *ibid.*

[49] Law Commission, Te Aka Matua o te Ture, *New Issues in Legal Parenthood* — NZLC R 88; *Delivering Justice For All: A Vision for New Zealand Courts and Tribunals* — NZLC R 85.

currently before the House arises from a number of Law Commission reports,[50] yet its passage to date has not been unanimous, and Opposition amendments proposed during the committee of the whole House stage were defeated by a single vote.[51]

The proposal for Law Commission bills has not been repeated and the impetus for it will have diminished with the recent introduction or passage of a number of Government bills based on Law Commission recommendations.[52] This rush of activity appears to be the result of a third-term Government that has implemented much of its policy platform turning its attention and resources to less 'politically important' matters such as law reform.

Omnibus Bill Rules

Currently, the Standing Orders require that bills must each relate to one subject area only,[53] and preclude the introduction of omnibus bills, unless they satisfy certain criteria. For example, an omnibus bill may be introduced if the bill:

i. makes only consequential amendments to Acts other than the principal Act amended (in fact, such a bill would not be regarded as omnibus in nature at all) (SO 261(2)), or
ii. falls into a category of omnibus bill that is specified as being acceptable, that is, Finance bills or confirmation bills that validate or authorise actions (including regulations) that otherwise are illegal, Local Legislation bills, Māori Purposes bills (which relate to Māori affairs), Reserves and Other Lands Disposal bills (dealing with public lands or reserves), or Statutes Amendment bills (see further below) (SO 263), or
iii. contains amendments dealing with an interrelated topic that can be regarded as implementing a single broad policy (SO 264(a)), or
iv. includes amendments to a number of Acts that are of a similar nature in each case (SO 264(b)), or
v. has been approved by the Business Committee (SO 264(c)).

Tanner has argued for these rules to be extended to include a further category of omnibus bill, the 'sector bill', that is, a bill that amends several Acts within a

[50] Juries in Criminal Trials (NZLC R69), Acquittal Following Perversion of the Course of Justice (NZLC R70), and Criminal Prosecution (NZLC R66).

[51] 20–22 March 2007.

[52] For example, the Crimes (Repeal of Seditious Offences) Amendment Bill; amendments to the Bail Act 2000 and provisions to establish a Sentencing Council set out in the Criminal Justice Reform Bill; improvements to the Arbitration Act 1966 set out in the Arbitration Amendment Bill; the Property Law Bill; and the Wills Bill and Succession (Homicide) Bill, which are based on a 10-year old Law Commission report on its review of succession law (NZLC R41, 1997).

[53] Standing Order 261(1).

particular sector.[54] He described the concept of a 'sector bill' as — (a) defined by spheres of activity and interest in the community, and (b) broadly consistent with the subject areas of the House's own subject select committees.

The Standing Orders Committee considered a submission from Tanner in 2003 that included his proposal for 'sector' omnibus bills to be provided for in the Standing Orders.[55] The Clerk of the House provided a paper setting out a different view, explaining how the current restrictions on the introduction of omnibus bills arose from abuses of the previous, looser rules that enabled the combination of several important and controversial legislative proposals into a single bill and had represented an unacceptable truncation of the legislative process.[56] The committee expressed the view that 'this is a significant debate in terms of the shape of the legislative process in New Zealand', but noted that it had not reached agreement on extending the omnibus bill rules to allow the introduction of 'sector bills'.[57]

The matter has not rested there. Tanner continued to express his views on the matter after the Standing Orders Committee reported in 2003, most notably through a paper to a public law conference in 2004.[58] The New Zealand Law Society has subsequently supported his position,[59] and the issue has also been alluded to by the Regulations Review Committee.[60] A Minister has subsequently written to the current Standing Orders Committee, stating her 'strong view that the rules on omnibus bills should be softened',[61] so the proposal therefore is still on the agenda.

Why Changing the Omnibus Bill Rules is Not the Answer

While the addition of a new category of permitted omnibus bills seems like a minor proposal, it would actually represent a significant reform of the way the House conducts its business. The primary difficulty would be that the rules would not be relaxed only for technical and non-controversial law reform proposals. Governments could combine all manner of disparate and possibly controversial

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[54] *ibid.*, p 46, para 147.

[55] Submission to the Standing Orders Committee by Chief Parliamentary Counsel (SO/PCO/1), dated 14 October 2003.

[56] Paper from the Clerk of the House in response to the paper prepared by Chief Parliamentary Counsel, dated 4 November 2003 (SO/Clerk/5).

[57] Standing Orders Committee, *Review of Standing Orders*, (I.18B) December 2003, p 52.

[58] Tanner, 2004, *op cit.*

[59] New Zealand Law Society, supplementary submission to the Regulations Review Committee (INQ/ARP/6A) on the inquiry into affirmative resolutions procedures, May 2004.

[60] See above, p 118.

[61] Hon Lianne Dalziel, Minister of Commerce, letter to the Standing Orders Committee, dated 17 March 2006.

legislative initiatives together into one bill with the only proviso being some association with a single broad sector of government activity.

Another issue would be that some interpretations of the term 'sector' could be very wide indeed: for example, an 'obvious' sector would be justice — 'including courts, the judiciary, procedure, law reform, and criminal and civil matters'.[62] Arguably, a bill for the 'justice' sector could also include provisions relating to Treaty of Waitangi settlements, privacy law, human rights, constitutional and electoral matters, police powers, military discipline and family law. The relaxation of the omnibus bill rules to permit sector bills would thus remove all effective constraints, and would permit a return to the abuses that occurred prior to the introduction of the current rules.

A proliferation of omnibus bills with disparate amendments to various Acts would present a number of challenges to New Zealand's select committee-based legislative system. There would be a greater prospect of significant legislative proposals not being noticed or comprehended by members, or by members of the public who might otherwise have been expected to make submissions to select committees. It would be more difficult for submitters to prepare effective submissions on a bill with wide-ranging topics. A wider range of topics in a bill could also cause difficulties in terms of arranging the attendance of members to hear relevant submissions (or relevant aspects of some submissions) and to participate in particular parts of the consideration process. Moreover, the ability to include disparate topics in a single bill would increase the prospect of amendments relating to new topics being added to a bill during its passage, possibly without sufficient policy development processes occurring, and could also lead to a more piecemeal approach to legislating (rather than the more coherent lawmaking hoped for by proponents of sector bills).

While it may technically be true that 'New Zealand has greater restrictions on omnibus bills than any other Commonwealth parliament',[63] the New Zealand Parliament is unusual in a number of respects. It comprises a unicameral assembly elected by way of proportional representation, nearly all bills are referred to select committees for public submissions, and there are no formal pre-introductory public consultation processes set out for Government bills.

Finally, complaints that it is too difficult to introduce omnibus bills in New Zealand do not accord with the plain fact that many bills are introduced that are omnibus in nature. Most of these have been permitted under Standing Order 264(a), the very provision that is the primary target of Tanner's criticism. The House and the

[62] Regulations Review Committee, Interim report on the inquiry into the affirmative resolution procedure, (I.16F) July 2004, p 11.

[63] New Zealand Law Society, supplementary submission to the Regulations Review Committee (INQ/ARP/6A) on the inquiry into affirmative resolutions procedures, May 2004, p 3.

Business Committee still have discretion to introduce omnibus bills despite the restrictions. The 'sector bill' proposal would effectively shift this discretion from the House to the Government. In short, the relaxation of the omnibus bill rules would enable the Government to pass legislation faster regardless of its political priority or level of controversy. Parliamentary scrutiny would be compromised. The adoption of this proposal would represent the loss of an opportunity to reform the legislative process in a way that provides an appropriate balance of parliamentary perspectives.

Sittings in a Second Chamber[#]

When preparing the rules for the imminent first MMP Parliament, the Standing Orders Committee in 1995 considered the idea of establishing a procedure for non-controversial bills to have their committee stage off the floor of the House similar to the then newly established Main Committee of the Australian House of Representatives. The committee reported that while it was 'attracted to this procedure' it considered it unnecessary given the significant reform such a development would involve.[64]

In 2003 the Clerk of the House raised issues in relation to the reduction in recent years of sitting hours available for the passage of legislation and the House's other business. In doing so, he reminded the committee of the second-chamber option.[65] Support for the consideration of the Main Committee model was also expressed by Tanner.[66] However, the Standing Orders Committee again discarded the idea as a way to increase the number of hours of House time available.

It is clear that the second-chamber concept could be applied in New Zealand. The functionality of a second chamber does not necessarily require a much larger population of members than exists here — the House of Representatives in Canberra comprises 150 members. The establishment of a second chamber can add significantly to the time available both for progressing the business of the House and for conducting debates. Both the Australian and Westminster Hall models have proven popular with members because they provide more opportunities for members to participate in the proceedings of the House and have their say. There is a significant difference in the nature of the business considered in these two forums: the Main Committee is chiefly a second legislative stream, while the Westminster

[#] This section has been heavily edited by the journal editor in the interests of keeping the article within the word limits of this journal. Those interested in further details of the systems of Main Committee used in Australia and Westminster Hall should contact the author directly.

[64] Standing Orders Committee, 1995 (I.18A), p 57.

[65] Submission of the Clerk of the House to the Standing Orders Committee on the Review of Standing Orders, May 2003, p 17.

[66] Tanner, 'Confronting the process of statute making', May 2003, p 38, paras 119–120.

Hall model offers only an increased ability to debate non-legislative matters that otherwise would not be debated at all. Perhaps the most salient procedural feature of the Main Committee and Westminster Hall is that both operate on a consensus basis, and this fact has deterred some New Zealand observers.

Should the Second Chamber Operate on Basis of Unanimity?

Any one member can call a halt to proceedings in the Main Committee in Australia. A question that cannot be agreed unanimously is referred to the House for resolution. However this model cannot necessarily be transposed directly into the New Zealand context, as there is a fundamental difference in the way business is managed in the House in each of the two countries.

The key is to consider the House and the second chamber as components of a single system. In Australia, the Main Committee operates on the premise that, in dealing with non-controversial items, it frees up time in the House for considering more controversial or significant business. The *quid pro quo* has been a major reduction in the use of the guillotine to limit debate in the House itself. That this aim has been achieved is demonstrated by the dramatic fall in the use of the guillotine procedure since the Main Committee was established (see above). If the Australian Leader of the House were to notice a lack of co-operation in the Main Committee, the Government could resort to resuming or increasing its use of the guillotine or closure in the House.

In New Zealand however, there would be a greater risk that a second chamber operating on the basis of unanimity would be limited in its activity. There tend to be more multi-member parties represented in the House in New Zealand under MMP than in the Australian House of Representatives,[67] increasing the negotiating required and the potential for one party to raise an objection. New Zealand has a standing guillotine on all stages of legislation except the committee stage.[68] This means that the Government in New Zealand would have no fall-back position analogous to the threat available to its Australian counterpart of increased use of the guillotine or closure if time is not being made available in the Main Committee. At any rate, the bringing of guillotine or closure motions would be less assured of success in the New Zealand context with its propensity for minority government (the reduction in the use of urgency by recent Governments has illustrated this).

[67] Currently there are seven parties with two or more members in the New Zealand Parliament, as well as a party with one member and two independent members. In the Australian House of Representatives there are three major parties, two of which are in coalition. There are also three independent MPs.

[68] The first, second and third reading debates for virtually all bills have limits prescribed in terms of the number of speeches permitted. See Appendix A of the Standing Orders.

Shifting of Committee Stage to Second Chamber

A more suitable option for New Zealand would therefore be to conduct the committee stages of all or most bills in the second chamber or allow the Government to manage the referral of business to it without needing unanimous support. At first glance this option would seem unpalatable to Opposition parties. However, the time in the House that would be freed up in this way would not simply provide more time for the Government to progress more bills; it could rather be seen as extra time to debate the merits of legislation and to consider other business. The length and structure of debates on bills in the House would be redesigned to provide a balance in this respect, so that both Government and other parties would benefit significantly. There could be an increase in the set times available for debates in the House, and greater provision could be made for other matters of interest (such as select committee reports or other special topics) to be debated. A careful balance would need to be observed when determining how to use the extra time in the House that this option would create, so as not to diminish — or unduly increase — the efficiency of the legislative process.

Maintaining a Presence in Two Chambers (and in Select Committees)

Any proposal for establishing a second chamber must address difficulties that would be posed for smaller parties in maintaining a presence in both the House and the second chamber at the same time. This would be exacerbated by the regular scheduling of select committee meetings during House-sitting hours, which reduces the number of members all parties have available.

A possible solution would be to reduce the prospect of select committees meeting when the second chamber is in operation (as often happens now). Committees would retain the ability to meet by leave (unanimous agreement) while the House is sitting.

Under this proposal, members of smaller parties could well end up needing to be in fewer places at once than is currently the case. The situation for smaller parties could be further eased by allowing any party's votes to be cast on its behalf in the second chamber, even when no members of that party are present.

Getting More out of the Committee Stage

A number of problems arising from current procedures for the consideration of bills in the committee of the whole House have been identified above. In short, the committee stage usually does not give rise to the sort of detailed debate for which it was intended, and procedures distort the structure of bills and can result in legislation that lacks coherence. There have been attempts to adjust procedures (such as the recent move to debating preliminary clauses after all other provisions have been considered), but the basic problems remain.

No procedural adjustments will bring about a substantial improvement to the situation unless they recognise the fundamental problem: that under MMP it tends to be more difficult for the Government to obtain extra sitting hours, and when House time is at a premium those debates that are not subject to prescribed limits will become the focus for the Push-Me-Pull-You efforts of the Government and Opposition. However, imposing an arbitrary system for determining fixed-time limits for committee stages of bills could exacerbate the problem (particularly if the time were calculated according to the number of Parts in a bill, for example). On the other hand, removing committee stages from the Order Paper's queue of business can be done without compromising the essential purposes for which the committee stage exists, and may well enhance the legislative process considerably.

Firstly, the availability of more time for debate in the House would allow more members to speak to the broader policy matters in legislation in the more appropriate context of the first, second and third reading debates, so these members would not find that the committee stage is the only available outlet for their views. Meanwhile, in the second chamber chairpersons could more strongly assert the need for contributions in the committee stage to focus on the detail of specific provisions. The rate of progress in committee would not directly affect the queue of business on the Order Paper, thus encouraging members to participate to the extent of their interest and no more. For the same reason there would also be less of an imperative to minimise the number of Parts in bills, and less pressure on the chairperson over the acceptance of closure motions. The disincentive for the Government to recommit bills to improve their coherence and correct errors would largely be removed, as doing so would not cost the Government any time in the House. Finally, a more committee-like setting would also facilitate constructive interactions between members and Ministers.

Voting in Second Chamber

The party voting system used in the New Zealand House of Representatives would equip it well for running a second chamber, and would mean controversial legislation could be considered in that chamber. While the parallel chambers in Australia and the United Kingdom must suspend and report to the House to determine through a division any question for which the outcome is not unanimous, such questions could easily be dealt with in New Zealand through the conduct of party votes.

Personal votes, on the other hand, could not easily be undertaken in a second chamber. Provision could be made for the presiding officer in the second chamber to report to the House when a personal vote is required, for the question to be put without debate. However, it would be preferable for bills that raise conscience issues (or otherwise for which personal votes are likely) always to be debated in the House itself, and not in the second chamber. In part this would be necessary because of the logistics for conducting personal votes, but, more importantly, such matters should always be dealt with in the primary forum.

This would mean that, even if standard practice were for bills to be referred to the second chamber, the House would reserve its right to retain some bills and resolve itself into Committee to consider them.

Management of Business

A further issue would be that the establishment of a second chamber could make the management of the Government's legislative programme more complex. Moreover, while a second chamber would facilitate the passage of legislation through the House, it could affect the number of hours available for select committee meetings (if the above proposal were adopted to prevent select committees meeting while both chambers were in session). Members could also become frustrated if two bills of similar subject matter were simultaneously up for consideration in the two chambers.

The shifting of the committee stage of most bills to a second chamber could allow the business of the House to become more predictable, because the least predictable aspect of its business would be removed from the floor. This could enable a more structured approach to scheduling business that could seek to avoid major clashes, and which could enable members to target their time at the matters of greatest interest to them more easily than at present.

Urgency

Over the years, Governments have routinely used urgency to make headway on their legislative programme rather than for dealing with bills that are genuinely urgent. However, minority Governments cannot count on urgency being agreed, and the referral of bills to a second chamber for their committee stage would free up some extra time for the passage of bills during normal hours. Conversely, a legitimate expectation would be that the use of a second chamber would further reduce the need for urgency to be taken to progress the Government's legislative programme. The imposition of a bar on meetings of the second chamber during urgency would provide a disincentive for urgency to be taken except for the rare bills that need to progress through more than one stage on a sitting day so as to be passed very quickly. This would be another way in which parliamentary life could become more predictable through the second-chamber model.

Enhancing and Extending Debates in the House

Removing the committee of the whole House to a second chamber would permit members to reclaim the right to speak in the House without reducing the Parliament's legislative output. This change would: allow more time for major or controversial bills and issues to be debated in the House, provide extra hours for the passage of legislation and enable discussion of business and topics that otherwise would not be subject to debate in the House.

An important aspect of any move to establish sittings in a second chamber therefore would be the need to find an appropriate balance for the allocation of the time freed up in the House. Much of the extra time could be directed towards 'select committee orders of the day' and other important scrutiny activities such as the financial review debates and Estimates (which would become more meaningful if sufficient time could be spent on each financial review or Vote). These major debates in the financial cycle should remain in the House and not be taken in the second chamber.

Continuation of Debates Started in House

One of the most popular aspects of the Main Committee in Australia is that it allows extended debate on issues of great public interest. This has enabled members who otherwise would not have been able to participate in such debates, to speak and place their views on the record. Once the flow of business in the House and in the second chamber has been established, consideration could also be given to introducing this practice of continuing debates on the floor of the House.

Extra time for Members' Business

Members' business would also benefit from any introduction of a second chamber (aside from any considerations of what extra time could be set aside in the House itself for Members' business if a second chamber were established). Provision could be made for Members' business to be given precedence in the second chamber on certain days. All Members' bills could stand referred to the second chamber for their committee stage, unless they raise conscience issues or are otherwise likely to lead to personal votes. If no Members' bills were available, the second chamber could move into an adjournment debate or discussion of some other topic of interest (even Members' notices of motion).

Conclusion

New Zealand's legislative process is robust and well regarded, though this is primarily on account of highly effective select committee processes. A number of concerns raised about the House's own procedures for dealing with legislation are valid. Attempts to address these concerns are flawed if they do not involve a survey of the wider parliamentary perspectives that could be served by any proposed reforms. The proposal to relax the omnibus bill rules does not find the desirable balance. On the other hand, the concept of holding sittings of the committee of the whole House in a second chamber could provide considerable opportunities for addressing the problems identified in the first part of this paper. The key is not to view the second chamber concept in isolation — this approach has led to the concept being discarded too quickly in the past. Instead, an overall package for arranging business both in the House and in the second chamber should be

developed with a view to meeting the interests of both Government and non-Government participants. The possibilities are endless. ▲