

# SELECT COMMITTEES AND THEIR ROLE IN KEEPING PARLIAMENT RELEVANT: DO NEW ZEALAND SELECT COMMITTEES MAKE A DIFFERENCE?

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New Zealand has a unicameral Parliament and very high levels of legislative party cohesion, with very few instances of MPs voting against their Whip. Until recently the two major parties had all but a complete monopoly on parliamentary representation. While in the last six years New Zealand has fluctuated between majority and minority governments (both coalition and single party), for most of its modern history the party of government has dominated Parliament. So marked was the lack of any checks and balances that Lijphart (1984) saw New Zealand as the quintessential example of the majoritarian system (as did Hague and Harrop, 1987). In 1979, Geoffrey Palmer described the power of Cabinet in New Zealand as "unbridled" and claimed New Zealand had "the fastest law making in the West." Thirteen years later, after he had spent 11 years as an MP, including five as Deputy Prime Minister and one as Prime Minister, Sir Geoffrey concludes that the New Zealand Parliament played a very limited role:

*Each week MPs of the governing party met in caucus and in secret settled their policy. Once adopted, all members were obliged to vote for it in Parliament. Parliament became a rubber stamp - it determined nothing. It was just a talking shop. The positions were pre-determined elsewhere and the control just about total, to an extent still not possible in the United Kingdom (Palmer 1992, 105-106).*

While there is a growing acceptance that the upper house in bicameral legislatures may be able to play an effective role (in the Australian context see e.g., Smith 1994, Sharman 1999, Uhr 1998), there is a general despair for unicameral Parliaments. Despite this it has been suggested that the New Zealand House of Representatives does indeed play an important legislative role. It is able to do this, it is argued, owing to its system of select committee scrutiny of legislation. The evidence of this is provided by a pattern of significant changes being made to legislation in the select committee<sup>1</sup> process (Skene 1990). Burrows and Joseph (1990, 306) go as far as to describe New Zealand's Committee system as a "a crucial bastion of democracy in our legislative process."

This paper examines the existing evidence that select committees play a significant role in ensuring New Zealand's Parliament is able to act as an effective legislature, and sets out the findings of the author's current research.

### **New Zealand's system**

New Zealand's system of select committees has been viewed favourably by commentators outside New Zealand (e.g. Coghill 1996, Stone 1998, 52) and has features, the absence of which, have been lamented elsewhere. For example, (Hawes 1993, 208) while arguing that the United Kingdom's system of select committees has made a major contribution to executive and administrative scrutiny, Westminster really needs a system were there is "informed effective input before legislation is passed."

- Standing Orders provide that at the commencement of each Parliament the following select committees are to be established:
- Commerce
- Education and Science
- Finance and Expenditure
- Foreign Affairs, Defence and Trade
- Government Administration
- Health
- Justice and Electoral Law
- Law and Order
- Local Government and Environment
- Maori Affairs
- Primary Production
- Social Services
- Transport and Industrial Relations

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<sup>1</sup> Officially they are referred to as "select committees" but in practice they are permanent, or "standing committees".

Amongst them, these committees have jurisdiction over all spheres of Government activity. The New Zealand select committee system is unique in the Westminster-world in that almost all legislation is scrutinised by committees, with legislation automatically standing referred to a committee. Also unique is the way in which a committee's recommended changes to a bill are drafted into the bill as reported back and unanimous changes adopted automatically by the House. Committees also, as a matter of course, invite public submissions on the legislation before the committee. This does not extend only to written submissions but to hearing oral submissions from pretty much anyone who wishes to be heard. While in many jurisdictions committees do take public submissions, there is not the same expectation that submissions will be received and heard as a matter of course. This greatly enhances the legitimacy of the committee process.

The role of select committees goes beyond examining legislation. In addition to scrutinising legislation the committees consider the estimates and petitions and conduct reviews of expenditure by departments and other Crown entities in their subject area. By examining estimates of spending for the forthcoming year, followed by a financial review of the way Departments and Crown entities have performed in the previous year, committees are able to play an important oversight role. They also have the power to launch inquiries on their own initiative. This power can be quite significant. In the last Parliament the Health Committee undertook an investigation into the mental health effects of cannabis. Their unanimous recommendation that the Government consider decriminalisation has played a significant part in accelerating moves to change the legal status of cannabis. While the no-legislative roles of the committees are important in their own right, they also enhance the ability of the committee effectively to scrutinise legislation by developing a Member's subject area expertise.

In addition to the select committees there are a number of "permanent" committees: the Regulations Review Committee, which, since its establishment in 1985, has been chaired by an Opposition MP, the Officers of Parliament Committee and the Privileges Committee. Usually a Standing Committee will be appointed during each Parliament. Although these committees have important roles of their own, it is the select committees that are most important in ensuring that the House is able to play an effective legislative role.

Formally the membership of select committees is determined by motion of the House at the start of each Parliament. In practice the composition of each committee is determined through inter-party bargaining and agreed on by the Business Committee. The Business Committee is a special committee that makes determinations about the business of the House. Standing Orders require the committee to attempt to make unanimous decisions. Where it cannot achieve unanimity, a decision is only made if there is, in the Speaker's view, "near-unanimity" assessed on the "numbers in the House represented by each of the members of the committee" (SO.75). While it is not clear what the threshold is, it has been established that when the representative of a party with four MPs (in the 1993-1996, 99 member, Parliament) objected, there was "near-animity." (Speakers' Rulings 1996, 11/4). In determining the make-up of the committees the Business Committee is constrained by a Standing Orders requirement that "the overall membership of select committees must, so far as reasonably practicable, be proportional to party membership in the House." In the current

Parliament this means that on three committees the (minority) Government does not have a majority, even with the support of its parliamentary ally the Green party. As there is no provision for the chairperson to exercise a casting vote, this means the government must gain the support of another party to win votes on these committees. The challenges of chairing a tied committee are discussed by Liz Gordan (chair of the Education and Science committee) in her paper.

Neither Cabinet Ministers, the Speaker nor the Deputy Speaker sit on select committees, though Ministers in charge of bills may take part in the proceedings of the relevant committee while it is considering their bill, but they cannot vote (Standing Orders Committee 1995, 35). The Standing Orders Committee felt it "desirable" for the practice of Ministers attending committees when summonsed to appear, but the exact status of a summons to a Minister is not clear.

Committees have had a significant role in New Zealand politics since the Nineteenth century, however, from the 1960s the legislative role played by the committees expanded significantly. Initially selected legislation was referred to committees for consideration by the Government. However, since 1979, almost all legislation is automatically sent to a legislative committee for consideration following a debate on its first reading (Standing Orders Committee 1999: 23-24). "Appropriation" and "Imprest Supply Bills" are not referred to select committees as such, however the contents of appropriation and imprest supply bills are scrutinised by the committees. After the budget is introduced each select committee considers the estimates in its subject area (McGee 1994, 262 *contra* McRae 1994, 204). The third type of bill that does not go to a select committee is the most controversial. If the House accords urgency to a bill before it has reached the select committee stage, then that bill will not go to a select committee, and the Speaker cannot accept any motion to send the bill to a committee (McGee 1994, 262).

Why does it matter if a bill is sent to a select committee? When a bill is referred, the select committee advertises for public submissions and calls for reports from Government Departments most closely concerned with it. As well as receiving written submissions from the public it hears witnesses who wish to present their submissions in person. This public involvement is a key element in the process. When Government legislation is introduced we can usually assume that considerable work has gone into its development. However, this work goes on behind closed doors. The very open nature of the public submission and hearing process creates an impression of legitimacy. The expectation is created that some credence will be paid to public submissions. When significant public concern is expressed during the hearings, it becomes difficult for a Government to press on with the legislation it previously sent to the committee without any modifications.

Also the submissions and hearing process can affect the view of the individual MPs on the committee. All parties discuss, in caucus, the way their members on a particular select committee should vote on legislation before any final votes are taken. However, the MPs who serve on the committee, and have read the submissions, witnessed the public hearings and been briefed by the interested departments will be better prepared than their colleagues to determine what the party line on the legislation should be. If Government MPs believe that the Minister in charge of the legislation has not properly addressed arguments that have been raised in the submissions or hearings, they are in a position to argue that matter out in caucus. In

the absence of a committee system it is unlikely that Ministers would to be made aware of such issues.

### **Challenges to the system's effectiveness**

Clearly the New Zealand House of Representatives has a fairly comprehensive system of legislative committees. However this, in itself, does not guarantee an effective committee system. McRae (1994) in his work 'A Parliament in Crisis: the Decline of Democracy in New Zealand' paints a picture of a Parliament completely at the mercy of the executive. He was particularly concerned about the practice of the both Fourth Labour and Fourth National Governments of using the exemption for money bills to avoid select committee scrutiny of legislation. The practice evolved of "tacking" unrelated matters to the finance bills and then after the Committee of the Whole stage, introducing a 'supplementary order paper' (a list of proposed amendments) that split the bill into a number of other bills. The Third Reading on all these bills then took place as if they had gone through the entire process. Often the Minister sought leave for the Third Reading of all the bills to be taken as one question (McRae 1994, chapters 7 & 8). This process is certainly a matter of concern. However, since McRae, the Standing Orders have been revised to make it much more difficult for governments to introduce these "omnibus" finance bills (Standing Orders Committee 1995, 49-51; Standing Orders 256-259).

While the use of omnibus bills has declined, the larger problem currently is the ability of the Government to seek urgency for the passing of controversial legislation through all its stages. This has become more difficult since 1993 with the demise of single-party, majority governments. However, while the National-New Zealand First Government was in office, even though it held the barest majority in the House, we saw a recurring tendency to put the House into urgency on controversial legislation. The Green party, upon whom the present Government relies to pass legislation, announced that it would not support taking urgency except in extraordinary circumstances. It has also attempted to broker deals where the Opposition agrees to time limits being imposed on debates rather than going into urgency. We have seen the House taken into urgency on a number of occasions already this term, but only after legislation has been reported back from the appropriate committee. To some extent the recent changes to the voting system within the Chamber have facilitated taking urgency. With the removal of the division process, even if the Opposition forces the Government to move the closure on every clause and takes every issue to a vote, the legislation can be processed relatively promptly (see Ganley 1998).

The other approach Governments, including the current one and its immediate predecessor, have taken to reduce the impact of select committees is the establishment of ad hoc committees to consider particular bills. The current Government established the Accident and Employment Law committees to examine its reform to the accident insurance regime and the Employment Relations Bill. This allows the Government to ensure it has a majority and a chairperson in whom they have faith. However, as was seen with the 1998 reforms of accident insurance (discussed below), establishing an ad hoc committee does not guarantee smooth sailing for Government legislation.

The urgency provisions have been controversial in the last few years (e.g. Donald 1999, Foulkes 1998, Llewellyn 1998a, Llewellyn 1998b, Marks 1998, NZPA 1991, NZPA 1998) and there have been a number of notorious cases of governments

abusing procedure. The use of the omnibus financial bill method in 1990 and 1991, and the taking of urgency on the "work-for-the-dole" legislation in 1998 stands out. This raises a crucial question, why do not Governments use these procedures to force all controversial legislation through the House? In 1994 McGee found that 90% of all Government bills and 100% of members, private and local bills went to select committee (1994, 262).

The most obvious answer is that there is a widespread expectation that legislation will be subjected to the scrutiny of select committee examination. Such is the level of acceptance of the legitimacy and desirability of New Zealand select committee process that a Government can expect a large degree of opprobrium for bypassing the committees. Even those sections of the news media which support a bill can be expected to speak out against forcing it though without going through the committee system.

While the potential exists for the committees to play an important role, it is possible to imagine that the committees, being a microcosm of the House could be, just as the House is, completely dominated by partisanship. According to Mulgan (1994, 77) whenever important political issues arise, committees revert to partisan clashes. If this is the case then we should expect to see the committees making few politically significant changes. They could play a useful technical role and have an important legitimating role, especially by providing an avenue for public participation in the legislative process, but would not see major changes being made to important legislation. Certainly this is what the Australian experience would lead us to assume. As Sharman (1999, 157-8) argues:

*The whole point of reviewing legislation is to take control of the reviewing process away from the government of the day. Otherwise, the reviewing process is of limited use and subject to partisan control by the government parties. This is graphically illustrated by the ineffectiveness of lower house committees in reviewing legislation.*

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*To be brutal, the only way governments are going to be persuaded to negotiate with their partisan competitors is through the use of a powerful sanction, and the Senate's veto over legislation is the most powerful sanction it possesses. If that sanction were removed, the Senate's review of legislation would be largely ignored and the requirement for the government to negotiate over the final form of legislation would be removed. ... To pretend that the reviewing function would continue to work effectively if it were entirely dependent on the sweet reasonableness of governments is a fantasy.*

## **Impact of Select Committees**

If it can be shown that the New Zealand's select committee process does result in significant changes to legislation, even during periods of single party majority Government, then this is of particular interest to political scientists and all those interested in the study of Parliament. We would be forced to conclude that

unicameral Parliaments, such as Queensland, even those in which one party holds a majority of seats, can still play an important role in the legislative process.

Palmer in 1979 and Skene in 1990 each studied a sample of the bills that were considered by select committees and reported on the degree of change that occurred to them between introduction and being reported back from select committees. Table 1 compares the findings of Skene and Palmer with an examination of all bills that were considered by select committees in 1997 except Statutes Amendments bill (these deal with a large number of unrelated technical amendments to a range of bills). The pattern of committees being prepared to make a large number of changes to the bills that come before them identified by Skene in 1989 continues.

**Table 1**

	<b>1977</b>	<b>1989</b>	<b>1997</b>
Number of public bills examined	36	20	47
Total changes made at select committee stage	978	830	2008
Average number of changes per bill	27	41.5	43

It is important at this point to note that, unlike other jurisdictions, the New Zealand select committees do not just provide the House with a report on the bill. After reading the written submissions, hearing oral submissions, and receiving advice from officials, the members consider the bill and determine what changes need to be made to it. The bill is then redrafted to incorporate the committee's decisions. On Government bills, and many Members' bills, the committee is provided with assistance from the Parliamentary Counsel Office to draft these changes. It is this redrafted bill, along with a commentary explaining why the committee made its changes that is reported back to the House. Any unanimously agreed to amendments to the original bill moved in committee are automatically incorporated into the bill when the House agrees that the bill should proceed. If the Government wishes to remove the changes it must amend the bill on the floor of the House. Amendments that are made by a majority of members of the committee need to be formally adopted by the House.

The figures in Table 1 show that bills are likely to have a large number of changes made to them by select committees when they are reported back to the House. However, this does not necessarily guarantee that committees make *significant* changes. The amount of change may indicate little more than the performance of a "tidying" role in the legislative process. Certainly they do play such a role. One drafting change made to the Harassment and Criminal Associations bill by the (then) Justice and Law Reform Committee in 1997 shows how important this tidying role can be. If it was not for the careful scrutiny of the committee, serious criminal sanctions may well apply to New Zealanders found in possession of "coco leaves.". However, the above evidence, while perhaps useful as a performance indicator for the respective legislative drafters, does little of itself to show that New Zealand's select committees make a major difference.

It has also been suggested that the amount of change that occurs might indicate that the Executive is so assured of its control of the parliamentary processes that it is prepared to introduce legislation in a rough form and let committees fix it up. Former

New Zealand Chief Parliamentary Counsel, Walter Iles QC claims that "the knowledge that the select committees can 'tidy up' bills may encourage the government to introduce bills in a rough form, even against the advice of the Parliamentary Counsel" (Iles 1991: 178).

In order to show that New Zealand's committees do make a difference it is necessary to go beyond simple quantitative measures. To show politically significant change occurs requires a close study of legislation. Examination of a sample of bills also avoids the problem of focussing on the most controversial bills to the exclusion of other legislation. It is sometimes argued that the ability of the Government to prevail on its highest priority legislation indicates that select committees provide a weak check on the executive's legislative intentions. It is not surprising that a Government will pull out all stops to see the most controversial or highest priority legislation emerge from the legislative process in a form that it prefers. However, as discussed above, there are usually political costs in doing this. Examination of legislation other than the headline bills shows that the New Zealand committees are able to make politically significant changes to legislation, even when there are majority Governments. This is not to say that the select committee process never makes a difference with controversial legislation. Recently the Government has announced that it will be drafting a "supplementary order paper" to the Employment Relations Bill in response to concerns raised during the select committee's hearings of evidence on the bill.

Closer examination of legislation shows that committees are constantly making significant changes to legislation. A taste for the kind of changes that occur can be seen in the recent changes made, unanimously, by the Health Committee to the Misuse of Drugs Amendment bill. This bill seeks to provide for expeditious classification of substances as prohibited drugs. The committee made two main changes to the bill. The first was to overhaul completely the process for expeditious classification so that it was less offensive to established constitutional norms. This was based largely on a report the Health Committee received from the Regulations Review Committee, which had initiated its own investigation of the legislation under its power to examine regulation-making powers within legislation. The second major change proposed by the Health Committee was to require the establishment of a statutory advisory committee through which any moves to classify a substance would have to be directed. This was not something the Ministry of Health had proposed and places a restriction under the bill on the powers of the Minister of Health. In the last Parliament, the Accident Insurance bill 1998 was substantially amended (by an ad hoc committee) to strengthen employment protections and rights of appeal to independent arbiters. While these proposals were not particularly contentious they represented changes to the nature of the bill which would have been unlikely to occur without the committee process. More controversially, in the last Parliament the Finance and Expenditure committee removed certain retrospective provisions from the Taxation (Accrual Rules and Other Remedial Matters) Bill 1998 contrary to the Government's wishes.

Skene (1990) cites the examples of the Children, Young Persons and their Families bill 1990 (introduced in 1986 as the Children and Young Persons bill) which had every clause rewritten by its committee and emerged almost twice the size of the original bill. So extensive were the changes that the bill had to be reprinted before

being reported back to the House. In effect, the Committee had drafted a new bill (Iles 1991, 173). A similar story can be told of the Mental Health Bill, which spent two years at the Social Services Committee and also underwent substantial change (Skene 1990, 20). Iles (1991, 172) also notes the controversial State Sector bill 1998 that was 48 pages when it was reported back. These cases are not anomalous examples chosen to highlight the heights to which committees can rise, but simply a few examples of changes that are being made constantly by committees.

## Conclusion

New Zealand's select committees do make a real difference in New Zealand's parliamentary system. While committees may not be quite as powerful as the cartoon on the title page suggests, they do have considerable legislative influence. Not only do they play an important tidying role that inevitably comes with close scrutiny of bills; they also bring about important changes to legislation. In addition to direct changes made to the draft bill the committee reports back to the House, Governments are prompted to draft their own changes in response to issues arising from select committees hearings of evidence. Through their inquiries, committees also bring pressure on Governments to initiate legislative change.

This inevitably gives rise to another question: why is the New Zealand committee system so influential? Part of the answer must be electoral system change. With the change to the mixed-member system of proportional representation (MMP) has come a large parliament (120 rather than 99 members), a wider spectrum of parties and a complete overhaul of Standing Orders. All of these have helped strengthen the committees. However, MMP alone is not the answer. Nor is the breakdown of the two-party system and development of minority government, which we saw in the 1993-1996 Parliament. If MMP were the answer, we would not have seen the results reported by Skene in 1990. Much of the strength of the New Zealand committee system must come down to its structure. The two key elements of this are:

- automatic referral of almost all legislation to a committee; and
- inviting submissions and hearings all who want to be heard on all bills as a matter of course.

The lesson other Parliaments can learn from New Zealand is that while a powerful committee system might not alleviate all the perils of executive dominance, it can go a long way to enhancing the strength of a Parliament to act as an effective legislature.

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