4 Parliament

Articles 27–53

This chapter describes the most significant changes we are proposing to our current parliamentary system and the reasons for those. The changes include:

- a fixed four-year parliamentary term:
- allowing select committees to recommend new legislative proposals to the House of Representatives:
- requiring a 75 per cent majority in Parliament to allow urgency to be taken in passing law:
- more checks and balances, including a stronger Bill of Rights and making more information available before legislating:
- outlining the system of public finance in the Constitution; and
- an independent Speaker elected by the House on a personal conscience vote.

The functions of Parliament

Parliament is the central democratic institution of Aotearoa New Zealand and the most important organisation in the country. By 'Parliament', we mean the Head of State and the House of Representatives.

The House of Representatives consists of Members of Parliament (MPs) who are elected by the members of the public eligible to vote. In a representative democracy, the fact of election by the voters legitimates the powers that MPs exercise. None of this will change with the proposed modernised Constitution.

The seven primary functions of Parliament, and more especially of the House of Representatives, are:

1. to provide a Government:
2. to hold Ministers to account:
3. to raise the money by which the business of government may be conducted and to approve the expenditure of money:
4. to consider and pass Bills into law:
5. to provide a place for the airing of grievances:
6. to act as a check on the manner in which Government is actually carried out, by virtue of the fact that Cabinet is

responsible to the House of Representatives:
7. to serve as a forum for party political contest.

The Constitution Act 1986 and Parliament

The Constitution Act 1986 provides a statutory but not a constitutional framework within which the New Zealand system of government functions. Alone, this ordinary Act of Parliament provides little guidance as to the distribution of powers between the different parts of the system or even about the rules under which they operate. For this there must be resort to other sources of the constitution, including numerous other statutes, judicial decisions, rules and constitutional customs and conventions.

When it was passed, the Constitution Act brought together a number of important provisions of the law relating to governance arrangements, including of Parliament, in New Zealand. This law meant more of the constitution was written down than before. The passage of the New Zealand Bill of Rights Act in 1990 added to that also. Both establish a helpful platform from which we can take the further step of providing a written, codified Constitution of the type most other countries have. Most of both these statutes appear in Constitution Aotearoa.

The Constitution Act 1986 sets out the following basic but essential rules relating to all branches of government; that is, the Sovereign, the Executive, the Judiciary, and the Legislature or Parliament. The important rules pertaining to the House of Representatives and Parliament are:

- "There shall be a Parliament of New Zealand, which shall consist of the Sovereign in right of New Zealand and the House of Representatives" (section 14).
- The House of Representatives has as its members persons elected under the provisions of the Electoral Act who shall be known as members of Parliament (section 10).
- The House of Representatives "shall be regarded as always in existence, notwithstanding that Parliament has been dissolved or has expired" (section 10).
- The "Parliament of New Zealand continues to have full

power to make laws" (section 15).
- The term of Parliament is "3 years from the day fixed for the return of the writs issued for the last preceding general election of members of the House of Representatives, and no longer" (section 17).

These familiar features of the New Zealand Parliament will not be greatly changed by the proposed, modernised Constitution. But some features are altered, as explained below.

The parliamentary term and law-making

The most important change we propose to make to our current system relates to the three-year parliamentary term. We are proposing that it should be changed to a fixed four-year parliamentary term. We believe this is necessary because our law-making system is in serious need of improvement, both in terms of the process by which legislation is made and the quality of the legislation itself. As we have a separate chapter on law-making (chapter 11) devoted to the critical need for reform in this area, we set out only briefly here the problems facing our current system. Reducing the time pressure currently exerted on law-making by our three-year term will assist enormously.

Article 28

A wonderful quotation about legislation comes from former United States president Woodrow Wilson when he was a Professor of Government at Princeton University: " . . . [o] nce begin the dance of legislation, and you must struggle through its mazes as best you can to its breathless end—if any end there be."[1] Here, Wilson makes the point that every piece of legislation has its own unique history. It has its own often convoluted and difficult journey through the government and parliament. There may never be an end to this journey; time and events ultimately render most statutes obsolete. Indeed, their shelf life seems to be becoming shorter. In a small country with easy resort to legislation we tend to reorganise ourselves continuously and rather incoherently.

Making law takes more time in the House of Representatives

1 Woodrow Wilson *Congressional government: a study in American politics* (15th ed, Mifflin, Boston, 1973, originally published in 1885) at 297.

than any other of its functions. However, the amount of time spent is not reflected in the quality of the legislation produced. To the contrary, our statute book is weighed down by laws that cannot be said to be fit for purpose.[2] Big and important Bills containing significant new policies are often hurried because of the three-year term so that new statutory schemes are not planned and developed properly. The lack of time means insufficient efforts are made to get the underlying policies and the legislation itself right—there is more pressure to just get measures through, than to get them right. At the same time, important but usually uncontroversial smaller care and maintenance provisions that often would be very beneficial, languish on the order paper, sometimes for years, and so never become law. This is the conundrum that must be addressed, and we do so in the proposed Constitution of Aotearoa New Zealand.

Insufficient time is also contributing to a tendency to amend statutes in a piecemeal fashion rather than undertake a systematic review of a law. Statutes subjected to this approach become long, often incoherent and unclear, and this contributes to the unmanageable quantity of laws on our statute book. There is a clear need for better scrutiny of amendments that are proposed after select committee consideration of a Bill through supplementary order papers and for these amendments to be carried out with less speed. Restraint in the moving of supplementary order papers needs to be enforced by new rules contained in the standing orders of parliament.

Lack of time is also one of the factors contributing to the way the Government resorts to urgency in order to get its Bills passed into law. Emergencies do occur that require urgent legal change by legislation, but they are not frequent and resort to urgency is an ever-present temptation in a Parliament with only one House.[3] Urgency has been taken much less frequently

2 For a more detailed examination of how laws are currently made and presented to the public, and the serious deficiencies in both those processes, see Geoffrey Palmer "The Harkness Henry Lecture: Law Making in New Zealand—Is there a better way?" (2014) 22 Wai L Rev 1.

3 Claudia Geiringer, Polly Higbee, Eizabeth McLeay *What's the Hurry—Urgency in the New Zealand Legislative Process 1987–2010* (Victoria University Press, Wellington, 2011). This book contains a comprehensive

since the changes in 2011 to the standing orders—the rules of procedure for the House of Representatives—that provided extended sittings. But, urgency has over the years been too often abused to truncate select committee consideration of Bills and shorten the time available for debate.

Articles 50 and 43(3)

The current features of our law-making system will not be fixed solely by extending the parliamentary term. We also recommend that the present system of executive control over legislation be loosened up by allowing select committees to recommend new legislative proposals to the House of Representatives, and we have included provisions to this effect in the proposed Constitution. We propose that the urgency provisions of the standing orders are restricted further by requiring a 75 per cent majority in Parliament to allow urgency to be taken.

In addition to addressing deficiencies plaguing our law-making system, a fixed four-year term also has the virtue of avoiding long periods when Parliament does not meet where that is the preference of the Government. And it avoids manipulation of the dates for general elections for motives of party political advantage.

In response to the argument that a four-year term is too long, we have incorporated in the proposed Constitution many more formal checks and balances than currently exist, especially a stronger Bill of Rights. Any dangers of an increased term are therefore limited, and we are strongly of the view that it is safe and far more preferable to have a longer term.

Responsible government and accountability

In New Zealand, our system of government is based on the principle that the power to govern is distributed over the three branches of government: legislative, executive and judicial. At the same time, we have a Government which must operate in accordance with "responsible government".

The Government is formed by the Prime Minister and ministers, who have first been elected as MPs. They then are formally appointed by the Governor-General. The Constitution

account of the use and abuse of urgency in New Zealand.

Act 1986 provides that "a person may be appointed and may hold office as a member of the Executive Council or as a Minister of the Crown only if that person is a member of Parliament" (section 6). These requirements are not new, but in the proposed Constitution we are simplifying their application by ensuring that it is the House that chooses the Prime Minister. We say more about this in the next chapter, which examines the offices of the Prime Minister, other ministers and the Government.

The system of responsible government that New Zealand has long enjoyed pivots around the fact that ministers sit as Members of Parliament. This means that the Government and the ministers themselves can be held to account in the House of Representatives for their actions and policies and those of government departments and ministries. Ultimately a Government can stay in power only for as long as it has the confidence of the House of Representatives. The House sits at the top of the accountability tree, and is organised as a big accountability machine.[4] A variety of other techniques exist by which ministers and the Government can be made answerable for their actions.

Parliamentary question time is probably the most obvious. These regular interrogations of ministers often descend into political argument in the House but both oral and written questions are an important check and restraint upon the activities of ministers. Parliamentary debates also force ministers to explain their conduct and defend their policies, and the proposals from ministers are voted upon after being debated. Scrutiny of legislation and of financial proposals can be intense. Government policies can be investigated and reported upon by select committees, and ministers sometimes must appear in front of select committees and answer questions.

The extent to which the House functions effectively to hold ministers and the Government to account can be limited because much of the activity of the House revolves around political party fighting and jockeying for political advantage. This can

4 Tony Wright "The politics of accountability" in Mark Elliott and David Feldman (eds) *The Cambridge Companion to Public Law* (Cambridge University Press, Cambridge, 2015) at 96.

be highly adversarial. Partisan considerations can blur the picture and produce policy blunders.[5] Members of Parliament on the Government side do not see themselves as holding the Government to account; they see themselves as ministers in waiting, as foot-soldiers of the Government, helping it and defeating opposition arguments and policies. Political ideologies also play a big role in the debates and often get in the way of analysis of the facts and whether policies are working well or not. In politics, truth has many facets.

In a small House of Representatives such as New Zealand's it cannot be said that the House holds the Government to account effectively over a wide range of issues. While New Zealand has many other bodies that have accountability functions, the most important of which are outlined in the Constitution, new mechanisms are also needed and provided for. We founded many of our recommendations in the proposed Constitution upon the principle that ministerial accountability to the House is vitally important but is not in itself a sufficient constitutional check on Government.

Articles 107–114

The importance of ministerial accountability also must not prevent other forms of accountability for specialist purposes being established. One of the most important instruments of accountability is the availability of information. That is why we have included strengthened provisions in the Constitution to make information more available. Governments do have incentives to hide information to avoid political embarrassment. We have more accountability mechanisms than existed 50 years ago. We need them and we need to build on them.

Parliamentary sovereignty—an outdated doctrine

One of the primary constitutional doctrines of the Westminster system of Parliament is parliamentary sovereignty. Although the term is not free from ambiguity, it means that the legal power of Parliament is unlimited. Parliament can legislate without restriction. There is no higher law-making authority. Parliament is supreme. The dangers of such unlimited powers

5 Anthony King and Ivor Crewe *The Blunders of Our Governments* (Oneworld Publications, London, 2014).

are obvious enough and not tolerated in most democratic countries. Furthermore, the doctrine is unrealistic. Traditionally governments do not do extreme and unreasonable things; that is because they wish to be re-elected. Nevertheless, the legal power exists here and it would be better in our view to accept that the real constitutional principle is not the sovereignty of Parliament but the democratic authority of the people. Democracy is not merely a numbers game. Indeed, in New Zealand there are now generally acknowledged to be some limits on the principle.

For example, as far back as 1956, Parliament passed a law requiring a special parliamentary majority to amend the requirement for parliamentary elections to be conducted under a secret ballot. This provision and five others critical to the democratic framework—including the current three-year parliamentary term—can only be changed by a 75 per cent majority in Parliament or a referendum of the electors. The same law is now found in the successor Electoral Act 1993.

These requirements for special majorities for very important constitutional safeguards have been universally followed since they were first enacted. It is now generally accepted that such "manner and form" restrictions, as they are known, are binding and cannot be ignored by a later Parliament. We are building on that tradition in the proposed Constitution to protect more institutions and principles in the same way. Their binding nature means that there are an increased number of matters which cannot be altered by a simple majority. It would seem to be a sound idea to set out the limits formally in a constitution rather than allow the constitution to be shaped by the remorseless ebb and flow of political developments.

Hiding behind the doctrine of parliamentary sovereignty allows the Government to effectively dominate the House of Representatives, even under our mixed-member system of proportional representation. It also allows Parliament to behave as though it is not bound by the Bill of Rights, which has serious implications for the rule of law.

To say that governments act in the name of democracy is politically naïve and neglects to explore the counterfactual concerning how political decisions are made and enacted.

Governments act to remain in power as long as they can and they tend to try to get away with whatever they can. The risk is that they will observe no limits so long as there are none. It is a reality in New Zealand that the Government cannot—and should no longer—be relied upon to respect constitutional boundaries. It has the capacity to command resources and influence situations and outcomes to the point where it not so much acts in the public interest as in the Government's political interest.

The effects of MMP

The biggest constitutional change in New Zealand in the last quarter of the 20th century was the adoption of the mixed-member-proportional system (MMP) of electing Members of Parliament, following the referendum held in 1993 in which New Zealanders voted to change their electoral system from the traditional first-past-the-post method (FPP). The House has been revitalised by MMP and it appears here to stay.

The electoral system was the subject of a referendum at the 2011 general election in which voters were asked to vote to keep MMP or change to another system. They were also asked to express a preference for one of the following voting systems: FPP, single transferable vote (STV) or supplementary member (SM).

In the event that a majority had voted for change, another referendum would have been held at the time of the 2014 election to choose between MMP and the system preferred in the 2011 referendum. But MMP won more than 50 per cent of valid votes cast, thus triggering an independent review of MMP by the Electoral Commission using a public consultative process to determine whether changes are necessary and desirable and make recommendations to the Minister of Justice. Its final report was presented to the Minister in October 2012 but it does not appear any action was taken upon it.

Under MMP the diversity of representation in Parliament is greater in terms of age distribution, gender, ethnicity and political views. There are now more political parties represented in the Parliament (currently seven). In one sense MMP was a reform of Parliament measure. It placed some restrictions on

Parliament being the "Fastest Law-maker in the West".[6] But it has not overcome problems with legislative quality.

Under FPP, since one party controlled a majority in Parliament and formed the Government, parliamentary supremacy was effectively wielded by the Cabinet. Under MMP this has continued to be so, and to a much greater extent than may have been anticipated. Minority government has been the predominant form of government since MMP.

In order to maintain the confidence of the House and ensure that the Government can survive, the biggest party enters into confidence and supply agreements with minor parties when attempting to form a Government. This means the passage of every piece of legislation that the Government proposes depends upon its ability to persuade a majority of MPs to vote with it. This process involves trade-offs, many of which are far from transparent.

In some respects, therefore, one effect of MMP has been to blunt the hard edge of Cabinet decision-making by adding into the mix increased amounts of political policy pluralism. Power has to be shared more than it used to be. There is more representation within the Cabinet decision-making system of diverse policy views, and politicians of different outlook and philosophy have had to work together more. The primacy of Cabinet and its processes remain under MMP but their dominance is reduced and there is room for more flowers to bloom. The Prime Minister and his other Cabinet colleagues have to convince more than their own party in order to produce change. Particularly noteworthy, compared with the classical Westminster model, has been the loss of absolute control over legislative outcomes by the Government.

But the system is still too Government-friendly. And much of the legislative power exerted by the Cabinet is exerted in conjunction with the public service behind closed doors. More light needs to be shone on these transactions and the bargaining that precedes the introduction of legislation into the House.

6 Geoffrey Palmer "The Fastest Law-Makers in the West" *New Zealand Listener* (New Zealand, 28 May 1977).

Taxing and spending

Lack of financial resources is a major constraint upon the policies of any Government. At the same time, Parliament has control of the public finances. This means that Governments must make proposals to raise money through taxation and to spend the money so raised for public purposes. Such proposals are scrutinised by Parliament and accepted, modified or rejected. The Constitution Act 1986 requires that Bills levying a tax, appropriating public money or spending public money must be passed through Parliament. Most significantly, each year the Minister of Finance proposes to Parliament a budget that sets out the Government's financial plans for that year, its taxation proposals and its expenditure proposals.

To ensure that this complicated set of arrangements works properly there is much work by the select committees on the expenditure proposals. The Auditor-General keeps a watch on the whole process to see that money is spent for the purposes for which it was appropriated. Under the Auditor-General's supervision, the Audit Office and other auditors audit all the Government accounts to ensure that everything is above board. There are many complications in this complex web of the Government's fiscal and financial system, the details of which are set out in the Public Finance Act 1989 and we do not have the space to go through it here. New Zealand has a long history of financial rectitude in its public finances, and by and large the system works quite well. We are not proposing much change to it.

Articles 54–60

What we are proposing is including in the Constitution the most salient principles of the public finance system in order to protect the constitutionally significant features of the system that are now contained in the Constitution Act 1986, the Public Finance Act 1989 and the Reserve Bank Act 1989. This will ensure fiscal responsibility, and sound money and financial stability.

Other changes

In addition to the fixed four-year parliamentary term already discussed, there are other changes to the way Parliament works that we recommend.

Articles 52 and 54

Parliament is a complicated place. Parliament has many important rules that are contained in the standing orders. The main text on parliamentary practice in New Zealand covers 770 pages.[7] Some of the features of the standing orders have constitutional significance. For example, the activities of the Regulations Review Committee, in acting as a watchdog against excessive use of regulations, is important. As such, some of the provisions contained in the standing orders need to be included in Constitution Aotearoa. And they have been.

Article 34

In a small Parliament we think it is important that the Speaker be entirely independent from any political party once elected. We recommend that the Speaker be elected by the House on a personal conscience vote. Once elected, the Speaker should not vote on issues before the House. The long habit of the New Zealand Parliament in having a Speaker nominated by the Government should cease.

The proposed Constitution overcomes the problems attached to the reserve powers that possibly can be exercised by the Governor-General in exceptional circumstances. Parliament is a body in continuous existence. The House of Representatives elects the Prime Minister. There is a fixed four-year parliamentary term. The House cannot be prorogued or adjourned by the Head of State.

The exceptional powers of parliamentary privilege enjoyed by the Parliament were revised and extended by statute in 2014.[8] We state the general principles only. But we try to define what the respective powers of the courts and the House are on this delicate matter. We do not favour the courts becoming involved in the application of parliamentary privilege, which is important for enabling the House to carry out its business. We do favour

7 David McGee *Parliamentary Practice in New Zealand* (3rd ed, Dunmore Publishing Ltd, Wellington, 2005).

8 Parliamentary Privilege Act 2014.

the position that the courts can decide whether a privilege exists. A clash between these two branches of government is to be avoided. People need to appreciate, however, that Parliament can punish by fine or imprisonment breaches of privilege and this needs to be limited. We have restricted imprisonment to one year. We favour codifying the law relating to parliamentary privilege, but that is an exercise for another day.