NEW ZEALAND CENTRE FOR PUBLIC LAW
Te Wānanga o ngā Kaupapa Ture ā Iwi o Aotearoa

New Zealand Journal of Public and International Law

VOLUME 15 ▪ NUMBER 1 ▪ JUNE 2017

THIS ISSUE INCLUDES CONTRIBUTIONS BY

Jonathan Boston
Timothy Endicott
Mark Hickford
Sarah Kerkin
Dawn Oliver
Sir Geoffrey Palmer

TE WHARE WĀNANGA O TE ŪPOKO O TE IKA A MĀUI
VICTORIA
UNIVERSITY OF WELLINGTON

New Zealand Journal of Public and International Law

Faculty of Law
Victoria University of Wellington
PO Box 600
Wellington
New Zealand

June 2017

The mode of citation of this journal is: (2017) 15 NZJPIL (page)

The previous issue of this journal was volume 14 number 2, December 2016

ISSN 1176-3930

Printed by City Print Communications, Wellington

Cover photo: Robert Cross, VUW ITS Image Services

CONTENTS

The **New Zealand Journal of Public and International Law** is a fully refereed journal published by the New Zealand Centre for Public Law at the Faculty of Law, Victoria University of Wellington. The Journal was established in 2003 as a forum for public and international legal scholarship. It is available in hard copy by subscription and is also available on the HeinOnline, Westlaw, Informit and EBSCO electronic databases.

NZJPIL welcomes the submission of articles, short essays and comments on current issues, and book reviews. Manuscripts and books for review should be sent to the address below. Manuscripts must be typed and accompanied by an electronic version in Microsoft Word or rich text format, and should include an abstract and a short statement of the author's current affiliations and any other relevant personal details. Manuscripts should generally not exceed 12,000 words. Shorter notes and comments are also welcome. Authors should see earlier issues of NZJPIL for indications as to style; for specific guidance, see the *New Zealand Law Style Guide* (2nd ed, 2011). Submissions whose content has been or will be published elsewhere will not be considered for publication. The Journal cannot return manuscripts.

Regular submissions are subject to a double-blind peer review process. In addition, the Journal occasionally publishes addresses and essays by significant public office holders. These are subject to a less formal review process.

Contributions to NZJPIL express the views of their authors and not the views of the Editorial Committee or the New Zealand Centre for Public Law. All enquiries concerning reproduction of the Journal or its contents should be sent to the Student Editor.

Annual subscription rates are NZ$100 (New Zealand) and NZ$130 (overseas). Back issues are available on request. To order in North America contact:

Gaunt Inc
Gaunt Building
3011 Gulf Drive
Holmes Beach
Florida 34217-2199
United States of America
e-mail info@gaunt.com
ph +1 941 778 5211
fax +1 941 778 5252

Address for all other communications:

The Student Editor
New Zealand Journal of Public and International Law
Faculty of Law
Victoria University of Wellington
PO Box 600
Wellington, New Zealand
e-mail nzjpil-editor@vuw.ac.nz
fax +64 4 463 6365

NEW ZEALAND JOURNAL OF PUBLIC AND INTERNATIONAL LAW

The New Zealand Centre for Public Law was established in 1996 by the Victoria University of Wellington Council with the funding assistance of the VUW Foundation. Its aims are to stimulate awareness of and interest in public law issues, to provide a forum for discussion of these issues and to foster and promote research in public law. To these ends, the Centre organises a year-round programme of conferences, public seminars and lectures, workshops, distinguished visitors and research projects. It also publishes a series of occasional papers.

Directors

Director	*Professor Claudia Geiringer*
Director	*Dr Dean Knight*
Associate Director	*Dr Carwyn Jones*
Associate Director	*Dr Guy Fiti Sinclair*
Centre and Events Administrator	*Anna Burnett*

For further information on the Centre and its activities visit www.victoria.ac.nz/nzcpl or contact the Centre and Events Administrator at nzcpl@vuw.ac.nz, ph +64 4 463 6327, fax +64 4 463 6365.

THE CONSTITUTIONAL SIGNIFICANCE OF THE ABOLITION OF THE LEGISLATIVE COUNCIL IN 1950

Sir Geoffrey Palmer QC*

For nearly one hundred years, New Zealand had an appointed upper house in its Parliament, called the Legislative Council. It was abolished by statute in 1950. The search for a substitute took some years, but ended with no proposal succeeding. This article reviews the history of the Legislative Council and revisits the reports done in attempts to revive a second chamber and the constitutional agitation that accompanied those efforts. It analyses the weaknesses of the Legislative Council and why reform proposals failed. It examines more recent efforts to reintroduce a second chamber, including the Bill for an elected Senate that was introduced into Parliament, alongside the measures to implement the Mixed Member Proportional election system in 1993. The Senate provisions were excised by the Select Committee considering the Bill. Efforts still continue to revive the idea of a second chamber, but the article concludes they are doomed to failure in New Zealand's particular political culture. It suggests that the salient function of a second chamber as a revising chamber for legislation should be achieved by improving the scrutiny of legislation in the House of Representatives.

I INTRODUCTION

Many democracies with which New Zealand tends to compare itself have bicameral Parliaments. Those with whom we are mostly closely associated, including the United Kingdom, Australia and Canada, have each experienced significant constitutional and political problems with their second

* Distinguished Fellow, Faculty of Law and New Zealand Centre for Public Law, Victoria University of Wellington; Global Affiliated Professor of Law, University of Iowa; Barrister.

The author is most grateful for comments and ideas from the political scientist Dr Elizabeth McLeay, Sir Kenneth Keith, Dr Andrew Butler and the anonymous reviewer. Scarlet Roberts provided research assistance and the New Zealand Law Foundation has provided a grant to assist the work which is part of the Constitution Aotearoa project mentioned in the article.

chambers that remain unresolved. Efforts at reform have been more or less constant in those countries, but without obvious success.[1]

New Zealand had an appointed upper house, known as the Legislative Council, for almost a century, but it was abolished in 1950. Recent efforts to revive the idea in a New Zealand context suggest the issue should be analysed again. While the theories that advocate bicameralism are rather thin, there are functions that a second chamber can perform. This article will argue that those functions can also be performed by an appropriately reformed unicameral legislature.

The purpose of this article is to revisit the history of the Legislative Council and the deliberations that followed its abolition. It will also deal with later efforts to revive bicameralism. It will attempt to extract from the experience its potential significance for contemporary constitutional reform. Since the abolition of the Council, discussions of constitutional reform in New Zealand have, on occasion, proposed the return of a second chamber of Parliament. This article suggests this is a road best not taken.[2] In the case of New Zealand, the preferable course would be to improve the scrutiny of legislation in the House of Representatives rather than to revive and establish a second chamber.

The intricate historical steps of the Legislative Council's constitutional dance have been well documented and analysed, especially by Professor Keith Jackson and Dr Harshan Kumarasingham.[3] The idea to revive the Senate was introduced as a Bill at the time the Mixed Member Proportional

---

1 See Vernon Bognador *The New British Constitution* (Hart Publishing, Oxford, 2009) and references to the potential for a reformed House of Lords in the United Kingdom in ch 6; Linda Trimble "Status Quo Unacceptable; Senate Reform Possible; Abolition by Stealth Anti-Democratic" (2015) 24(2) Constitutional Forum 33 on Senate reform in Canada; and Robin Archer "From an aristocratic anachronism to a democratic dilemma: an elected House of Lords and the lessons from Australia" (2013) 51 Commonwealth & Comparative Politics 267 for a discussion of the lessons to be learned from Australia's history of reforms in this area.

2 See H Benda "The Legislative Council" (1949) 1(2) Journal of Political Science 24; DJ Riddiford "A Suitable Second Chamber for New Zealand" (1951) 27 NZLJ 102 ["A Suitable Second Chamber"]; DJ Riddiford "The Case for a Corporate Upper House: A Reformed Upper Chamber" (1951) 3(2) Political Science 23 ["A Reformed Upper Chamber"]; GA Wood "New Zealand's Single Chamber Parliament: An Argument for an Impotent Upper House?" (1983) 36 Parliamentary Affairs 334 at 335–336; Andrew Stockley "Bicameralism in the New Zealand Context" (1986) 16 VUWLR 377; Sir Douglas Graham "Reflections on the Constitution" [1999] NZ L Rev 561; Whata Winiata "How Can or Should the Treaty be Reflected in Institutional Design?" in Colin James (ed) *Building the Constitution* (Institute of Policy Studies, Wellington, 2000) 205; Andrew Geddis "Parliamentary government in New Zealand: Lines of continuity and moments of change" (2016) 14 ICON 99; and Gareth Morgan "Gareth Morgan's Ratana Speech for the Opportunities Party" (Ratana, 24 January 2017), video and transcript available at <www.top.org.nz/the_opportunites_party_ratana_speech>.

3 See William Keith Jackson *The New Zealand Legislative Council; A Study of the Establishment, Failure and Abolition of an Upper House* (University of Otago Press, Dunedin, 1972); and Harshan Kumarasingham *Onward with Executive Power: Lessons from New Zealand 1947-57* (Institute of Policy Studies, Wellington, 2010) at ch 4. That chapter contains the constitutionally appropriate heading "Executive Power in Action: the Abolition of the Legislative Council".

voting method (MMP) was being considered in 1992. The whole experience can be mined to reveal insights about constitutional defects that still exist in New Zealand, particularly in relation to scrutiny of legislation, even if the introduction of a second chamber is not the optimal way to remedy the weakness.

II THE BROADER CONSTITUTIONAL TIMELINE

The slow march of New Zealand from colony to nation and the constitutional independence that followed the enactment of the New Zealand Constitution Act 1852 (UK) suggest the whole constitutional edifice needs to be re-thought. There never seemed to be an opportunity for the fundamentals of New Zealand's constitutional arrangements to be systematically considered during the whole period, even unto the present. They just evolved from the colonial constitution, though sometimes with substantial innovation, adaptation and change.

The establishment of responsible government arrived early – in 1856. The power to repeal most of the 1852 Act, save 21 provisions, was provided for in the New Zealand Constitution Amendment Act 1857 (UK). The abolition of the provinces came in 1876. Dominion status was acquired in 1907. New Zealand sat in its own right at the negotiations leading to the Treaty of Versailles, which ended the First World War. New Zealand joined the League of Nations as an independent nation. The Balfour Declaration of 1926, giving equal status between the United Kingdom and the Dominions, was followed by the Statute of Westminster 1931 (UK). New Zealand was nervous about the measure and did not adopt it until 1947 with the passage of the Statute of Westminster Adoption Act 1947. Abolition of the Legislative Council followed quite quickly.

A fascinating glimpse into the way in which New Zealand fitted into the constitutional arrangements of the British Empire, and later Commonwealth, is to be found in a book published in 1944 under the editorship of JC Beaglehole.[4] The purpose of the book was to discuss whether New Zealand should adopt the Statute of Westminster and made it clear that New Zealand should do so since "the original failure to adopt [the United Kingdom Act passed in 1931] was based on loyalty to an outworn formal imperial unity and on suspicion of the future."[5] The New Zealand Constitution Amendment Act 1973 removed doubt about the capacity to legislate extraterritorially and removed some obsolete provisions.

---

4 JC Beaglehole (ed) *New Zealand and the Statute of Westminster* (Victoria University College, Wellington, 1944). The book comprises five lectures, two by Beaglehole and one by FLW Wood, both historians; and one each by Professor RO McGechan, a lawyer, and Professor Leslie Lipson, a political scientist.

5 At xii.

The final step in repatriation of our constitutional arrangement was marked by the passage of the Constitution Act 1986 that revoked the application in New Zealand of the 1852 Constitution Act enacted by the United Kingdom Parliament.[6]

III A BRIEF HISTORY OF THE LEGISLATIVE COUNCIL

The New Zealand Parliament had a second chamber until 1 January 1951, close to 100 years. The Legislative Council first met in May 1854. The General Assembly of the Colony of New Zealand, established by s 32 of the New Zealand Constitution Act 1852 (UK), consisted of "the Governor, a Legislative Council, and House of Representatives."

At first, the Legislative Council was comprised of members appointed for life. After 1891, new members had a seven-year term, but with eligibility for re-appointment.[7] Members were not elected but nominated by the Governor. After 1868, there was no legal requirement for approval from London for appointment and appointments were made even before 1868 on the advice of New Zealand ministers.

The appointive system was controversial, even at its inception, as the debates in the United Kingdom Parliament on the 1852 Act show.[8] Additionally, opinion among the settlers in New Zealand favoured an elective chamber. Thus, the bicameral system began life under something of a cloud and never became a confident and secure body.

Indeed, the Council itself debated proposals for its reform more or less continuously over the years.[9] But nothing of significance could be agreed, except for the change from life membership. It was not possible to replicate in New Zealand anything like the House of Lords and yet the authorities in London had thought the interests of the Crown needed the protection of a Council. The 1852 Constitution Act did not define the powers of the Council.

The Act provided for the summoning of "not less in number than ten" persons as members of the Council. There was no upper limit prescribed in the Act, although for a time one was imposed through

---

6 For an authoritative legal account of how the law developed, see Philip A Joseph *Constitutional and Administrative Law in New Zealand* (4th ed, Brookers, Wellington, 2014) at 119–122.

7 Legislative Council Amendment Act 1891, s 3.

8 See (21 May 1852) 121 GBPD HC 922, where Sir William Molesworth objected to an Upper House composed of members nominated for life and to the superintendants being nominated by the Governor.

9 Jackson, above n 3, at 154–165.

royal instructions.[10] That limit was removed altogether in 1861 and, thereafter, the risk of "swamping" by appointments from the government of the day was an ever-present threat.[11]

Bicameral parliaments were part of the classic Westminster system of government. In constitutional theory upper houses are regarded as having real legislative influence in revising legislation, improving it and providing the opportunity for sober second thought by delaying legislation.[12] As well, they can act as something of a check and a balance on the lower house and constitute a brake on the power of the executive.[13]

The theory cannot be seen to have worked out as intended in New Zealand. For much of the 19th century, the Chamber was reasonably effective in amending and promoting legislation. It clashed with the Liberal Government in 1891 and the Government found its Bills wrecked by amendments in the Council.[14] The difficulty was overcome by the Government securing the appointment of more members, a request refused by the Governor but acceded to by the Colonial Office when the Government successfully appealed to London to overrule him – an important victory for Premier John Ballance. William Pember Reeves, a minister of the Government at that time, pointed out that the Liberal majority in the country was hardly recognised in the Council at all:[15]

> In important divisions, Government measures passed by decisive majorities in the popular Chamber could only muster two, three, four or five supporters in the Council. This not only meant that a hostile majority could reject and amend as it pleased, but that measures were not even fairly debated in the Upper House. Only one side was heard.

The Premier Richard Seddon, in his long period in office, effectively bent the Council to his will and neutralised its wrecking characteristics.[16] As time went on, it was reduced to becoming a source of patronage for ministers to reward party stalwarts and supporters. It was not perceived as independent. It became irrelevant. It lacked democratic legitimacy or functionality and commanded

---

10 At 20.

11 Leslie Lipson *The Politics of Equality: New Zealand's Adventure in Democracy* (University of Chicago Press, Chicago, 1948) at 140.

12 Jackson, above n 3, at 103; and Geoffrey Palmer *New Zealand's Constitution in Crisis* (John McIndoe, Dunedin, 1992) at 123–125.

13 Jackson, above n 3, at 94–122.

14 Lipson, above n 11, at 357–358.

15 William Pember Reeves *The Land of the Long White Cloud* (3rd ed, Allen and Unwin, London, 1924) at 311.

16 Tom Brooking *Richard Seddon: King of God's Own* (Penguin, Auckland, 2014) at 361.

little public respect. James Belich suggests that this was the time during which the Council was "effectively almost castrated and had little influence until its abolition in 1950."[17]

Calls for reform became insistent and the leader of the Reform Party, WF Massey, included a policy of reform in the party's 1912 election policy. Massey's key argument was that appointees lost their independence rapidly and became subservient supporters of the party in power.[18] Around the same time, Sir Francis Bell, a leading Wellington lawyer, was appointed to the Council as its leader, the first non-Liberal party appointment in 21 years.[19] He was also a minister and supported the idea of reform. The fact that he was a recent arrival in the Council did not assist his task of convincing the Council to reform itself. After several attempts, he procured the passage through the Parliament of the Legislative Council Act 1914. It provided for a Council, elected by proportional representation. It was a stern struggle to secure this legislation, as the Council was resistant to it.[20]

The reformed Council was to comprise 40 elected members, to be elected at the time of elections for the lower house and representing four electorates, into which the whole country was divided.[21] The legislation had many merits over the Council's original framework. It could not be swamped by new appointments. It defined with some particularity the powers of the Chamber, particularly in relation to money bills and financial matters, making it subordinate to the House of Representatives.[22] By being elective, it would have enjoyed democratic legitimacy.

The Act was never brought into force. The First World War began in the same year the legislation was passed. A coalition government was formed during the war but the price of Liberal membership was that the legislation not be brought into force. Nevertheless, the statute remained on the statute book until formally repealed in 1950, as part of the legislation that actually abolished the Council. How different New Zealand would have been had it been implemented must remain a matter of speculation.[23]

An interesting account of the political developments surrounding the legislation is to be found in a chapter of Bell's biography written by William Downie Stewart – a contemporary, politician and

---

17 James Belich *Paradise Reforged* (Allen Lane, Auckland, 2001) at 42–43.

18 See William Downie Stewart *Sir Francis H D Bell: His Life and Times* (Butterworth, Wellington, 1937) at 96, quoting Massey's announcement of the policy at Wellington Town Hall in 1911; and Lipson, above n 11.

19 See the entry by WJ Gardiner in Claudia Orange and WH Oliver (eds) *Dictionary of New Zealand Biography* (Bridget Williams Books, Wellington, 1993) vol 2 at 35.

20 Jackson, above n 3, at 166–176.

21 Legislative Council Act 1914, ss 10 and 14.

22 See pt 1.

23 See generally Harshan Kumarasingham "What if the upper house had not been abolished?" in Stephen Levine (ed) *New Zealand as it Might Have Been. Volume 2* (Victoria University Press, Wellington, 2010) 253.

one of Bell's ministerial colleagues in the 1920s.[24] Council members were not happy to face the uncertainties of elections and while Bell had powerful arguments, he lacked diplomacy. Downie Stewart argues that, for years, Bell "would wear this measure like the Ancient Mariner's albatross tied round his neck."[25] Electors were little interested in the Council. Yet, there was no shortage of people wanting to be appointed. Bell was a formidable lawyer and he designed the legislation for reform and oversaw its drafting. But it was side-tracked and delayed "and the next few years of this ill-fated reform was to cause him endless vexation."[26]

In the end, new appointments had to be made to the Council to secure passage of the reform measure in 1914. Due to compromises that had been made, the new law was to come into effect on 1 June 1916. After the 1914 election, in which the Reform Party was returned with a very slender majority, the Liberal Party made it a condition of joining the national unity Government that legislation to create a Senate would not come into force during the life of that Government.[27] That forced an amendment to be made to the legislation such that it would not come into force without a further proclamation – a significant and, in the end, decisive victory for the reform's opponents. By the time the Coalition came to an end in 1919, opinion in the Reform Party had become lukewarm about the whole proposal and Massey had gone off the idea because of the experience with proportional representation in the Australian Senate.[28]

His biographer says Bell's real reason for supporting the reform was that an elected Council could not be swamped by new appointments and would be "prepared to resist any revolutionary process."[29] In 1951, the Attorney-General, Clifton Webb, remarked that Sir Francis Bell's purpose was "to prevent a Labour Government from gaining control – that is, to prevent what in point of fact happened."[30] Bell had, however, a real interest in quality legislation and wanted to have safeguards against hasty legislation. He saw the Council as "the only safe constitutional check or balance against violent swings of the political pendulum, and the erratic oscillations of democratic opinion."[31] So it was that, in a dubious constitutional development, the measure remained enacted but never brought into effect.

Because the reform was never implemented, the unreformed chamber remained something of a political time-bomb. The First Labour Government that was in power from 1935 until 1949 had at

---

24 Downie Stewart, above n 18, at 93–104.

25 At 94.

26 At 97.

27 At 98; and Lipson, above n 11, at 359–362.

28 Downie Stewart, above n 18, at 98.

29 At 102.

30 Riddiford "A Suitable Second Chamber", above n 2, at 105.

31 Downie Stewart, above n 18, at 104.

times said it would abolish the Council as a matter of policy, although it never attempted to do so while in power. In fact, Labour appointed a large number of new members to the Council, almost all of whom were drawn from the ranks of its own supporters.[32] The National Party thought it was a superannuation scheme for Labour supporters.[33] Both the Labour Party and the Liberal Party previously were antagonistic to the Legislative Council, perhaps giving substance to the view that a second chamber is essentially an institution that will hold back progressive policies put forward by elected representatives and is, therefore, of dubious democratic provenance.

IV SID HOLLAND'S CONSTITUTIONAL LEGACY

Long in opposition and hungry for office, the National Party saw a political opportunity. The Leader of the National Opposition, SG Holland, in 1947 proposed a Member's Bill to abolish the Council.[34] It was defeated. There followed a series of constitutional manoeuvres within the Parliament that set in motion the events that led to a substantial constitutional change. Many in the Labour caucus would have voted for Holland's Bill. However, Prime Minister Fraser held it up by pointing out that the New Zealand Parliament did not have the power to abolish the Council.[35]

Two things happened which contributed to this issue gathering enough momentum for change. First, the Government legislated to adopt the 1931 Statute of Westminster that New Zealand had always been ambivalent about, reluctant to cut the apron strings with the United Kingdom.

Secondly, Parliament passed the New Zealand Constitution (Request and Consent) Act 1947 asking the British Government to legislate and grant New Zealand full independence. The United Kingdom Parliament soon passed the New Zealand Constitution (Amendment) Act 1947 (UK). This repealed the New Zealand Constitution Amendment Act 1857 and empowered the New Zealand Parliament to "alter, suspend or repeal" all or any of the 1852 Act. Whether this belts and braces approach was legally necessary may be doubtful, but certainly these actions put the issue beyond doubt. New Zealand could, thereafter, abolish the Legislative Council.

The legal arguments as to why the legislation was necessary were most ably analysed by Professor RO McGechan in a book edited by JC Beaglehole, published in 1944. The legal complexity was substantial and the case for securing clarity persuasive. There were three elements to the issue: extra-territoriality, repugnancy and limitations imposed by Imperial statute.[36] To reform or remove the

32 Lipson, above n 11, at 358–360.

33 Kumarasingham, above n 3, at 105; Lipson, above n 11, at 361.

34 TO Bishop and RM Algie "Reports of the Constitutional Reform Committee" [1952] IV AJHR I18 at 6–7.

35 At 6.

36 RO McGechan "Status and legislative inability" in JC Beaglehole (ed) *New Zealand and the Statute of Westminster* (Victoria University College, Wellington, 1944) 65 at 98.

provisions in the 1852 Constitution Act that still remained, it followed from this analysis, would require adoption of the Statute of Westminster.

At the same time, New Zealand was going through the motions seemingly required for independence, a Joint Constitutional Reform Committee of the two Houses was set up to consider the issue of the second chamber. In 1948, it reported that it was unable to agree on a recommendation.[37] Holland, still in opposition, introduced his Bill and again it was defeated. In 1949, the National Party ran in the general election on a platform of abolition of the Council. It won and proceeded to implement its policy.

Many of the difficulties encountered with securing agreement on the 1914 legislation were overcome by appointing members to the Council who could be relied upon to vote for abolition. They were known as the "suicide squad". Some of them may have changed their mind after appointment, so Holland appointed some more.

The strategy adopted by Holland was cunningly devised not to oppose bicameralism outright. The policy was to abolish the Council and then see what, if any, replacement may be required. Too many members of Holland's caucus, RM Algie, JR Marshall and Speaker Sir Matthew Oram amongst them, were ardent proponents of a second chamber. Thus, adoption of a blunt rejection of bicameralism was not feasible. Indeed, Sir John Marshall in his memoir published in 1983, well after he had retired from Parliament, wrote:[38]

> I still hold to the view that an Upper House would be a worthwhile constitutional safeguard to place some curb on the unrestricted legislative power of our present single chamber Parliament.

V A PERIOD OF CONSTITUTIONAL AGITATION

Abolition of the Legislative Council led to a prolonged period of constitutional consideration, even agitation, concerning an alternative to the Legislative Council. A procession of petitions and select committee reports lasted until the mid-1960s when the efforts, having failed to produce a new second chamber, finally petered out. The 1952 report is worthy of close study and made a strong attempt to rehabilitate the idea of a second chamber and provide a function for it.[39] But it was for a nominated chamber. The proposition was re-examined along with others in 1961, but was again unsuccessful.[40] But the idea never quite died. During the Bolger Government, a bill for a second

---

37 See *Statements Prepared for the Joint Constitutional Reform Committee* (Legislative Department, Wellington, 1948).

38 John Marshall *Memoirs. Volume 1: 1912 to 1960* (Collins, Auckland, 1983) at 158.

39 See generally Bishop and Algie, above n 34.

40 GG Grieve "Report of the Public Petitions M to Z Committee" [1961] IV AJHR I2–I2A; and RE Jack "Report of the Constitutional Reform Committee" [1964] III AJHR I14. See also Les Cleveland and Alan Robinson (eds) *Readings in New Zealand Government* (Reed Education, Wellington, 1972) at 14–145 and 183–271.

chamber was introduced. Sir Douglas Graham, Minister of Justice in the Bolger Government, went on record as favouring a second chamber.[41]

The agitation in the 1950s and 1960s broadened out to include demands not only for a second chamber, but also for a written constitution and a bill of rights. Two positive constitutional developments may be ascribed indirectly to these efforts: the introduction of the Ombudsman in 1962 and the agreement between political parties, followed by legislation, to entrench key democratic provisions for fair and free elections, now contained in s 268 of the Electoral Act 1993. This was described by JR Marshall, the Attorney-General at the time, as "a genuine and, I believe, successful attempt to place the structure of the law above and beyond the influence of Government and party."[42]

The debate on the second chamber centred around the question that Holland had left open for further consideration: should a new second chamber be adopted and if so, what form should it take? Before the Legislative Council was abolished, a second joint Constitutional Reform Committee of the two Houses was established in September 1950. Members from the Legislative Council continued to sit on the Committee even though the Council had been abolished. Its report was published in 1952, recommending an upper house of 32 members called the Senate.[43] Members were to be appointed by leaders of the parties in the House of Representatives according to their numerical strength there for a term of three years. It was to be empowered to hold up Bills for two months, but no longer. It was to have the same powers over legislation as the previous Legislative Council. The Labour Party refused to participate in the Committee and it was made up of members of both the House of Representatives and the Legislative Council, who had to be included by resolution of the House of Representatives since the Council had been abolished. Neither would Labour debate the report in the House. That effectively killed in the House an idea that lacked any popular support outside it.[44]

But the demand for a second chamber did not die completely, especially within the National Party. One response to this was the Government's offer to introduce more safeguards by passing the entrenched provisions mentioned above in the 1956 Electoral Act. However, this did not silence the critics who thought more was needed to provide a proper check against executive power within the legislature.

Pressure groups to seek constitutional change were formed. One of the most well-known was led by the Constitutional Society for the Promotion of Economic Freedom and Justice in New Zealand Inc. Two of its leading members were JN Wilson QC of Auckland, who later became a judge of what

41 Douglas Graham "Reflections on the Constitution" [1999] NZ L Rev 561, arguing for a 30 member senate as an alternative to Mixed Member Proportional voting.

42 (26 October 1956) 310 NZPD 2839, per JR Marshall. For Marshall's own account of this reform, see Marshall, above n 38, at 246–248.

43 Bishop and Algie, above n 34, at 18.

44 At 8.

is now the High Court, and AC Brassington, a Christchurch lawyer and a former teacher of constitutional law at the University of Canterbury Law School. They presented at a number of select committee hearings.

The Society was thought by some to be an organisation designed to curb the forces of socialism. In the early 1960s, considerable attention was focused on constitutional issues. But those issues never became a matter of prime public interest, although they persisted for a surprisingly long time. The issues did not divide altogether along party lines; it was not a simple right and left political issue. The Society's membership list included long-time unionist, Labour stalwart and Legislative Councillor on several occasions, JT Paul. He had been a member of the Legislative Council at the time of its abolition and was a member of the Constitutional Reform Committee that reported in 1952.[45]

The Society was backed with resources from the prominent brewer, Sir Henry Kelliher, and formed 16 branches around New Zealand, with a monthly newsletter. Sir Matthew Oram, a former Speaker of the House of Representative, became its President on his retirement from politics in 1957.[46]

Another group of business- and professional men forged a different group in Wellington, the Legislature Reform League. The Constitutional Society had for a while largely ignored the issue of a second chamber in favour of concentrating on the issue of a written constitution. But by 1959, the aims of the two organisations merged according to the account given by Professor Jackson.[47] Two major campaigns were organised by the Society in 1960 and 1963, focusing on the re-establishment of a second chamber and the introduction of a written constitution with a bill of rights.

While these efforts did not ignite the political imagination of the people, they were important within the councils of the National Party, particularly when it was in opposition from 1957 to 1960. In its 1960 election policy offerings, National offered to investigate the issues of a bill of rights and written constitution and to introduce an Ombudsman. These measures were clearly designed as a constitutional offering to head off the demands for a second chamber in the legislature.

The Constitutional Society organised a petition praying for a written constitution and a second chamber. After National's 1960 victory, pressure intensified and, in 1961, the Society submitted a

---

45 Erik Olssen "Paul, John Thomas" Te Ara <www.teara.govt.nz/en/biographies/3p16/paul-john-thomas>. In his entry in Te Ara, historian Erik Olssen notes: "Paul discovered himself to be a constitutional conservative and devoted himself to its salvation. After the abolition of the Council in 1950 he played an active role in founding and promoting the Constitutional Society."

46 John E Martin *The House: New Zealand's House of Representatives 1854-2004* (Dunmore Press, Palmerston North, 2004) at 234.

47 Jackson, above n 3, at 202–205.

petition, with proposals for a draft constitution and a Senate. Drafted proposals were also later produced.

Submissions on these proposals from academic political scientists and lawyers at Victoria University were in vigorous opposition to all the proposals, although they did favour a four-year electoral term.[48] The Petitions Committee did not make any recommendation on the petition. One point worthy of notice is that only political scientists, lawyers and politicians seemed to take any interest in the issues concerning the Legislative Council and the debates its abolition spawned. At no time did there appear to be any widespread public demand for the idea of a second chamber in any form.[49]

The Society launched a further petition in 1963, the same year the National Party introduced a bill containing a bill of rights based on the 1960 Canadian model that did not involve superior law. This and the petition were referred to a select committee. In 1964, the Constitutional Reform Committee recommended that the Bill of Rights be not allowed to proceed. And again the proposal for a second chamber failed.[50]

This record is a testament to how hard it is to revive the bicameral idea in New Zealand. The proponents saw the reality and added further arrows to their constitutional quiver, a written constitution and a bill of rights.

VI AC BRASSINGTON'S PAPER

In the midst of these debates in 1963, Mr Brassington presented a paper to the Triennial Conference of the New Zealand Law Society.[51] In those days, that was a highly significant occasion in the life of the law. Brassington was something of an eccentric and there exists a delightful pen portrait published about him.[52] Brassington appeared in front of the Constitutional Reform Committee on behalf of the Society. I was struck reading his thoughtful piece how little has changed since then.

He complained of the inadequacy of the "vestigial remains of a statutory instrument for Colonial government" in the form of the New Zealand Constitution Act 1852 (UK).[53] That case was clearly well based, but it took a further 23 years before the need was met in the Constitution Act 1986.

---

48 See Grieve, above n 40.

49 Lipson, above n 11, at 360.

50 See generally Jack, above n 40.

51 AC Brassington "The Constitution of New Zealand: Aspects of Change and Development" [1963] NZLJ 213.

52 Glyn Strange *Brief Encounters* (Clerestory Press, Christchurch, 1997) at 43–48.

53 Brassington, above n 51, at 213.

Brassington lamented that most practicing lawyers had shown little interest in constitutional law.[54] He admitted that New Zealand may just continue to muddle along.

For Brassington, constitutional law:[55]

> … defines the functions and regulates the structure of the Legislature, the judiciary and the executive, and their relationship to each other, it impinges in its own special way upon politics, economics and the social sciences, thereby opening to lawyers a realm of wide human interest.

His call to arms was that adjustment to change be "intelligent, orderly and peaceful", then the constitution should be "as perfect and adaptable as we can make it."[56]

He reviewed developments between 1907 when New Zealand became a Dominion and 1947 when it passed legislation adopting the Statute of Westminster that removed the remaining restrictions on the capacity of the New Zealand Parliament to legislate. He linked that new-found power to the abolition of the Legislative Council three years later.[57] He regarded the action as a bid for absolute power. He concludes: "a constitution may be subverted as the result of a combination of political circumstances propitious to an attack on it."[58]

Brassington conceded that the appointive character of the Council was relatively ineffective. The term was seven years. There were 25 members in 1950. The National Government procured the change by appointing new members to bring the total to 53, ensuring it had the numbers in the Council for its abolition.

Brassington deplored the abolition of the Legislative Council, but admitted that its "resistance to its own reform was perhaps an important reason for its ultimate failure to preserve not only itself but the principle of checks and balances."[59] He yearned for the Legislative Council Act 1914, the work of Sir Francis Bell, which provided for a Council elected by proportional representation. He concluded his treatment of the second chamber by saying the continued existence of the Council "was felt as a potential hindrance to the growing power of the executive."[60]

---

54 At 214.

55 At 213.

56 At 214.

57 At 214.

58 At 214.

59 At 215.

60 At 216.

Concerning the entrenchment provisions of the Electoral Act 1956 (now contained in s 268 of the Electoral Act 1993), he discussed the inability of the Parliament to bind its successors.[61] Modern constitutional opinion is that manner and form entrenchment is legally effective and would be enforced by the courts, but that was not the official view in 1956 and arguably wrong even then. Brassington thought the 1956 Act an important development that may be intended "to give some stability in a future situation in which a dominant political party might attempt by altering electoral procedures to secure its own recurrent return to power."[62]

As well as commenting on issues surrounding the Legislative Council, Brassington complained that New Zealand's constitution is inaccessible. He said "the public cannot readily inform themselves of the barest essential about our constitution and its workings."[63] He also criticised the legal framework that allows for the creation or abolition of law by a parliamentary majority of one. A government that wears "the paraphernalia associated with Parliamentary sovereignty, might well wear thin", he argued.[64] It should be recalled that the Labour Government of 1957–1960 had a majority of one. Mr Brassington regarded the legislative process as being too hasty and not sufficiently considered.[65]

The solution to these problems, as Brassington saw it, was to introduce a written constitution with a second chamber. He also discusses a bill of rights to protect fundamental rights, although an entrenched bill of rights in his view foundered on the rock of parliamentary sovereignty.

He thought the special legal position of Māori was as vulnerable to attack as the fundamental freedoms were.[66] It is perhaps noteworthy that Brassington did not doubt in 1963 that Māori occupied a special legal position, a view that quite a number of New Zealanders still do not agree with. The problems of majority tyranny certainly worried Brassington, and with good reason.

VII IS THE CASE FOR A SECOND CHAMBER STILL DEAD?

In retrospect, it can be argued that both the Constitutional Society and Mr Brassington were barking up the wrong constitutional tree in advocating a new upper house. Restoration began as their major goal and the question of the written constitution and bill of rights surfaced later.

New Zealand's first Professor of Political Science, Professor Leslie Lipson, was scathing in his assessment of the Legislative Council. He argued in 1948 that this must be considered one of the most

---

61 At 216–218.

62 At 218.

63 At 218.

64 At 219.

65 At 220.

66 At 223.

futile and ineffective second chambers in the world.[67] It had no share in the decisions that really count. Lipson was of the view that the Council only did useful work through its Statutes Revision Committee, concentrating on drafting and errors in the text of bills – a function he thought could be carried out by a committee of the House of Representatives, as it was after the Council was abolished.[68]

This was followed in 1954 by a devastating judgment about the Council made by Professor KJ Scott in a book about New Zealand's constitutional development published in London:[69]

> It was not an effective revising body; it did not prevent the passing of hasty and ill-considered legislation; it did not relieve members of the Lower House from the arduous committee work; and it did not represent a distinct interest in the community.

These judgments must have made the task of those who wanted to re-establish the Council difficult indeed. Professor Jackson's empirical research shows that in the course of its history the Council amended 34 per cent of the bills referred to it, but only 9.4 per cent between 1936 and 1950.[70] Further, only 6.5 per cent of public bills originated first in the Council between 1891 and 1950.[71] The record suggests a diminishing level of useful activity on the part of the Council.

The idea of a second chamber did not die, however, with the failure of the Constitutional Society's efforts. When the Royal Commission on the Electoral system reported in 1986, it recommended a mixed-member proportional electoral system based on the German system.[72] The two main parties in the New Zealand Parliament under the first-past-the-post system, National and Labour, were both opposed to it. Due to political manoeuvring too complex to go into here, the new system was ultimately adopted by referendum and the first election under it was held in 1996.[73] In the 1990 election campaign, the National Party offered to take directions from the people on the electoral systems. It also had an election manifesto commitment to establish a senate, as an alternative to reforming the electoral system.[74]

---

67 Lipson, above n 11, at 360.

68 At 361.

69 KJ Scott "Parliament" in JL Robson (ed) *New Zealand: The Development of its Laws and Constitution* (Stevens, London, 1954) 30 at 38.

70 Jackson, above n 3, at 239.

71 At 238.

72 John Wallace and Others *Report of the Royal Commission on the Electoral System: Towards a Better Democracy* (December 1986).

73 See generally William Keith Jackson and Alan Mcrobie *New Zealand Adopts Proportional Representation* (Ashgate, Aldershot (UK), 1998).

74 (15 December 1992) 532 NZPD 13157 per DAM Graham, Minister of Justice.

The pressure behind the Royal Commission's recommendations were building among the public, if not among the MPs. In the special indicative referendum conducted on 19 September 1992, in which 55 per cent of eligible voters voted, 85 per cent were in favour of change to the voting system.[75] And of the four voting systems on offer, 70 per cent were in favour of MMP. A further binding referendum was then inevitable.

In December 1992, the Government introduced an Electoral Reform Bill that defined the grounds upon which a binding referendum would be held in conjunction with the 1993 general election. The Minister of Justice at the time, the Hon DAM Graham, introduced a Bill that was massive, more than 300 pages, since it had to set out in full the law as to how the new voting system would work in the event it was preferred by the electors to the existing system.[76] He expressed in his speech that there was some disquiet about the absence of checks and balances in New Zealand where there was only one House and where governments were rarely defeated in that House. Quite apart from the change to the electoral system, he asserted there was a second issue: "whether there is a need for greater constraints on the Executive, and if so, whether that should be achieved by the creation of a Second Chamber or Senate."[77]

Parts XI–XVI of the Bill were termed the Senate Bill 1993. The Senate Bill was to come into force only if the first-past-the-post system were retained at the referendum.[78] And even then, its creation would have to be supported by a majority at referendum. It was described by the Minister as a "House of Review."[79] The proposed Senate was to have 30 members elected from six multi-member constituencies with five members each.[80] These were to be known as senatorial districts. Two were in the South Island and four in the North Island.[81] Boundaries were to be set by the Representation

75 Geoffrey Palmer and Matthew Palmer *Bridled Power* (4th ed, Oxford University Press, Melbourne, 2004) at 11.

76 Electoral Reform Bill 1992 (209-1).

77 (15 December 1992) 532 NZPD 13157 per DAM Graham, Minister of Justice. The National Party put in a substantial amount of work on constitutional issues before and after the 1990 election. A report of the Electoral Law Reform Committee to the Caucus in September 1990 recommended the party continued its opposition to the introduction of an entrenched bill of rights, acknowledged that scope existed for more frequent use of referenda and proposed indicative non-binding referenda of the type that were adopted by statute in 1992, opposed a four-year term while the deficiencies in the electoral system remained and recommended an election Manifesto Commitment to hold a referendum on electoral law matters and to include questions whether a second chamber should be introduced. The Law Reform Division of the Department of Justice produced detailed and extensive issues papers in March 1992 on the establishment of a second chamber. The proposal was well worked through, it was not some casual proposal.

78 Electoral Bill 1992 (209-1) at iii.

79 (15 December 1992) 532 NZPD 13158 per DAM Graham, Minister of Justice.

80 Electoral Bill 1992 (209-1), cl 283.

81 Clause 280.

Commission. Both Houses would come for election at the same time. Voting for the Senate was to be by Single Transferable Vote.[82]

The Minister set out a vision for the Senate that steered a middle course between extremes: it was to have power and not be useless, but it would not be co-equal with the lower house and would not be able to produce deadlock, only delay.[83] The House of Representatives would be able to override resistance. This was designed to provide incentives for government to make changes to legislation. It was to provide a second opinion. Bills could be introduced in the Senate.[84] But it could not reject any bill or introduce money bills.[85] Its powers of delay were to be limited to one month. The Minister concluded his speech by suggesting that the Select Committee considering the Bill may also wish to consider whether the parliamentary term should be extended to four years.

The lead speaker for Labour, the Hon David Caygill, said "the only reason that the Senate is included in the legislation is that the National Party was silly enough to put it in its manifesto last year."[86] He thought there was no significant case to be made for a senate and there had been no substantial public discussion about the proposal and it should not proceed. He suggested it was a means of procuring a bias to encourage people to vote against MMP. The contents of the Bill establishing the Senate were detailed and complete with 172 provisions.

The Senate proposal was killed by the Select Committee. The chair of the Select Committee, the Hon Murray McCully, giving the report back speech, said:[87]

> A significant number of submissioners argued that the Senate option unduly complicated what was already a difficult and complex question. The committee felt that it should remove any room for such criticism, and therefore reports the Electoral Reform Bill back without Parts XI to XVI, which have been constituted into a separate Bill called the Senate Bill, which remains available for the select committee to consider should the present first-past-the-post system be retained at the forthcoming referendum.

The referendum resulted in MMP being adopted and no more has been heard of the Senate Bill, but the proposal could revive.

---

82 At v.

83 Clause 277.

84 Clause 276.

85 Clauses 273–275.

86 (15 December 1992) 532 NZPD 13163.

87 (22 July 1993) 536 NZPD 16729 per Hon Murray McCully, Minister of Customs.

VIII A SECOND CHAMBER AND REPRESENTATION

Dr Gareth Morgan's new political party, the Opportunities Party, advocates a written constitution that incorporates obligations under the Treaty of Waitangi. He sees a new upper house as "defend[ing] our constitution, which has at its centre, the Treaty of Waitangi."[88] He expresses the view that he wants to take "sovereignty" away from Cabinet.

He sees the establishment of an upper house as the means of achieving these goals. He says:[89]

> My dream would be that the two treaty signatories are equally represented in the Upper House which, while deferring to the sovereignty of parliament, the Lower House – has the ability to highlight to the public weaknesses in intended legislation, as well as the ability to refer to the Courts issues of constitutional breaches. With the Constitution firmly including the principles of the treaty, this should ensure the interests of both tangatawhenua [sic] and the other societies that make up the "New Zealanders", are protected and nurtured.

In the full statement of the Opportunities Party policy entitled "Democracy Reset", the proposal for a second chamber is elaborated.[90] The thrust of the whole policy is that democracy has been eroded in New Zealand and the key issue is how to restore public participation. The policy suggests that had a second chamber existed, Sir Robert Muldoon would not have been able to get away with what is described as an election bribe relating to the National Superannuation Policy in 1975, a somewhat doubtful proposition. The argument is that "an Upper House would long ago have turned over such political pandering as Constitutionally unsound."[91] That appears to be a proposition that the record of the Legislative Council of New Zealand would not support either.

In the policy, it is argued that an upper house would reduce the concentration of executive power. The upper house will be able to ask the House of Representatives to reconsider legislation it has passed. But its power will be recommendatory only. It is a power to scrutinise and suggest amendments but not to insist on them. It would stop the fast tracking of legislation and force more debate about dubious legislation. The policy does not say how the membership will be determined. It may have a mix of appointed and elected members. And it could be on a different cycle than the House of Representatives. The upper house would also have special functions to protect Māori interests.

The policy has two essential ideas. The creation of a legislative process that is slower and more deliberate; and the protection of Māori interests. These two ideas are both important, but they are not necessarily connected.

---

88 Morgan, above n 2.

89 Morgan, above n 2.

90 The Opportunities Party "The Opportunities Party Democracy Reset" <www.top.org.nz>.

91 At 3.

The arguments that have been advanced from time to time to have Māori interests represented in such a chamber on a 50–50 basis face serious difficulties. First, public opinion is unlikely to support such a development. Providing weighted representation for one group in the community is unlikely to be politically acceptable or in accordance with democratic theory, absent a shift in public sentiment. There already exists a strong view on the part of portions of the public against the Māori electoral seats. Yet, an upper house that specifically involved protecting indigenous interests would necessarily involve some sort of representational preference.

The case for recognition of indigenous rights has merit. But how the aim can be advanced through a second chamber is much less sure. The idea has been around at least since 2000 when it was advanced by Professor Winiata, drawing upon reforms within the New Zealand Anglican Church.[92] It has never secured widespread political traction. The proposals for second chambers in New Zealand have been dogged by undemocratic features, first overtones of a landed aristocracy in the early days and later devising a chamber that could be elected, yet would do useful work without impeding an elected House of Representatives. No such design has yet appeared that commands the necessary support and producing such a design looks to be impossible.

The key issues that arise in relation to Dr Morgan's proposal are:

(1) Would the Chamber or any portion of it be elected by electors on the electoral roll?

(2) If there are to be appointed members, how would they be appointed and by whom?

(3) Would it be iwi?

(4) How would representation of urban Māori be accomplished?

(5) What would the precise powers of the new Chamber be?

(6) How long could it hold legislation up for?

(7) To whom would the members of the new Chamber be accountable?

(8) How would such a proposal mesh with the representation issues and the equality of voting power that is so much a feature of the New Zealand representative system?

(9) How does one determine which issues and interests affect Māori particularly as opposed to the general population?

These problems seem to me to be difficult, if not insoluble.

92 Winiata, above n 2.

IX HOW TO IMPROVE SCRUTINY WITHOUT A SECOND CHAMBER

Scrutinising legislation tends to be an arcane task not understood by the public. While important, it is not a constitutional duty of Parliament that is obvious to many people. The Council for many years seemed to have lacked any utility and its abolition was not mourned by the public.[93]

The development of a modern comprehensive select committee system in the 1980s, in which almost all government bills are scrutinised and public submissions heard, has given the opportunity to revise legislation in a different way. Select committee scrutiny was in many ways an attempt to mimic what a second chamber would do with legislation. That does not mean, however, that the absence of a second chamber has no consequences. Its absence certainly facilitates the passage of legislation quickly and sometimes without adequate scrutiny.[94]

The issue of checks remains an important one, but the goal of achieving an adequate balance can be better facilitated by other mechanisms. While a carefully designed second chamber could scrutinise legislation, it is difficult to see in the New Zealand context how it could avoid either being a political competitor to the House of Representatives or a docile lap dog of the House. It is probably better to locate the checks and balances elsewhere. A unicameral Parliament seems to be here to stay.

A constitutional realist would conclude that the prospects of developing an effective second chamber in New Zealand at this juncture to be impossible. As Professor Philip Joseph observes, it is unlikely the public would support a second chamber; they want a smaller Parliament, not a larger one, as evidenced by a 1999 citizens' initiated referendum.[95] On this latter issue, public sentiment can be argued to be wrong. For a single House to function properly, it should not be so easily dominated by the government as is the case in New Zealand. To carry out the scrutiny functions properly, given the quantity of legislation that is passed, more MPs are needed. Legislatures have to be big enough to fulfil their many functions as well as to represent the voters. But let us put that issue to one side.

---

93 A good summary of the competing arguments regarding an upper house may be found in Ava Alexander and others "Unicameral v Bicameral: Pros and Cons" (16 October 2011) <www.avaalexander.com> at 41, quoted in Brian Gaynor "Brian Gaynor: In this game, we're beating the Aussies" *The New Zealand Herald* (online ed, Auckland, 20 May 2017):

> The strength of the unicameral system is its simplicity, transparency and efficiency – values which have generated responsive and accountable legislative systems in Nebraska and New Zealand. By contrast, the strength of the bicameral system is in its greater deliberations, expertise and legislative oversight. Either system, however, comes at a price. The unicameral system may lack effective oversight of both itself and the executive branch and the bicameral legislature may witness greater gridlock, log-rolling and buck-passing, in addition to less transparency.

94 See generally Geoffrey Palmer "Law-Making in New Zealand: Is there a better way?" (2014) 22 Wai L Rev 1.

95 Joseph, above n 6, at 357.

Recall Lipson's remark earlier that the statutes' revision work of the Council could be performed in the House of Representatives. This was carried out after the abolition of the Council through the old Statutes Revision Committee that was abolished in the 1986 changes to Standing Orders that established the comprehensive select committee system that exists still. The writer sat on the Statutes Revision Committee from 1979 until it was abolished and it seemed a highly effective scrutiny committee, although other committees at that time did not perform as well.

Public submissions to select committees in New Zealand are a bright point in the system and that needs to be preserved and enhanced. The tendency of governments, which have the numbers on a committee, to exploit them rather than to engage in debating and refining bills is a tendency that has developed. It sucks the vitality out of the select committee system. The New Zealand habit of determining everything in secret in caucus is alive and well. A powerful select committee system is essential to a Parliament that has only one House.

A number of factors have combined to make technical scrutiny of government legislation through submissions by the public to select committees less effective now than it was when the system was established. As an example of how the existing House could be reformed to improve legislative scrutiny, the submission of the New Zealand Law Society to the Standing Orders Committee in February 2017 is relied upon. The writer should disclose that he was involved, with Professor Philip Joseph, both in writing and presenting the Society's submission, so naturally supports it. This is only one example of how to improve scrutiny and there are others that could be developed. A portion of the submission is reproduced here with footnotes from the original to demonstrate in detail how to overcome some of the problems concerning adequate parliamentary scrutiny of legislation without a second chamber.

The New Zealand Law Society told the Standing Orders Committee in 2017 that quality legislation required some changes:[96]

> … the Law Society considers that changes to the Standing Orders are needed to enhance the quality of legislation. New Zealand has a tendency to pass too much legislation and often too hurriedly. Unlike most democratic legislatures, the New Zealand Parliament has only one House, and it seems that this has altered the speed with which legislation is progressed. The Standing Orders cannot deal with the problems of the legislative process that arise within the Executive Branch but they can improve the quality of parliamentary scrutiny of Government Bills.

With the bifurcated responsibilities for legislation in New Zealand split between the executive and the Parliament, it is not easy to determine which branch of government bears the heaviest responsibility for the lack of quality and coherence that some statute law exhibits.

---

96 Submission of the New Zealand Law Society to the Standing Orders Committee of the House of Representatives (25 November 2016) at 2.2.

This makes sheeting home accountability for the quality and nature of the laws passed by Parliament difficult. It cannot really be said there is ministerial responsibility for the statutes passed. There can be ministerial responsibility for what is introduced in Parliament but not what is passed. In an MMP Parliament, diverse pressures are at work and ministers cannot get their way on all issues all of the time. Nor should they. In order to sharpen accountability and make clear who is responsible for what, it is necessary to make transparent what occurs in the legislative process before a bill comes to the House of Representatives.

Things have changed in the writer's view over time, including greater pressure on parliamentary time, a much increased legislative load, an MMP Parliament where smaller parties have difficulty resourcing select committees. This has been accompanied by greater complexity of legislative schemes than in days gone by and the remorseless pressure on legislative progress caused in part by the three year term of Parliaments.[97] Parliament has become more of a legislative bottleneck in the last few years.

Pressure at the Committee of the Whole House stage has seen truncated consideration caused by taking bills part by part rather than clause by clause. This has meant the debates are more political and less concentrated upon whether the actual provisions in the bill are fit for purpose. It is here where scrutiny breaks down. More openness should also help improve the quality of legislation and the ease of scrutiny so long as adequate time is allowed to get big legislative schemes right.

On the issue of improved ways to carry out technical scrutiny, the Law Society submission said:[98]

> **7 The Committee of the Whole – technical scrutiny of legislation**
>
> 7.1 The Law Society submits that what happens in the Committee of the Whole presents a significant threat to legislative quality.[99]
>
> 7.2 Amendments are moved and agreed to by SOP in circumstances that often do considerable damage to the architecture and coherence of Bills. Both opposition and Government members can move amendments with little notice and with no certainty until the last minute whether or not they will be accepted. SOPs can be tabled up until the moment that voting begins on the provisions they propose

97 Palmer, above n 94, at 39.

98 New Zealand Law Society, above n 96.

99 See David Bagnall "Problems with New Zealand's Legislative Process, and How to Fix Them" (2009) 24(2) Australasian Parliamentary Review 114, in which he suggests that the conduct of the committee stages of all or most bills should be conducted in the second chamber without the need for unanimity. See also Palmer, above n 94; and Geoffrey Palmer and Andrew Butler *A Constitution for Aotearoa New Zealand* (Victoria University Press, Wellington, 2016) at 202.

to amend. SOPs of more than 100 pages are not unknown.[100] Wholesale amendments at this late stage can cause considerable harm, yet there is a reluctance to recommit Bills that are subject to such amendments. Attempts over the years to rectify this feature of the New Zealand process have not proved effective.

7.3 In short, the Committee of the Whole stage is no longer capable of ensuring that each provision of a Bill is subjected to close technical scrutiny.

7.4 It is ironic that not only is scrutiny often inadequate, but also that it takes too long. Even uncontroversial changes often wait a considerable time to be passed into law. It promotes the public interest to keep the law up to date and systematically remedy defects and faults in it.

7.5 Structural reform to reduce the legislative backlog in the House and improve the quality of technical scrutiny of legislation should be considered. The Law Society appreciates that this may be beyond the scope of the current review of the Standing Orders but suggests that consideration should be given to introducing a parallel legislative chamber,[101] modelled on the Australian Commonwealth Parliament's Main Committee.[102] That would enable the House to devote more time to legislation and process it in a more considered manner. A committee modelled on the Australian precedent would provide close, detailed scrutiny of a Bill's provisions to ensure they are fit for purpose. Such detailed scrutiny would substitute for the sweeping SOP amendments currently seen at this late stage of a Bill's passage.

7.6 The Commonwealth Parliament's Main Committee, established in 1994,[103] has been successful in alleviating the pressures on the Australian lower house.[104] About a third of all legislation is referred to it.

7.7 The committee stage of Bills that are largely uncontroversial could be taken in this parallel chamber, comprising no more than 30 members, sitting in the old Legislative Council Chamber. It would enable more time and attention to be given to the detail of Bills, with the aim of achieving optimal legislative outcomes. A Bill subject to examination in the Main Committee would revert to the full Committee

---

100 In 2009, a Government supplementary order paper contained 112 pages of amendments to the Climate Change (Moderated Emissions Trading) Amendment Bill.

101 Note: What is meant by parallel legislative chamber in this context is an alternative, for some Bills, for the Committee of the Whole stage provided for a present in Standing Orders. This would allow more rigorous scrutiny by interested MPs. Proceedings could be conducted in the existing Legislative Council chamber.

102 A serious proposal for such a step was made by the then Acting Second Clerk – Assistant of the Office of the Clerk in New Zealand; Bagnall, above n 99, at 114.

103 The Main Committee is now known as the Federation Chamber.

104 Parliament of Australia "Infosheet 16 – The Federation Chamber" <www.aph.gov.au>.

of the House in the event of significant disagreement. A parallel legislative chamber would mean that the House could deal with two streams of business concurrently.

7.8 Adoption of a parallel legislative chamber would facilitate business for uncontroversial measures and improve the quality of parliamentary scrutiny. Such changes would help to alleviate the serious delays to which some measures are subject because they lack political priority.

Recommendation:

That consideration be given to establishing a parallel legislative chamber for the technical scrutiny of Bills and for ensuring that they properly give effect to the purposes of Bills as agreed to on second reading.

Efforts to persuade the Standing Orders Committee to adopt a version of the approach in the Australian Commonwealth Committee have been made for quite some years through the Law Commission, without any action yet having been taken. The author has been involved in one of those efforts when President of the Commission and also supports the recommendation of the Law Society set out above.

X WHAT IS TO BE LEARNED FROM THIS RECORD?

The fundamental reason the second Chamber was abolished in the first place and the reason it could not be revived despite several efforts lies in the fact that it was contrary to the New Zealand democratic impulse. Proposals for change must run with the grain of New Zealand's constitutional and political culture.[105] What did the Chamber represent? The Legislative Council was never elected and it lacked legitimacy for that reason. Political representation lies at the heart of New Zealand democratic politics. As Professor Elizabeth McLeay has put it, "the relationship between the represented and those who represent should rest on clear democratic principles of representativeness, responsiveness and accountability".[106] The Legislative Council could not draw authority from the people directly. It failed on all three counts. New Zealand has traditionally prized direct control over its political representatives. Yet, the Legislative Council represented no set of interests. Further, it operated as something of a spoils system for the government of the day.

The prime reason why the final proposal of the Select Committee failed in 1952 lies in the fact that it too was to be appointed. If the members were to be elected, they would expect to have power to make significant policy decisions. Should that occur, the prospect for disagreement and confusion between two chambers looked very uninviting to any Cabinet. So two themes coalesced to produce the result. A strong democratic and egalitarian tradition that said political decision-makers should be elected, combined with a desire of the political elites for strong executive power.

---

105 See generally Matthew SR Palmer "New Zealand Constitutional Culture" (2007) 22 NZULR 565.

106 Elizabeth McLeay "Political Connections: Exploring Representation" (Inaugural lecture, Victoria University of Wellington Council Chamber, 11 September 2007).

Two proposals, one of which reached the statute books and the other contained in a Bill introduced to Parliament, involved an elected senate. Yet these proposals, although democratically based, could not command support either. The 1914 legislation containing Bell's elected senate never commenced. Efforts to revive the idea in 1992 with an elected senate also failed to secure support. This latter may well be partly attributable to mixing up the issue with the change to the electoral system. Further, that Senate was to have been relatively toothless for a body with such a complex electoral structure. In the end, there just did not seem to be enough for a second chamber to do to make the exercise worthwhile.

The life of the Legislative Council took place for the most part in a first-past-the-post electoral system. Majoritarian sentiment was strong. The New Zealand system over time produced governments with great and dominant executive power. MMP was in part a reaction to this sort of authoritarian behaviour. The MMP era has produced a multi-party legislature and put an end to single-party majority governments for the most part. MMP also produced a much more representative Parliament than before, with much greater diversity both in ethnic terms and in political terms.

From this record, there can be salvaged some second chamber functions that can, and should be, included in the single Chamber we have. The key issue involves scrutiny of legislation – the prime point that proponents of a second chamber point to and which historically remains the major justification for a second chamber. As to further checks and balances, they are probably best designed by means other than a second chamber.

The Legislative Council saga tells how difficult it was to alter our underlying constitutional structure which was first set out in legislation in 1852. Designing a functional upper house that would meet the test of both functionality and public acceptability could not be achieved. That suggests it is probably because it is impossible in the New Zealand political culture to find a place for one. It is, therefore, fascinating to revisit the debates between 1947 and 1993 and assess what elements of New Zealand's constitutional arrangements have changed and how much they remain the same.

NZCPL OCCASIONAL PAPERS

1 Workways of the United States Supreme Court
Justice Ruth Bader Ginsburg

2 The Role of the New Zealand Law Commission
Justice David Baragwanath

3 Legislature v Executive – The Struggle Continues: Observations on the Work of the Regulations Review Committee
Hon Doug Kidd

4 The Maori Land Court – A Separate Legal System?
Chief Judge Joe Williams

5 The Role of the Secretary of the Cabinet – The View from the Beehive
Marie Shroff

6 The Role of the Governor-General
Dame Silvia Cartwright

7 Final Appeal Courts: Some Comparisons
Lord Cooke of Thorndon

8 Parliamentary Scrutiny of Legislation under the Human Rights Act 1998
Anthony Lester QC

9 Terrorism Legislation and the Human Rights Act 1998
Anthony Lester QC

10 2002: A Justice Odyssey
Kim Economides

11 Tradition and Innovation in a Law Reform Agency
Hon J Bruce Robertson

12 Democracy through Law
Lord Steyn

13 Hong Kong's Legal System: The Court of Final Appeal
Hon Mr Justice Bokhary PJ

14 Establishing the Ground Rules of International Law: Where to from Here?
Bill Mansfield

15 The Case that Stopped a Coup? The Rule of Law in Fiji
George Williams

17 The Official Information Act 1982: A Window on Government or Curtains Drawn?
Steven Price

18 Law Reform & the Law Commission in New Zealand after 20 Years – We Need to Try a Little Harder
Rt Hon Sir Geoffrey Palmer

19 Interpreting Treaties, Statutes and Contracts
Rt Hon Judge Sir Kenneth Keith

20 Regulations and Other Subordinate Legislative Instruments: Drafting, Publication, Interpretation and Disallowance
Ross Carter

Available from the New Zealand Centre for Public Law
Faculty of Law, Victoria University of Wellington, PO Box 600, Wellington, New Zealand
Email: nzcpl@vuw.ac.nz, Fax +64 4 463 6365