

With Respect

Parliamentarians, officials, and judges too

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*To information and information technology staff
in government agencies who ensure government websites
have accessible and accurate information.
Their efforts contribute to honesty and openness
in the New Zealand government*

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Preface

This book originated in a series of research papers and discussions convened by the Institute of Policy Studies in 2007. The discussions involved a variety of academics and practitioners chaired by Colin James. Following the seminars, Colin wrote an extensive note of the topics discussed and the emerging conclusions. That note has been a valuable inspiration to this text.

Having received Colin's paper, Andrew Ladley, the then director of the Institute of Policy Studies, worked with his colleague Nicola White to write an assessment of changing constitutional understandings of parliament and its role. Andrew made a start on a text with the intention that he and Nicola would complete it as a joint draft. However, other priorities intervened and both intended authors moved on from the institute, leaving a draft of an introductory chapter and an outline for the proposed text. Key within that proposal was Andrew's formulation of the iron rule of political conflict; that was at the heart of the book as proposed and remains central to the book as completed.

In late 2009, Jonathan Boston, the current director of the Institute of Policy Studies, commissioned me to take the available material and complete a manuscript for publication. This book has grown beyond the plans of the previous proposed authors, but I still owe a huge debt to Colin, Andrew and Nicola for the earlier work.

The main shift I have brought to the work is to focus not on parliament itself, but on the relationship between parliamentarians and public servants. (Judges are there too; it turns out there are more than two parties in the relationship between officials and politicians.) Similarly, though constitutional issues are covered, this text focuses more on the pressures on people as they work in different parts of government. That reflects my own background as a public servant with long (it felt like forever) experience of working with parliamentarians.

Though the resulting text is a practitioner's document, reflecting personal experience, it is not a memoir. I aim to share my knowledge, but I am not sharing confidences. There is only one place where I have used a personal recollection, and in that example I have gained the agreement of the member of parliament concerned before publishing the incident.

The text outlines a simple theory of factors that drive the relationship between politicians and public servants, and it draws out the practical implications of that theory by means of case studies. In selecting these case studies I looked for recent examples, and to ensure objectivity I have generally

selected cases where I had no or little involvement. The exception is the case study about the advice to negotiating parties in 1996; that is the only occasion when officials have played such a role so I had to use it even though I was actively involved as a senior Treasury officer at the time.

Far from relying on inside knowledge, this book is almost entirely drawn from publicly available material. In New Zealand the combination of the Official Information Act 1982 and very good departmental websites means much is available on any topic. In Part One, the emphasis is on developing the theory that drives the text, so it is not heavily sourced. But Parts Two and Three deal with the application of those theories to real incidents, and I have attempted to substantiate the facts of each example. Much is drawn from media coverage, a great deal from official websites, and a small amount from requests for information from departmental records. In that process I have been very impressed by the quality of record-keeping in government departments and the work that has gone in to making material available on the internet – hence the dedication of this book.

Many have contributed to this book. Most important are Colin James, Nicola White and Andrew Ladley, whose earlier drafting has shaped my thinking. Some of Andrew's drafting has survived into this book and he is acknowledged as the joint author of two chapters. I am very grateful to him and the other two for their efforts.

The first contributor to the book was the Emerging Issues Programme; this is a fund provided by government departments to support research into issues of the day. Since this text goes as far back as 1215, it may seem odd to think of parliament as being emergent, but a theme of this text is that parliament constantly adapts and so this project qualifies for support within the programme. The Institute of Policy Studies is grateful for the continuing partnership and support that is offered through the Emerging Issues Programme.

Government departments have given significant support to the development of the case studies. Permission to access information for case studies was given by the Secretary for Education (special education), State Services Commissioner (government formation), Secretary for Justice and Chief Parliamentary Counsel (Real Estate Agents Bill), Secretary to The Treasury (imprest), and Commissioner of Inland Revenue (select committee inquiry). I am particularly thankful for the special efforts by staff in those departments as follows: Jan Breakwell and Brian Coffey (Ministry of Education), Hugh Oliver and Malcolm Macaskill (State Services Commission), Alan Bell (Ministry of Justice), Fiona Leonard (Parliamentary Counsel Office), Marcus Jackson and Peter Lorimer (The Treasury), David Shanks (formerly Inland Revenue

Department, now Ministry of Social Development) and Peter Newell (Inland Revenue Department).

Several people gave up time over Christmas to read a near final draft; I am grateful for the comments and suggestions they offered. Some were happily in contradiction to the comments that others made; that seemed to leave me with freedom to make my own choices. In other cases, the comments were emphatically uniform and I bowed to superior wisdom. I offer thanks for this service to Jonathan Boston, Matthew Palmer, Vernon Small, Chris Eichbaum, Derek Gill, Nicola White, Andrew Ladley, Lesley Bagnall and Sam Prebble. Any remaining mistakes must have been inserted after those readers checked the text and they are absolved of any responsibility.

I am much indebted to the staff and contractors of the Institute of Policy Studies. Jonathan Boston first suggested to me that I take on this task and has provided warm (and critical) support and advice throughout. Zoë Lawton, an intern at the Institute of Policy Studies, has acted as research assistant; she has been very prompt in finding legal cases, newspapers, *Hansards* and files and has checked every reference. Zoë has been a great help, saving me many weeks' work. Belinda Hill and Victor Lipski provided prompt and precise service as editors, Diane Lowther did an excellent job creating the index, and Kevin Scarlett at Milne Print did the lay-out work for the cover.

Contributors

Mark Prebble is the sole author of most of this work and the co-author of chapters 2 and 3. Mark is a senior associate at the Institute of Policy Studies. He was State Services Commissioner during 2004–2008. In the course of his distinguished public service career, Mark was the Chief Executive of the Department of Prime Minister and Cabinet and Deputy Secretary to the Treasury.

Andrew Ladley co-authored chapters 2 and 3. Andrew is an adjunct professor in the School of Government. He was Director of the Institute of Policy Studies from 2003 to 2008. Before that he served for three years as the Chief of Staff and Coalition Manager in the Office of the Deputy Prime Minister, having previously been a senior lecturer in the Law School at Victoria University of Wellington.

Introduction

The business of government involves many people attending to a variety of duties.¹ Control of those processes comes from Wellington, which acts like a committee in continuous session.² Various subcommittees form and re-form; sometimes as working groups, sometimes as officials' committees and sometimes as ministerial or parliamentary groupings. The topics shift through a constantly rotating agenda covering food standards, tax rates, military deployments, threatened species, tyre tread-depths, and anything else of general interest to society. Reports, memos and emails move between the different participants as they seek to inform and influence.

The participants in that committee are colloquially known as 'suits', but various groups can be identified within that population. One of the most distinct groups of those involved in the broad process of government is parliament, which consists of around 120 members. A much bigger and less distinct group is officialdom, or what is loosely called the public service; there are tens of thousands of public servants in Wellington. From those numbers it would seem obvious which group might prevail in any test of strength between parliament and the public service. And indeed the result of any such contest is predictable: parliament wins every time. That is right and proper because the public service exists in a supporting role to parliament.

Constitutional purists will be dismayed to see the relationship between parliament and the public service expressed in this way. The two may both be parts of the overall machinery of government, but they are within different branches of government. Parliament is the legislature and the public service is part of the executive; the public service does not serve parliament. The public service works for ministers and ministers account to parliament. The public service can be said to support parliament only in the sense that all three legs of a three-legged stool must be in place for any leg to stand. But taxonomic purity is not the point of this book.

1 The first draft of this introduction was by Andrew Ladley; some of his prose survives in this longer chapter.

2 I am grateful to Jas MacKenzie for this analogy. He used it when recruiting me to join the public service in the 1970s; unaccountably, it attracted me into government service.

Though the intention is to be correct, the aim is to explain lucidly, rather than expound pedantically. For example, the strict constitutional meaning of parliament is the House of Representatives (including the clerk of the House) plus the Queen (or governor-general). Here it means what most people mean: the 120 (or so, depending on the electoral arithmetic) members of parliament (MPs) who make and change governments, and make and change statutes. Similarly, several dozen people (including former state services commissioners) can precisely define the limits of the public service and can go on to expand on the other categories of state servants in New Zealand. In this book, however, the public service means what most of the public would understand: it refers to officials working in the various agencies of government. Where the distinctions between groups matter, they are explained in context.

That pragmatic approach also characterises parliament in New Zealand. Parliament is of course an institution at the centre of political power and governance – it makes (and unmakes) governments, it authorises taxation and expenditure, it makes law, and it is shaped by myriad rules of varying degrees of formality. But it is also a living process, constantly in motion, evolving in small ways. It is a human institution – with very New Zealand characteristics.

The public service is one of the groups that interact with parliament in the overall process of government. But the behaviours and attitudes seen in the public service are often so different from those shown by parliamentarians that they can seem to be different branches of humanity. Contacts between the essentially political culture of parliament and the managerial and bureaucratic culture of the public service are a central feature of the process of government in New Zealand. This book attempts to unravel the confusions that can arise between these two groups at the heart of government.

Both groups tend to favour pragmatism over theoretical purity, but their work is dominated by a big picture of historically derived constitutional principle, of constant party-political contest and a clash of cultures. That big picture shapes how the political contest can impact on non-political public servants.³ Practitioners in parliament's processes (elected representatives, parliamentary officials, public servants, the press and the surrounding layers of civil society) are daily players, focused on the moment. For a public servant preparing answers for a minister to an oral question, or appearing before a select

3 A political scientist would say that a public servant's work is political; the correct term to convey non-involvement in party politics is non-partisan. But in New Zealand the public service generally uses the term non-political and it is used here.

committee, there is unlikely to be time for anything other than delivery as best as possible under pressure. But all this daily activity takes place within a constitutional framework anchored by principles. Foremost of these principles is that an executive (the cabinet, commonly called the government) is formed from elected MPs, making it responsible and accountable to the House and thence to the people of New Zealand.

That bedrock also frames the ongoing political contest which parliament embodies. Being responsible and accountable to the House, and thence to the voters, has created an unwritten iron rule of political contest (the iron rule), which often surprises new MPs in its intensity, but is soon branded indelibly on their psyches. Its quadruple formulation is as follows.⁴

- The opposition is intent on replacing the government.
- The government is intent on remaining in power.
- MPs want to get re-elected.
- Party leadership is dependent on retaining the confidence of colleagues (which is shaped by the first three principles).

There is nothing wrong or deplorable about the fact of political contest. Though this democratic competition might seem to detract from some Olympian ideal of caring and dispassionate government, it is good that people should come to government with passion. It is through the competition for power that the competition of ideals and skill is played out.

It is in the nature of the political contest that it involves MPs, aspiring MPs, their political staff and their political supporters. It is definitely not the business of non-political public servants. But the regular reality is that public servants are affected by the political contest, often to their surprise and confusion. They are non-political, but every day of the week there are some who have to cope with politics. That continuing culture clash plays out in ‘the everyday paradox’, which is formulated as follows.

- All public servants are non-political members of the executive, so they are not involved in the political contest.
- But all public servants are accountable to their minister who is an MP and is accountable to parliament for their work (some are indirectly accountable to a minister through their board).

4 This formulation of the iron rule was devised by Andrew Ladley, and any further use of it should be attributed to him.

- Therefore, it is inevitable and commonplace that officials are swept up into parliamentary contests.

Politicians operate under the iron rule of political contest. That shapes their culture and their approach to their work. Public servants are administrators who come from a managerial culture. Generally, it matters little that mutual incomprehension is common. But incomprehension can turn to frustration and fear when the operation of the everyday paradox sweeps the public servant into the foreign culture of politics.

Both politicians and officials can find themselves in foreign parts when their actions are reviewed in court. The judiciary is the third branch of government; it ensures that excesses of populism or bureaucracy are kept within the law. As it does that it introduces a third culture to the mix. Although the primary focus in the book is on MPs and officials, the role of judges must be considered because they have a strong influence on both groups.

The goal of this book is to add somewhat different perspectives to the body of literature about the House and New Zealand political and constitutional issues. The magisterial publications by a former clerk of the House, David McGee,⁵ dominate the landscape regarding the practical rules and principles by which the House itself works. Detailed studies have been made about how proportional representation has affected all elements of parliament, including coalitions and legislation. And of course, academics, current and former MPs, public servants closely connected to the Beehive or the House, and a cluster of politically wired journalists participate in, and think and write about, daily events, trends and developments.

A smaller body of work exists about the operations of the public service. Often this work draws on management theory to explain processes or describes structures by reference to the central laws that set up the state services, including the State Sector Act 1988.⁶

Legal texts on the constitution describe where parliament fits within the structure of government. This book does focus on aspects of the law, but it does not claim to be a legal authority. Professor Joseph is the current New Zealand authority, and his book is referred to as necessary.⁷

5 McGee (2005).

6 See, for example, Scott (2001).

7 Joseph (2007). For those with the time to absorb 1,300 pages, and \$200 to spare, I strongly recommend Joseph's book as a fascinating read. Alternatively, Palmer and Palmer (2004) is similarly authoritative and a little more accessible.

Unlike those other sources, this book looks at parliament with an emphasis on how its work influences the public service. The picture that emerges is of a many-faceted institution, at the centre of the power structure of the state but also constrained in many formal and informal ways. Its reach is octopus-like, but also tentative. It is respected but also ridiculed and at times despaired of. It is the focus of those who want to make a difference, but are frustratingly resistant to crusades. It is an imperfect and blunt translator of the people's wishes and hopes, and a confusing cauldron of different perspectives, beliefs and argument, as well as the theatre in which the nation plays out the ongoing contest for the right to wield political power.

To the extent that New Zealand draws on the United Kingdom heritage, parliament is an ancient institution. In form it would be clearly recognisable if fairy-tale MPs were to wake up after a century and walk into the chamber. Sometimes changes have been reasonably dramatic, as with the electoral system in 1993. But mostly change is gradual, incremental and not particularly noticeable for all but the most dedicated of watchers or players. Parliament is a living, adaptive institution, shaped by the pragmatic mores and needs of a practical people in a small polity, interconnected with the world. For all the texts setting out rules and analysis, there is, in short, no textbook parliament.

The public service is similarly hard to comprehend, mainly because of its size and operational complexity. The variety of tasks undertaken by the public service runs from collecting taxes to disbursing benefits, from advising on new laws to monitoring fishing boats, and from maintaining archives to protecting national parks. Its activities are ordered in a hierarchical system, under the responsibility of ministers, and using authority granted by parliament. This book seeks to explain that authority, its origins and its implications for the operation of a modern government system.

But, though this book includes some exploration of the culture of the public service (and of the legal profession), this is only partial; there is an emphasis on the contrast between the public service culture and the parliamentary culture. The underlying goal is to explain the confusions that arise when officials approach the political world of parliament. The equally interesting issues of the frustrations and confusions endured by ministers as they deal with officials,⁸ or the ways a public service culture may become self-serving⁹ are not part of this study. This focus on the interaction with politicians may create an impression

8 Palmer (2008, pp 243–244) says they speak different languages.

9 This is covered extensively in *The Treasury* (1987).

that the political work of parliamentarians is in some sense less worthy than the managerial approach of officials; no such impression is intended.

Although there is room for improvement, there is much to respect about parliament and its members. All New Zealanders should be proud of this institution. Its members collectively set out to work for the benefit of the nation. They often fail, but that is not for lack of effort or application. Of course they fail; if public policy were easy, it would not be needed. Not only do parliamentarians grapple with the hardest issues of the day, but they do it in a wilfully difficult way: through politics in an open, democratic contest. Democracy is complex and demanding, but it eclipses any of the attractions of technocratic efficiency. The focus on the strains that may arise between officials and politicians is not meant to imply that something is amiss; on the contrary, the strains are evidence of two groups working under the contradictory disciplines of their respective roles. That is how it is supposed to be; the process of democratic government is not supposed to be easy.

The book has three main parts. Part One covers the framework of constitutional context, political contest and culture clash. Part Two puts parliament into its modern context as a source of the law in New Zealand; that is critical for officials because obeying the law is the first responsibility of public servants. Part Three focuses on how parliament performs its functions, and the implications of that for officials.

Part One

Principle, Contest and Clash: The basics

Introduction to Part One

The regular processes of government involve politicians and administrators continually trying to handle the issues of the day. The politician may be preoccupied by the need to defend a policy on television later that day, and the official may be concerned about the morale of staff whose careers will be influenced by the same policy. But as they deal with these practical day-to-day events they are often unknowingly playing roles that are driven by three elements: constitutional principles, political contest and the clash of cultures between the political and the non-political. Each of these three elements needs to be teased out more fully. That is the purpose of Part One.

A central part of that exposition is some history. That is because the principles that drive the constitution have not been extracted from some philosophical discourse; they were hammered out over centuries in arguments between monarchs, parliaments, ministers, courts and officials. Those arguments led to a series of resolutions as the arguing groups kissed and made up; or sometimes the resolution was that the loser was executed because people took arguments very seriously in those days. The resolutions of those various arguments became accepted practice. Those accepted practices have become the principles of the constitution. To understand how that happened requires a rapid review of events from the middle ages to the present.

The process of political contest occurs in any democracy. This part examines the impact of that contest on parliament, its members, and its work. Finally, this part introduces the different cultures that have arisen in parliament and officialdom (partly as a result of respecting constitutional principles), and the confusion and clash that can arise as the two cultures meet.

Constitutional Principles Come from History

Jointly written with Andrew Ladley

Constitutional basics

The essence of the New Zealand constitutional system can be summarised as responsible and accountable government operating under the rule of law. All citizens, and especially public servants, need to understand what that means; once it is clear, the place of the public servant in the firmament, including her or his relationship to parliament and to the courts, will jump into focus.

Confusingly for the outsider, there is no statute, charter or other document that allocates and confines governmental power using the words ‘responsible and accountable’ government. The closest one might get is the introductory description of the constitutional order set out by Sir Kenneth Keith in the *Cabinet Manual*,¹⁰ which is drawn on here. Explaining the concepts relies on different sources and reveals different meanings. Only some of the meaning can be found in clear legal provisions. A great many key rules of the system are simply accepted experience on how things ought to operate, known as constitutional conventions.

Parliament is at the centre of the constitutional framework, even though the executive branch (into which public servants fall) is a much bigger player. But size is not everything; the key is balance. The constitution works as a balanced system of overall governance, with institutions (and those making decisions within them) having zones of relative autonomy that are by definition limited. At various times some claim pre-eminence, but there is no unlimited power in New Zealand’s constitutional system.

The expression ‘responsible and accountable’ means, in New Zealand, that government is based on the consent of the people expressed through elections that constitute the people’s representatives in parliament. A prime minister and cabinet, supported by the majority of those representatives on key matters, form the government of the day. That prime minister and cabinet are responsible and

10 Cabinet Office (2008).

accountable to parliament for the conduct of government, and through parliament they are responsible to the people.

The idea that no power is without limit comes from the rule of law. That is, rather than any one institution or person having the power to make laws and then apply them without constraint, everyone must operate under the law. The limits to powers are to be found in law and in principles of fairness and respect for human dignity that are expected to be upheld by all holders of public office, by the people themselves and, in particular, by the courts.

All government (that is, executive, parliamentary and judicial branches) is carried out in the name of Her Majesty the Queen, but this is subject to the notion that actual power, constitutive power, comes from the people of New Zealand and from the accumulated experience of centuries of common law. In that single sentence lies the history of the evolution of parliamentary government in Britain and its transplant and growth in New Zealand. Hence the Crown is, in New Zealand usage, shorthand for the government as a whole (as opposed to the government currently holding office, that is, the cabinet).

Applying this to elaborate further on the layers of meaning, a fuller description of the constitutional order (set out in the *Cabinet Manual*) is as follows.

- The Queen is the nominal (and residual) head of state, and executive power operates under the symbolism of the Crown.
- The governor-general is the Queen's representative living in New Zealand, but for all intents and purposes, including on foreign visits, functions as the New Zealand head of state.
- The governor-general presides over the Executive Council, but does not actually rule; rather, he or she acts on advice on all matters.
- This advice is the polite constitutional term that really means the instruction as to how the executive power of government is to be exercised, that is, instruction given by a prime minister and cabinet that is able to command the confidence of parliament.
- Commanding the confidence of parliament is itself a term of art in the constitutional system – it means being able to get sufficient votes in the House of Representatives on confidence matters. Those are the budget that sets out how government is to be financed, and any other matter that is of such importance to the government that, if it did not secure sufficient votes, it should resign.

- The prime minister and cabinet are constantly responsible to the House by needing its consent to govern, and accountable to the House for how they govern. Through elections for parliament, the people ultimately decide on whether they approve of the government after a term of three years, or mandate other representatives to reconstitute a new government for the next three years.

Below this constitutional construct, in a firmly subordinate role as part of the executive, are the various arms of the state services. The executive is one of the three branches of government. The legislature, the first branch, makes laws. The judiciary, the second branch, applies those laws to resolve disputes. The executive, the third branch, is all those other parts of the government system that actually do things, to people or for people, using the authority of the law. Ministers lead the executive and are accountable to parliament for the actions of the executive. Public servants, or officials, work within the executive under the responsibility of ministers. It is officials who generally exercise the real day-to-day powers of government. Collecting taxes, running prisons and controlling the border are all done by public servants. Policing the streets and patrolling the oceans are done by uniformed branches of the state services. These powers are defined by the authority of parliament, and they are exercised under the scrutiny of the courts.¹¹

The principles of consent of the people and the rule of law dictate that the public servant must be subordinate to political leadership. This is expressed through the accountability of departmental chief executives to ministers (or, in the case of Crown entities generally through a board to the minister). The minister then accounts to parliament.

Government is conducted in the name of the Queen, but by representatives chosen by the people. How formal power can notionally come from the head of state, but real power from the people and the law, is only understandable from the history that shows a gradual and irreversible democratisation of monarchical power, subject to the law. An outline of history explains the context that shapes parliament, the ongoing processes of adaptation, and how responsible and accountable government has become the essence.

11 There are some Crown prerogatives, deriving from history, but these are not explored here.

Constitution Act 1986

New Zealand's parliament reflects its United Kingdom roots going back many centuries, and the institution has been growing in New Zealand's culture for more than a century and a half. That institutional memory shapes how the New Zealand parliament works. A full historical account is obviously beyond the scope of this book. Here, the goal is to connect some of the key developments across the centuries, especially as they relate to the formation and export of the Westminster story.¹² The summary developed here is of course idiosyncratic, since its purpose is to show how the respectful balance between parliament, the political executive, the public service and the courts developed over centuries.

It is useful to begin that historical summary with an immediate illustration of the absorption of that heritage into current governance as seen in New Zealand's Constitution Act 1986. The key sections dealing with parliament carry the simplicity of continuity:

14 Parliament

- (1) There shall be a Parliament of New Zealand, which shall consist of the Sovereign in right of New Zealand and the House of Representatives.
- (2) The Parliament of New Zealand is the same body as that which before the commencement of this Act was called the General Assembly (as established by section 32 of the New Zealand Constitution Act 1852 of the Parliament of the United Kingdom) and which consisted of the Governor-General and the House of Representatives.

15 Power of Parliament to make laws

- (1) The Parliament of New Zealand continues to have full power to make laws.
- (2) No Act of the Parliament of the United Kingdom passed after the commencement of this Act shall extend to New Zealand as part of its law.

In constitutional terms, these simple provisions are sweeping. Bearing in mind that the New Zealand parliament was entirely created in 1852 by an Act of the United Kingdom parliament, the 1986 Act seizes all future authority to

12 The British system of a cabinet drawn from and accountable to parliament is commonly called the Westminster system; the term comes from the Palace of Westminster, which is where the Houses of Parliament convene.

control New Zealand's constitution. The United Kingdom parliament, which established the New Zealand parliament, is disempowered by the New Zealand parliament from any further right to legislate for New Zealand. Lawyers, conditioned to demand a legal source for every power, might gasp. If parliament removes the source of its own authority, on what authority does the power of the New Zealand parliament stand?

The answer is that the New Zealand parliament rests on the continuity of its history. It is the same body as its colonial (and then dominion) predecessor, except that it now recognises no external source for, or controlling, its power to make law. Parliament was, still is, and will continue to be. It is still a bit breathtaking; not because it sweeps away the past, but for the opposite reason. An Act passed in 1986 has ensured the New Zealand parliament is the successor to a tradition spanning several centuries.

The 1986 Act marks the final confirmation of the legislative independence of the New Zealand parliament, or what is sometimes called full parliamentary sovereignty. And there is little in the 1986 Act to suggest that there are any domestic limits on the power of the New Zealand parliament to make law. Thus, there is no equivalent of the ringing terms of the United States Constitutional Amendments, which provide a string of limitations on the power of the United States congress to make law infringing on core rights of citizens, phrased simply, 'Congress shall make no law [on]'.

But none of this should suggest the absence of all limits so that a majority of members of parliament (MPs) in New Zealand could pass any law whatsoever and expect it to be implemented as such within New Zealand. This is discussed in Part Two, but here two perspectives are sufficient. First, it is more useful to see the New Zealand constitutional system as a set of balanced powers rather than to look for some sort of theoretical absolute power. Second, it is easier to understand the role of parliament in the New Zealand constitution as what happened, and what happens, rather than being too wedded to theory.

In some countries, the passage of a Constitution Act might have been momentous. But this was an ordinary statute, with only one clause subject to any special procedure (setting the term of parliament at three years, and making this only amendable following a referendum of 50% of voters or a parliamentary vote carried by a 75% majority). In the New Zealand parliament, the Constitution Act appears to have been largely seen as reflecting existing constitutional form, along with pragmatic updates. The simplicity of section 15(2), providing that no Act of the United Kingdom could have effect in New Zealand law, marks the final cut with the power of the Westminster parliament to legislate for New Zealand, a power that had formally been

available from 1840 until this clause came into effect in 1986. This is classic New Zealand gradualism – the changes had taken place years before in practice, and the 1986 Act quietly recognised this in law.

The real power of the Constitution Act 1986 is not so much in its constitutive effect as in its continuity. The broad principles of the distribution of power in New Zealand reflect those that evolved in Britain over nearly 1,000 years and it is useful to outline the key developments that have affected the New Zealand constitutional framework.

As outlined above, the heart of the British and New Zealand constitutions is that the monarch (or governor-general), in whose name the formal legal power of the state is exercised, does not control its use in practice but acts on advice of a cabinet with a democratic mandate, expressed through parliament. This came about through ancient battles for power.

Impact of history

Given the connected evolution of government in what is now the United Kingdom, there is no clear beginning to New Zealand's constitutional history. Nevertheless, the tale can start in England in the 13th century.¹³

Most of the present institutions and functions of government did not exist, but there were nascent signs. Clearly the Crown existed and was embodied in a person with substantial power. The king was supported by a council, the *Curia Regis*. This council was appointed by the king, mostly from among the barons and senior clerics, and performed many functions. Sometimes it met to consider issues of tax and spending. In this function they were supported by the clerks of the exchequer (who used a checker board to keep track of finances). In this process the council tended to combine a judicial role by considering claims to resources and an administrative function by determining spending priorities. Eventually these roles separated into the Court of Exchequer and the Treasury. There was also an inner group, the Privy Council; this group was the origin of cabinet. The work of the council was assisted and recorded by clerks. These were generally priests or other members of religious orders, because the Church was the main centre of literacy.

An example of how current institutions have their origins in 13th century structures can be seen in the development of independent courts of justice. The

13 This does not purport to be an original work of history, and no attempt has been made to find original sources. Any reader wishing to know more of these matters can refer to a wide variety of general histories.

origins of courts of common plea, which essentially applied the customs of the people, are lost in the mists of time. But the consolidation of the monarchy after the Norman invasion of 1066 saw increasing petitions for justice being made to the king. Accordingly, one of the functions of the *Curia Regis* was to hear cases. Council members sat with the king to hear legal claims. Eventually some members were appointed to carry out this function even in the king's absence, and so the King's Bench court was established. Gradually the advisory role became more and more independent from the monarch. Occasionally monarchs tried to re-assert their historical dominance in controlling judges. But by the end of the 17th century it was settled that the law should be administered impartially and not as an instrument of royal policy.

Interestingly, the ancient source of the authority of judges as advisers to the monarch remained evident, even in New Zealand, until very recently. The Privy Council is still formally a committee that gives advice to the Queen, even in its judicial function. Thus, Judicial Committee of the Privy Council decisions on New Zealand cases, while it was still our final court, concluded with the words, 'For these reasons their Lordships will humbly advise Her Majesty that the appeal should be'.

But, though the origins of some modern institutions were emerging, the 13th century did not have government as we know it today. At that time, the English monarchy by no means controlled all of England, let alone the surrounding areas. Technology was simple, transport and communications rudimentary. Not only did the king have difficulty imposing royal writ across mainland Britain, but there were myriad sources of competing or at least shared power, including the Church (bishops, religious orders, the pope); local and European contest (especially in France); reciprocal obligations between the king and the leading barons, landlord and tenant; the growing economic power and populations of the cities (especially London and other ports); and even the various fledgling institutions of state (including the different branches of courts).

In this process, any assertion of all-powerful dominance was at best rhetorical. Some barons were more powerful than others, and the king was at times the most powerful in that respect, and usually commanded a bigger army. That power occasionally produced dictatorial behaviour from monarchs. But the monarchy itself was never all-powerful in Britain, and the later French formulation of the monarch being the state never took hold in Britain.

In 1215, civil war loomed but was averted by the signing of the Magna Carta. This document was, in simple terms, a ceasefire agreement. In return for King John agreeing to respect the ongoing rights and privileges of the nobility

(including not to seize their lands and not to try to use the law to imprison them without a trial by a jury of peers), the barons agreed to end their military action against the king. Successive monarchs did their best to regroup with stronger armies to impose complete dominance several times that century – but on each occasion the monarchs were compelled by superior force to accept the Magna Carta as the basis on which the barons would re-pledge loyalty to the Crown.

By this slow process war about dominance led by consent to the concept of limited government. The Magna Carta was re-issued several times, until its adoption in 1297 by a great gathering of worthy lords and leading citizens, called parliament. Hence, the statute of Magna Carta 1297 was the confirmation of limitations of royal power that (so far as the barons asserted) had existed from time immemorial. The Imperial Laws Application Act 1988 provides that parts of that charter are still a fundamental part of New Zealand law over 600 years later.

Unsurprisingly, this great victory did not end the determination of successive monarchs and their advisers and armies to build a coherent government with fewer rivals. Good reasons lay behind this determination, including the extraordinarily violent competitiveness that characterised Europe. Being in control of taxes to raise a competitive army and navy was a matter of survival, requiring a stronger monarchy and centralised government.

A short summary of the English constitution between the 13th and the 20th centuries might be that it represented the period when the monarch's governments built the institutions and jurisdictions of a centralised state, particularly to be able to beat off armies from Europe on land and sea. However, while those powers of centralised government were being built, they were contested by other institutions. From these contests, which in the 17th century saw one king executed and another deposed, the notions developed that royal powers were limited by the consent of parliament and by the common law. To obtain the consent of parliament, monarchs needed key advisers who held the confidence of parliament. Thus grew cabinet government, responsible and accountable. To develop and administer policies, those cabinets needed professional support; that led to the permanent civil service.

The contest for control, played out over several centuries, was the forge in which the constitution was moulded. Three key elements of the constitutional structure are relevant to this book: parliament, cabinet and the civil service. Conveniently, they largely developed sequentially, in that order.

Growth of parliament

The Magna Carta laid out the idea of a constrained monarchy in 1215, and it was confirmed by the first parliament in 1297. But it was not until the Bill of Rights in 1688 that the supremacy of parliament over the king was firmly established. There was no straight line from one to the next. On the contrary, a succession of monarchs worked with varying success to re-assert control.

Tudor times saw a high point of royal power. Henry VIII and Elizabeth I both had some very capable men on their councils who worked assiduously to strengthen the Crown. Royalty benefited substantially by the dissolution of the monasteries, and the monarch became head of the Church of England. This brought huge wealth, and reduced competition for authority. The Tudors often ruled by proclamation, but even they found it expedient to call parliament in order to raise funds for government, especially as England faced various external threats.

It is hard to exaggerate the importance of European wars in the consolidation of centralised government under the monarch, and in the contrary need to share authority. There was widespread recognition that only a strong army and navy, centrally controlled, could protect England in an age of extremely competitive and violent European expansionism, including conflict over trade, religion and territory.

A central command – an army and a government – needed to be funded and the search for revenue might be regarded as the defining feature of the evolution of centralised government. A few details explain how this took place.

By about the 13th century, the capacity of the monarch to raise sufficient funds from feudal extraction through landlords was exhausted. More, much more, was needed. Trade through the major ports and cities, especially London, had produced an entirely new source of wealth, and hence of potential taxation. But how to extract tax from cities that were vast conglomerations of people with no allegiance to the rural land-owning processes that had previously produced rents and revenue?

The simplest answer was to appeal to leading citizens for their agreement to be taxed, in return for the protection of peace; security was, and is, a key ingredient in economic growth, particularly security of trade routes. Equally, it became clear that the now-centralised government needed new tools of regulation and control to prevent domestic chaos and keep up with changing times. New laws and new taxes were needed, and it was best for both to take place if they were done by as much agreement as representative consultation (backed by force and law) could achieve. Long before Rousseau's formulation

of a notional social contract (1762, in which subjects exchange allegiance, and tax, in return for protection) the core idea had been the basis for monarchical rule in Britain

The great parliaments of the 14th century had grown in importance. By 1600, faced with ongoing need for revenue, it had become reasonably settled that new laws could not be passed nor taxes raised by the monarch, without the consent of parliament. Throughout the 17th century, that principle was vigorously contested by the Stuart kings, who rather favoured the apparent absolutism of their French counterparts across the channel.

Desperate for funds to raise armies against the major threats of Austria, Spain and France, successive British Stuart kings tried to raise taxes without parliament's approval, even going so far as to appoint judges to imprison those who did not pay the new taxes. In 1649 civil war broke out. King Charles I was captured and beheaded, and for nearly a decade the parliamentary military and political leader Oliver Cromwell (and briefly his son, Richard) tried to rule Britain without a monarch. But the mental and practical mechanisms for that early republic were not up to the job, and chaos resulted. A restored monarchy set about doing the same thing as its predecessors (asserting dominance). Again civil war threatened. In 1688, James II fled down the Thames and by sea to Ireland, dropping the Royal Seals into the river (apparently thinking that without the symbolic authority of the Royal Seals, all government was impossible).

James II was brought down by the Glorious Revolution. The name history gives to that rebellion demonstrates the rule that history is written by the winners, but it was a momentous event. The leading figures of the day invited a royal couple from Holland, William and Mary, to continue the Stuart dynasty as joint monarchs, but only on strict conditions. They were required to accept limited government in accordance with law, respect for the powers and privileges of parliament, and a whole host of rights that would be protected (such as appointing and dismissing judges, and trying to raise taxes or spend money without the consent of parliament). This document was passed into law by the British parliament and signed by William and Mary, King and Queen, as the Bill of Rights 1688. It is still, in its entirety, a cornerstone of New Zealand law.

At the time of the Bill of Rights, the United Kingdom parliament had two houses, Lords and Commons, as it does today. But the composition of both was very different. During the last 300 years, the membership of the British parliament changed. Gradually, the concept of elections took hold, with ever-increasing expansions in the rights of people to vote for members of the House

of Commons. And more recently the voting membership of the Lords was reduced.

Though those changes had profound effects on the issues of interest to parliament, and so on the lives of people in Britain, they are not basic to the powers of parliament. Accordingly, 1688 is a suitable time to cut off this review of the history of the British parliament.

In the nearly 400 years between Magna Carta in 1297 and the Bill of Rights in 1688 the British constitutional psyche had been built from concepts of limited monarchical government according to law, respect for the liberties of the subject and, most simply, no taxation without parliamentary approval. The pre-eminence of parliament was the most visible expression of that new constitutional understanding, and parliament was established as the central pillar of government. From 1688 onwards, no monarch would again challenge the proposition that her or his government could not make laws, levy taxes or spend money, without the consent of parliament. During the next 300 years to the present day, this constitutional foundation provided the basis for the political contest for power.

Evolution of cabinet

The powers of parliament emerged from the clash of armies and death on the battlefield, but cabinet was developed as part of the political struggle. Undoubtedly these political struggles did shorten some lives through over-work (and others through over-consumption), but the weapons were words not swords.

The terms on which William and Mary were invited to be joint King and Queen of England essentially confirmed that the monarchy would not try to pass law or taxes without parliament, nor interfere with its proceedings. But the Bill of Rights did not directly seek to limit their ability to run the government. At that point, the actual business of government was still very much under the control of the monarch and her or his advisers and ministers. Strictly speaking the work of these ministers could continue without consent of parliament. But the need to get money and pass laws meant it was already commonplace that senior government officers were MPs.

This had been so for some time. Sir Thomas More, for example, served as Speaker of the House of Commons during his time as a minister for Henry VIII. Clearly, the idea of the Speaker as parliament's man standing up to the king was still evolving. Likewise, 150 years later, Samuel Pepys became an MP during the Stuart restoration years, the better to forward the interests of the Navy Office

in political debate. The idea that ministers should defend the performance of their offices in parliament was already the norm. But the notion that they served together as a united administration was still in the future.

At the end of the 17th century, the king or queen still met with his or her inner councillors to discuss and decide affairs of state. There was no need for anyone to be identified as the leader of the government: the monarch was the leader and chaired the meetings. Similarly, though there were various major offices of state through which ministers could wield considerable power, none was generally accepted in parliament as representing the government as a whole. It was quite possible for the king to change ministers. This could happen for poor performance, and an inability to command respect in parliament would be a factor in such consideration, but the idea that the king could call on only those ministers who enjoyed the confidence of parliament was not yet established. It was generally accepted that appointment to government office was a matter of royal patronage.

One catalyst for change was the accession of George I, a German. From 1717, he ceased to attend cabinet meetings, perhaps because he could not speak English. Although he still met individually with his ministers (communicating in French), his departure both reduced the influence of cabinet and left a void to be filled by a new leader. He needed such a leader very soon, when it became apparent that he had participated in questionable transactions that led to the South Sea Bubble.¹⁴ Sir Robert Walpole emerged as a minister who could defend the king in parliament and chair cabinet.

Walpole is generally regarded as the first prime minister (though he never accepted the title), holding the leading role in parliament and cabinet from 1721 to 1742. He ensured that his colleagues subscribed to his views and he was the sole controller of royal patronage. He promoted the supporters of his Whig party so assiduously that a Whig dominance was established for many years. He was so much in command that he placed little reliance on cabinet, and instead used his own abilities, connections and the power of patronage to craft his support in parliament. He was accepted as the leader of the executive branch of government, with the responsibility to advise the monarch in the day-to-day relationship with parliament, and in the ongoing business of governing; that is, commanding the public service.

14 The South Sea Bubble was a speculative boom and crash that shook British markets in the early 18th century. Sadly, the incompetence of New Zealand finance houses in the early 21st century has many precedents.

He was particularly successful in the role, because he understood the importance of keeping parliament on side. At that time, keeping the support of parliament was common sense and good politics for a minister. By the 19th century, however, common sense had hardened into principle: the ministers making up the government – the group that advised the monarch on the day-to-day business of government and use of state power – needed explicitly to have the confidence of parliament as well as that of the monarch. This was a gradual process. By the 19th century, it was firmly established that the monarch could act only on the advice of ministers in most matters, by the 20th, in all matters. Likewise, by the end of the 19th century there was no longer any doubt that the monarch could appoint only a prime minister who had the confidence of parliament, and that all other ministers must be proposed by the prime minister.

This arose from the process of political contest. Parliamentarians outside the government became increasingly focused and effective in identifying weakness among ministers, leading to the forced resignation of those who could not maintain their parliamentary support. The loss of individual ministers can be survived by a prime minister, but the effectiveness and prospects for the government as a whole can be damaged. It became clear that the business of government progressed more smoothly if ministers acted coherently, as a unified group, rather than as individual operators in the political fray. And so ministers began to stand together as a disciplined group, led by a prime minister. A disciplined system of collective cabinet government slowly evolved, with ministers drawn from, and accountable to, an elected House of Representatives, and taking responsibility for all actions of the Crown (the government). The process of democratising the Crown had been under way for centuries, but its definitive formulation was consolidated only when the cabinet effectively wielded the commanding and governing power of the sovereign, based on the consent of the House of Representatives, elected by universal suffrage.

For public servants especially, it should be stressed that the evolution of cabinet government took place almost entirely by that constitutional curiosity of Westminster-based parliamentary systems: conventions. In particular, the cabinet, that most important star in the firmament for a public servant, has no status in law. It is not established by statute, regulation or standing orders. It has simply evolved as a practical response to the need to maintain responsible and accountable government, and it exists by convention. Put simply, conventions are agreed rules of conduct of government, developed from experience and accepted by all the key actors and commentators. These conventions are not rules of law, enforceable by the courts; they are rules of constitutional practice. If someone breaks them, the system shudders and a crisis might develop. If

enough people break them, they cease to be conventions and the constitution evolves.

To take a New Zealand example, it is a convention that the governor-general (or Queen) will always sign into law any regulation that has been brought by cabinet to the Executive Council. However, if ever a governor-general suddenly broke the convention and refused to sign, the regulation would not be made and a major constitutional crisis would develop. Possible consequences would be that the governor-general would resign or be removed and replaced. A statute might be passed to clarify the situation and to prevent it happening again.

In the meanwhile, however, so long as everyone follows the convention (or until everyone agrees on a new convention), the system continues smoothly. There are a host of such conventions in the New Zealand constitution. The most important of these are now written in the *Cabinet Manual*, and they include such matters as the conventions of caretaker government, the circumstances in which a prime minister would be expected to resign, and the rules of collective cabinet responsibility (dramatically changed as a result of multi-party governments).¹⁵

This emergence of government by cabinet is the result of a Darwinian process. It is not obvious that anyone would have designed it that way on purpose. Many technocrats would like things more neatly cut and dried. But the fact is, it works. It achieves flexibility and responsiveness, while maintaining responsible and accountable government.

Permanent civil service

Virtually any government since the emergence of civilisation has included functionaries who keep the affairs of state organised. The best systems have created means by which capable workers can rise to the top, whatever their origins. The worst systems are characterised by entrenched privilege and corruption.

The strength of England's ancient administrative tradition is demonstrated by the *Domesday Book*. Nearly 1,000 years ago the king's clerks assembled an extraordinary record of all the assets in the kingdom. For centuries that record and the clerical ability that produced it was a major factor in England's strength, as it underpinned the tax system. This is the kind of esoteric excellence that would gladden the heart of any true administrator. Even the Chinese, whose

15 Joseph (2007, pp 215–251) includes a whole chapter on conventions.

merit-based mandarinism is even older, never had such a complete record of the tax base.

Those medieval clerks were mostly drawn from the Church, because that was the only centre of scholarship. Many leading clerics were younger sons of barons or other prominent people, but others were bright young men who entered the Church from humble beginnings. This demonstrates that clerical work for those in authority has long offered some social mobility, but it was to be another 800 years before the permanent non-political, merit-based bureaucracy evolved.

The idea of working for the government meant little in medieval times. One worked for one's feudal lord or for the king. A household role might well include wider responsibilities on behalf of the kingdom. But it became increasingly common for men (it was always men) to be appointed to public office, sometimes working their way up from inferior positions. The evolution of these roles can be seen in a brief outline of the careers of a few prominent office-holders.

By Tudor times, men such as Sir Thomas More and his successor Sir Thomas Cromwell both started their careers by studying the law (rather than taking holy orders) and later entered service for Henry VIII. Their most significant contributions were in diplomacy and in working against or for religious reformation. The distinction between political and non-political roles would have been a completely foreign idea to them. By modern reckoning they occupied the most senior secular role in the government, and so were politicians. But they worked their way up through lower roles, without ever jumping to a political status. Each position was achieved on the basis of preferment from on high as the gift of a patron. This was not necessarily corrupt, as good administrators were regularly recognised for their ability. But loyalty to the patron was critical.

There is another key difference in the careers of these two luminaries who made huge marks on the history of England compared to job expectations today: in both cases their careers ended with execution. This certainly adds salience to the thought that all political careers end in failure.

The career of Samuel Pepys illustrates the further development of government service. He was the son of a tailor who won a scholarship to Cambridge. His initial appointment as a clerk in the Navy Office came through the influence of his cousin, who had good contacts at the court of Charles II. His diaries record that, after initially enjoying the benefits of an easy and bacchanalian life, he realised that he could achieve recognition only through

hard work. His expertise in administration and newly acquired knowledge of the navy was recognised and he received several promotions, eventually serving as secretary of the affairs of the Admiralty of England, roughly equivalent to a combination of the more modern positions of first lord and secretary of the Admiralty. Like More and Cromwell before him, when Pepys was in a senior role he entered parliament. Though never executed, he suffered the effects of strong opposition as he faced a charge of treason, based on the scurrilous evidence of a well-known blackmailer. He was saved when the king dissolved parliament.

Through diligence and capable administration Pepys introduced robust processes to the Navy Office, and hugely strengthened the navy. At the peak of his career he became one of the most powerful people in the kingdom. Like his predecessors, he worked in a context of patronage, and he had to be astute in managing political affairs. But the scale of the operations of the Navy Office represented a significant expansion in the size of government compared with that in Tudor times.

Throughout the 18th century the pattern continued. The major offices of state continued to expand, which required increased professionalism from everyone concerned. Processes of recruitment and training, however, did not adapt, and positions were achieved by purchase or patronage. Promotion was automatic, and the apogee of the civil service career was the pension or, for grantees, a seat in the House of Lords.

By the beginning of the 19th century there was a separation between the role of the minister and the position of permanent head of various offices. The permanent heads were not MPs, but that did not mean the process for the employment of civil servants was apolitical. On the contrary, most appointments were made on recommendations of people the senior civil servant needed to curry favour with, most particularly the minister and the minister's political friends. There were capable people who did good work, but this was largely despite the system they worked in. This was the state of the civil service when New Zealand was colonised, but one more example will complete this survey of British civil service development.

The career of Sir Charles Trevelyan shows the next stage of evolution. In the 1820s, Trevelyan, the son of an archdeacon, entered the bureaucracy, but not government service. By that time Britain's interests had widened, and the largest and best-organised administrative operations were found, not in the government, but in the East India Company. The East India Company had a thorough training system, inspired by the Chinese system of merit-based promotion for mandarins on the basis of exams. Trevelyan served very

successfully in India before returning to London and joining government service as assistant secretary to the Treasury, a position he held nearly 20 years. During that time he achieved infamy in Ireland for his failure in his responsibility to alleviate the Irish Famine, but this was not held against him in London, and he became governor of Madras in 1859. After publicly opposing proposed financial policies he was recalled in disgrace. But by this time job loss did not lead to execution or even the threat of further penalty. Instead, after a couple of years of gardening leave he returned in triumph, appointed to the (non-elected) position of minister of finance for India.

Compared to during Tudor and Stuart times, Trevelyan's career illustrates a new global scale of British activity, and a gentler process of penalising those who have lost high favour. But his most important role in the development of government was as writer of the Northcote–Trevelyan Report, which introduced major civil service reform. During the Crimean War the weakness of logistic support for the troops became a major scandal. Trevelyan and a politician, Sir Stafford Northcote, were appointed to investigate the performance of the civil service. They described a system of placeholders and time-servers with automatic promotion and low morale. Although they believed the challenges of government should attract the keenest and most able, they found that:

Admission into the civil service is indeed eagerly sought after, but it is for the unambitious, and the indolent or incapable, that it is chiefly desired.¹⁶

Following the Northcote–Trevelyan Report, major reform saw the removal of patronage and the introduction of the merit-based system of public service that has largely endured to the present day. From that time there has been a clear separation between the political role of the minister and the non-political role of the administrator. Career preferment has been firmly based on performance, rather than connections.

This completes the story of the evolution of the Westminster/Whitehall system of government.¹⁷ It is time to turn to developments in New Zealand.

16 Northcote and Trevelyan (1854).

17 The term Whitehall relates to the merit-based civil service in Britain; it comes from the street where many ministries are still located.

Immigrant system of government

For the purposes of this summary, around the middle of the 19th century British constitutional history delivered to New Zealand a set of institutions honed by civil war and countless contests. None of this suggests that the institutional development was somehow perfected – clearly not. The great electoral reforms of 1830 enfranchised only about 10% of adult men, while women had to wait a further century to vote. However, a balanced set of institutions was developing. Any claims of ultimate authority had been fudged, with:

- the monarch accepting it was not possible to govern without parliament to make law, levy taxes, and provide a Cabinet)
- parliament accepting that the monarchy was essential to stable government in form and practice
- both parliament and the monarchy accepting that the law applied to all, administered by independent judges
- judges accepting that, whilst the common law applied on all matters, the statutes from parliament constituted the superior law of the realm.

The results of all that history were in essence exported by settlers and by constitutions re-establishing the institutions to New Zealand. The new institutions had, of course, to adapt to their own sets of contests, which over a century and a half have given the New Zealand parliament (and general constitution) its local flavour.¹⁸

In 1840, New Zealand was a new colony. The political situation in Britain at the time meant the extension of the authority of the United Kingdom parliament was dependent upon obtaining consent from the native peoples of these islands. That was the purpose of the Treaty of Waitangi, which recorded an exchange of (some degree of) governance in exchange for protection of rights and the rule of law.¹⁹ Having decided that they had obtained the consent they needed, the British rapidly established Crown authority, followed by the embryos of parliament, courts, cabinet government and a public service.

The new colony was governed initially by the Colonial Office of the British government, briefly from New South Wales and then, as soon as could be arranged, under its own revenue and parliament. Elections were held, based

18 Constitutional Arrangements Committee (2005). Readers seeking a more complete but accessible account of the evolution of New Zealand's constitution are referred to Appendix B in the committee's report.

19 Clearly, there is more to the Treaty of Waitangi than this. Palmer (2008) is the most complete recent source outlining the legal and constitutional implications of the Treaty of Waitangi.

initially on a qualified property franchise (taxpayers). With representatives in a New Zealand parliament it was inevitable that history would immediately replay a familiar theme. The settler parliament demanded that the governor act on advice of a cabinet responsible to parliament, rather than carry out the instructions of the Colonial Office with the support of advisers who had been appointed without reference to parliament. The application of that hard-fought principle still took some time to arrange. Indeed, delays in seeking confirmation that the governor would act on advice of representatives of the General Assembly prevented the first responsible government from taking office for two years.

Thereafter, the core principle of responsible government was approved, subject to some limitations in which the governor, acting on instructions from the Colonial Office in London, was expected to intervene in matters of governance. Consistent with the basis on which Crown authority had been extended, the key initial limitations related to the Treaty of Waitangi and the protection of Māori, particularly the reservation that only the Crown (the governor and his staff) could purchase Māori land. Similarly, there were initial limits on the full legislative authority of the New Zealand General Assembly.

However, the overwhelming goal of the British government was to establish a self-sufficient colony that could survive on its own revenues – which inevitably meant that the settler parliament needed access to the only real source of initial revenue: land sales. Soon even this key reservation of power was handed over to the settler government.

Put simply, New Zealand constitutional history thereafter is essentially a progressive establishment of the full doctrine of responsible and accountable government. Initially, it was responsible and accountable to a limited group of property-owning men. It took several more decades before full emancipation made the government responsible and accountable to all people.

Whilst much governance was conducted locally, some matters were initially reserved for London. From 1892, Britain instructed the governor here to accept the advice of ministers without any qualification, and another 34 years passed before formal power to reserve a bill for royal assent in London (which had never been done) was rescinded. Formal legislative independence was not assumed until the passing of twin Acts of the New Zealand and Westminster parliaments in 1947. Any lingering possibility that the British parliament could technically still legislate for New Zealand was finally ended with the Constitution Act 1986. At what point in that process the New Zealand parliament became fully independent is a matter of definitional debate.

Evolution of the New Zealand state services lagged, then leap-frogged, the process in Britain. Patronage endured throughout the 19th century. Though there was a formal requirement for examination for entry to the service, the prime minister, Richard Seddon, notoriously and regularly circumvented this by temporary appointments, and the service was rife with petty patronage. By the end of 20 years of Liberal party rule the situation was scandalous.

Bill Massey's Reform party took office in 1912 and immediately set about the reforms that its name implied. The government went further than in Britain, and enshrined the professional, non-political public service in the Public Service Act 1912. Authority for appointments and employment was removed from ministers, and the protection of the non-political public service was given to a new statutory office – the Public Service Commission (later renamed the State Services Commission). Though there have been major changes in management systems in the intervening century, the basic ethos of a professional merit-based public service dates back to that legislation.

And so, to the present

The theme for this chapter has been that parliament must be located in an historical context. The three branches of government, legislative, executive and judiciary, balance one another like a three-legged stool. All three emerged over history as checks on the power of the monarch, and then on each other. Between them, they give working force to the fundamental concepts of democracy and the rule of law that underpin modern constitutional government. To understand the pressures on and responses of parliament, therefore, requires an understanding of the interplay with the pressures on the other two legs of the stool.

The precise terms of that balance are not constant. They have evolved over time with changing circumstances and continue to do so. There is an ongoing constitutional conversation among the three branches of government in New Zealand, especially as new challenges arise.²⁰ Much of the dynamic of balance is shaped by popular consent connecting parliament and the people. But because the terms of that interaction are not static, expectations of the citizen–state relationship change. Furthermore, the interplay with the rest of the world is the other increasingly dynamic element in the picture: New Zealand may be an

20 The term 'conversation' has been introduced recently to describe the interaction between the three branches of government. See, for example, White and Ladley (2005, p 9) and Palmer (2008, p 239); the term is also in use in Canada.

island geographically, but not geopolitically. It is interconnected to the world in the movements of people and trade and in governmental and legal relationships. That international interaction affects parliament, too. The full picture is one of dynamism across a complex set of relationships.

By the time the New Zealand parliament acquired full law-making capacity, the world was changing around it. One dramatic change was the growth of international institutions and international law. Interestingly, just as New Zealand was internationally accepted as a fully independent state, some of its first independent acts were to limit its independence. New Zealand joined the United Nations and signed international treaties and conventions, with the express purpose of accepting limitations on governmental and parliamentary powers.

A second change was taking place at about the same time, with both domestic and international aspects. The role of the courts was progressively changing, seen internationally in the development of human rights standards enforced by courts, and locally in the development of administrative law to require all actions of government to be fair, reasonable and in accordance with law. Although primarily an assertion of a constraint on the executive's use of power, administrative law has also always carried with it a potential check on parliament as well. The simplest version of this check is that across the 20th century, courts have increasingly read additional requirements and procedures into the legislated words of parliament, especially where fundamental norms were at issue. The statute book is peppered with seemingly absolute discretions granted to executive decision-makers, which the courts increasingly stated did not mean what they appeared to say, often citing the language of deference that 'parliament could not have intended'.

The interaction between parliament and the courts, and the way that interaction changes, is the subject of Part Two. Here it is enough to say that the branches of government stand in balance. Like most things that balance, they sway from time to time, and must adjust to restore the balance.

Any view based on history has a risk of creating an illusion of completeness, but the work of building parliament and the other branches of government is not complete. The process of change is ongoing. Matthew Palmer has listed 80 elements of our constitution. Of those 59 can be associated with a specific date, and 42 of those 59 have been changed or established since 1970; that is, over 70% have been changed in the last 40 years.²¹ But that does not

21 Palmer (2006, p 147).

mean it is irrelevant to consider history. The various elements of the modern constitution are important details constructed to give effect to the principles of responsible and accountable government, the separation of powers and the rule of law, and a merit-based public service. Those are principles established by history.

The Iron Rule of Political Contest

Jointly written with Andrew Ladley

Darwinian struggle

The bedrock principle of New Zealand's political order is that a government is responsible and accountable to parliament (and thence to the people). This chapter outlines how that bedrock principle shapes the ongoing political context in which parliament operates. Being responsible and accountable to the House, and thence to the voters, has created in New Zealand (and, with variations reflecting each context, in comparable parliamentary systems) an iron rule of political contest, in a four-fold and inter-related set of goals.²²

- The opposition is intent on replacing the government.
- The government is intent on remaining in power.
- Members of parliament (MPs) want to get re-elected.
- Party leadership is dependent on retaining the confidence of colleagues (which is shaped by the first three principles).

As with any formulation of a rule of behaviour, this is stylised. No human is as one-dimensional as this rule implies, and (contrary to popular opinion) politicians are human. Similarly, this formulation is not meant to imply that politicians are self-seeking (any more so than any other person pursuing a career). The point is that the constitutional principle of responsible and accountable government demands political contest; it is that requirement for political contest that creates the iron rule. Also, the rule suggests there are only two sides in parliament, the government and the opposition; and that there are only two states in parliament, in government or not in government. Proportional representation has made things more complex; parties position themselves along a spectrum, near to or far from the government. And some ministers hold office while insisting that they are not part of the government. But these complications do not change the underlying truth: parliament is about the struggle for power,

22 Attributed to Andrew Ladley; see footnote 4.

and government is where the power is. Accordingly, the iron rule means that MPs are locked in continuing contest.

Its iron-likeness is that it is always, always in operation. This does not repudiate the idea that pursuit of policy is relevant – all parties and all MPs have some ideological basis and perspectives on how to make the world better. But in considering everyday parliamentary tactics these are well down the pecking order if set against the imperative of getting into power.

Within the precincts of the House, there are occasions when the iron rule might appear to be suspended, like the famous Christmas ceasefire for a game of football between the Allied and German trenches in World War I. Hence, there might be joint tributes to the recently departed, or a common show of unity on some military occasion, or an extremely rare policy agreement on all sides of the House. But even these are not really suspensions as opposed to tactics for short periods where all sides agree on stage management. For example, the leader of the opposition is invited to speak at parliamentary occasions for visiting dignitaries. The unwritten political protocol is that these are parliamentary occasions, rather than party-political, so the leader of the opposition's speech will be carefully framed to be gracious and statesperson-like; not trumping the prime minister, not showing any great difference in foreign policy, but also making it clear that she or he is a credible prime minister in waiting. Breaching the protocol risks showing up the leader as not credible as a challenger – and hence may result in loss of support amongst colleagues. So, the show of unity at a state banquet is not false – but the unity is itself an agreed formulation for the continuation of the iron rule by other means.

Occasions of real cooperation are rare; so rare they seem contrary to nature. In 1993, the National government persuaded Labour and the Alliance to enter into an accord, with the aim of putting superannuation matters beyond politics.²³ The leader of the opposition, Mike Moore, described his feelings graphically:

I do feel like the Bosnian Muslims. I do feel my village has been raided, my goat impregnated, my farmhouse burnt down. And then after capturing, humiliating ... somebody wanted to call the United Nations for peace talks.²⁴

23 This book refers to New Zealand political parties by their most commonly used name: ACT New Zealand (ACT), the Alliance Party of New Zealand (Alliance), the Green Party of Aotearoa New Zealand (Green Party), the Māori Party, New Zealand First, the New Zealand National Party (National), the New Zealand Labour (Labour), and United Future New Zealand (United party).

24 Armstrong (1993).

Without getting diverted by concern for the goat, one can sense Mr Moore's dismay at being manoeuvred into the suspension of hostilities, which is an unnatural political act. Even that accord (which proved to be short-lived) was not a positive gesture, but an agreed retreat from the damage that the debate was inflicting on the credibility of political parties.

The Darwinian nature of the iron rule will already be apparent from the above, and it can be simply articulated. Being responsible and accountable to the House, and thence to the people, frames a mutually accepted struggle for political survival: who will represent the people in government and how will government function? This affects everyone working in parliament, and everyone who takes part in any way in a parliamentary process. It is, therefore, important to understand how the rule operates. The process is active and constantly operating on all sides. There is no firm front line between the opposition and government; in focusing on one perspective one is inevitably also discussing how the other responds.

Accepting that this is an interactive process, not one-directional, the following sections focus first on the opposition in terms of the major parties contending for office, then on the government. Finally, they consider the position in the iron rule of the smaller parties and players on both sides of the divide. While it is inevitable that readers will associate this discussion with the current or very recent holders of the respective offices (especially as examples are used), essentially the same applies to whoever is in that office. There may be variations in tactics and personalities, but all are subject to the iron rule.

The opposition

All parties in parliament have at their heart an idea, an ideology, about how the world, or at least New Zealand, could be run better. But voicing an idea is only the start; it is only in government that the ideas can be implemented. The opposition has few levers, so getting into government is the point of its politics. The largest party in opposition generally has a realistic hope and expectation of forming the next government and its drive towards the goal is implacable.

As a result, the fundamental, overriding and unrelenting perspective that drives the parliamentary opposition is to replace the government. At its simplest, this requires showing why the government is bad and the opposition better. In particular terms, therefore, the opposition must accuse, imply, attack, discredit, mock, humiliate, show contradiction, expose, and by any (parliamentary) means, wear down the government. Drawing (political) blood is

the goal, and the closer to the leadership of the government this process can reach, the redder. But, crucially, everyone in the state sector, from the prime minister down, is in the cross-hairs: ministers, chairs of select committees, chief executives, the entire public service, state-owned enterprises. The immediate battlefield is the House, using every tool and space available: question time, written questions, general debate, budgets, Estimates, legislation, select committees, members' bills, the parliamentary press gallery, discussions in corridors, and coffee in Copperfield's (the parliamentary coffee shop).

The ultimate goal is, of course, to convince the electorate that it is time for a change of government. That requires that the country knows what is happening, which brings the media to the forefront. The opposition goes to extraordinary lengths to get on the front pages, *Morning Report*, general radio and television, and to stay on message. And the message is attack, attack, attack. In parliament, the immediate focus is on the parliamentary press gallery, who are critical to all sides in the iron rule.

Battle requires supplies. The opposition is funded by public and private funds, sustaining a research unit and staff members for MPs and for each party. Actual election campaigns just before an election, as technically defined, have limits on expenditure, but the ongoing whole-of-term war has only the limits that the public or private purse will contribute. In terms of weaponry, if the opposition is constantly shooting arrows, what are they made of? The general answer is that anything that hurts government is a weapon, so the choice is wide. The more specific answer is that information is at the heart of what hurts. This places the search for information, and its careful advice and placement by media-minders, at the forefront of the opposition's agenda. Research units in parliament, and MPs themselves, constantly scan the media to find material that might hurt. Putting the opposition, particularly its big hitters, into the limelight as cogent critics of the government is the goal.

Given the widespread reporting on all aspects of New Zealand life, but particularly on what goes wrong (political storms are front page news, not the things that are going well), the ordinary business of government provides endless opportunities (111 calls, hospitals, bullying in schools, youth crime, crime in general, prisons, drought, flood, the economy, immigration). So do new proposals for policy or legislation, or public statements or travels of government ministers. But these are front stage and perhaps obvious. Less obviously, the opposition is constantly probing in the backstage of government. Here the principal tools are written parliamentary questions, the Official Information Act 1982, and the various formal avenues of inquiry (such as the ombudsmen, auditor-general, and state services commissioner).

It is difficult to exaggerate the importance and the impact of the Official Information Act 1982 in the iron rule. As Nicola White has shown,²⁵ the Act has become a central tool in this process, with endless streams of requests for vast amounts of paper, which are then scanned for any value, and dumped. It is no exaggeration to say that an entire service industry within government has grown to manage this process. The search, constantly, is for information that will surprise, hurt, wound and (hopefully) kill.

Damaging or destroying is a necessary, but not sufficient, condition for achieving the objective of the first part of the iron rule. The opposition has to establish some credibility as an alternative government in the place of the current (unworthy) incumbents. This provides some limits to a single-minded strategy of attack without an alternative and credible policies. And certainly, the opposition is vulnerable to counter-attack in much the same terms as above, the more so if it has recently been in power and can be blamed for problems that emerge. But, ultimately, the opposition's weaponry is exhaustion: death by a massive hit on a prime minister who made a major mistake would be best, and the scalp of ministers is useful, but death by a thousand cuts is the default, like the multiple bites of wild dogs chasing down an antelope in the grasslands of Africa: over time, even the strongest beast will be exhausted. In parliamentary terms, success is when the MPs of the other side see the risks of current leadership being greater than their potential rewards (see the third and fourth parts of the iron rule) and choose a new leader.

Thus, as Julius Caesar discovered (and since then the element of surprise should have been lost), the poetry of pressure from the opposition's perspective is that the final unkind cut may be made by someone close to the principal target – her or his colleagues. Prime minister David Lange, beleaguered and isolated in a divided caucus, is said to have quipped across the House to the effect that he knew where his opponents were, and that was mostly in front of him (the opposition); but he also knew where his enemies were, and that was mostly behind him (on his own side). As the bleeding continues, as opinion polls drop and herald that the opposition is likely to be the next government, and particularly if a competitor emerges from the government's ranks, ready to sally forth and do better, so the discomfort of the government members increases. Numbers men (or women since numbering is an equal-opportunity task) start quietly checking the support. Rumours are planted or otherwise circulate from a mass of possible sources, including the press. Then, once the numbers are clear, some *et tu Brute* colleague has to confront the prime minister, point out that the

25 White (2007).

numbers are against him or her – and so the next prime minister emerges, desperate to reverse fortunes.

Leadership counts, perhaps increasingly so in the parliamentary arena, as television presents such short bites of information and impressions. A case in point is the damage done by repeated exposure of a short television clip of Don Brash teetering on a shaky gangplank at a time when his leadership was in question.²⁶

Throughout New Zealand's political history, the importance of leadership has been critical to the iron rule. If the government is under sufficient pressure that its leadership is shaky, the opposition has gold. If shakiness emerges in the run-up to an election, so much the better. In recent decades, this was particularly evident in the events that led to changes of government in 1990 and 1999.

On Labour's side, David Lange resigned in 1989 just before he was pushed as the numbers men were numbering. Geoffrey Palmer replaced him as prime minister, but the polls did not turn favourably. The numbers men got back to work, and Palmer in turn resigned under pressure, with Mike Moore taking over for a few weeks before the election in 1990. It is not clear whether this was a forlorn attempt to reverse the tide (if so, it failed), a tactic to lessen the damage with fewer seats lost, or a calculated move of the old caucus to select the opposition leader for the next term, without the benefit of the fresh views of new MPs. The Labour government fell, exhausted, and Mike Moore was replaced in a landslide victory by National's Jim Bolger. Mike Moore led the opposition into the next election in 1993 and, despite significant gains, lost again. Following the formation of the new National government, Mike Moore was quickly replaced as leader of the opposition by Helen Clark.

And on National's side, the prime minister, Jim Bolger, looked impregnable until the polls indicated that National would certainly lose the 1999 election. Numbers men numbered, Brutus appeared, and Jenny Shipley became prime minister in 1998, being seen as a winnable foil against the rising female star in the Labour opposition. National lost at the election in 1999 – and Jenny Shipley was replaced as leader of the opposition by Bill English a couple of years later.

Obviously, it has not always been the case that sitting prime ministers are replaced when the prospects of defeat loom for a government at the next election. Often a prime minister will stay in office hoping to turn the tide or perhaps to absorb the damage. Changes of prime minister inevitably will depend

26 Chapple (2006).

on the circumstances and personalities, including the hubris of challengers; there may be nobody willing to take on the job. In Australia in 2007, whilst the opinion polls forecasted the inevitable defeat of prime minister John Howard's government, no challenger was able or willing to seek to command the bridge of an apparently sinking ship.

In 2008 in New Zealand, a similar scenario occurred: declining poll ratings for an incumbent government, but no suggestion of a leadership change. Following the election the departing Labour leadership demonstrated an understanding that untidy leadership change is damaging, and an extraordinarily smooth transition was achieved with Phil Goff emerging uncontested as the new party leader.

For the opposition, there is a constant double-bluff calculation to be made, over whether it is better to deliver a fatal blow and drive a panicked government into a disastrous leadership change, or to continue to wound the prime minister sufficiently to destroy the government at the elections – but not so much as to force a leadership change in favour of a possibly better leader who might rally the troops.

The permutations are endless. Unsurprisingly, the iron rule is completely engrossing for those caught up in its power.

The government

As already will be clear, the government does much the same thing as the opposition, with much the same focus on leadership, but from the perspective of being in, and wanting to stay in, power. Attack is centrally against the leader of the opposition. In some respects, this can be easier than attacking a prime minister. While the prime minister has a risk of making a serious mistake in office, the position also provides plenty of chances to exercise leadership which projects a positive image. For the prime minister, just drinking a beer while cooking a barbecue with a visiting prince gets a picture in the paper.²⁷ But the leader of the opposition gets few chances to look good.

The position of leader of the opposition is extraordinarily difficult. The leader is trying to project the image of a future prime minister, better than the incumbent, capable of leading the nation. But there is little opportunity to prove the necessary skills; all the leader of the opposition can do is criticise and opine. The government never gives the leader of the opposition an easy ride; any weakness or inexperience is exploited.

27 Fox and Broun (2009).

But the advantages a government has of not completely destroying a vulnerable leader on the other side are also enormous; something both Margaret Thatcher and John Howard understood and prospered from. In the United Kingdom, Michael Foot could get enough votes to lead the Labour party in the 1980s, but was never a credible prime minister, and the prime minister of the day knew it. Tony Blair, as leader of the opposition, was of course a completely different opponent. And much the same proved true of John Howard's opponents over the last decade in Australia until Kevin Rudd emerged.

There is great comfort for a prime minister in having opposite in the House a leader of the opposition who is vulnerable. In New Zealand, this proved true for Helen Clark, albeit narrowly, in the opposition leadership of Don Brash. The government threw endless ammunition at Don Brash in parliament, where he clearly could not compete with the prime minister. Instead, he spent more of his time in the country at large, especially in Auckland, where votes and dollars were thought to be in abundance. However, a succession of media images and other slips, along with ideological bogeys, increased the scope for the government to scare off the suggestion that it should be replaced by an alternative under Don Brash's leadership.

For government, then, the iron rule dictates that the constant strategy against the opposition is a plaited combination of policy, credibility and fear – principally by portraying the opposition as unable to govern, or as about to embark on some radical new (or old) agenda, or as untrustworthy. Hence, government ministers and their researchers will look for and find vulnerabilities in the opposition – divided leadership, mistakes on policy, contradictions, previous actions, ideological comments, defects of character (affairs, sexuality, drinking, suggestions of violence, antics on dining tables), anything that wounds anyone connected to the leadership and its party. All this is played out in the House, with constant cut and thrust: a comment that the government knows that the leader of the opposition is a 'dead man walking', a counter-hint from an opposition MP to a minister that he might be having an affair with his secretary.

The iron rule has some limits in its language and tactics. In the House the rules of parliament (unparliamentary language, calling a member a liar), are constantly invoked, and everyone knows when they have gone too far. Otherwise, there are some mutually agreed (but never explicit) avoidances, such as families and personal attacks. These are not ultimately done for sympathy reasons, however much that might be relevant, but because they are in the interests of both sides. There is a limit to the amount of collateral damage that the public will accept; dragging in the antics of family members may get a headline, but may also provoke private head-shaking. Always, the calculation

about whether to use any information will be its perceived political benefit, set against the risk that all bets will be off on all sides.

Somehow, this mutually assured destruction works tolerably well, at least in the House. In the wider press, MPs know that dirt-throwing, including into family matters that are decades old, is an occupational hazard, reflecting the pervasiveness of the iron rule amongst supporters outside of the House. For the ideologically determined or the party rottweilers, 'my enemy is a target', and 'if I can hurt her or him by hurting the family too, I will try'. Such people are a particular hazard because with their lack of professionalism they often fail to understand the risks of backlash.

Of course, government has the public resources and the power of office, so the contest might appear unequal. Government governs, implementing policy, taking decisions, meeting world leaders, getting on with the business, showing who is in charge, occupying the leadership ground, setting the agenda, standing on the castle walls waiving the flag, claiming the high ground of effectiveness and power. This gives tremendous media exposure, especially if the people concerned are good at sound bites and things are going well.

But at the same time as front-footing, government is constantly back-footing in response mode. And tides can turn from the one to the other very fast. An effective opposition will be constantly shooting arrows and some will find marks. Government is hard. Policies do not always work. Evidence might be contradictory or not available. Human beings make mistakes. The tyranny of responsibility that comes from having to govern in an imperfect world means that every opportunity for being a leader also contains vulnerability to things going wrong. So a government in office is at once dominating and paranoid, raising shields, trying to reduce the blood-flow: explain, fix, deny, obfuscate, allocate responsibility elsewhere, defend.

Some governments simply do not understand the value for the opposition of a ministerial attempt to tough it out when something has gone wrong. The target stays in the cross hairs; every day something can be added to the story in the media. A few more cuts each day. At times, the attack on policy from the opposition finds a senior public servant in the cross hairs. For example, the revelation in 2007 that an employment decision in the Ministry for the Environment was made to suit the minister's politics was a gift to the opposition.²⁸ It provided an ongoing stream of stories that wounded the

28 Dewes (2007).

government and the public service. At such times, the rhetoric might not seem fair to the public servant, but the iron rule trumps public servants' sensitivities.

Governments that understand death by a thousand cuts, and bleeding from slashes, understand when sticking plasters are needed, and when cauterisation. Getting ministers to resign (or much nicer, stand aside) while allegations are swirling, or immediately when it is clear that an incident has taken place that seriously damages credibility, is a critical triage process for a prime minister.

For every avenue of attack from the opposition, government has to prepare a defence, from cauterisation to surgery, to changing policy. Such defences include the Official Information Act 1982, where endless, expensive and mostly unreported battles take place between requesters from the Opposition Research Unit, MPs, ministers, officials, advisers and the ombudsmen.

So the iron rule shapes everything about government in and around parliament. The grouping in power has the high ground of government to dominate the battlefield, along with the unavoidable exposure of standing on a castle wall when arrows are raining down. The grouping out of power shoots the arrows every day, as many as possible, probing for weakness, trying to inflict cuts, if not wounds. There is no rest.

Of course, some MPs (and the associated staff or journalists) tire of the unremitting process, or do not see themselves as currently in the same battleground as everyone else – but for MPs that tends to apply to bench players who by temperament or party status are marginally relevant either to defence or attack. For the rest, and especially for the key players, there is no suspension, ever. Every action, every day, is framed by the iron rule. The temperamentally unsuited, the weary, the not-useful, and the defeated (and, sometimes, the keen, but impatient) drop out, or are pushed out if possible. But there is an endless supply of others, mostly unsuspecting and unprepared, lining up to join the fray. Is there any scope, in this process, for smaller parties that might wish to play the iron rule in their own way, to hunt with the hounds and run with the hares, to be in government for some purposes and in opposition for others?

The smaller parties and players in parliament

The iron rule, in its New Zealand context, accompanied the dominance in parliament of the major two parties for much of the 20th century. It was widely expected that the introduction of proportional representation from the general election in 1996 would reduce two-party dominance; and it has. Still, there was a National-led government for parts of the 1993–1996 parliament (leading up to proportional representation) and for the 1996–1999 parliament, varying forms of

a Labour-led government in the three parliaments from 1999 to 2008, and another National-led government since 2008. In all those governments led by a major party the iron rule shaped how governments were made and operated, and how the minor parties and individual MPs responded.

By 1996 parliament already had some small parties. The left-of-Labour Alliance represented a former faction of Labour, led by Jim Anderton following a split in 1988. The Alliance has since disintegrated, but Jim Anderton remains as a one-person remnant of old feuds, imperceptibly different from Labour. New Zealand First (as its name implies, aiming for a nationalist vote) was led by Winston Peters, who had left National after a cabinet split in 1991. In 1995, some breakaway MPs positioned to form a political party (the United party) that would operate at the centre, hence swinging either way depending on the numbers; it too has one remaining MP, Peter Dunne. Other parties have since positioned themselves for policy or population niches, including the Green Party (environmental vote), the Māori Party (Māori vote), and ACT (aiming for votes from those who wish to reduce the size of government). There have been several Christian parties, all gaining parliamentary representation by dissident breakaways from other parties, and all being rejected at the next general election.

For all these parliamentary parties, the first objective within the iron rule is of course to get elected (or re-elected) – many hear the call though few will be chosen. But the purpose of getting elected is to participate in all parts of the iron rule, not just one. How that takes place exactly depends, as ever, on the numbers in the House and on the particular motivations of key leaders.

For example, the New Labour breakaway party from Labour in 1988 (and the Alliance that followed) contained activists who appeared to see their primary goal as replacing Labour as the real voice of workers and the principles for which they stood. Only once that was achieved, would they confront the National party on the other side.²⁹ Many of those same people also took the view that the combination of smaller parties that had made up the Alliance needed to be replaced by a unitary party organisation to achieve its two-step objectives. On that basis, they deeply resented the Green Party breaking away from the Alliance in 1999 to contest the election as a stand-alone party.

From those perspectives, the coalition government of 1999–2002 (between Labour and the Alliance, with support on confidence matters from the Green Party) was the equivalent of Labour and National forming a coalition

29 The comments in these paragraphs on the inner operations of the Alliance are based on Andrew Ladley's recollection of his time working as Jim Anderton's chief of staff from 1999 to 2002.

government – unthinkable. For those holding this view the coalition with Labour (and the mostly unwelcome support from the Green Party) was a pause in the real objective, rather than a genuine agreement to work together in government.

But such are the complexities of splinter groups. Overall, however, small parties are subject to the same iron rule as the major parties: they wish to be in office if they are not, and to prevent the other side from coming in if they are. Always, prospects ahead determine whether fellow MPs or party members will support the continuation of parliamentary leadership, though in most small parties there is little choice because the incumbent leaders are the reason (often the only reason) why they are currently represented in parliament. And all MPs want to get back into parliament (as do those claimants outside of the current crop).

This last factor (the fourth in the iron rule), plays out with particular intensity in the smaller parties – and as election time approaches, can dominate all other parts of the iron rule.

At various times over the last decade, most of the smaller parties have had electorate-based party leaders (Jim Anderton, Peter Dunne, Green Party co-leader Jeanette Fitzsimons, Rodney Hide and Richard Prebble from ACT, Winston Peters, and Tariana Turia and Pita Sharples from the Māori party). But for non-electorate MPs who came in on the party list depending on the proportion of the party vote gained in the general election, and for aspirant MPs, the position on the party list is critical. The same applies to list MPs in the major parties, but in a smaller party the intensity of competition is much greater.

For example, in 1999 the Alliance gained about 8% of the party vote and 10 MPs. Heading into a general election year in 2002, the party was below 5% but the party leader (Jim Anderton) had a safe electorate seat.³⁰ At that level of polling, the Alliance 10 would have been cut to about 6, and at the same time there were aspirants who wanted to be in parliament, including the party president. This meant there was intense infighting over the composition of the list order, especially since some of the senior Alliance MPs would have to be bypassed if activist MPs were to have a majority amongst the five or six who were likely to get back into the House. This kind of infighting appears to take precedence over other parts of the iron rule as candidate selection and finalisation of list places gets under way – for those not involved, it can seem astonishingly intense. But back in the House, the bigger picture of the iron rule

30 Under the proportional representation voting system parties that receive less than 5% of the total vote get no MPs, unless they win an electorate.

continues to frame activity, as the major parties square off for the critical phase in their *raison d'être*, the general election.

Outside of the party list scramble, however, smaller parties position to be on one side or the other in coalition and support arrangements that are of increasing flexibility. In that process, subject to the craft of building confidence by agreements with smaller parties, the iron rule applies. The process is more complex, because some parties will want to be joined with government for some purposes, but not for others. The pressures of coalition government caused a split in New Zealand First in 1998 and in the Alliance during the 1999–2002 parliament. The received history lesson is that coalition can be dangerous for small parties. But the choices they make reflect their calculation on the third of the four sub-rules (getting re-elected) rather than their not recognising, and participating in, the iron rule.

In summary, the constitutional context of responsible and accountable government plays out in a political contest as described above. This context shapes everything that happens in parliament, including its constant evolution. It has created a highly competitive culture, and those who rise to senior positions are fired in the heat of inter-party and intra-party conflict. Many people work in various forms of competition; business people, sports people and barristers spring to mind. But very few are expected to rise in public to account for themselves, day after day, as 50 or more rivals try to humiliate them. And there are very few who are expected to summarise complex policy positions in television sound-bites, sometimes without notice. Constitutional principles and the iron rule of party conflict both serve to mould the character of parliamentarians. That fact is essential to understanding parliament.

Having explored constitutional principle and the iron rule of political conflict, the third element of the story is the clash of cultures between the political and the non-political. This operates through the everyday paradox, which is the subject of the next chapter.

The Everyday Paradox

Two groups divided in a common purpose

Politicians and public servants are engaged in a joint enterprise. Both are concerned in various ways with promoting the public good by using the powers of government. But their ideas of how best to achieve that public good can be very different. Even ministers and public servants who work together can surprise each other with their different assessment of priorities. The void is even greater between public servants (who largely work out of the public gaze) and the opposition (for whom public criticism of government action is the norm).

For a hundred years in New Zealand, public servants, by law, have been required to be strictly non-political. That is, they must support the government of the day in a non-partisan way. But in a democracy, government is political. The politics of government is most apparent in the chamber of parliament. The arrangement of the furniture, with the government facing the opposition across the room, makes the political conflict visible to all. Within the chamber the subordinate and non-participant role of the official is explicit.

During the committee stages of legislation officials are allowed in the chamber to support the minister. They may provide answers to questions to the minister who is responsible for taking the bill through parliament. But though they are in the chamber, they must not step on the floor of parliament; instead there is a reserved step, beside the Speaker's chair, on which the officials' chairs are placed. From there they may pass notes to the minister. For anyone other than a retired basketball player it is a long reach to the minister, but the official must not shuffle forward from the step, because they would then be challenged with the cry of 'stranger in the House'. No one ever had a promising career cut short for letting their foot slip forward onto the floor; it is not a sacking offence, but a public challenge for trespassing into parliament is one of life's minor embarrassments, best avoided.

Though the separation between the political and the non-political is crystal clear in parliament, elsewhere it is murkier. Outside parliament the politics continues, but without the pageantry non-politicians can overlook the obvious. In the minister's office, it is possible for an official to think they are in an extension of officialdom. Desks, tables, meeting spaces and administrative staff

can look like those in the office of any senior functionary. And the visitor might lapse into habits best left behind at the department, such as assuming the day will be carried by process, precedent or logic; or worse, seeing the minister as a colleague.

The minister does have an interest in process, precedent and logic; they all can be useful in defending and explaining policy. But to carry the day the minister is vitally interested in much more, including presentation, timing and building a majority. The official who knows nothing of such matters fails the minister. But the official who trespasses too far into those matters enters the world of politics.

The official who sees the minister as a colleague has overlooked the fact the minister's daily reality is shaped by parliament. As ministers receive advice they constantly filter it through a party political lens as they determine how they might use it. The good official understands that and, without entering the political conflict, tailors advice to meet the minister's needs. The less competent official ignores the political context and tries to involve the minister in the department's priorities and operations

The official works for the government of the day and within the law. That is what they are trained for and what they are schooled to believe is proper. They know that if they follow that simple approach they are doing the right thing and, as such, they must, surely, be safe. That is why it can be a shattering surprise when an error can become a matter of political controversy. As the opposition and the media seek to pick over the details of some administrative mishap, probing to establish blame, the official writhes in the spotlight.

Many of the officials who find themselves under public scrutiny feel unfairly singled out, and believe that something extraordinary is happening. It is not extraordinary; it is the entirely predictable effect of the everyday paradox that, like the iron rule, operates continually at the boundary between the non-political officials and the parliament-based politicians.

The everyday paradox has three elements.

- All public servants are non-political members of the executive, so they are not involved in the political contest.
- But all public servants are accountable to their minister who is a member of parliament (MP) and is accountable to parliament for their work (some are indirectly accountable to a minister through their board).
- Therefore, it is inevitable and commonplace that officials are swept up into parliamentary contest.

Public officials often have a fascination with politics, but most are relieved that they are not required to play a part in political conflict. They see it as a failure of the system whenever one of their colleagues is brought into the fray.

This is not a new idea. For decades up to the 1980s there was much head-shaking among long-serving officials whenever a public servant was named in parliament. At that time there was a generally recognised convention that public servants were anonymous. To be referred to by name in parliament was seen as a slight, because even a favourable reference could carry a taint of political favour. And an unfavourable reference was a slur that could not be rebutted, potentially staining the official's career. Today, with greater clarity about the responsibility of officials, naming is not generally seen as an issue. But it is still common that officials are aggrieved that they are criticised; not just for the content of the criticism, but the fact of the criticism.

Public criticism is painful, and it is difficult for an official to respond appropriately. But such criticism is not a sign that the system has broken, nor is political criticism a mortal blow at the non-political role of officials. On the contrary such events are an inevitable consequence of the iron rule of political conflict and a reflection of the everyday paradox at work.

Sometimes senior officials see the unwanted attention they receive from politicians in moral terms. That is, the criticism from politicians in some way sullies the more pure world of managers. That view is not endorsed here. If there is any moral superiority it lies with MPs who have the authority derived from election. But this is not a philosophy text; the focus here is on how the system works.

Of course non-political administrative work is best conducted with discretion, dealing with citizens' issues privately and effectively. Problems are best identified early, and dealt with within the department. But a taxpayer-funded activity can never claim that its operations are not the legitimate interest of the public, the media or politicians. Dealing with information requests, media inquiries and parliamentary questions is time-consuming and energy-sapping. The ideal world of some technocrats would not involve such nit-picking processes; presumably their world would be populated by benevolent officials constantly honing their processes to deliver the best results without the distraction of politics. But a simple glance around the world at countries that do not enjoy the benefits of democratic debate demonstrates that totalitarianism is not a reliable recipe for good government.

Democracy is inefficient and its processes can be exhausting and frustrating, but it brings the moral authority that public servants rely on in

delivering the mechanics of government. If, in exchange, it also imposes scrutiny and complicates the careers of senior public servants through the operation of the everyday paradox, that is a small price to pay.

Though the everyday paradox is not novel, its operation continually distresses public servants. Why is it so painful? The pain reflects the different cultures between politicians and public servants.

Two cultures at work

It is no surprise that politicians and public servants see the world through different lenses.³¹ They may both be engaged on the same broad endeavour, but they have very different roles. Politicians and public servants generally follow very different career paths. They get their jobs (and lose them) by very different means. Though there are many exceptions, it is useful to look at this by reference to stylised accounts of typical careers.

Public servants generally build their careers within organisations. They apply for publicly notified vacancies and are appointed after a private process of testing their merits against the needs of the job and the talents of other applicants. They are valued for their ability to work within the organisation. Analytical or organisation skills are prized, along with the ability to motivate staff and to get the best out of people, whatever weakness they may have. Though most agencies respect some questioning of policy and practice, they also value a willingness to support the common purpose of the organisation.

At more senior levels, increasing value is placed on an understanding of where the agency fits within the wider scheme, including knowledge of the political process. Generally, though senior officials may need some specialised knowledge of government process, the skills they need are similar to those identified in most organisational management texts, except that there is less interest in charismatic leadership than some private organisations may favour. This is because ministers who seek public attention may not appreciate the competition of attention-seeking behaviour from the public servant.

Public servants can, and do, lose their jobs. Mostly, this is the result of organisational upheaval (restructuring), but it can be for poor performance. Any job loss occurs as an outcome of applying standard New Zealand employment

31 Palmer (2008, pp 243–244) briefly covers a similar idea of culture conflict between ministers and officials. He suggests they speak different languages; officials speak policy and ministers speak politics.

law, where matters such as notice and rights of reply and employee privacy are important.

Politicians, on the other hand, build their careers through parties and parliament. Even getting selected as a party candidate generally involves a public process of soliciting support. The election process itself is very public. The candidates make themselves available through public debates, photo-opportunities and door-knocking, so the electorate might compare them against their opponents. The list system of proportional representation has changed the selection process for some of the candidates, but the essence of public competition for support remains. For every successful MP, there are a greater number of unsuccessful candidates whose disappointment must be endured in public.

Once in parliament, individual progress, especially appointment as a minister, depends on getting the support of colleagues who (as the iron rule dictates) assess each other to see who among them is best able to improve the prospects of the party in the ongoing political conflict. Rules for selection to cabinet vary; National gives control to the prime minister, Labour uses a caucus vote, but the criteria are similar. Skills in debate and scoring points against other parties are important. Capturing publicity is a useful skill. The emotional strength to withstand criticism and respond strongly is vital. Those who can back themselves and marshal arguments will stand out. But those who are too ruthless in their own interest may never be trusted enough to be included in the deals that are needed to form a government.

Politicians can lose their jobs, either as a minister or as an MP. Every three years this is a very real prospect, with no protection from employment law. The biggest job losses occur as a result of electoral re-alignments at the time of a change of government, when virtually every minister and many MPs can be swept from office.³² Alternatively, a minister who loses the confidence of the prime minister is immediately out of office; an MP who offends the party can lose selection; and an MP who upsets the electorate may be voted out.

Losing an election may be gentler than losing your head, but it is still a more mortifying process than most employees endure. With that ultimate sanction hanging over them, politicians compete daily in public, striving to reveal each other's weakness.

32 The vagaries of proportional representation have allowed Peter Dunne (United) to avoid either fate in recent cycles, but in general the rule still applies.

These two career paths produce people with very different outlooks. Though both work for the public good, public servants progress through their careers by essentially private means; preferment and setbacks are determined by discreet processes. Politicians achieve their successes through public processes and their failures are there for all to see, picked over forever. There is not enough space here for a full anthropological dissection of the cultures that emerge, but a review of three areas illustrates the differences. Those areas are views about authority, information and loyalty.

Authority

To most public servants, authority is generally found in instructions and rules that are part of the management process of day-to-day activities. These will commonly be located in departmental circulars or manuals, and are transmitted through a hierarchical process from the head of the department. Public servants who follow the rules will usually be fine.

To those in head office and other senior roles, however, authority has an external origin. Most importantly, authority is found in whichever law authorises or requires the current activity. Any competent official will have a passing knowledge of the law they operate under. Authority also comes from the minister's instructions and cabinet minutes. In addition, those in policy roles will regularly consider what change in policy (and maybe law) would be desirable. In that context, authority comes from data and analysis.

To the politician, day-to-day activities are not something to be managed. On the contrary, they are generally of little interest except when something goes wrong, when they become an opportunity for opposition attack. In that context departmental rule books are not authority, but evidence: evidence of departmental (and hence ministerial) responsibility either for applying the rules incorrectly or for drafting them incorrectly.

In the wider context of reviewing policy and performance, politicians will share the public servant's respect for the authority of law, data and analysis. These are important in constructing a case for policy. But in the final analysis, the politician's authority does not come from those factors, it comes from votes. For authority, read majority.

I recall an occasion as a young Treasury manager when I set out with enthusiasm to brief Phil Goff, who had been recently appointed as minister of education. At that time education vouchers were an area of The Treasury's received wisdom, to be promoted at every opportunity. I had data and research to hand and set out to make my case. After a short time Phil Goff stopped me

politely, saying he had been mentally counting the votes in caucus for this idea. He thought maybe five caucus members would be interested to hear the case – but only five. Rather than continuing the discussion, the minister suggested the discussion move onto something else that he might have some hope of finding useful.³³

All the authority of public service analysis cannot prevail against the authority of the majority.

Information

Information is an asset, at times even a treasure, to the public servant.

Information must be collected properly, with due regard to the Statistics Act 1975, the Privacy Act 1993 and any other provisions that may apply. Information must be kept correctly, with appropriate regard to the Public Records Act 2005. And when asked for, information must be made available, with respect for the provisions of the Official Information Act or the Privacy Act, whichever is applicable.

But it is not just the rules that make information special. Information about individuals is the basis for the administration of their entitlements and obligations. Information lies at the heart of tax assessments, accident compensation case management, the administration of custodial sentences, and prosecution for fisheries offences. Its careful handling and use at the proper time and in the proper way is fundamental to all public administration.

Information is also critical to public policy. Data from statistics is basic to any analysis of policy proposals. Information may also come from interviews, administrative records, satisfaction surveys, public sources or even secret intelligence. Few people will place weight on a public servant's hunch that something will work, but an analysis based on well-assembled data from respectable sources may be persuasive. Information needs to be collected, massaged and made available at the proper time and in the proper way.

Information is also a treasure to parliamentarians. For them information is valuable as a tool to justify public policy, just as it is for the public servant. But to the politician information is not just an asset, it is a weapon. The public servant's rules and propriety have little weight for the MP. Whenever the opportunity arises, when one side of the debate has information that the other does not, information is no longer material to be made available in the proper way; on the contrary it is a secret to be revealed at the most opportune time.

33 I am grateful to Phil Goff for permission to report this exchange.

An example that vividly demonstrates the difference in approach was the use of Don Brash's 'gone by lunchtime' comment.³⁴ This was a comment made by Dr Brash when, as leader of the opposition, he had the chance for a private diplomatic discussion with visiting United States congressmen. He was speaking of the nuclear ship ban, and apparently he said that if he had a free hand the ban would go by lunchtime. As is usual at such private meetings, foreign affairs officials were present and they forwarded the details of the exchange to their colleagues in Washington, which is normal practice. None of the diplomats focused on the fact that cables to overseas embassies are routinely copied to the minister's office, so Phil Goff, the minister of foreign affairs, received a copy of the exchange. To him this diplomatic event was a domestic political goldmine, and its release was the obvious thing to do.

Phil Goff did not break any law in releasing the information as he did. It was his information, and he was entitled to do what he did. The diplomats, however, found it very disconcerting to be dragged into the political conflict.

Loyalty

Public servants are loyal to the government of the day. This does not mean they help ministers with their political tactics as they work to avoid the inevitable loss that eventually ends all governments in a democracy. What it means is that they accept the authority of the government, and work as best they can to carry out the government's programme in office, within the law. That programme may well involve dismantling the work of the previous government; public servants may have spent many months of effort on that earlier programme. It is common that the same team that put the previous set of measures in place will be called on to pull those measures apart, because that team is the group that knows the area best. This can be deeply frustrating to the public servant who may believe the previous policy was better.

In the process, good public servants will not complain about the government or the minister. They will not leak information to the media and will not withhold advice that could strengthen the government's policy. In particular, they will not pass secrets to the opposition, even when the polls all predict an imminent change of government. But when the government does change, they will immediately transfer the same loyalty to the new team.

Politicians also give loyalty to the government, but with important differences. They are fiercely loyal to the government they are in. And if they

34 Small (2004).

are not in government, they are loyal to the government they hope to be part of in the future. This strong and defensive team loyalty can make it hard for some ministers to believe in the public servant's loyalty to the current government.

At best, such ministers can behave like a wary spouse considering her partner's record of serial monogamy. At worst, an untrusting minister will aim to have very little to do with the department, will avoid discussing plans, and will see any departmental problems as signs of a conspiracy against the government. This paranoia can be mirrored by the naivety of some public servants who cannot understand that a new government is looking at them with fresh eyes and has fresh plans, and will not be impressed by reports of continued brilliant management of the previous agenda.

As always, the biggest strains can occur at times of stress when the public servant is under attack from the opposition. The public servant would generally like the minister to step forward and offer a defence. Ministers, however, find it hard to take the blame for public service mistakes.

Management theory suggests we should learn from our mistakes. Political competition says mistakes are there to be exploited by the opposition. Officials try to explain such events in non-political terms, as problems that will be repaired by improved processes. The opposition wants to show them as failures of leadership that can be repaired only by a change of government. In the opposition's eyes, the public servant's attempts to explain things in managerial terms is a wilful or misguided attempt to reduce the political heat on the minister, and so the official can become a target.

In that context, officials then hope that their loyalty to the government of the day will be rewarded by ministerial support. If ministerial support is less than vigorous, it may be seen as another instance of the widely deplored decline in acceptance of ministerial responsibility. But it is not that simple.

From the official's point of view, ministerial support can be a mixed blessing. Too much ministerial endorsement looks like political favour. From the government's point of view, using political capital to prop up a public servant may not be capital well spent. After all, the public servant does not have any political capital to offer in return – and besides, the mistake may well have been a public service matter.

Such events can be managed only on a case-by-case basis. If officials and parliamentarians understand the underlying principles, the pressure of the iron rule, and the ambiguities of the everyday paradox, such stresses can be managed. Most of the time relations do not deteriorate and the two sides rub along, each respecting the other's idea of loyalty.

A self-limiting process

This discussion has tended to focus on the problems and confusions between parliamentarians and officials. There are real misunderstandings on both sides, and these cause confusion. In addition, the process of the iron rule and the everyday paradox bring pressure onto officials. Sometimes that pressure can seem unsustainable, but the pressure is self-limiting.

It is true that members of parliament regularly criticise officials for real or perceived mistakes or misdemeanours. Late in 2009, for example, it was the turn of Barry Matthews, the chief executive of the Department of Corrections, to be the target.³⁵ The criticism came from opposition MP Clayton Cosgrove. It seems that at a select committee hearing the MP questioned the official about a supposedly threatening letter he had sent to the union. The official denied having made threats. When the MP later acquired a copy of a letter that suggested that if there were no change in union stance then contracting-out of prisons would be recommended by the official, he saw a deliberate misleading of parliament, and threatened to bring a charge of breach of privilege. Matthews still denied that the letter was intended as a threat; rather he saw it as an open account of what would be required if the union view did not change.

There would seem to be room for honest disagreement about the letter. In the context of a select committee, facing what often feels like loaded and leading questions, many witnesses can be confused by a question, and a confused answer can be construed by a hostile questioner as being deliberately misleading. The path looks alarming; a short step from confused questioning to charges of breach of privilege.

In fact, though such things could happen, and might well be consistent with Standing Orders, parliament's rules of procedure, it is most unusual for parliament to proceed formally against a public servant. The protection comes from the same source as the risk – politics.

The iron rule drives politicians to mount attacks, because they might do harm to the government. But the iron rule also moderates attacks, especially against people outside parliament, because a party that is seen as consistently unfair will have difficulty in the polls. Public servants, especially senior public servants, may not be popular with the public (they are not supposed to be popular), but that does not mean there is a widespread goal to ruin every public

35 Kay (2009).

service career.³⁶ And it is precisely because attacking public servants is as hard as shooting fish in a barrel that it attracts little respect.

So long as public servants are not contemptuous, scornful or rude in their dealings with MPs, then MPs realise there is little to be gained by hounding individuals beyond endurance. Yes, public servants will generally have to endure more hard and suspicious questioning than others will, but that is reasonable. After all, it is public servants who handle the government's resources and powers on its behalf, and public service salaries offer some compensation for the trials of office.

The underlying point is that the pressures of the everyday paradox can be endured so long as the public servant shows respect for parliament. It is important to avoid being irritated or viewing exchanges in moralistic terms. Politicians can be less polite or respectful of senior managers than is typical inside government agencies. But that is their job. The constitution drives the need for political contest, and that contest demands the iron rule. Sometimes, when facing a particularly silly question, it can be difficult for the official to remember all that. But the best approach is to avoid provocation. In Homer Simpson's terms the public servant should 'turn every cheek on his body'.³⁷ So long as that is done, even the angriest of MPs will be restrained by colleagues and the fish will continue to swim safe in their barrel.

36 This is an assertion based on feedback received while in office, and partially supported by UMR research. That research lists respect for public servants at the mid-point of polled professions, eighth out of 15. That is, above both of the two professions most likely to be involved in an attack on public servants: lawyers are 11th and politicians are 12th. See UMR (2009).

37 This is not another example of Homer Simpson being sexist. He was discussing his very worthy neighbour, Ned Flanders, not the public service.

Conclusion to Part One

The chapters in this part have outlined the basic principles that drive the constitutional relationships between parliament and officials. History has firmly put parliament in the superior position, and officials are in a service role to ministers, who themselves account to parliament. Officials are definitely non-political, but the operation of the iron rule and the everyday paradox, means they will be drawn into political exchanges, usually to their cost.

But the degree of subordination is not absolute. The process works by mutual respect and restraint. Primarily, the respect is from officials to parliament, as it should be. But the restraint that parliament generally shows in using its formal powers against officials is a minor illustration of the balances that have evolved throughout the constitution.

The history, principles and practices outlined in this chapter have focused on parliament and the public service. Taken in isolation they could create an impression that respect and obedience to the will of parliament are all that is needed to put the public servant on the right track. While such respect is appropriate, it is not all that is needed, because the constitution has more dimensions.

The same historic processes that led to the evolution of parliament also created other balancing elements of the constitution, in particular the courts. Parliament enacts statutes, but courts determine the law on a case-by-case basis. This means public opinion is not the only balance in our constitution; there is also judicial oversight.

The next part considers how these balances work out in practice, as it examines the extent of the powers of parliament.

Part Two

**Parliament is Sovereign:
Or so they say**

Introduction to Part Two

The discussion so far has focused on aspects of authority and accountability as they apply to officials and parliament. In doing that, it has glossed over the primary obligation of public servants. Public servants must be loyal to the government of the day and act to discharge the (lawful) instructions of their minister. That is apparent from Part One. But the most important part of that obligation is the word in parentheses: that is, the first obligation of any public servant is to obey the law.

It is a good idea that everyone should obey the law, but the imperative is much stronger on those who work for the government, because of the confusion and danger they could cause if they ignored the law. The government's power is greater than any other's in the country. Its powers affect everyone. If those who control the powers of government freely do as they think best (even if it is well intentioned), the result is an unpredictable and uncontrollable authority loose in the land. That is a form of tyranny.

It is not enough that public servants are controlled by a democratically accountable government; they must obey the law. To do that it is not necessary to be a lawyer, but it is helpful to have a basic understanding of what constitutes the law and how it is made. So far in this book parliament is the only source of law that has been analysed; the question for this part is the extent and the limits of the powers of parliament to make the law. The idea of parliamentary sovereignty suggests that those powers are absolute, but the balance of powers under the separation of powers suggests that no authority is absolute.

Parliament and the executive do not exist in isolation. If officials are to obey the law they need some understanding of the role of the courts. This chapter explains the balance that exists between the courts and parliament. It may look like a diversion from the core theme of the relationship between officials and parliament, but it is not. It is only by understanding parliament's relations with the courts that the law can be understood. Without an understanding of the law, officials cannot do their jobs, and they certainly will not understand their relationship to parliament.

In the hope of explaining these issues, the following chapters look at four questions.

- Does parliament control law-making?
- Are parliament's laws beyond review?
- Can parliament do whatever it chooses?
- Can parliament regulate its own affairs?

The first, third and fourth of these questions have practical application and are illustrated by case studies drawn from recent New Zealand experience. The second is essentially theoretical, so it is explored by reference to constitutional debates that have occurred in recent decades.

The consumer warning in the introduction still applies – this is not a legal text. Though it deals with matters that have been argued in court, it does not attempt to provide an authoritative view on the law. All the matters that are covered in a paragraph or two here have been the subject of lengthy judgments from superior courts, as well as weighty academic consideration. This book does not set out to match that discussion; rather the aim is to outline the issues so that those who seek to navigate through the mechanics of the constitution will have some warning of rough water ahead. Any who needs to sail through that rough water should get a lawyer.

Who Makes the Law?

Checks and balances

Under the Westminster doctrine, parliament enjoys unlimited and illimitable powers of legislation. Parliament's word can be neither judicially invalidated nor controlled by earlier enactment. Parliament's collective will, duly expressed, is law.³⁸

This all looks admirably simple. Having determined clearly who is on top, the public servant might decide to ignore all others and simply comply with parliament's wishes. This would suggest that, in order to obey the law, all the public servant need do is to read the relevant statute. And, when aiming to improve policy, all that is needed is to advise the minister to change statute law to achieve whatever efficiencies may be expedient.

This idea of parliament being supreme is widely held, and is reflected in loose catch-phrases such as that parliament is the 'highest court in the land' (in fact, parliament is not a court, and may only try breaches of its own privileges). It is hardly surprising that the supremacy of parliament is an idea that tends to find favour in parliament. Members of parliament (MPs) (and others) like to talk about it as parliamentary sovereignty.

Sovereignty is a word that hardly ever arises in day-to-day life; it is reminiscent of former times. It creates in the mind images of royalty or old coin collections. But the *New Zealand Oxford Dictionary* defines sovereignty to mean 'supremacy in respect of power, supreme authority'.³⁹ This generates an image more like an ayatollah, and so seems something worth fighting for, or at least arguing over; and some people argue strongly about it. For example, on the occasion of the 150th anniversary of the first sitting of the New Zealand parliament the deputy prime minister, Michael Cullen, set out a vigorous defence of parliamentary sovereignty.

New Zealand is a sovereign state in which sovereignty is exercised by Parliament as the supreme maker of law, the highest expression of the

38 Joseph (2007, p 487, emphasis in original).

39 Deverson and Kennedy (2005).

will of the governed, and the body to which the government of the day is accountable.⁴⁰

There seemed to be no ambiguity in Dr Cullen's mind and, therefore, for public servants, conditioned as they are to respect and obey ministers, it looks cut and dried. But there are some in the system who hold positions of authority that do not always see things the same way. For example, shortly before Dr Cullen's comments, Dame Sian Elias, the chief justice, gave a speech in which she said:

Parliamentary sovereignty is an inadequate theory of our constitution.

An untrammelled freedom of Parliament does not exist.⁴¹

When judges and ministers present such diametrically opposing views, it is tempting to duck for cover, but some explanation is needed.

It turns out the issue stems from the constitutional idea of the separation of powers; who gets what power, and how much power, and who controls whose use of power. The history outlined in the previous chapter focused on the transfer of royal power from the king to an elected parliament and cabinet. But it is not just a matter of transferring power; the other issue is controlling the use of power. A shift from a hereditary monarchy to an elected government with absolute power would not be likely to create a lasting benefit. After all, a government that knows it cannot last in office indefinitely might (in the absence of any controls) be tempted to plunder the treasury before it leaves. It has long been recognised that democratic government needs to be combined with the means of ensuring that the government acts within the law. Principally, it is the courts that play that role.

The courts and parliament have jostled for centuries about who has final authority and where each jurisdiction must give way to the other. This chapter does not attempt to outline that history, but provides a snapshot of where the arm-wrestling seems to have reached at the moment. It is inevitable in exploring these issues that the branches of government look to be involved in an unseemly struggle for power; in fact that is not so. The juggling between the legislature and the judiciary is simply an ongoing example of the constitutional conversation. As one arm of government acts in a way that seems to push the boundaries, the other will respond; between them they maintain the balance.

40 Cullen (2004, p 13,191).

41 Elias (2003, p 163).

Parliament at the centre

A simple picture of law-making is that parliament passes statutes and those statutes are the law. Statutory law is important and authoritative, but it is not the full picture. Other forms of law include delegated law. Delegation occurs to handle the many points of detail that require attention; having 120 MPs debating and determining which drugs doctors may prescribe or what levels of fishing are permitted in each fishery zone seems a good prescription for chaos. Likewise, determining approved uses of land in different towns and suburbs across the country does not seem to be a good use of parliamentary time. Accordingly, such matters are delegated.

There are several forms of delegated law, with the most significant being regulations. These are laws that are made by the governor-general in council. After the regular Monday cabinet meeting there is commonly a meeting of the Executive Council. Several ministers, including those formally proposing regulations, reconvene in a separate room at parliament (that is, not the cabinet room) to meet with the governor-general. The governor-general arrives with very little ceremony; most workers in parliament being unaware of the visit, other than the small inconvenience of a lift being reserved for his or her use. At the meeting, ministers propose the regulations, and the governor-general approves them. The regulations become part of the law and are gazetted. On average, there are over three times as many regulations made each year as there are parliamentary statutes.⁴²

Similarly, all local authority by-laws are a form of delegated law. Under the Local Government Act 2002 (and its various predecessors), local bodies are empowered to make laws that apply within their area. Such by-laws must be made following consultative procedures specified in the Act and must be publicly available.

In addition, a large number of legislative provisions permit the making of laws by other official bodies. These provisions include ministers, some senior public servants and some other government agencies such as universities and schools. Some law-making powers go beyond the state to incorporated bodies, industry sector organisations and professional bodies; in every case the power to make law is included in a statute that designates who may make law and may specify how such power may be used. The laws made in this way have many different names, including standards, codes, directions, instructions, orders, warrants and notices. These various forms of rules are generally not drafted by

42 Joseph (2007, p 1,007).

professional law drafters and are not published in any one place. Without some god-like omniscience, it is impossible for anyone to know all such laws.

Though there is extensive delegation, parliament has not abdicated responsibility for the law-making process. During the last 20 years the Regulation Review Committee (a committee of parliament) has had the power to review any regulation or rule made using powers created by parliament. The committee can recommend that regulations (or any of the various rules that, for this purpose, are ‘deemed regulations’) may be disallowed if they breach the standards outlined in the Regulations (Disallowance) Act 1989. In fact no disallowance has occurred, but the committee is active in reviewing regulations, either on its own initiative or following a complaint from any person who has a concern. As a result, various regulations have been revised. This is an unusually explicit example of a constitutional conversation.

Role of the courts

The courts have a very significant and different role in reviewing regulations and rules. This role arises from the court’s responsibility to determine what the law is in relation to each case that is brought before it. Parliamentarians (or delegated rule-makers) write the laws that are generally applicable, but judges determine what the law is, on a case-by-case basis. That is, when people disagree on who has what rights or obligations, the courts determine the relevant facts, review various applicable laws and decide the legal position. This can arise in a variety of ways. Three examples are briefly canvassed in the following paragraphs: determining whether a rule was made using a proper delegated power; interpreting statutes; and reviewing administrative actions.

First, the need to determine whether a rule was properly made arises from the fact that making law can be complicated. Well-meaning rule-makers might make many mistakes, including misunderstanding their own powers. For very many years it has been the practice of the courts to consider the validity of such rules. For example, whenever a citizen is prosecuted for breach of a regulation, the courts will consider the validity of the regulation. As early as 1701, Chief Justice Holt said:

every by-law is a law, and as obligatory to all persons bound by it ...
as any Act of Parliament, only with this difference, that a bylaw is
liable to have its validity brought into question⁴³

43 *City of London v Wood* (1701) 12 Mod 669, 678.

A regulation that is not clearly ‘within the objects and intentions’⁴⁴ of parliament’s statute will be ruled to be *ultra vires*, or beyond the authority of the rule-maker; as a result the regulation, by-law or rule will be declared invalid.

Second, the need for statutory interpretation will be obvious to anyone who has ever had to read much statute law; try as they might, parliament’s intentions are often a little unclear. But more importantly, the meaning of a law can be understood only in the particular context of the facts in each case. The judge determines the facts based on evidence, and then determines how the statute must be interpreted in that context.

The process of statutory interpretation has developed to a fine art. Most of us would think that the words of the Act would tell the story, but that is not all there is to it. In a recent Supreme Court judgment, Justice McGrath said:

Words, on their own, lack precision as conveyers of meaning, and techniques of statutory interpretation are the principles for ascertaining the most appropriate meaning of those available for any text.⁴⁵

This seems a bit breathtaking; is language not among humanity’s greatest achievements? How come words do not mean what they say? But this is not merely intellectual point-scoring. The judge went on to say that:

common law presumptions, in particular the presumption against interfering with the personal liberty of the individual, have also had a strong place as indicators of intended meaning of legislation.⁴⁶

That is, in considering cases judges look to previous court decisions for precedents; those precedents define the common law. Judges assume that basic common law rights endure, unless parliament expressly and explicitly rules them out. In that process, judges interpret statute with reference to the New Zealand Bill of Rights Act 1990 and they aim to protect principles such as due process, fairness and liberty. This process occurs whether or not there is any ambiguity on the face of the Act.⁴⁷ Even if the words seem clear, judges still apply the common law rules as they make their interpretation.

In looking to the common law, judges are looking at an ancient Anglo-Saxon thread of law. More recently, they are also likely to look more broadly at international law. Various factors drive this internationalisation, including the development of communication and information technology. It is now easier

44 *Carroll v Attorney-General* [1933] NZLR 1,461, 1,478.

45 *Hansen v R* [2007] NZSC 7, para 250.

46 *Hansen v R* [2007] NZSC 7, para 250.

47 *Hansen v R* [2007] NZSC 7, para 13.

than ever for lawyers and judges to know about significant legal developments in similar jurisdictions; precedents in other jurisdictions are not binding, but they may be influential.

As well as this amorphous effect of transnational judicial discourse, there is a more concrete process of accession to treaties. Since the establishment of the United Nations the number of international treaties has increased. These treaties have been gradually incorporated into statute law in New Zealand, and so become part of the resource that is drawn on for statutory interpretation. These treaties have contributed substantially to our law, so that an authoritative estimate suggests that 200 of our (about) 600 public statutes raise issues of compliance with international obligations.⁴⁸ As they influence interpretation, these international obligations operate to shape our law.⁴⁹

More recently, judicial thinking about the Treaty of Waitangi has had a major influence on the law. The single most significant case occurred in 1987. The case arose because section 9 of the State-Owned Enterprises Act 1986, for the first time, gave statutory recognition to the principles of the Treaty. Accordingly, the Court of Appeal fleshed out those principles, and they have been a major influence on policy-makers ever since.⁵⁰

Third, as well as the processes of reviewing regulation and interpreting legislation, the courts may also review any act (or inaction) of any person holding office, using the principles of administrative law. This means that officials must not rely solely on the provisions of a statute to guide their actions. Administrative law is largely concerned with the process of decision-making, but in recent decades, through judicial review, judges have occasionally looked at the substantive merits of official actions. Courts are likely to review an action on grounds such as procedural impropriety, illegality or unreasonableness. As a result, a growing body of administrative law applies to the actions of people in official roles. This law is as important and influential as any statute, but it was not made by parliament or by any delegated power. It was made by judges, using the power of precedent – it is common law.

The content of the common law, including the development of administrative law, depends on judges looking at past judgments in other

48 Keith (2004, p 597).

49 The impact of international law on domestic law is a large topic that is beyond the scope of this work, other than to emphasise the point that it is another example of the matters that must be kept in mind when considering the legality of official action.

50 *NZ Maori Council v Attorney-General* [1987] 1 NZLR 641. As with international law, the Treaty of Waitangi is a substantial topic that is generally beyond the scope of this work.

(similar) cases as a guide in identifying the law. Gradually as cases are determined by superior courts the law becomes clear and legal principles emerge. This means there are other players on the law-making field, the judges. Judges do not just apply the law; in the process of identifying applicable legal principles in a series of cases, they make law. Parliament is a manufacturer, making laws on a wholesale basis, and judges are the retailers, providing laws case by case.

As they make laws judges bring a dispassionate approach, considering each case on its merits and applying the law without regard to political parties or ministerial authority. This implies that the judge is a quite different person to the parliamentarian or the public servant; it is worthwhile to make a brief excursion to attempt to understand the culture that judges contribute to law-making. Courtroom dramas may be popular, but real judges are only occasionally glimpsed on television pronouncing sentence; they do not appear on news shows to explain or defend their decisions. This means this important group is likely to be little known to most New Zealanders.

Another conflict of cultures

In looking at the relationship between officials and politicians it was useful to consider how they each make their careers. It is equally useful to look at lawyers, including the peak of the profession, the judges, to see how they may be shaped by their careers.⁵¹

Recall that the political career is made in public, with regular public competitions determining long-term success. The ability to command a majority is the single most important determinant of success in politics, and the ability to cope with the emotional stress of constant public challenge is a vital survival skill. The official's career is made in organisations, through discreet competitive selection processes; there is much more emphasis on analysis and working together, and less emotional stress from public exposure.

A stylised account of a legal career, on the other hand, sees the lawyer making her way within the profession (as opposed to an organisation). The first requirement is to gain admission to the Bar, which requires evidence of qualification and character. Initially, a lawyer will commonly work for a firm (or a company or a government department), gaining experience in some area of the law. The key attributes are precision and thoroughness, supported by a good

51 See Palmer (2008, pp 121–123) for another discussion of how a legal background influences judicial decision-making.

knowledge of the law; the emphasis is on rational and deliberative legal analysis. But from the outset, this rationality will be applied to matters of considerable emotional significance to the client; why else would they bother to pay for a lawyer?

Some lawyers will get courtroom experience, which gives an opportunity to handle more emotion. The court always aims to sift through evidence in order to apply the law dispassionately, but on the way there can be very emotional moments. Defendants may face imprisonment and plaintiffs may face ruin; clients are commonly tense. And in court the lawyer must remain alert and confident in debating the law with a competing practitioner, in front of a judge who assesses every argument. It is like a long oral exam, but one in which someone else is trying to pass the exam at your expense, and you must do likewise. The process of cross-examining witnesses may involve significant confrontations. Even in parliament it is out of order to accuse a member of lying, but lawyers effectively make that accusation in court every day. The procedures may look sterile and polite, but that comes as a result of a lot of effort; the whole point is to take an argument that otherwise could not be settled, hear each side, and resolve it by careful application of the law.

The most successful and hard-working lawyers may be made partners, which offers prospects for substantial incomes and more hard work. Some more-senior lawyers may decide to move out of a partnership to work as barristers, focusing on difficult cases referred from other lawyers. The more successful among them will be appointed as Queen's Counsel, and so they are recognised as leaders in the profession. So long as the briefs keep flowing, this is simply another step on the path of more income and even more hard work.

The process for moving from being a practitioner to becoming a judge used to be a mystery; one was simply invited (or waited forever by the phone for a call that did not come). Now the process is outlined in a note on the Ministry of Justice's website.⁵² Periodic advertisements seek nominations or expressions of interest. The solicitor-general seeks the views of the chief justice to assemble a long list of candidates suitable for appointment.⁵³ When there is a vacancy the chief justice and the solicitor-general consult with other judges and the profession to prepare a short list. Several names are then put to the attorney-

52 Ministry of Justice (2003). The operation of the process was elaborated in a speech given by the then solicitor-general, Terence Arnold (2003). The approach is broadly similar for any court appointment, but here the focus is on the High Court bench.

53 The solicitor-general is the government's chief legal adviser, is head of the Crown Law Office and reports to the attorney-general, who is a government minister.

general. By strong convention the attorney-general ignores any party political considerations in selecting a preferred candidate. The successful candidate's name is mentioned in cabinet (that is, it is not a matter for cabinet input or decision), and then put to the governor-general for appointment. There is certainly no public competition, as there is for a political role. And even if there is an interview (which can happen occasionally), the assessment of merit is made by the process of consultation, not test; it depends on continuing performance as viewed by others in the profession.

Once appointed to the bench, a judge serves till retirement. So long as they do not suffer incapacity or criminal conviction, they cannot be removed on any of the employment grounds that might apply to others. Their pay is determined independently (that is, not by ministers) and may not be reduced. These measures ensure judges are beyond influence or pressure from the government.

Where a public servant may look to the rules to find authority and a politician looks for a majority, judges find authority in the law. A public servant sees information as a treasure, and a politician finds a weapon, but to a judge information, if it is acceptable and credible, is evidence. And while the public servant is loyal to the government of the day, and the politicians are loyal to their own government, judges are loyal to the law.

The processes of appointment and tenure mean judges are not bound by the iron rule of political conflict; they do not enter the conflict. Similarly, though judges may be 'subordinate' to parliament, in the sense that statute law overrides common law, they do not serve ministers, so the everyday paradox does not apply. When the need arises, they are able to see policies and priorities from a more detached legal viewpoint.

The career that has brought judges to the bench has taught them to approach issues rationally, consider them thoroughly and determine them clearly. Judges are dedicated to reasoned argument, supported by evidence. They are not oblivious to public opinion, but put more weight on good law, and certainly seek to resist political fads and fashions. Likewise, though judges acknowledge the responsible role that ministers play, they are not in awe of them (as officials may be) and are quite willing to judge a minister's actions, if the need arises and depending on the topic. Traditionally, judges are more likely to defer to ministers in matters of national security, recognising that that is a basic responsibility of the executive, but will be more likely to intervene on matters affecting human rights, which are definitely in the court's sphere.

Judges, and those who appear before them, are well aware of judges' responsibility to dispense justice, and the significance this has for a well-ordered

society. This is why the respect regularly accorded to judges in a courtroom is beyond what is found elsewhere. Judges still bow to each other in court; you do not find much bowing anywhere else in New Zealand (except in parliament). They know that they are at the peak of their profession, and that they have achieved their positions by ability and peer recognition.

An example of the deference shown to judges may be seen in the very first substantive hearing of the new Supreme Court. The first lawyer to appear before the court, a very experienced advocate, did not just welcome the court, or congratulate members on their appointment; he praised the judges for their ability. He said (by means of endorsing a quotation from another source):

I predict the new Supreme Court will be seen as an outstanding Court. The judges ... are very experienced in appellate work and in working together. They are well set to determine finally all the issues that a final court for New Zealand should determine⁵⁴

It would never be proper for a public servant to make such flattering comments to a minister, though probably some sycophants do, in private. But these comments were in public, and apparently they could be used to set the tone at the Supreme Court. The respect of the profession is a major strength for courts, providing comparable mana to the democratic mandate enjoyed by MPs.

These, then, are the people who make judge-made law; the next section explains some of the ways in which judges have shaped the law in recent years.

Impact of judge-made law

There is no simple way of encapsulating the law; it comes from too many sources. There are several hundred current statutes and many more regulations of various sorts. But even if these could be understood, there is an immense and constantly growing list of judgments that serve to act as precedent, so are also part of the law. Professor Joseph cites a total of 2,400 cases as he explains the law relating to the constitution and administration.⁵⁵ Of those cases, about 1,200 are New Zealand cases. You might think that would be enough; with that number of cases everything must be resolved already. Far from it; in fact the business is accelerating. Of the New Zealand cases Professor Joseph has listed, over 650 were determined between 1990 (after the New Zealand Bill of Rights Act 1990 came into effect) and 2007 (when the most recent edition of Professor Joseph's book was published) – that is about one cited case every

54 Hodder (2004).

55 Joseph (2007; the table of cases covers pp 1,229–1,270).

10 days.⁵⁶ And, since then, a steady stream of cases will serve to keep him occupied preparing the next edition of his book.

Clearly, it is not possible to expound on all this law here. Instead, a small number of cases illustrate how judges are constantly tuning the law, either by inserting protections and remedies that parliament unaccountably overlooked or by reviewing administrative action. Following that, in the next section a longer case study shows the issues that can arise for public servants as they operate within the law.

Intercepting information

In the 1990s, two people were seen hurriedly leaving a home following a break-in in Christchurch. A witness recorded the number plate on their car, and it transpired that they were from the Security Intelligence Service (SIS). In the subsequent court case, the government acknowledged responsibility for the break-in, but claimed it was authorised by a warrant issued under the New Zealand Security Intelligence Act 1969.⁵⁷ That Act states, in section 4:

the Minister may issue an interception warrant authorising the interception or seizure of any communication not otherwise lawfully obtainable

Section 4 goes on to outline the acceptable grounds for the issuing of such a warrant, but that is not the matter of concern here. The point at issue was whether the Act permitted the SIS to break in to properties to collect information that was not otherwise lawfully obtainable.

The SIS and the inspector-general of security (a retired High Court judge) had considered the break-in to be lawful, and in the High Court in Christchurch the judge agreed with them. Roughly their logic was that parliament authorised this interception and seizure of information and it must have intended to empower covert entry to achieve that purpose, as a necessary implication. The Court of Appeal disagreed. Using the principle that basic human rights cannot be abolished by implication, the court could not find any explicit authority for the SIS to break into homes, even with a warrant. Subsequently, parliament passed amending legislation to authorise entry onto property and to strengthen the safeguards around the use of the power.

56 Professor Joseph must have read all those cases, and presumably a whole lot more that he did not think were important enough to cite. Court judgments make dense reading; he deserves sympathy.

57 *Choudry v Attorney-General* [1999] 2 NZLR 582.

This is a useful illustration of a constitutional conversation. The SIS was initially established because the executive was concerned about security risks. Following the discovery of an undercover SIS agent at The University of Auckland there was a public furore and a commission of inquiry. This led to parliament enacting the powers and protections of the New Zealand Security and Intelligence Act 1969. When the powers came to be tested in court, they were shown to be inadequate, so in 1999 parliament legislated again.

Unlawful search

In the early 1990s, in the Hutt Valley, a police team arrived with a warrant to search a house. The son of the owner and a neighbour both explained to the police that the person the police were interested in had no connection with the address. The search began, but the senior police officer was persuaded to talk with the daughter of the owner, a lawyer, who confirmed the police had the wrong address. Despite that the search continued for a short time longer.

The homeowner sought redress from the police, but, though the search was unlawful and a breach of a right specifically protected by the New Zealand Bill of Rights Act 1990, that Act does not contain any provision for penalties. Because of that gap in the law the High Court struck out the action, but that did not stop the Court of Appeal, which considered that, ‘in affirming the rights and freedoms contained in the Bill of Rights, the Act requires development of the law when necessary’.⁵⁸

The court considered that, since the Act imposes an obligation on the executive, the legislature and the judiciary to protect rights, then the absence of specific remedies cannot mean courts cannot impose them. Noting that under the International Covenant on Civil and Political rights all signatories have undertaken to provide remedies for breach of rights, the court felt obliged to provide a remedy. Alternatively, the only course would be to mount a very expensive action through international tribunals, which the court considered excessive.

Citizens of New Zealand ought not to have to resort to international tribunals to obtain adequate remedy for infringement of Covenant rights this country has affirmed by statute.⁵⁹

58 *Simpson v Attorney-General (Baigent's Case)* [1994] 3 NZLR 667, 676 (CA per Cooke P).

59 *Simpson v Attorney-General (Baigent's Case)* [1994] 3 NZLR 667, 700 (CA per Hardie Boys J).

Accordingly, the court created the power to award damages. By following that approach the court quite consciously added to the provisions of an Act of parliament.

This too led to further constitutional conversation; the Law Commission reported on the issues in the case,⁶⁰ but the government did not move to change the law that the court had made. The case stands as part of the law of the land.

Flag-burning

In 2003, there was a demonstration outside parliament against the visit of the Australian prime minister. During the protest, flags, including a New Zealand flag, were soaked in kerosene and lit, producing a brief and spectacular fire. Next day on talkback radio the protestor said he burnt the flag because he believed it stood for imperialism. It seems he was one of the many thousands of people in the country who are unaware of the Flags, Emblems, and Names Protection Act 1981, which says, in section 11(1)(b), that it is an offence if anyone:

in or within view of any public place, uses, displays, destroys, or damages the New Zealand flag in any manner with the intention of dishonouring it.

This looked straightforward to the District Court judge, and the protestor was convicted. On appeal things were rather different.⁶¹

The judge considered how the Flags, Emblems, and Names Protection Act 1981 could be interpreted in the light of the free speech provisions in the New Zealand Bill of Rights Act 1990. After carefully considering whether flag-burning could be seen as ‘dishonouring’, the judge decided that dishonour could be involved. She went on to see whether the prohibition in the Flags Act was inconsistent with the Bill of Rights Act, and concluded that clearly there was an inconsistency because freedom of expression was being limited. She turned to section 6 of the Bill of Rights Act, which requires that other Acts should be interpreted in ways that uphold the rights in the Act ‘wherever an enactment can be given a meaning that is consistent with the rights and freedoms’ in the Bill of Rights Act.

The question then was whether the ‘dishonouring’ provision of the Flags, Emblems, and Names Protection Act 1981 could be interpreted in a way that was consistent with the New Zealand Bill of Rights Act 1990. The judge

60 New Zealand Law Commission (1997).

61 *Hopkinson v Police* [2004] 3 NZLR 704.

showed impressive flexibility and imagination as she concluded that such alternative meanings were possible, so quashed the conviction. That is, a process where a flag is burnt as a symbol of imperialism may not represent an intention to dishonour the flag and so the protestor avoided conviction.

This decision would surprise the MPs who supported the bill that became the Flags, Emblems, and Names Protection Act 1981. That was around the time of the Springbok tour and MPs and police certainly would have expected that a flag-burner in front of parliament would be arrested; it would be a change from hitting people with batons. But in the present context it seems a very proper decision, even if it demonstrates a flexible use of words. The judgment is crafted as statutory interpretation, but it largely eviscerates the penalty provisions of the Flags Act.

State house rentals

In 2004, a state house tenant applied for a review of his rent, based on the fact his income was variable. Income variability is not a factor included in the income-related rental formula in the Housing Restructuring (Income-Related Rents) Amendment Act 2000, so the application was declined. The tenant appealed to the State Housing Appeal Authority and was declined again. He tried again at the District Court, which said that Housing New Zealand should have considered the matter using its discretion under section 43(4) of the Housing Restructuring and Tenancy Matters Act 1992, which states:

If satisfied that special circumstances justify it doing so, the company may, under its absolute discretion, set for and accept from a tenant of any [Housing New Zealand] housing a rent lower than the rent otherwise required

Housing New Zealand went to the High Court for a judicial review of the District Court decision – by this time it was three years after the initial application. The case no longer concerned the individual tenant, but Housing New Zealand wanted clarity on its obligations. It claimed that there was no jurisdiction for appeal against its use or non-use of its discretion, and that there was no obligation for it to find out whether there were special circumstances when determining an income-related rent. Housing New Zealand's policy had been to adopt a very limited view of 'special circumstances' and the application did not fit its criteria.

The High Court judgment neatly encapsulates some basic points of administrative law.⁶² First, despite the explicit words of the Act, there is no such thing as absolute discretion. In particular, the discretion had to be used to promote the purposes of the Act, including responding to social needs. In the words of the judge, 'In law, no discretionary power is entirely unfettered'.⁶³

Second, an organisation with legislative discretion must not adopt policies that frustrate the use of that discretion. Administrative criteria cannot be used to prevent consideration of special circumstances. Quoting the judge again, 'A rigid policy is the antithesis of the exercise of discretion'.⁶⁴

And third, where a decision-maker has discretion to consider special circumstances, applicants should be informed of that discretion. If applicants are unaware of the discretion then they are prevented from making their case: 'administrative fairness include[s] an opportunity to place relevant information before a decision-maker'.⁶⁵ None of these points is explicit in the legislation covering Housing New Zealand; in fact, these points are not generally found in any legislation. They are, however, settled points in administrative law and officials ignore them at their peril.

Implications of court rulings

Most officials do not make covert entry into houses, or even search with a warrant, and hardly any get involved with flag-burning. Those cases may seem remote from the day-to-day work of public servants, but they are relevant because they illustrate the importance of principles of legal interpretation and of fundamental rights. On the other hand, administrative work like reviewing rentals is standard fare for any bureaucrat; the administrative law that the judge relied on is applicable to any official action.

But rather than see these provisions as a burden, they can be viewed as a mandate. Of course the official must follow whichever statute is applicable, but not blindly or rigidly. The principles of administrative law require fairness and good process. If parliament has neglected to mention those requirements, that does not mean public servants have a licence (or an obligation) to be unfair or sloppy. Unless explicitly abridged by legislation, the principles of administrative law endure.

62 *Housing New Zealand Corporation v Auckland District Court* [2008] NZAR 389.

63 *Housing New Zealand Corporation v Auckland District Court* [2008] NZAR 389.

64 *Housing New Zealand Corporation v Auckland District Court* [2008] NZAR 389.

65 *Housing New Zealand Corporation v Auckland District Court* [2008] NZAR 389.

Occasionally cases arise that involve concerns about basic rights as well as proper adherence to administrative process. Such cases can demand considerable skill as officials consider the best course and aim to avoid error. If there is a legal challenge, it can require months or years of work before a case is resolved. The following case study demonstrates some of the issues that can arise in implementing complex policy change.

Case study – special education

In late October 1998, Wyatt Creech, the minister of education, decided to disestablish the positions of 1,166 full-time-equivalent positions in special education facilities across New Zealand. He did not do this lightly; he took advice on his powers to make the decision, and he based his decision on the fact that a new policy, Special Education 2000, ‘would address the special education needs of more young New Zealanders in a much fairer way than was then provided for’.⁶⁶

Wyatt Creech had good grounds for his belief. His 1998 decision was a key step in a policy that had been under development since 1995. Cabinet had considered the matter many times; there had been consultation with disability groups and parents had been given information packs. His colleagues had agreed to substantial funding increases to improve the quality of special education and, though he was disestablishing positions, he knew the funding was sufficient for a large expansion in the number of people working with special-needs children. Cabinet had also agreed and funded an independent evaluation to assess the success of the new policy.

Despite that work, the new policy was not universally welcomed. Its central tenet was that more special-needs children could and should be given the support they needed so they could be taught in ordinary schools and classrooms. Though many parents welcomed the change, some, often those whose children faced the most severe disabilities, were fearful. They doubted whether ordinary schools would be capable of providing the warmth and support that their children needed.

During 1999, legal proceedings were filed to challenge the whole policy. The plaintiffs were a group of parents with some very sad stories; one, for example, had a seven-year-old boy who was unable to walk or talk and was not toilet trained, but was frequently able to pull himself upright to lunge at a hot

66 Creech (2003) in *Attorney-General v Daniels* [2003] 2 NZLR 747, 773.

element. His parents reported, ‘We have experienced problems getting [W] a fair education since before he commenced school’.⁶⁷

The *Daniels Case* was supported by the Quality Public Education Coalition and the primary teachers union (the New Zealand Educational Institute). The plaintiffs claimed that the new policy failed to meet their children’s needs, so was a breach of the Education Act 1989 (together with provisions applying to special education in the earlier Education Act 1964).

Officials had long been alert to the risk of litigation. As early as July 1996 officials had told ministers that many schools would be unaware of their legal obligations or would lack confidence in dealing with special needs children; accordingly, cabinet had approved extra funding to train boards and school staff.⁶⁸ The special implementation evaluation was approved at the same time, so that the effectiveness of the policy could be monitored.

But, though they acknowledged a risk of litigation, officials assured ministers in the same paper that there was no need to change legislation. It seems this assurance was motivated, in part, by a realistic appreciation of the difficulty of promoting any legislative change. For example, during August 1998, ministry officials told union representatives that repeal of some relevant sections in education legislation was contemplated, but, ‘Now with the political turmoil it seems likely only no[n]-controversial legislation will go ahead’.⁶⁹ Later that year the minister was provided with Christmas reading in which the possibility of legislative change was canvassed. His annotation against that point was, ‘Special [Education] 2000 will need greater acceptability first’.⁷⁰ So, though officials would have preferred some legislative change it was not made.

Despite officials’ earlier anticipation of possible judicial review, the extent of the attack was much wider than officials had contemplated. This was not simply a question of process, but an allegation that basic rights had been breached. In particular, section 8 of the Education Act 1989 states that:

people who have special education needs (whether because of disability of otherwise) have the same rights to enrol and receive education at state schools as those who do not.

67 *Attorney-General v Daniels* [2003] 2 NZLR 747.

68 Cabinet Office (1996c).

69 *Daniels v Attorney-General* 3 April 2002, Baragwanath J, HC Auckland M1615-SW99, p 9 (record of a meeting between representatives of the Ministry of Education and New Zealand Education Institute, 17 August 1998).

70 Ministry of Education (2008b).

Though the argument was much more complex, involving the Education Act 1964 and other provisions, much debate revolved around whether Special Education 2000 breached that statutory right.

The High Court hearing occurred before Justice Baragwanath, a former president of the Law Commission. Counsel for the plaintiffs was a well-respected Queen's Counsel, and the Crown Law Office team included a lawyer known for producing an authoritative text on the New Zealand Bill of Rights Act 1990. There were days of highly erudite hearings; counsel and the judge canvassed cases from around the world, dropping into Latin and other languages as the mood took them.

Some months later the judgment emerged. The Crown had lost. Despite all the work the judge concluded the government had failed in its duties to the children. The judgment acknowledged that it was not the court's role to make policy decisions; rather it should limit itself to determining 'whether the law has been infringed'.⁷¹ But in doing that, the judge needed to determine what were the rights protected by section 8 of the Education Act 1989. Crown lawyers had suggested the matter was too broad to be determined by a court (that is, justiciable), but the judge disagreed.

Faced with the choice between giving substance to the 'entitlement' and 'rights to education', or emptying them of legally enforceable content, I am satisfied that the former must be adopted.⁷²

The judge went on to say:

In my view it [parliament] cannot have intended such entitlement to entail anything less than

- [the right to education] must not be clearly unsuitable (and in that specific sense of it suitable) for the pupil
- [the right to education] must be regular and systematic.

The judge went on later to say:

The court will enforce the minimum content of the right, which requires an individual focus on the learning needs of each child, and provision of extra assistance in proportion to the extent of the particular child's disabilities.⁷³

71 *Daniels v Attorney-General* 3 April 2002, Baragwanath J, HC Auckland M1615-SW99, p 4.

72 *Daniels v Attorney-General* 3 April 2002, Baragwanath J, HC Auckland M1615-SW99, p 45.

73 *Daniels v Attorney-General* 3 April 2002, Baragwanath J, HC Auckland M1615-SW99, p 46.

A crunch point was that this responsibility was not attached to the school; it was a duty to be performed by the secretary of education (and the Ministry of Education).

When officials came to report on the judgment to ministers they assessed the likely cost at around \$106 million per year. But more importantly they warned that this was a very significant judgment; if it stood, it marked a substantial shift in the role of the courts into policy as they determined what would be the detail of a suitable, regular, systematic education. Litigation would increase across all of education as groups demanded equity of provision.⁷⁴

The cabinet that had to consider whether to support an appeal was not the same government that had introduced Special Education 2000. The new Labour-led government was friendlier to the teachers' union that had supported the litigation, so it would have been understandable if they had not wanted to appeal. Instead the attorney-general soon decided that the decision must be tested.⁷⁵

In the Court of Appeal, things returned to an even keel. Rather than attempting to give substance to the right to education, the court turned to the statute, and decided that parliament had done it already. In considering the High Court judgment, Justice Keith said for the court:

Any requirement that the education be 'regular and systematic' is met in its essence, it seems to us, by the statutory requirements, including those for minimum days and hours, teacher registration and curriculum. These and the other features of the Act mentioned above, together with the very opaqueness of the proposed standard, also appear to us to negate a judicially enforceable 'not clearly suitable' general standard⁷⁶

But that did not mean it was all over; there was still the more usual administrative law question of whether the minister had properly made his decision on disestablishing the special education positions. The minister's decision related to special classes, units and services that had been established

74 Cabinet Office (2002b).

75 Cabinet Office (2002a). It is an interesting side-line to note that in the Cabinet Policy Committee when the implications of the case were considered this item was only one among many. There were 13 items, and the committee usually has one-and-a-half to two hours. On that occasion, the committee also had to consider the 2002 budget (itself a massive item) and other substantial matters. Few officials or members of the public realise how many matters are considered by ministers in New Zealand.

76 *Attorney-General v Daniels* [2003] 2 NZLR 747, 766.

around the country to meet the needs of children. The minister's power to close those units was in section 98(2) of the Education Act 1964:

The Minister may likewise disestablish any special school, class, clinic or service ... if he considers that sufficient provision is made by another similarly established special school, class, clinic or service, or by any other school or class in or reasonably near to the same locality.

As the minister had explained in his affidavit, he considered that the new policy would provide for children throughout New Zealand; the court did not debate his judgment, but said that was not the right question. It was not enough to consider whether special education would be provided across the country; the Act required consideration of each locality where a class or service was being disestablished.

A review of the report to the minister proposing the disestablishment shows the court was right.⁷⁷ The list of units is comprehensive; every position in every school is listed. The list covers 18 pages. But if the minister had tried to reassure himself that each locality would be well served under the new policy, there was nothing. It was not even easy to assess what would be lost in each locality, as the positions in each school were mixed and spread across the list. The ministry promised a report in a month on the impact of the decision and on proposals to ensure continuity, but that could not inform the minister's decision in October.

On that ground, the court found that the minister was in breach of section 98(2) of the Education Act 1964 when he made his decision in October 1998. Only because of procedural error the Crown lost the case.

No order was made for any remedy – it was beyond the court's aspirations to unscramble the omelette. Instead, the parties were sent away to negotiate a settlement. The result was an agreement to a major consultative process to review the adequacy of services in every region.⁷⁸

This review dominated the work of the Ministry of Education's Special Education Group for the next 18 months. During 2004, staff from head office and the districts joined 395 public meetings in 52 town and cities across New Zealand. Tens of thousands of invitations were sent plus widespread advertising. Some 5,387 people registered their attendance at these meetings, and many others did not sign in. Many of these meetings were highly emotional as parents voiced their concerns for their children.

⁷⁷ Ministry of Education (1998a).

⁷⁸ Deed of Settlement (2003).

In early 2005, the ministry produced a 90-page national report and further reports for every district.⁷⁹ The report showed that parents and teachers wanted more funds. Later that year, the budget included initiatives for special education totalling over \$45 million per year; an increase of over 10%. A follow-up report in 2006 attributed further increased spending in the 2006 budget to the 2004 consultation process.⁸⁰

Breaking the law had consequences for officials, and for the taxpayer. Officials participated in an exhausting series of meetings with frustrated and sometimes angry parents. The taxpayer picked up a large bill. Having lost in court as the result of an error in process, the new consultation process was undoubtedly more thorough and the extra funding has provided extra benefit for special needs children. But was it worthwhile?

The irony is that though the initial process was ruled to be faulty, in substance the new policy was already having a major effect. Between 1995, when the policy was first contemplated, and 2003, when the judgment was finalised, the number of children benefiting from special education support increased from 20,000 to 50,000. That is, Mr Creech's belief that more children would be supported was vindicated. But the process failed him.

Good judgment?

The *Daniels Case* represents a very near miss on the part of those who would seek to use the courts to control government policy. If the initial judgment had stood it would have had enormous effect on education. The judgment meant every school-age student (not just those with special needs) had a legally enforceable right to a 'suitable' education, and what this meant would probably be the subject of more litigation. Here the judge was considering children with special needs, but what about gifted and talented students, Māori students, students from other ethnic groups, students who would do better in single-sex education, or any student who was below average on standardised tests? What would be the meaning of the judge's test for 'suitable' then? What was the standard to be applied? There were implications beyond education. A similar approach could lead to courts formulating rights in other areas such as health and welfare. The cost could be enormous.

Though, in the end, this judicial initiative came to nothing, there will be more attempts. In particular, the view that basic points of policy are too broad to

79 Ministry of Education (2005, p 63) provides the data on the consultation process.

80 Ministry of Education (2006, p 1).

be open to judicial review will face continuing attack. Grant Illingworth, the lawyer who took the *Daniels Case*, argued that blanket immunity for any category of public decision-making is untenable.⁸¹ He is not alone in that view, and other lawyers have tried alternative approaches to litigate public policy.

Another recent case involved the Child Tax Credit, which was available only for those in work. The claim was that this requirement unlawfully discriminated against the unemployed. The Human Rights Review Tribunal decided the discrimination was lawful,⁸² but officials should not assume the Crown will always win such cases. For example, in a recent decision the Human Rights Review Tribunal ruled that the government's policy of excluding the family of people with disabilities from receiving various support payments is a breach of the New Zealand Bill of Rights Act 1990.⁸³ The Crown intends to appeal, but if the tribunal's decision is upheld it will represent a significant change in policy.

The emergence of this field of public interest litigation illustrates several points. First, and fundamentally, public servants work under the authority of parliament, at the direction of ministers, but under the scrutiny of the courts. All must be obeyed.

Second, while ministers, who are responsible for the use of taxpayers' funds, will tend to push for efficient implementation of policy, and officials will tend to look for policies that are generally beneficial, the courts will look to protect rights. International trends and our own New Zealand Bill of Rights Act 1990 are promoting increased emphasis on fundamental human rights. This will have an ever-stronger effect on the work of officials and politicians, whatever their personal views.

This does not represent a grab for power by the judiciary. Judges have long taken a close interest to ensure that the executive and parliament do not overturn basic rights. In the 19th century they were more focused on property rights. As a result, there is a long-established principle that parliament must use clear words before judges will interpret an Act as expropriating property rights. In the 20th century the focus has shifted more to protecting human rights.

Third, though the courts may be taking a greater role in human rights matters, there is no tradition in New Zealand for the courts to usurp the role of administrative decision-makers, and there is continued respect for legislation;

81 Illingworth (2006, p 173).

82 *Child Poverty Action Group v Attorney-General* [2008] NZHRRT 31.

83 *Atkinson v Ministry of Health* [2010] NZHRRT 33/05.

that is, the three arms of government endure in their different roles, but as they endure they adapt. The important result of the *Daniels Case* is that the Court of Appeal did respect the provisions of the Education Act, and accepted parliament's role in defining the rights at issue.

Though the broadest implications of the initial *Daniels* judgment did not stand, the Crown still lost the case on appeal. The lesson is that, at the same time as officials must be increasingly alert to the risks of rights-based litigation, officials should never advise the minister to use a statutory power in an unlawful way. If officials get it wrong, they may suffer through months of recriminations in public meetings, and the taxpayer may have to pay large sums.

Filling in the gaps

The conclusion to this chapter on who makes the law is that judges, as well as parliament and its delegates, have a major role. It is like colouring in a picture.⁸⁴ Parliament uses a legislative pen to draw the black and white edges of the law. Officials use delegated authority and administrative practice to colour in the picture. The judges lean across from time to time to assess the quality of the artwork. Where judges consider that officials have drawn over the line, or used the wrong shade, they rub out the officials' work and colour it in again. Occasionally, judges will take parliament's drawing and point out that it can be re-interpreted, like an Escher drawing, and it really means something different from the first impression. It isn't a struggle for dominance; it is simply the separation of powers, a constitutional conversation around the artist's easel.

But what if there is an attempt to grab the pen? Who has the most important role? Whose law may trump? Clearly, parliament can override judge-made common law. The following chapter considers the obverse; whether judges can override legislation. If they can, it could mean that officials standing at the easel earnestly colouring in the sketch that parliament has drawn may find a judge tearing off a corner of the picture, or even whipping away the drawing to replace it with a new drawing in a new hand.

84 I am grateful to Nicola White for suggesting this analogy.

Who Is in Charge Here?

Overturning statute

The first question in considering the extent of parliament's sovereignty was who may make laws; it turns out that parliament does not have a monopoly. The second question is whether parliament's laws are beyond review. The whole purpose of passing a statute is to make law. It seems simple that, having made an enactment, the Act so made is law. This was most memorably outlined by a prominent 19th century academic, Albert Venn Dicey, who said:

The principle of parliamentary sovereignty means neither more nor less than this, namely that Parliament thus defined has, under the English constitution the right to make or unmake any law whatever; and further, that no person or body is recognised by the law of England as having a right to override or set aside the legislation of Parliament.⁸⁵

This was quoted with approval by the chief justice, Sir Richard Wild, as he delivered his judgment in *Fitzgerald v Muldoon*.⁸⁶ In that case an otherwise little-known public servant,⁸⁷ Mr Fitzgerald, challenged the orders of the incoming prime minister, Robert Muldoon, that all collection of contributions for the New Zealand Superannuation scheme should cease, pending the repeal of the relevant legislation. That is, the government proclaimed that the statutory obligations to make and to collect superannuation payments were suspended. The chief justice declared that instruction unlawful, even though the new government had a clear majority and would soon repeal the law.

Though the judgment in *Fitzgerald v Muldoon* caused a minor sensation at the time, and is often cited in legal texts, it could hardly be said to have carved new territory. As early as the 17th century, the then chief justice, Edward Coke, had firmly put James I in his place by declaring that the king had no power to set aside acts of parliament.⁸⁸ And article 1 of the Bill of Rights of 1688, still part of our law, states (with the spelling as quoted by Chief Justice Wild in the

⁸⁵ Dicey (1959, pp 39–40).

⁸⁶ *Fitzgerald v Muldoon* [1976] 2 NZLR 615, 622.

⁸⁷ Unlike in other professions, little-known-ness (anonymity?) is an admirable state for public servants.

⁸⁸ *Case of Proclamations* (1611) 77 ER 1342.

Fitzgerald v Muldoon judgment), ‘That the pretended power of suspending of laws or the execution of laws by regall authority without consent of Parlyament is illegall’.⁸⁹

The importance of the case was not its newness, but its reaffirmation of enduring legal principles; the battles that had been fought in England to assert parliamentary control over the king still have legal relevance in New Zealand. The message is clear; neither prime ministers nor bureaucrats have the power to suspend the law. The executive must operate within the law, as ordained by parliament.

But what of the third arm of government, the courts? Are they also obliged to operate under parliament’s laws? A large number of court decisions have conceded that parliament does prevail. For example, as recently as 1991 the High Court said in a case brought by a tobacco company:

The constitutional position in New Zealand ... is clear and unambiguous. Parliament is supreme and the function of the courts is to interpret the law as laid down by Parliament. The courts do not have a power to consider the validity of properly enacted laws.⁹⁰

But however strongly one feels about the contractual rights of tobacco companies or superannuation contributions, they are not generally regarded as touching on basic human rights. Some more interesting questions might arise if parliament were to attack such rights. But even here there is strong judicial precedent to affirm parliament’s power. For example, a few year before the *Fitzgerald* case a distinguished British judge, Lord Reid, held:

It is often said that it would be unconstitutional for the United Kingdom Parliament to do certain things, meaning that the moral, political and other reasons against them doing them are so strong that most people would regard it as highly improper if Parliament did those things. But that does not mean that it is beyond the power of Parliament to do such things. If Parliament chose to do any of them the courts could not hold the Act of Parliament invalid.⁹¹

Given this string of legal precedents, what is the issue? Is there any basis for the claim from Dame Sian (as quoted at the beginning of this part) that parliament is not sovereign? Have courts ever struck out an Act? Well, yes. The same Edward Coke who told James I that he could not overturn statute had, just

89 *Halsbury Statutes of England* (3rd ed) (1968, p 490) quoted in *Fitzgerald v Muldoon* [1976] 2 NZLR 615, 622.

90 *Rothmans of Pall Mall (NZ) Ltd v Attorney-General* [1991] 2 NZLR 323, 330.

91 *Madzimbamuto v Lardner-Burke* [1969] 1 AC 645, 723.

the year before, set aside a statute because it breached natural justice.⁹² Some jurists wistfully look back to those bold days and wonder whether they should not behave similarly in similar cases.

To understand the dimensions of parliamentary sovereignty in New Zealand, it may be useful to tease out its components. First, parliament is no longer legally subordinate to any external legislature.⁹³ Second, there is no superior constitution that divides authority between different legislative bodies, as would be found in a federation. Third, the role of the monarch (or governor-general) is to sign into law any bill duly passed by parliament. Fourth, parliament cannot bind its successors (other than procedurally), so any parliament may unmake a law made by any previous parliament. All these points may raise technical issues, but they are not contentious.

A critical (fifth) component of the sovereignty doctrine is that the role of judges is to interpret and implement legislation, and that they are subordinate to parliament (meaning that statutes can override common law). And the strongest (sixth) component is that there is no higher principle or law that limits what parliament may enact. As a general rule the fifth component is accepted, but some hypothetical cases have raised doubt, especially with regard to the sixth proposition, that there is no higher principle than the will of parliament.

An old hypothetical case demonstrates the issues that could be created by strict adherence to the proposition that there is no limit to the laws that parliament could enact. An example used in the 19th century to illustrate the extent of parliamentary sovereignty was the proposition that a law authorising the execution of all blue-eyed babies would be valid law. People working for the police, prisons, welfare agencies and the courts would be obliged to give effect to the law (or resign). Parents presumably might be punished for resisting the law. Clearly, the example was put forward precisely because it was offensive even to contemplate, and so it effectively demonstrated the extent of parliamentary authority.

In the 21st century, it does not look so clear. Between then and now the world has witnessed genocide and the response at Nuremburg. It is well known that senior Nazis were tried and condemned for their roles. It may be less well known that those who carried out Nazi laws, up to and including judges, were also convicted. Their argument that they were simply administering the law was not a successful defence.

92 *Bonham's Case* (1610) 8 Co Rep 113b; 77 ER 646.

93 Practical issues may arise in dealing with external authorities, but that is a different matter and is considered later.

Just as it is unthinkable that a New Zealand parliament would enact such legislation, it is now inconceivable that any New Zealand court would connive in the implementation of a blue-eyed-baby-execution law. The previous section illustrated the ability of the courts to interpret law to protect rights. It seems likely that a baby-killing law would be circumvented, perhaps by demanding more precise measurement of blueness, or requiring more precise language to override the rights of babies. But what if those technical approaches do not work? What about the more frontal issue of whether a court would simply strike down the law and declare it unlawful?

Chapter 2 said that the constitution was based on the consent of the people and the rule of law. Most of the rest of the analysis has focused on the development of democracy – the consent of the people. But the rule of law is a separate issue. To most people it simply means obey the law, but when talking about making law it all gets a bit more complex. Any claim that there is some higher law that parliament must obey seems to be based on religion or some other mysterious source of law. But many legal thinkers, and judges, believe that some legal principles must be upheld, and some consider this could justify the courts striking out obnoxious legislation.

To zealous democrats, this seems wrong. To them, the idea that elitist, non-elected judges might seek to overturn the law as made by the people's representatives is odious. That presumably is why parliament has moved to prevent it, by inserting parliamentary sovereignty into key legislation. For example, the explanatory note attached to the Constitution Amendment Act 1973 says its purpose is 'to make clear that Parliament has sovereign powers to make law'. Likewise, section 3(2) of the Supreme Court Act 2003 includes the words, 'Nothing in this Act affects New Zealand's continuing commitment to the rule of law and the sovereignty of Parliament'.

But these provisions simply give an impression of nervousness, not confidence. If parliamentarians believed that this provision was necessary to shore-up the powers of parliament, they would also realise that it must be ineffective. If parliamentary sovereignty was not already effective, an Act of parliament could not be the means of correcting the weakness.

But what is going on here? Why do the chief justice and parliament appear to hold different views on the constitution? There are some real issues, but it is also another example of the confusion caused as people from different cultures talk past each other. A lifetime of considering legal issues and years on the bench considering the rights of litigants mean legal principles must weigh more heavily with judges than they do with politicians or officials. And it cannot be

denied that judges tend to have more knowledge of the law than those in parliament who enact statutes.

Coming as the judiciary does from an environment of reason and respect, it is impressive that the judiciary accords deference to the output of parliament's argumentative processes, and hardly surprising that some may wonder whether that democratic deference might be carried too far. In addition, in other jurisdictions such as the United States and Australia, the highest court has the power to strike down legislation; why not here? Given that background, consider some of the recent arguments against parliamentary sovereignty.

Judicial concerns

In the last decade, there has been considerable academic and judicial comment about parliamentary sovereignty; Dame Sian's comments were not made in isolation.⁹⁴ That debate has sought to clarify the balance of democracy and the rule of law, and as a result it is not always cast for a general audience. It tends to be at the edge, where statute law is at the same time supreme, but also possibly reviewable. Uncertainty prevails; it is as straightforward as quantum mechanics, but it may be even harder to apply in daily life. Issues such as 'who is in charge here?' seem bafflingly simple, but they raise matters at the very basis of the constitution and the law.⁹⁵

Lawyers are expert in achieving a precise understanding of the law as it applies in any given circumstance, but the basic question of 'what is law?' is much harder, and will keep them debating for as long as the legal profession exists. Such things matter to the rest of us only when they imply a shift in the operations or structure of the law or the constitution. A change in our understanding of who determines the validity of statute law would be such a shift.

A thorough outline of all the points made in this debate is not possible. Instead, consider one of the most vigorous arguments for change, put forward by a prominent judge, Sir Edmund Thomas. A decade ago, while he was a member of New Zealand's then most senior court, the Court of Appeal, Sir Edmund made a speech about the relations between parliament and the

94 See footnote 41; Sir Robin Cooke, as he then was, also made important comments in this area, including in judgments; see footnote 106.

95 Constitutional Arrangements Committee (2005). There is a good summary of the arguments by Matthew Palmer, Claudia Geiringer, and Nicola White in Appendix F of the committee's report. The report also contains a helpful list of references.

courts.⁹⁶ This speech is not selected as being representative of judicial opinion; when it comes to opinions on such matters most judicial commentary demonstrates a studied opacity, so it is hard to say what the average judge thinks. It is likely that Sir Edmund's views are more radical than most judicial opinion, but it is because he stated a radical view that his arguments are clear, trenchant and easy to follow.

Sir Edmund explained that several factors made the issue of parliamentary sovereignty more current. These include a world-wide interest in human rights issues, continued development of the role of judicial review, increased respect for the Treaty of Waitangi, and proportional representation – which he saw as increasing the risk of a small group negotiating law changes that more liberal majorities might otherwise have resisted. He also saw the role of politicians and the soundness of democracy being more subject to question:

It is generally acknowledged that this radical change [proportional representation] was endorsed by a majority as a result of disenchantment with politicians rather than Parliament or the electoral system as such. The question, it is fair to say, is increasingly asked, are representative government and our democratic institutions as stable and secure as we might have thought?⁹⁷

Sir Edmund suggested that it was inappropriate to think about sovereignty as attaching to any institution. He preferred the idea of 'sovereignty of the people' with parliament and the courts both operating 'in the democratic service of the people'. The courts would protect the people, and their sovereignty, from any extreme Acts that parliament might pass.

If Parliament [enacted] legislation undermining the democratic basis on which it exercises the sovereign power of the people, there is nothing in the notion of Parliament's omnipotence which would preclude judicial resistance rather than obedience.⁹⁸

The basis for that judicial resistance was, in Sir Edmund's mind, the inherent power of courts to declare what is lawful – either in statute or any other source of law.

96 Thomas (2000). Though this speech is a decade old, Ted Thomas is still accorded considerable respect; in late 2009, Victoria University of Wellington awarded him an honorary Doctor of Laws.

97 Thomas (2000, Part II).

98 Thomas (2000, Part IV).

Reduced to a minimum ... Parliament's legislative supremacy exists to the extent that courts give it recognition. The conferral of that recognition is in the nature of a self denying ordinance.⁹⁹

Sir Edmund suggested it would be preferable if it were accepted that the courts have the power to declare statutes invalid in extreme cases. He acknowledged there would be some hostility, based on 'misconceptions'. These, however, could be 'brushed aside' and a stronger working relationship could then be constructed between parliament and the courts.

Although Sir Edmund's views carry the arguments further than other judicial comment, the general direction of his comments is reflected in some extra-judicial commentary from other senior judges. There is a serious proposition here that can be analysed in three dimensions: the legal position of courts, the possible role of an invalidation power, and the political issues.

Existence of an invalidation power

First, can courts strike down statute? Lots of precedent says no, but Sir Edmund's point that that is a self-restraining ordinance would imply a senior court could reverse the matter when necessary. The suggestion that parliament is sovereign because courts said so raises chicken and egg questions. Did not the power of the courts also derive from the king? But the historic fact that courts were able to declare both royal proclamations and statutes to be invalid in the 17th century demonstrates that the power has existed at some time.

In other parts of the world this power is common, sometimes explicitly provided in a written constitution. Perhaps the best known example is the United States, where the Supreme Court has used its authority to annul laws made by congress. In that case, the power is not explicit in the constitution. It was not until 1803, in the case of *Marbury v Madison* that the power was first asserted by the Supreme Court.¹⁰⁰ It is now beyond question. If the United States Supreme Court could assert that power, why is it unthinkable for the New Zealand Supreme Court to do the same?

One of the most recent cases in this area comes from Britain, the country with a constitution most similar to our own, and a shared legal tradition; it is the *Foxhunting Case*.¹⁰¹ In this case supporters of blood sports went to the House of Lords (then Britain's highest court), seeking to overturn parliament's decision to

99 Thomas (2000, Part VI).

100 *Marbury v Madison* 1 Cranch 137; 2 L Ed 60 (1803).

101 *R (Jackson) v Attorney-General (Foxhunting Case)* [2005] 3 WLR 733.

outlaw foxhunting. The judgments are fascinating to read, but very disappointing for anyone hoping to understand anything about the finer points of foxhunting. Virtually all the judges begin their comments with some wistful points about the complete absence of any direct reference to hunting in the case. It seems that they were regretting that they did not get a last chance at yoicks, tally-ho and jumping over hedges.

The technicalities of the case revolved around how the law had been made. The House of Lords (as part of parliament) had never approved the law and it was enacted solely by the House of Commons and the Queen, in line with empowering legislation made in the 1940s – also by the House of Commons, without agreement from the Lords (but in line with earlier empowering legislation). In effect the 21st century *Foxhunting Case* revolved around whether the previous 1940s empowering legislation was valid. It is just the kind of issue that makes people impatient with lawyers, but it is an essential issue. But who is to say whether legislation is valid? Was it a question for the courts? The law lords in the House of Lords (as a court) decided yes.

The appellants have raised a question of law which cannot, as such, be resolved by Parliament. But it would not be satisfactory if it could not be resolved at all. So it seems to me necessary that the courts should resolve it, and that to do so involves no breach of constitutional propriety.¹⁰²

This rather supports Sir Edmund's proposition that the sovereignty of parliament was a gift from the courts. Lord Justice Steyn went on to envisage a scenario when the gift could be taken back.

The classic account given by Dicey of the doctrine of the supremacy of Parliament, pure and absolute as it was, can now be seen to be out of place in the modern United Kingdom. Nevertheless, the supremacy of Parliament is still the *general* principle of our constitution. It is a construct of the common law. The judges created this principle. If that is so, it is not unthinkable that circumstances could arise where the courts may have to qualify a principle established on a different basis of constitutionalism.¹⁰³

Clearly, the House of Lords considered it could consider the validity of legislation if necessary, which was a significant judgment. The reason why most non-lawyers did not notice the case was that, in spite of all the careful reasoning

102 *R (Jackson) v Attorney-General (Foxhunting Case)* [2005] 3 WLR 733, 746.

103 *R (Jackson) v Attorney-General (Foxhunting Case)* [2005] 3 WLR 733, 767, per Steyn LJ (emphasis in original).

about their powers, the court decided the law was validly made so there was no reason to use their power. This means that Lord Steyn's comments are, in the jargon, *obiter dicta*. That means, roughly, something else that the judge said that was too juicy to ignore, but not essential to the judgment so not strictly a precedent. All the case really established was that there are grounds on which the courts may consider the validity of statute; that in itself is significant.

As a result of the judicial comments in the *Foxhunting Case*, and the behaviour of courts in other jurisdictions, it seems that the traditional view that the courts cannot overturn any part of statute law is no longer open and shut. It is at least arguable that in certain circumstances the courts could declare statutory provisions to be unlawful.

Scope of an invalidation power

The second question to consider about invalidation is, if courts could strike down statutes, would they do it? If the courts do have a power to strike down legislation, when might they use that power? All those asserting the power are careful to point out that it would be used only in limited circumstances when fundamental issues are at stake. In general, the power of parliament to legislate and the obligation of the courts to uphold that law are not questioned. Issues arise only when parliament threatens a basic constitutional provision.

Perhaps this can be best understood as an example of a constitutional conversation. History has not delivered us a finalised constitution, written in stone. The constitution is not static; it is constantly being made by the actions of office-holders, the passage of legislation and the decisions of the courts. Dicey compared it to a honeycomb, constantly built by a hive of bees. If one of the three arms of government moves in a way that modifies previous understandings that will be noted elsewhere. If the change is generally acceptable, behaviours will change to exploit whatever new opportunities are created. If the change is not welcomed, a response is likely that either seeks to reverse the change or to readjust the constitutional balance elsewhere. In this context, the power of judicial invalidation of statute could be the means by which the courts would respond to an Act that alters the constitutional balance in an unacceptable way.¹⁰⁴

Sir Edmund saw the issue arising in the context of:

legislation which raises a fundamental constitutional issue and places in jeopardy the basis of representative government, the rule of law, or

104 Constitutional Arrangements Committee (2005; see Appendix F for further explanation).

the fundamental rights and freedoms which are embedded in the democratic ideals.¹⁰⁵

That list comes from Sir Edmund's perception of the courts as the guardians of the people's sovereignty; that require protection of democracy, the law and human rights. This would set some limits on the possible invalidation power. For example, it would probably not involve the courts defending the rights of English squires to set packs of dogs on to foxes (or of New Zealand pig-hunters to do the same thing), but it conceivably could raise issues about legislative powers to enforce a hunting ban, depending on how draconian such powers might be. That is, the issue could come up in all sorts of areas that most people would not think of as constitutional.

In contemplating a comprehensive approach to basic rights, Sir Edmund is an inheritor of a proud judicial tradition in New Zealand. As long ago as 1984, the then president of the Court of Appeal, later Lord Cooke, said, 'some common law rights presumably lie so deep that even Parliament could not override them'.¹⁰⁶ This represents both a strong suggestion to parliament that the courts will put up with only so much and a vague indication of what kind of behaviour will be unacceptable. It is a bit like a parent telling a child to be good. The child may know there will be consequences from being bad, but badness as such is still undefined.

Another comment from the Court of Appeal in the 1990s adopts a similar approach. It was made by Justice Hardie-Boyes, who later went on to be governor-general:

Enjoyment of the basic human rights are [sic] the entitlement of every citizen, and their protection the obligation of every civilised state. They are inherent in and essential to the structure of every society. They do not depend on the legal or constitutional form in which they are declared.¹⁰⁷

For those who look to the courts to protect their rights, this is inspirational stuff. For those with a more black and white view of the law, or die-hard defenders of parliamentary superiority, it is very scary. If it does not matter how the rights are declared, how do the courts know they are rights? Claiming they are inherent in society is fraught with risk; for example, feminist thinkers would point out that society tends to be patriarchal, and may therefore be a poor source

105 Thomas (2000, Part I).

106 *Taylor v New Zealand Poultry Board* [1984] 1 NZLR 394, 398.

107 *Simpson v Attorney-General (Baigent's Case)* [1994] 3 NZLR 667, 702 (CA).

for identifying universal rights. So where do the rights come from? Perhaps judges just know these things. But there is no entrance exam for judges, so how can we be sure they know the right set of rights?

The answer, of course, is that their knowledge of rights comes from their experience and exposure to professional discourse and legal methodology. But those are not directly tested in the wider democratic debate, and from the point of view of other players in the system the assertion of a range of variously specified rights may seem provocative. In terms of the constitutional conversation analogy, if the courts were to invalidate a law on such grounds, it would appear to others as the abrupt opening of a new topic for discussion. It could well lead to a vigorous argument – shouting and tears before bedtime. That is, there might be a political response.¹⁰⁸

Sir Edmund's list of the possible grounds for judicial invalidation can be contrasted with the approach taken by the British judges in the *Foxhunting Case*. In that case a couple of judges affirmed that a challenge to legislative validity could be possible, but it is noticeable that they focused on one example. In particular, Lord Steyn, in a continuation from his words quoted in the previous section, said:

In exceptional circumstances, involving an attempt to abolish judicial review or the ordinary role of the courts, the Appellate Committee of the House of Lords or the new Supreme Court may have to consider whether this is a constitutional fundamental which even a sovereign Parliament acting at the behest of a complaisant House of Commons cannot abolish.¹⁰⁹

Similarly, Baroness Hale said:

The courts will treat with considerable suspicions (and may even reject) any attempt to subvert the rule of law by removing governmental action affecting the rights of individuals from all judicial scrutiny.¹¹⁰

That is, the judges were not envisaging some future time when they would launch out to open a new topic in the constitutional conversation. Instead, they were giving notice of what they thought should be the court's response if parliament were to act against the courts.

108 The possible political response is considered in the next section.

109 *R (Jackson) v Attorney-General (Foxhunting Case)* [2005] 3 WLR 733, 767.

110 *R (Jackson) v Attorney-General (Foxhunting Case)* [2005] 3 WLR 733, 783.

The law lords are quite right to see protection of that role as fundamental, and they have picked a compelling example of the kind of issue that might justify invalidating a statute. Irrespective of the question of the powers of courts to invalidate legislation, the role of the courts in judicial oversight of the government is vital. People's rights and interests may be threatened by ministerial policy or official ineptitude; either way, society looks to the courts for protection.

It seems the example did not arise spontaneously. During the last decade British ministers have openly contemplated using statute to restrict or prevent judicial review. In particular, there has been considerable controversy about a proposal that immigration tribunals should be removed from judicial review, even on points of law. Immigration cases inevitably involve sensitive issues of rights. Being forced to leave a country and live elsewhere is a major upheaval; when it was done to citizens, it was called exile and was just below execution in the hierarchy of punishments. It is hardly surprising that courts see an important role in ensuring that rights are not flouted in such cases. In that context, the comments from the judges in the *Foxhunting Case* do not amount to a claim for power so much as a defensive restatement of ancient responsibilities.

Looking back at the president of the Court of Appeal's 1984 comment about rights that parliament may not override, it is useful to remember the context. This comment was made after nine years of government led by Sir Robert Muldoon, and in the context of sweeping government controls involving the use of regulations to overturn the effect of statutory provisions, and in the aftermath of the massive police operation at the time of the Springbok tour. The judiciary may well have been feeling provoked at that time. It is not so clear what recent government actions would provoke judicial warnings now.

Response to an invalidation power

The third question about the possibility of invalidation is, even if courts could and would use the power, should they? That is, having established that there is an arguable case for an invalidation power, even if any such power would apply in only extraordinary circumstances, it is now useful to explore what might happen if an order were made to declare a legislative provision invalid.

If parliament has declared that something is lawful, and the Supreme Court says that parliament's law is unlawful, the instinct of a pugnacious politician might be to ignore the court's order – after all, such a ruling is sufficiently unusual as to render it questionable. But that response leads nowhere, because there is no court in which the judgment can be questioned. In the interim,

officials would be in an invidious position, serving ministers who were giving directions that the court had ruled unlawful. Since the first obligation of public servants is to obey the law, and the Supreme Court is the arbiter of what is lawful, any ministerial instruction to ignore the court would have to be defied. Stress within the executive would be enormous.

But direct resistance is unlikely to be the reaction. Adhering to court orders is a regular response for the government, and the consequences of defiance, with constitutional crisis and economic uncertainty, would be unpalatable. This suggests the court simply needs to chance its arm by declaring some statute invalid and it will win. A new constitutional reality would exist. Let's all run down to the Supreme Court and cheer them on.

Well, maybe, but the constitutional conversation would be only beginning. Exactly how parliament might respond would depend on the political circumstance of the day. The outcome of a technical constitutional debate would most likely depend on public opinion. If it were possible to assemble the votes in parliament, the government might simply pass another bill and dare the court to try again. Alternatively, the government might have an opportunity to test public opinion in an election. If it wins, the court might face a government that is strengthened by a strong mandate for the old policy. The game might play out all over again. The number of permutations is huge.

Part of the problem is that in the absence of a codified constitution there is no predetermined process for determining the outcome. In countries where judges do strike down statute there is generally a written constitution that can be appealed to. If the public do not like what the court has done then there is a process that can be followed to change the constitution. For example, groups that are opposed to abortion have been trying to amend the United States constitution for years in order to overturn the Supreme Court's decisions. In New Zealand no clear process is available; in effect, the constitution would be seen as whatever the judges say it is. Perhaps a codified constitution would emerge. Such a constitution might enshrine judicial authority, but it might also limit judges' powers.

If an invalidation power became real, the cabinet's task would change. As well as maintaining a majority in parliament to support its policies, it would have to persuade the court. That would make the dynamic between the court, the government and parliament significantly different. Sir Edmund suggested that

once the misconceptions were brushed aside the new relationship would allow the evolution of a 'more mature conception of democracy'¹¹¹ in which:

the relationship of Parliament and the courts is one in the nature of a fruitful partnership in the law-making business together, but with Parliament the dominant partner working within the constitution.¹¹²

These comments overlook the implications of the iron rule. Parliament is far too preoccupied with its own concerns to be a sensible partner for anyone. The idea that parliamentarians would have their misconceptions swept away and work happily with the courts in a joint endeavour to create good law forgets the competitions and struggles that already consume the time and energy of politicians.

On the contrary, the risk is that as the courts were seen to take a partnership role in validating laws made by parliament, they would become subject to some of the public and media scrutiny that is now directed at parliament. Judges are well used to professional criticism; it is exacting and regular. But public criticism and media scrutiny would lift to a new level. The same unpopularity that Sir Edmund mentioned in relation to politicians may well spread to judges once they are seen as major players in making law.

In fact, it is not clear that judges are widely loved now. During the lead-up to the enactment of the New Zealand Bill of Rights Act 1990, many submissions opposed enacting a power for judges to strike down laws that conflicted with the rights in the Act. Many submitters did not want to see judicial authority raised above parliament. Perhaps it is part of the New Zealand culture; this is an area Matthew Palmer has written on:

I believe that New Zealanders were, and still are, fundamentally suspicious of judges. ... [J]udges are unelected, elite, former lawyers. Politicians may be trusted even less, but at least they can be ejected from government every three years.¹¹³

If people voiced concern when the power of invalidation was contemplated, the reaction may be even stronger if the power were ever used.

The politicisation process would not end with public opprobrium. The obvious response from the executive faced with a court determined to play a more active role in unmaking legislation would be to review the process for the appointment of judges. The current process is largely dominated by the judges,

111 Thomas (2000, Part VI).

112 Thomas (2000, Part VII).

113 Palmer (2007, p 585).

but there seems nothing to stop the attorney-general from putting more weight on other factors. Even without changing the current presumption against party political considerations, the attorney-general could put more emphasis on the views of candidates and their approach to the law. The exacting and highly politicised processes followed by the United States senate in confirming judicial appointments is largely a result of the Supreme Court's role in the United States. Where judges take an active role in determining schools policy or abortion law, then whatever role they may think they are playing they will be seen as acting politically. If judges are seen to be playing a political role then others will use them for their own ends; inevitably, the iron rule will start to affect them.

Concluding thoughts on invalidation

Judges already have considerable flexibility in the process of interpreting statutes, and most of the concerns they face can be addressed through interpretation, so why would they want to change? Some, it seems would like to be more open about their approach. Sir Edmund, again, 'I know of no rule of law or logic which would make judicial disobedience more palatable simply because it is done covertly'.¹¹⁴ Perhaps this is what someone steeped in the law would say. The problem here is that palatability is a matter of taste; it has nothing to do with law or logic. It might be more sensible to look to diplomacy or politics; these both suggest that finding an acceptable way to express an uncomfortable truth can be a more successful strategy than frontal assault.

Rather than Sir Edmund's view that the courts have followed a self-denying ordinance, it is as reasonable to suggest that they have followed a self-protecting ordinance. That does not mean they have shrunk from their duty. Over the years, the courts in New Zealand have taken on a succession of governments and protected the rights of citizens, without resort to invalidating statutes. Judges are influential already, so why would any court jeopardise the current balance? Judges are picked for their judgment, not foolhardiness.

To sum up, for those who have got a little confused along the way, the power for the courts to strike down laws is a power that seems to exist and not exist at the same time. It is like quantum physics, where the physicist shoves a cat into a box and declares it is both alive and dead at the same time.¹¹⁵

114 Thomas (2000, Part VI). Dame Sian Elias (2005, p 72) quotes a point to similar effect from Lord Leven.

115 This is probably not an accurate reflection of quantum physics or the behaviour of physicists. Do not use this book as an authority on quantum; it is not a physics textbook, even more than it is not a legal textbook.

Likewise, with views on the judicial power to rescind statute; they could do it, and maybe not; they would do it and they certainly would not; they should do it and they should not. The position is crystallised by an authority on confusion, Terry Pratchett, ‘Everybody may be right, all at the same time. That’s the thing about quantum’.¹¹⁶ Unfortunately, unlike quantum, when you open the box and look inside to see whether the judges do or do not have the power to unmake statute, you definitely will not find a cat to stroke.

That may suggest that this whole discussion of invalidation has been a diversion, but it has served to illustrate the issues that arise between the areas of jurisdictions under the separation of powers. It also serves as a reminder; if a future government does act against fundamental provisions of the constitution, the court might strike it down.

This has relevance for officials. Sometimes frustrated ministers or select committees may contemplate a change in the law to enforce their will. The frustration may even be focused on the courts, and the proposed new law might abrogate judicial authority. In that context the official should remind politicians that the theoretical threat of invalidation could become real. Ministers and parliament might not like the response that their actions could provoke.

Offering unwanted advice in such a context can feel scary, but that advice would be in everyone’s interest, including officialdom. Staying within the law is complex enough in the present constitutional conversation. Provoking a crisis in which the invalidation debate was crystallised could make thing worse.

Having dealt with making and unmaking laws, the next issue is getting things done.

116 Pratchett (1992).

Who Makes Things Happen?

Controllers of all they survey?

Continuing the theme on the limits of parliament's powers, this chapter introduces practicalities that limit parliament's reach. There is still a focus on laws, but this chapter touches on parliament's capacity in other areas, including some more everyday activities of government workers. It starts to discuss government in its wider sense; not just policy-makers in Wellington, but people working in communities throughout New Zealand. However, though the focus widens, this is not a book on government management; inner processes of public service agencies, and the details of public service interactions with ministers remain beyond the scope of this work.

The idea of a sovereign and all-powerful parliament conveys the impression of an institution that can do anything. Surely, an all-powerful parliament could stop droughts; or, if that is too hard, it could save children from being beaten by their parents; or, if social engineering is beyond them, members of parliament (MPs) could connect communities by building roads wherever they are needed. In fact, parliament can do none of those things.

Though we now understand that humanity is affecting the climate, the weather is still mainly controlled by the laws of physics, not parliamentary statute. As a rule, parliament does not try to repeal the laws of physics. This was not always so. In the past, there was one basic fact of physics that parliament presumed to control; the passage of time. When parliament took urgency the Speaker would order that the clocks be stopped, so as to create the fiction that the session was contained in one sitting day. By this means parliament created a miraculous time-warp; in the chamber the exhausted MPs were still in Thursday, while others were watching their children play Saturday sport. Sadly, in these more prosaic days, parliament has abandoned that whimsy; all MPs are now supposed to know what day it is.

As to protecting children from their parents, there is a world of difference between enacting a statute and controlling behaviour. Parliament can make laws, but it cannot make people be nice to each other. During the *Foxhunting Case* Lord Hope mused on this social limitation on sovereignty:

Parliamentary sovereignty is an empty principle if legislation is passed which is so absurd or so unacceptable that the population at large refuse to recognise it as law.¹¹⁷

Fortunately, most parents do not beat their children, but that may not have much to do with the law.

Recognising the laws of physics and the realities of social interaction are one thing, but surely parliament can build a road. Well, in theory it could make a law requiring that a particular road be built; and creating a duty that a certain person or entity builds the road; and providing the funds for the land, labour and materials; and setting aside all local and central government permit requirements; and determining the precise location and specification for every camber and layer of tar seal; and even making it an offence if the responsible entity does not get the road built by next year; and probably making it an offence to hinder the operations of the road builders; and maybe creating a public duty to assist the road builders. But none of that is the same as building a road – nor would it be a good use of parliament’s time.

The point is that it is not parliament’s role to deliver government programmes. It is not even parliament’s role to say what *shall* happen; parliament says what *may* or *may not* happen. To accomplish anything, parliament needs the executive. The central point of this chapter is that though the executive is accountable through ministers to parliament, it does not run, direct or control the executive.

Authorising or directing

Parliament does not exist to make things happen; it either authorises or funds activities or forbids them. It is for ministers to direct what shall happen; parliament sets the boundaries around ministers’ powers.

This can be very frustrating for those MPs not in cabinet. It is common at select committee hearings that a first-term MP will demand that a public servant do as they are told by the MP. Public servants, however, appear to assist the committee, at the direction of the minister.¹¹⁸ They do not work for the committee or for parliament; they work for the minister of the day.

Sometimes ministers and MPs seek to blur the distinctions between the legislature and the executive, perhaps hoping to reduce the frustrations of sitting on parliament’s backbenches. Ministers, especially those new to office,

117 *R (Jackson) v Attorney-General (Foxhunting Case)* [2005] 3 WLR 733, 773.

118 The role of officials at select committees is outlined in State Services Commission (2007).

occasionally direct officials to act on the instructions of another MP. This is a mistake that generally leads to confusion or worse. The problem is that the backbenchers are not subject to any of the disciplines of the executive: they do not negotiate priorities with their colleagues, they do not account to parliament for their performance, and they have no ongoing relationship with officials which might otherwise moderate unreasonable behaviour. An example of this was seen in 2009. Hone Harawira, a Māori party MP, was given control over a consultation process. That would seem a simple task, but within months he was sending expletive-laden threatening emails to officials.¹¹⁹ It is difficult to do much about such behaviour; if a minister loses control, the prime minister can act, but the prime minister has very little influence over backbenchers.

Delegations to backbenchers are not the norm; the reality is that the executive is led by ministers. But even they are fully occupied leading and accounting for government activity; they do not do the work of government. It is the tens of thousands of public servants and the hundreds of thousands in the wider state service who do the government's work. They act under the authority of parliamentary statutes,¹²⁰ but not under parliamentary direction.

The cabinet is commonly referred to as the government. This makes some sense, because it is cabinet that stands in parliament to be accountable for all government activity. But the government is not 20 people in the Beehive. They are the political directors of the government, with oversight and responsibility, but the government is a much bigger and diverse thing.

On a remote East Coast beach, the fisheries inspector who accosts suspected poachers is the government. In an alpine valley, the Department of Conservation ranger who collects hut fees is the government. In a Work and Income New Zealand office in Manukau, the clerk who declines an application for a benefit is the government. In an office in Wellington, the Environmental Risk Management Authority committee that authorises the use of a hazardous chemical is the government.

During the 20th century the role of government steadily grew, taking in social services as well as economic development and regulation. This meant that the task of managing has grown. But it is not just a matter of scale, or even of diversity; it is the particular responsibilities involved in exercising the powers of government that create unique issues.

119 Hartevelt (2009).

120 Or some ancient prerogatives.

State servants treat the sick, teach children and support the poor, but anyone could do that. State servants also imprison people, compel households and businesses to pay taxes, use force to maintain order, and take children from their parents, and nobody else may do those things. The executive is the biggest and most powerful force in the land. Its impact on daily lives is huge, and people may not choose not to have dealings with it.

To manage these executive processes ministers and officials do many tasks without reference to parliament. These tasks include making appointments to key positions, contracting for the provision of services, borrowing funds and conducting international diplomacy. In the process, they make long-term commitments that must be met by future taxpayers.

Given the significance of the executive, it is not surprising that the iron rule drives parliamentarians to struggle for control. It is also not surprising that the everyday paradox will regularly ensnare officials when they come near parliament. Officials deal with so many issues of such significance to the lives of New Zealanders that parliamentarians cannot ignore officialdom. But being in the sights of backbench MPs is not the same as being under their direction.

Executive law-making

The executive is accountable to parliament, but not under the control of parliament; that is simply another statement of the separation of powers. But, as with all of the boundaries in this constitutional structure, there are ambiguities and frictions. Contrary to the general picture of parliament being supreme, it is very often the actions of officials in the executive that push the boundaries. This is most graphic in making laws. Law-making is pre-eminently a role of parliament but, though parliament may keep out of executive activities, the executive does not keep out of law-making. This occurs explicitly, under delegation; implicitly, by the creation of practices and conventions; and effectively, by the creation of new realities. These are the processes by which officials colour in the picture to make the law; sometimes extending the picture beyond the outlines that parliament has sketched.

The process of making law by regulations and rules was considered in chapter 5. This process is explicitly mandated by parliament and supervised by the Regulation Review Committee of parliament.

Delegated law-making is explicit, but creating conventions is more subtle and implicit. Conventions are not merely the generally accepted practices of the day, but are those regularly observed behaviours that serve to make the constitution operate. They are created by the actions of various office-holders,

many from the executive. They require continued observance by all involved or they disappear. Disappearance is not hard for something that is as insubstantial and inchoate as constitutional convention.

Though they are hard to grasp, there is general agreement as to the significance of constitutional conventions, 'Shorn of conventional rules actually observed, the legal constitution would be an irrelevant metaphor'.¹²¹

Some of the major conventions are more significant than the laws recorded in the Constitution Act 1986.¹²² For example, section 16 of the Act simply says that statutes become law when signed by the governor-general. It does not refer to the convention that the governor-general will assent to bills, despite personal views. This convention has been binding since 1829; at that time George IV signed a bill that he opposed, because he accepted it was his duty to do so. In 1877 the convention applied in New Zealand when the governor-general signed a bill that parliament had passed in the face of advice from the premier, Sir George Grey, that he should refuse his assent.¹²³

It would be a rare MP who would see any problem in the convention that the governor-general should assent to bills, but other conventions are not so entrenched or even widely agreed. And if it is not absolutely clear which are the conventions of the day, it is even less clear how they emerge.

One convention that has recently been clarified and complied with is the caretaker convention. This convention is recorded in the *Cabinet Manual* and has applied on several occasions during the period between an election and the formation of a new government. However, though the general idea of caretaker government has a long history, in New Zealand it was little more than a curiosity until the aftermath of the 1984 election, when Sir Robert Muldoon refused to act on the advice of the incoming government. In the following years, the *Cabinet Manual* was expanded to outline a series of steps for the transition.¹²⁴ This convention has become much more significant with the introduction of proportional representation and the new reality that government formation can take some time. The rules reflect a similar approach to that taken in other Westminster countries, but they are not identical. For example, in New Zealand, our caretaker convention applies only after an election; in Australia, the caretaker period applies during the election campaign. There is no legal basis for the difference, just history.

121 Joseph (2007, p 215).

122 Joseph (2007, p 217).

123 Joseph (2007, p 310).

124 Cabinet Office (2008, p 75).

But other conventions develop all the time. For example, in 2002 the ombudsmen recognised the significance of the need for confidentiality of advice from the Department of Prime Minister and Cabinet.¹²⁵ Successive chief executives of the department and successive prime ministers had regarded the briefings as confidential. This was, in part, to allow the inclusion of information that could assist prime ministers to carry out their obligation to assess the effectiveness of individual ministers; this assessment would be inhibited if the information were public. The department was established only in 1987, but by 2002 the actions of three chief executives and five prime ministers had established a pattern that the ombudsmen acknowledged. The ombudsmen did not use the term ‘convention’ but they accepted the practice as something to assist the prime minister to do her job.

Neither of these examples was ever the subject of parliamentary debate or acceptance; that is not how conventions are made. The action of officials working with ministers develops practices that harden into conventions. That is, the constitution (but not strictly the law) is amended implicitly.

But as well as the explicit process of regulation and the implicit process of evolving practice, there are other areas where executive action effectively creates reality that shapes the law. The use of manuals and directives creates procedures and criteria that apply in many aspects of government decision-making. From the point of view of citizens dealing with the government these are binding constraints, even if not spelled out in the law. Unlike formal rules or regulations, they cannot be rescinded by parliament’s Regulations Review Committee. They exist at the behest of officials, until they are tested by judicial review.

International agreements

A more significant area where executive action can create legal reality is in international relations. Once an international treaty has been made, there is an obligation in international law to put it into effect. This may require amendment to legislation to ensure compliance. Such treaties inhibit parliament from future legislation that would breach the treaty. That is, treaties have a major legal impact. But treaties are negotiated and agreed by the executive.

Historically, it is obvious why treaties belonged to the executive; they related primarily to national security, which is the executive’s responsibility. But in the last century, treaties have been transformed to cover matters such as

125 Office of the Ombudsmen (2002, pp 29–34).

international law-making (the law of the sea), trade (the General Agreement on Tariffs and Trade, and various bilateral trade deals), social matters (the International Covenant on Economic, Social and Cultural Rights), and environmental matters (the Kyoto Protocol on Climate Change). As the world has become more interconnected it has become necessary to coordinate policies and laws in many more areas.

In response to this, parliament has introduced a procedure for it to review treaties before they are ratified. A treaty must be put before parliament with a national interest report explaining why the treaty will benefit New Zealand. The treaty is then referred to a select committee, which considers the treaty and reports back on matters of concern. It remains the government's decision whether or not to ratify the treaty.

This is not an empty process. In 2004, a treaty was agreed between Australia and New Zealand to establish a trans-Tasman therapeutics board that would regulate the production and sale of therapeutic goods in both countries. The officials who had negotiated the deal were particularly proud because they had achieved a structure that improved effectiveness of regulation while achieving substantially equal control with Australia. But the select committee recommended against the treaty.¹²⁶ Despite that recommendation, the government went ahead and introduced legislation to bring the new agency into being. To the acute embarrassment of ministers and officials, there were not enough votes to pass the bill. There is still no such body regulating therapeutics, and New Zealand is in breach of a treaty.

The important constitutional point here is, how far should the democratic requirement for parliamentary affairs give way to the practical reality of international diplomacy, which is so complex that it is not amenable to negotiation by a parliament of 120 MPs? Parliamentary control has precedent here. In the United States, the senate must agree to accede to a treaty. This is commendably democratic, but the uncertainty involved for other countries faced with the risk that a treaty might be amended in the senate has inhibited some diplomacy. Presumably, such inhibition would be even greater for countries contemplating a deal with a tiny country in the South Pacific.

If making treaties is a little complex, what about going to war? The following case study illustrates how matters can unfold when parliament tries to participate in an executive function, even one as grave as going to war.

126 Health Select Committee (2004, p 9).

Case study – going to war

On 3 October 2001, just three weeks after the attack on the World Trade Centre in New York, parliament considered New Zealand's response – joining the international military operation in Afghanistan.¹²⁷ Parliament had already recorded its outrage and distress on 12 September, when it resolved to work with others to stamp out terrorism. Now it was time for something more specific. As the debate began, the Speaker noted the significance of the matter and asked for more decorum than is usual for most debates.

The prime minister, Helen Clark, began by outlining recent events, including New Zealand's work with the Americans and others since the 9/11 attacks. She moved the following motion:

That this House declares its support for the offer of Special Air Services troops and other assistance as part of the response of the United States and the international coalition to the terrorist attacks that were carried out on 11 September 2001 in New York, Washington and Pennsylvania.¹²⁸

As is usual at such times, the prime minister was followed by the leader of the opposition, Jenny Shipley. She noted her concern that the government had not made earlier strong comments in support of the United States, but welcomed the decision to send the Special Air Services (SAS) to Afghanistan. She then moved an amendment¹²⁹ to add at the end of the resolution the words, 'and totally supports the actions of the United States'.

The third speaker was Jim Anderton, the deputy prime minister and leader of the next largest party, the Alliance. He responded to Jenny Shipley's concerns about lateness by referring to comments he had made on 12 September, when he was acting prime minister, and went on to focus on the resolutions of the United Nations Security Council that had called for international action against terrorists. He moved a further amendment to insert after the words 'declares its support', 'for United Nations Security Council Resolutions 1368 and 1373'.¹³⁰

127 'Debate: Terrorist attacks – Special Air Services commitment' (*Hansard*, 2001, pp 11,996–12,017).

128 'Debate: Terrorist attacks – Special Air Services commitment' (*Hansard*, 2001, p 11,996).

129 'Debate: Terrorist attacks – Special Air Services commitment' (*Hansard*, 2001, p 11,998).

130 'Debate: Terrorist attacks – Special Air Services commitment' (*Hansard*, 2001, p 11,999). This amendment lapsed because it was not consistent with Standing Orders; even senior members can have difficulty remembering all the rules.

Then it was the turn of Richard Prebble from ACT. He was all in favour of sending the SAS, but was concerned that past diplomatic strains had prevented joint training with American troops. He moved that the amendment to the motion be further amended by adding after the words 'United States', the words:

this House notes New Zealand is still legally a member of the ANZUS Alliance and further that the Australian House of Representatives has passed a resolution that the terrorist attack of 11 September is an attack under article IV and V of ANZUS, and therefore this House declares the terrorist attack on America to be under article IV and V of the ANZUS agreement to be an attack on New Zealand.¹³¹

It was during Richard Prebble's speech that Labour ministers started to interject.

The next speaker was Keith Locke, representing the Green Party. He opened with appreciation that the government had agreed to have the debate before troops were deployed and deplored the 9/11 attacks. However, he expressed doubt whether military deployment would succeed in bringing terrorists to justice; perhaps it would be better to send investigatory officers to help identify the culprits. He moved a further amendment to the amendment by adding after the words 'New Zealand', the words:

and in accordance with international law, with the objective of apprehending terrorists and bringing them to trial, not for revenge or retaliation.¹³²

There was understandable procedural confusion by this time. Wyatt Creech, the deputy leader of the National party, sought clarity, saying:

We have now got an amendment, an amendment to an amendment, and an amendment to an amendment to an amendment, and it is going on and on.¹³³

The Speaker tried to simplify things by having the House debate the amendments one by one, but this was not agreed.

The next speaker, Winston Peters, largely confined his comments to attacking Keith Locke, in the face of various points of order as his direct attacks were ruled to go too far. He supported the government motion, and refrained

131 'Debate: Terrorist attacks – Special Air Services commitment' (*Hansard*, 2001, p 12,001).

132 'Debate: Terrorist attacks – Special Air Services commitment' (*Hansard*, 2001, p 12,004). He seems to be amending the ACT amendment, but his amendment is hard to follow.

133 'Debate: Terrorist attacks – Special Air Services commitment' (*Hansard*, 2001, p 12,010).

from further amendments. Peter Dunne also spoke to support the motion without further amendment.

The House dealt with the amendments from the Green Party and from ACT. There were 17 votes for the Green Party's motion, including 10 votes from the Alliance; that is, one of the parties in a government that was sending troops into battle voted to limit the SAS objective to apprehending terrorists. It is unclear how the SAS could do that in the middle of a battle between United States-led troops and Afghan fighters; it looks like a dangerous job. The ACT amendment to revise history by re-creating the ANZUS alliance also failed, but it attracted 53 votes from ACT, National, New Zealand First and the United party.

After further speeches the minister of defence, Mark Burton, moved to tidy things up by moving a further amendment to the amendment (that is, the National party amendment) by omitting all the words after 'supports', and inserting the following words:

the approach taken by the United States of America, and further declares its support for United Nations Security Council Resolutions 1368 and 1373.¹³⁴

After more speakers but no further amendment, the amendments were agreed to, but, understandably, members asked for clarification on what they were voting for. They all knew it was about Afghanistan and the SAS, but beyond that it was a little confusing. The motion was finally put as follows:

That this House declares its support for the offer of Special Air Services troops and other assistance as part of the response of the United States and the international coalition to the terrorist attacks that were carried out on 11 September 2001 in New York, Washington, and Pennsylvania and totally supports the approach taken by the United States of America, and further declares its support for United Nations Security Council Resolutions 1368 and 1373.¹³⁵

This motion was finally carried with the votes of every party except the Green Party, which voted against.

Democracy or farce?

The background to this debate is instructive. It had not been normal practice for parliament to vote on a deployment of troops before. There is certainly no legal

134 'Debate: Terrorist attacks – Special Air Services commitment' (*Hansard*, 2001, p 12,012).

135 'Debate: Terrorist attacks – Special Air Services commitment' (*Hansard*, 2001, p 12,017).

necessity for such a motion. In 1999, when the previous government had made a much larger deployment of troops to East Timor there was a special sitting of parliament to debate the matter. But on that occasion, the motion was less ambitious. On 17 September 1999, the prime minister, Jenny Shipley, began the debate on the deployment with the following motion, 'That the House do now adjourn until 2 p.m. on Tuesday, 5 October 1999'.¹³⁶

It might suggest some lack of commitment to start a debate by proposing to take a break, but that is parliamentary code for a general debate. It may be more emotionally satisfying to move a specific motion as happened in 2001, but the Afghanistan example demonstrates the risk in decision-making by parliament.

Parliament can, and does, make big decisions. Every statute is a result of parliamentary decision-making. When parliament speaks by enacting a bill it makes law. But this was different; when parliament speaks by passing a resolution, it simply makes a noise. Though members were aware of the solemnity of the moment, the iron rule compelled political point-scoring.

The resolution did not authorise sending troops; the government had that authority already. If the government motion were lost, the legal position would not have changed. It would have become a political matter, and the government would probably have fallen if it had lost such a motion.

And that makes the basic point. Going to war or not going to war is a fundamental responsibility of any government. If MPs do not like the government's approach, they can seek to remove the government by means of a no-confidence motion. Such a motion would have been the more appropriate debate, rather than strangulation by a thousand amendments. It is for the government to set the rules of battle (technically known as the rules of engagement), and for parliament to decide if it still has confidence in the government.

So how did the 2001 debate happen? It is noticeable that in the 1999 Timor debate, Jim Anderton welcomed the debate, but foreshadowed a time when he hoped that parliament would be entrusted with such decisions. In 2001, he was a senior member of the government and he got his wish, but it was not a pretty sight.

Jim Anderton is not alone in seeking to increase the role of parliament. In 2007, as Gordon Brown, the new British prime minister came to office, he announced his intention to hand over a range of royal prerogatives to parliament. The proposals included the powers to declare war and to ratify

136 'Debate: East Timor' (*Hansard*, 1999, p 19,461).

treaties, as well as powers over senior appointments and the civil service.¹³⁷ In the subsequent couple of years parliament saw more details in a green paper, then a white paper and a draft bill. Some of the changes have not yet crystallised but in October 2009 the United Kingdom government:

concluded that it is unnecessary, and would be inappropriate, to propose further major reform at present. Our constitution has developed organically over many centuries and change should not be proposed for change's sake. Without ruling out further changes aimed at increasing Parliamentary oversight of the prerogative powers exercised by Ministers, the Government believes that any further reforms in this area should be considered on a case-by-case basis, in the light of changing circumstances.¹³⁸

The British have shown commendable flexibility in considering these matters; just because royal prerogatives are ancient it does not mean they are appropriate. On the other hand, it is equally true that being old does not necessarily mean the prerogatives are inappropriate. Democracy is vital to responsible and accountable government, but the practicalities of executive action mean parliament is often unsuited to controlling executive action. It is not surprising that reflection has led the British to be more cautious than they initially contemplated.

Executive discretion

The experience of the Afghanistan debate demonstrates the complications that arise as parliament moves beyond authorising government action into the more complex area of controlling government action. This is not just a constitutional nicety; it can have profound impact on the work of officials. For the SAS the impact could be life or death. And if SAS troopers do not meet the usual definition of officials, the top brass do. It is the generals who are responsible for giving clear orders to the troops under the direction of ministers. In this case, parliament was flirting with setting a mission (apprehending terrorists) that would have been highly dangerous, but the chief of defence force had no opportunity to advise parliament.

Everything the government does, including sending troops to Afghanistan, is of interest to parliament. Everything should have appropriate legal authority and everything may be questioned. All public servants, and the wider grouping

137 Ministry of Justice (United Kingdom) (2007).

138 Ministry of Justice (United Kingdom) (2009).

of state servants, are potentially liable to have their actions questioned in parliament. The military is not exempt from scrutiny, any more than nurses, teachers or social workers are exempt. In that sense, everything in government is the business of parliament. But that does not mean parliament is able to direct officials. As an institution, parliament is neither constitutionally nor effectively capable of filling that role. Instead, the control of the executive is the responsibility of ministers, who are accountable to parliament.

Responsible and accountable government is the heart of our democracy. The role of the non-political public service, including the military, is to serve the government in office. That way ministers maintain control, and may be held to account for their failings. Activist MPs who seek to exert control over the actions of the government without accepting the disciplines of executive accountability jeopardise a fundamental constitutional principle.

This begs the question: if parliament cannot control the government's actions, can it control anything? In particular, can it control itself?

Who Controls Parliament?

It's their privilege

Previous chapters have suggested that our sovereign parliament does not control the government and does not even control all law-making. But, when it comes to its own procedures, there is no question, parliament controls its own affairs. This may not seem unusual; businesses and clubs control their own affairs, why not parliament? The difference is that if shareholders or club members believe the directors or club committee have acted inappropriately they may test their concerns in court. But the courts will not pass judgment on parliament's processes.

Parliamentary privilege evolved over centuries in Britain. During the struggles between king and parliament, while it took real courage to stand and defy the king, it was essential if parliament was to play a serious role. Accordingly, parliament regularly asserted customary rights to freedom of speech and asked the Crown to respect that right. Over time, that customary right and a wide variety of associated rights became recognised as the privileges of parliament. The whole idea of parliamentary privilege revolves around protected behaviours that are necessary for parliament to do its job. If parliament could be controlled from outside then it could not discharge its democratic mandate.

Enshrining the privileges of parliament was one of the results of the Glorious Revolution; article 9 of the Bill of Rights of 1688 says:

That the freedom of speech, and debates or proceedings in Parliament, ought not to be impeached or questioned in any court or place out of Parliament.¹³⁹

Though privilege may serve to protect an individual member of parliament (MP) from the consequences of their utterances, it is not MPs who the privilege protects; privilege protects the proceedings of parliament. If public affairs are to be debated openly, parliament must be able to hear the views of all its members. That may involve an MP saying things in parliament that, if said elsewhere,

¹³⁹ Quoted in Joseph (2007, p 410).

would be libellous. But because parliamentary proceeding cannot be questioned outside parliament, the courts will not rule on comments made there.

The precise boundaries of this privilege are a matter of intense interest to MPs, and courts have ruled on the question regularly. Recent New Zealand cases have held that comments made in parliament cannot be used by a committee of inquiry to draw adverse inferences about an MP;¹⁴⁰ a defendant in a libel case cannot draw on parliamentary speeches to substantiate impugning the reputation of an MP,¹⁴¹ but where an MP endorses their own parliamentary comments outside the chamber, that may be deemed a repetition of the comments and be actionable.¹⁴² But the issue of interest to non-MPs is those aspects of privilege that create obligations on others. And, though the scope of these privileges is defined by the courts, in enforcing them parliament is the judge in its own cause.

Contempt of parliament

History has given us the term ‘contempt’ as a word describing an offence against parliament. However, the issue is not whether someone’s behaviour has been contemptuous. Parliamentarians do not like being insulted anymore than anyone else does, but they do not exact formal punishment for an insult. The issue of contempt arises for actions that obstruct the functions of parliament.

Many actions may constitute contempt of parliament. No one may detain an MP while parliament is sitting, or obstruct them as they make their way to the chamber, or intimidate them, or disadvantage them on account of their conduct in the house. It is also contempt to disrupt the proceedings of parliament. In 1946, Peter Verschaffelt, a former public service commissioner, was found guilty of contempt when he shouted his disapproval of public service legislation from the gallery of the House. As a result he was banned from parliament and its grounds.¹⁴³ Some would see that as little hardship, but at that time this was a real sanction, creating genuine inconvenience, even for those who did not wish to watch parliamentary debates. Before the introduction of security measures and locked doors, it was common for Wellingtonians to walk through parliament as they went from the city to Thorndon; in bad weather it was the best route. Peter Verschaffelt was literally left out in the cold.

140 *Peters v Davison* [1999] 3 NZLR 744.

141 *Prebble v TVNZ* [1993] 3 NZLR 513.

142 *Jennings v Buchanan* [2005] 2 NZLR 577.

143 Henderson (1990, p 187).

But, despite the ability of a retired commissioner to cause a disturbance, the list above would seem to hold few terrors for public servants. Much as some might like to, there is little chance of a public servant intimidating or detaining an MP. But other causes of contempt are relevant to officials. These causes generally revolve around the right of parliament to receive truthful and timely information.

Parliament's function would be severely harmed if it could not receive information whenever it wanted. This need does not arise solely at predictable and convenient times when the budget or legislation is being considered. The same need may arise whenever parliament acts to hold the government to account. That may happen at inconvenient times, because examining the actions of the government happens whenever it is politically expedient; and the iron rule means it is expedient always.

Key parts of parliamentary process are set up to permit ongoing scrutiny; these include daily oral and written questions to ministers and select committee hearings. In every case, questions must always be answered truthfully. The urgent process of assembling answers before question time is a daily pressure point in Wellington; senior officials frequently must abandon other tasks to ensure that correct information is made available within a couple of hours. The grind of responding to written questions can be more debilitating; the same truthfulness is required without the excitement of a two-hour turnaround. If an incorrect answer is provided, the liability falls technically on the minister, who must correct matters in parliament without delay. Generally, however, ministers are able to transmit their discomfort onto officials.

At select committees, senior officials are personally responsible for ensuring that their answers are correct and appropriate. It is contempt to deliberately mislead the house, to refuse to answer questions or to present altered documents. Committees are understandably annoyed whenever they think they have been misled, but they seem to reserve special irritation for any official who transgresses. Parliamentarians think officials should know better. That seems quite reasonable, because senior officials are paid to know their obligations to parliament.

Telling the truth while working as a loyal servant of the government of the day and not criticising government policy is a skill that needs much practice. Doing all that while avoiding irritating committee members is an art.

Other issues can arise when staff members appear before a select committee, perhaps to testify about their concerns with their employer. The following case study is an object lesson.

Case study – Television New Zealand

On 22 December 2005, the chairman of the board of Television New Zealand (TVNZ) wrote to Ian Fraser, the chief executive, relieving him of any further duties and asking him to return all TVNZ property.¹⁴⁴ This letter arose because a week earlier Ian Fraser had attended a select committee meeting to testify about various matters of concern at TVNZ, including his own impending departure. He had told the committee that he had lost confidence in the board,¹⁴⁵ and his appearance at the committee made for an exciting hearing:

For Opposition MPs, it was manna from heaven. Here was Ian Fraser, head of TVNZ, baring his soul about his board of directors and how he wanted to kill them.¹⁴⁶

The board was understandably upset by those comments and, having taken legal advice, it terminated Mr Fraser's involvement with TVNZ. However, in doing so the board had not considered privilege, and the obligation that a witness not be disadvantaged for answers given to parliament. Once MPs complained the board quickly apologised for the oversight, but the Speaker referred the complaint to the Privileges Committee.¹⁴⁷

The board chair was summoned to appear before the committee, where he apologised again. The committee considered that the board's actions amounted to 'assaulting, threatening or disadvantaging',¹⁴⁸ and that the board's actions might deter others from testifying in future.¹⁴⁹ The committee concluded the board had committed contempt. When the chairman was advised of this finding in the draft report, he apologised again.¹⁵⁰

The committee noted that this was not the first time that the board of a Crown entity or state-owned enterprise had failed to consider its responsibilities to parliament, and criticised board staff and the external legal advisers for the quality of their advice. Apparently, the committee's draft report named the external adviser, but the adviser wrote asking that the name of the law firm be removed from the report. Perhaps with an eye to administering acute pain,

144 Privileges Committee (2006, Appendix C, letter to Ian Fraser).

145 'Questions TVNZ must answer' (2005, p B4).

146 'TVNZ: no more mates rates' (2005, p B4).

147 In the media the committee is commonly referred to as 'parliament's powerful privileges committee', but though the alliteration is seductive that is not its correct name.

148 Standing Order 444(w).

149 Standing Order 400(t).

150 Privileges Committee (2006).

the committee complied, but then reproduced the letter, on Bell Gully letterhead, as an appendix to the report.¹⁵¹

The committee was so concerned at repeated lapses by state enterprises, including by TVNZ on a previous occasion, that it recommended exemplary punishment. As well as requiring a formal written apology to the House, the committee proposed a fine of \$1,000. This was endorsed by parliament.

TVNZ proffered its fourth apology and paid the fine.

Penalties for breach of privilege

The TVNZ case demonstrates that government officials can be punished for contempt of parliament. This is a rare event; parliament may sometimes seem a little precious, but it can be quite forbearing in the face of annoying behaviour. An official's testimony would probably need to be reckless and egregious before it would be adjudged to be a contempt of parliament. But a threat to a witness or a leak of information are real possibilities, so what punishments could be inflicted?

The most common punishment that parliament administers is a demand for an apology. As TVNZ learned, apologising three times already does not avoid that threat. In spite of such experience, if you are in trouble apology is a good first step to redemption, so it may be beneficial to everyone involved.

Another punishment is censure. To someone working outside the government system that may not seem too serious, but for those within the government it is a stain on the record. An official who had been censured would be likely to meet very little trust in any future dealings with parliament and possibly much more overt hostility than is usually directed at officials. It would be hard to continue in a senior role.

Exclusion from the precincts of parliament could occur. That would be extremely inconvenient for a senior official; appearing before select committees to represent the department is a basic responsibility of senior staff. Others may also be affected. For example, in 1992 three courier companies were banned from making deliveries to the parliamentary complex because the owner had refused to inform parliament of the source of a leak of confidential select committee material.¹⁵²

151 Simcock (2006) in Privileges Committee (2006, Appendix G).

152 Privileges Committee (1992).

The TVNZ case also demonstrates that parliament is prepared to impose fines. This case was the first fine for over 100 years. Though \$1,000 may seem a modest sum to impose on TVNZ, the committee said higher fines might be imposed in future. However, though TVNZ paid the fine, there is real doubt that parliament has the power to fine.¹⁵³ Parliament's powers are derived from those enjoyed by the House of Commons in 1865, the year that parliament assumed its privileges. The British House of Commons has not fined anyone since 1666.

And, whether or not parliament has the power to fine, it does not have the means to extract payment from an unwilling payer. If parliament were to fine a private individual for contempt, the individual might ignore the bill. Though a private creditor might resort to the courts to enforce payment, the courts might not confirm parliament's power to fine. So long as the person had no need to deal with parliament in the future, then the bill may remain unpaid. But that is not an option for someone working in the government system. A state official cannot afford to be formally off-side with parliament. Even if the official had no need to deal directly with parliament, the strain of parliament's wrath would corrode working relationships. Irrespective of doubts about parliament's powers and in spite of its lack of any system of enforcement, officials should not hope to avoid punishments exacted by parliament while remaining in the job.

Finally, there is the power to detain or imprison. That is, once there was the power to imprison. Professor Joseph cites estimates of nearly 1,000 committals for contempt between 1547 and 1810 by the House of Commons.¹⁵⁴ Parliament would imprison offenders (or, strictly speaking, contemnors) until they expressed contrition for their contempt or until the end of the parliamentary session. In New Zealand, parliament has never used the imprisonment power, and its use in modern times requires a stretch of the imagination. Where would parliament put a prisoner? And, though parliament has not expressly repudiated its power, section 315(1) of the Crimes Act 1961 provides that no person may be arrested without a warrant issued under a statute, and imprisonment for contempt does not exist in statute. Therefore, it seems unlikely that anyone should be concerned at the risk of detention at the will of an angry parliament.

153 Joseph (2007, p 462).

154 Joseph (2007, p 460, citing Erskine May).

Maintaining respect

Parliament's privileges are important and are particularly significant for anyone who deals regularly with parliament. This may seem onerous to an individual official involved in complex tasks, but parliament must maintain its ability to perform its functions. Parliament needs good information, hence the obligations to tell the truth and to protect witnesses. Parliament must be able to hear the opinions of its members, hence the right of free speech. Parliament's committees need to consider draft reports in private, hence the obligation to protect confidential evidence and private information about deliberations.¹⁵⁵ Respecting these privileges may involve an official in a lot of care, but that does not justify breaching privilege.

A significant number of officials can be directly affected by the requirements of privilege. The government provides officials to act as advisers to select committees; law drafting is done by staff from the Parliamentary Counsel Office;¹⁵⁶ ministerial office staff (technically part of the public service) interact closely with parliament; officials frequently provide information to select committees; and senior officials appear regularly before select committees. All those people need to understand parliament's rules as they do their part to assist parliament to do its job.

While it is quite possible to comply with parliament's needs, it requires concentration. Guidance is available.¹⁵⁷ Circumstances as difficult as those faced by TVNZ have been handled in the past. For example, in the select committee inquiry into the Inland Revenue Department, the department had to cope with staff testifying about a succession of claims about mismanagement.¹⁵⁸ Those matters were managed without falling foul of parliament.

155 This is still protected by Standing Orders, but parliament seems to have stopped worrying about submissions being published and leaks from committee members seem common. Officials attending committees should still be discreet, however.

156 Parliamentary counsel are not public servants in the strict meaning of the term, but they are part of the executive accountable to the attorney-general.

157 See, for example, State Services Commission (2007).

158 This inquiry is the subject of a case study in chapter 12.

Conclusion to Part Two

Parliament is sovereign because it says so, some legislation says so, and much academic thought has said so. Parliament is at the heart of our government system, the principal source of law and the democratic foundation for government; in that sense it is sovereign. But that does not mean it is all-powerful. We have a separation of powers, and both the executive and the courts have authorities that go beyond parliament.

For an official working in the system, this means that parliament deserves great respect, but it is not the only centre of authority. It is not enough to have regard to statute; a wider range of law, including administrative law, must be considered.

Public servants cannot rely on sponsorship from parliament to bless every efficiency-promoting scheme that they may devise. Even if ministers manage to achieve a majority and enabling legislation is passed, the courts may still insist that human rights are protected. The courts will look beyond parliament for authority as they set about protecting those rights. In the words of Sir Kenneth Keith, commenting on a decision of the New Zealand Court of Appeal:

While not denying they were confined *by* the words of the statute they did not see themselves as confined *to* them.¹⁵⁹

And, in the same speech in which Dame Sian questioned parliament's sovereignty, she said:

And when parliament legislates to confer powers upon the executive which may erode human rights, it can expect scrutiny of the exercise of those powers ... in a manner which is commensurate with the legislative and international recognition of rights as constitutional in a broad sense.¹⁶⁰

Many public servants, imbued with respect for parliament and democracy, and focused on schemes for technocratic efficiency, may be frustrated by this judicial fixation with rights. But a little thought would remind them that everyone stands to benefit from an independent judiciary – especially from a judiciary with a concern for human rights. Even public servants can have their rights threatened, and the machinations of democratic politics do not always put great weight on the rights of public servants. It is a comfort to know that all constitutional powers are balanced by other powers.

159 Keith (2004, emphasis in original).

160 Elias (2003, p 162).

It may be confusing, but for officials the law is critical for it is at the heart of all official actions. The law is both the source of authority for officials and a constraint on their actions. A glib assertion of parliamentary sovereignty is inadequate and could lead ministers and officials into constitutional blind alleys. In the words of Sir Kenneth Keith:

Beware of slogans. Look past the familiar words and formulas ... And ask yourself – is your reference to sovereignty, whether of Parliament or of the state, correct? Is it helpful?¹⁶¹

After all that, perhaps sovereign is a good word for how we should see parliament. Sovereignty is like an ancient coin, still very valuable and hugely respected, but over the years its edges have been clipped and it cannot buy everything.

¹⁶¹ Keith (2004).

Part Three

Parliament in Action

Introduction to Part Three

The previous part was concerned with the limits of parliamentary power. Constant repetition of those limits may have created an impression that all these checks and balances mean parliament is not very important. That would be the wrong impression. Parliament's importance does not come from symbolism. While it is true Parliament does operate from a grand-looking building on a hill, that is its least significant characteristic. Its importance comes from what it does.

Professor Joseph identifies five functions for parliament.¹⁶² Those functions are provider of government, passage of legislation, consent to taxation and public expenditure, scrutiny of executive government, and representation of the government and the people. These tasks are huge; they are of sufficient daily moment that they provide a substantial part of our nightly news entertainment, squeezed between traffic accidents and the misdemeanours of celebrities. And not only is the task a big one, it is done by democratic contest – probably the hardest possible approach.

It is the democratic mandate of parliament that gives all of government its moral authority. Members of parliament are accountable to the electorate every three years. Nobody else in national government faces that regular requirement to renew their authority, and all others engaged in any part of government must respect the weight of a democratic mandate. It is through the exercise of that mandate that parliament provides the means for all of the government to function; this is particularly clear when considering the executive.

To bring out the relations between parliament and public servants, the functions of parliament may be slightly rephrased. First, parliament makes the government of the day; parliament provides the cabinet and ministers who lead the work of the executive. Second, parliament makes legislation; those laws provide the authority and boundaries of government action. Third, parliament provides funds; without parliamentary authority, there can be no taxation and no spending. Fourth, parliament scrutinises government action; regular review enables parliamentarians to call the government to account. Fifth, parliament represents the people; that is, members of parliament assist their constituents in their dealings with the government. All of these functions have great significance for the work of public servants. In the following chapters, these functions are considered in turn.

162 Joseph (2007, pp 295 and 296–337). The order of the functions is changed. Other authorities such as Palmer and Palmer (2004, p 158) and McGee (2005, pp 3–5) give different lists of functions, but for our purposes the Joseph list provides sufficient scope to cover the issues.

Making Governments

Parliament's business

The making, maintenance and dislodging of representative governments is perhaps the highest achievement of democracy. Ministers collectively form the government of the day. While in office, ministers direct the operation of the executive and bring their programme to parliament for enactment. Formally, their right to hold office is embodied in a warrant issued by the governor-general. In fact, their power comes from their supporters in parliament; those who have support from a majority in parliament may serve as ministers because they enjoy the confidence of parliament. As with many other parts of our unwritten constitution, the formalities of the law continue the fiction that the monarch (the governor-general) has the power. In truth, the power lies with parliament.

That parliament decides who is to govern is simple and obvious, but legal sources are generally silent on how that occurs. The first parliamentary function identified by Professor Joseph is the provision of a government, but everything he has to say on the matter can be squeezed into just over a page.¹⁶³ In a textbook laden with source notes, he cites no court cases on the formation of a government. The Constitution Act 1986 (section 6) mentions that all ministers must be members of parliament (MPs), but does not say how they are selected. Parliament's Standing Orders are also silent; there are provisions for the election of a Speaker, the appointment of parliamentary officers and the identity of the leader of the opposition, but nothing about the election of a prime minister or cabinet. Even Standing Orders make no explicit provision for testing whether the government has the confidence of parliament; various votes and processes are provided for, but none is identified in Standing Orders as a confidence motion.

Where are the codes, manuals and guidelines? Is this not a vacuum at the centre of the constitution, crying out for some orderly minded public servant to introduce some process, transparency and clarity? Well, no. On the contrary, the theme of this section is that the formation of governments is not the realm of the

¹⁶³ Joseph (2007, p 296).

public service. Just because ministers are the most important people in the professional lives of senior public servants, it does not follow that public servants have (or ought to have) any contribution to make in the formation of a government. This is, quite properly, the preserve of politicians; if they choose to exclude or involve others, they may. On some occasions and in a few roles, politicians have involved public servants, but as a rule this aspect of parliament's work is not the business of public servants.

Where do governments come from?

Though New Zealand is a democracy, governments are not elected by the people. Elections are held regularly, but the public does not get to vote for a prime minister; the votes are for candidates for parliament. It is parliament that decides the government. The question is, how? There is no motion in parliament to appoint ministers, not even the prime minister. Technically, the government is appointed by the governor-general, but the appointment is of a prime minister (and his or her nominees as ministers) who has the support of parliament. So how does the governor-general decide who has the support of parliament?

For most of the last century, the question was academic. From the 1930s under the first-past-the-post electoral system it was generally clear on election night or soon after that either the Labour party or the National party had a majority of MPs. The leader of the majority party became the prime minister. Niceties of process could be ignored when the need arose. For example, in the days after the election in 1984 during an exchange-rate crisis, senior Treasury and Reserve Bank officials called on David Lange, the incoming prime minister, to brief him on urgent measures needed to stabilise the economy. In fact, Sir Robert Muldoon was still the minister of finance and prime minister at the time; Sir Robert then generated a constitutional mini-crisis when he refused to act on the incoming prime minister's request that he devalue the currency. The resolution of this issue was the origin of the caretaker convention, obliging an outgoing prime minister to act on the request of an incoming prime minister.

With hindsight, it is not just Sir Robert's behaviour that seems incorrect. It would now be very dangerous for public servants to assume that they can call on the person they think is the incoming prime minister on the day after the election. That is because, since the introduction of proportional representation, no party has achieved a majority of parliamentary seats. Between the election and the appointment of a government either the Labour party or the National party has needed to organise support arrangements with other parties before they could claim to lead a government. It is now more obvious that parliament

must determine who is to govern; the election simply determines who may participate in that government-formation process. Public servants do not have a vote in that process, and for most of them the formation of the government is as mysterious as it is to other New Zealanders.

The most authoritative official source on the formation of governments is the *Cabinet Manual*. The Cabinet Office's knowledge of such matters comes from the fact that the cabinet secretary also holds the position of clerk of the Executive Council. In that role, the clerk advises the governor-general, including during the sensitive steps of a transition between governments. This can involve liaison with various party leaders about process and progress with government formation.¹⁶⁴ In addition, the cabinet secretary discusses portfolio allocations and committee structures with the incoming prime minister. That is, in the normal course of events, the cabinet secretary is the only public servant who plays any role in the formation of a government. But there is no need to get excited, for it does not mean that we have found the real power in the land. The cabinet secretary's role is liaison between politicians and the governor-general, and adviser on process and precedent; it is not a negotiating or coordinating role.

If it is not the cabinet secretary who makes it all happen, perhaps it is the governor-general who takes charge? Again, no. The *Cabinet Manual* makes it clear that the governor-general waits until a clear political outcome has emerged between the parties before appointing the prime minister and those ministers that the incoming prime minister proposes.¹⁶⁵

During the 1990s, in the run-up to the first election under proportional representation the then governor-general, Sir Michael Hardie Boys, publicly explained the vice-regal role under the new electoral system.¹⁶⁶ He expected that a passive role, patiently awaiting a political outcome, would be all that was needed; so far, he has been proved right. He contrasted the likely approach with the approaches found in other countries. In Denmark, the Queen remains non-partisan, but is expected to talk with all party leaders before appointing someone (the probable next prime minister) to explore options to form a government. In Ireland, the president is equally non-partisan, but awaits a parliamentary vote (which must be held within a month of the election) before appointing the victor

164 Cabinet Office (2008, para 6.41).

165 Cabinet Office (2008, paras 6.39–6.40).

166 Hardie Boys (1996).

to lead the government.¹⁶⁷ In New Zealand, the politicians sort it out and make the result public, so the governor-general can then appoint the government.

Sir Michael's speech on the role of the governor-general closed with the thought that he did not see himself as an active and powerful player, such that:

if anything is amiss in the body politic, the Governor-General is (to borrow a phrase from P G Wodehouse) 'the chap to kiss the place and make it well'.¹⁶⁸

On the other hand, Sir Michael also considered that he was not an historic relic with only symbolic value, comparable to the Mock Turtle from 'Alice in Wonderland':

'Once,' said the Mock Turtle at last with a deep sigh, 'I was a real Turtle.'¹⁶⁹

Sir Michael saw himself somewhere between those two extremes: not an active player but filling a real role. Despite his view, it turns out that in the processes of government formation since the mid-1990s the role of the governor-general has been more mock than real; the real thing in government formation is done by the politicians.

To understand what the politicians do, look at the *Cabinet Manual*. Unlike other official sources, it is prepared to offer a comment. In one cryptic paragraph the manual records, 'The process of forming a government is political, and the decision to form a government must be arrived at by politicians'.¹⁷⁰

The message is as clear as it is short; this is not an area for reports, public deliberation or legal proceedings. It is about consenting, elected adults interacting in private. Having just endured weeks of mutual criticism during an election campaign, politicians demonstrate their professionalism by sitting down together in private to see if they can work out a deal to form a government. If they can agree on a programme, the allocation of jobs and procedures to work together in parliament, they have the makings of a government. If they cannot arrive at such a deal, it is unlikely that public servants, judges or the governor-general could do it for them.¹⁷¹

167 More information on government formation in other countries is in Boston (1998).

168 Hardie Boys (1996).

169 Carroll (1865, p 83).

170 Cabinet Office (2008, para 6.37).

171 Jonathan Boston has published studies on the politics of government formation after each of the elections since 1996, see Boston and McLeay (1997, p 207), Boston (2000, p 239), Boston and Church (2003, p 333), Boston (2007, p 389), and Boston (2010, p 206).

There will always be some, however, who are convinced that with the opportunity to access a little more wisdom the politicians could do a better job. With appropriate advice they could avoid foolish policies. Some of those holding such views are public servants, and the wisdom they believe that politicians need would be found in advice from the public service. ‘Surely’, they think wistfully, ‘if negotiating parties had officials in the room with them, or at least offering reports, they could start their governments on a sounder footing’. As it happens, this proposition is one that has been tested; there is no need to rely on theoretical musings. A look at a time when there was some public service input into government formation will reveal whether it contributed a useful dose of wisdom.

The election on 12 October 1996 was the first under the new proportional representation voting system. The result was that both the Labour party and the National party had a real chance of forming a government; the decision lay with New Zealand First, led by a former National party minister, Winston Peters. Comment before the election had suggested he might favour the Labour party, but after the election, he made it clear he would talk with both major parties before New Zealand First would determine its preference. There followed seven weeks of media stake-outs in the corridors of parliament, with journalists looking for comments from politicians as they paraded to and from confidential negotiating sessions. Finally, nearly two months later, Mr Peters announced that New Zealand First would enter a coalition with the National party.

The focus of the next case study is not on the political machinations, but on the role played by officials during the negotiations.

Case study – government formation in 1996

Within a week of the 1996 election, with mounting public speculation about a hung parliament, both Winston Peters and Helen Clark (the leader of the Labour party) wrote to the prime minister seeking access to the advice of officials. Mr Peters wrote:

my Party wishes to avail itself of ministry advisers as deemed necessary from time to time. Can you please confirm we will have access as required.¹⁷²

172 IPRO (1998, p 10, quoting Winston Peters’ letter).

Ms Clark wrote:

During this period of finalising the makeup of the new government, it will be important that all potential members of a government have access to factual information on which to base their negotiations. I presume that work has been done by the public service regarding how best this should be facilitated in a way which protects both the confidentiality of the request and the impartiality of the public servants.

There are a number of areas where I envisage I may wish to receive such information and I would appreciate your advice on what procedures can be put in place.¹⁷³

Ms Clark was correct in her surmise that the public service had made preparations, but the focus was more on impartiality rather than long-term confidentiality. As the first proportional representation election approached, the likelihood of some kind of post-election negotiation to form a government had been obvious. Officials had prepared, as they do, by forming a committee.¹⁷⁴

A major pre-occupation of that committee was to maintain the work of the public service during political uncertainty, without threatening the non-political nature of the public service. In particular, the enthusiasm of some senior public servants to offer advice during government formation created a risk that they would be seen as participants in the process, and therefore politically aligned. On the other hand, if a minister were to give an instruction requiring a department to offer advice to negotiating parties that would be lawful and could not be ignored and that, too, would create a risk of perceived political alignment.

To address these risks cabinet approved a process in mid-1996 by which the incumbent prime minister (presumably a caretaker prime minister) would authorise the provision of information by the public service to assist parties in negotiation to form a government.¹⁷⁵ However, though the process was agreed, it had not been promulgated at the time of the election.

During the week after the election officials met again with the prime minister and the minister of finance; they agreed that a careful process to provide information should be used, under the control of the state services

173 IPRO (1998, p 10, quoting Helen Clark's letter).

174 The Officials Committee on the Implementation of Proportional Representation (IPRO) was led by the State Services Commissioner and the cabinet secretary, and included officials from the prime minister's department and The Treasury.

175 Cabinet Office (1996b).

commissioner. This process was confirmed at a meeting of the caretaker cabinet on 21 October,¹⁷⁶ and the state services commissioner issued guidelines to all chief executives that afternoon.¹⁷⁷

In essence, the guideline was (and remains) that the prime minister had a ‘threshold responsibility’ for authorising contact between negotiating parties and the public service.¹⁷⁸ The state services commissioner, supported by a committee of central agency colleagues from the prime minister’s department and The Treasury, was the point of contact. Requests would be directed to the commissioner and allocated to departments for response. Responses would be reviewed by the coordinating committee to avoid overenthusiastic advice (rather than the more sober provision of information), and then provided to the negotiating party that made the request. Ministers were forbidden from approaching departments directly for information or advice to assist with negotiations. The commissioner (and only the commissioner) was to inform the prime minister ‘in general terms’ of the assistance provided; this was not to include details of a request or a response, unless the question was from the prime minister’s party. It was acknowledged that the Official Information Act 1982 applied to the whole process of request and response, so information would probably be released in the future.

For ministers and officials who were used to working closely together this was a cumbersome process, but it was used. Within two days of the cabinet decision Wyatt Creech, the minister of education, wrote to the commissioner, attaching written authority from the prime minister, seeking answers to 11 detailed questions of education policy.¹⁷⁹ Mr Creech expressly asked that the question be referred to the secretary for education for urgent answer. Ironically, one of the first decisions of the officials’ committee when it met the following day was to refer the questions to The Treasury, because most of the questions involved costings, and all costings were to be coordinated by The Treasury.

Answers began to flow back to the National party a day later, the end of the same week in which cabinet had authorised the process, but ministers were ‘dissatisfied’.¹⁸⁰ Ministers had been used to having their requests clarified in discussion with senior officials, and receiving explanations and analysis about the practical implications of their proposals. The initial answers, however,

176 Cabinet Office (1996a).

177 State Services Commission (1996).

178 State Services Commission (2008).

179 Creech (1996).

180 IPRO (1998, p 13).

showed the cautious influence of the officials' committee, and were restricted to factual answers to the questions as asked. After further discussions with ministers the guidance was clarified; departments were now to provide fuller answers, including practical implications, and some explanation of existing policy (while still avoiding advice). In addition, the process was changed to allow the commissioner to clarify questions when departments needed more information.¹⁸¹

Although most of the questions were lodged by the National party (in effect, by caretaker ministers), on 14 November, nearly four weeks after the system was under way, the Labour party also lodged a few requests; two on housing and one on school staffing. In the end, of 28 separate requests (many consisting of multiple questions), 25 were from National and 3 from Labour. In total, the information supplied to the parties during the negotiating period amounted to 600 pages of material.¹⁸²

All of the answers were prepared at speed, and some included a comprehensive analysis of the relevant issues. At times officials worked through the night to prepare prompt responses.¹⁸³ One matter that proved to be of major significance was compulsory superannuation. A request for an evaluation of compulsory superannuation was received on 4 November. On 8 November officials provided 18 pages discussing economic implications, possible fiscal impacts, equity issues and administration. In particular, the officials said it would take nearly three years to design and introduce a superannuation scheme.¹⁸⁴ It seems that politicians may not have concentrated closely on the answers they received, as the eventual coalition agreement committed them to completing design and legislation for a new scheme before being put to a referendum and then implemented within 18 months of the new government taking office.¹⁸⁵

All this feverish writing occurred at the same time as ministers suffered the frustration of leading a caretaker administration, forbidden (by its own decree) from taking any initiatives. Senior officials were similarly frustrated that the briefings they had prepared for an incoming government, outlining issues of the day that required ministerial attention, could not be made available to assist the negotiating parties. Requests for information in the ministerial briefings or for

181 IPRO (1998, p 13)

182 State Services Commission (1997a).

183 IPRO (1998, p 14).

184 State Services Commission (1997b, p 15).

185 *Coalition Agreement* (1996, p 79).

information supplied to political parties in negotiation were refused until the negotiations were complete. Those on the inside of government were frustrated that they could not talk directly to each other on policy matters, and those outside were frustrated that they could not find out what was going on. The tension eventually surfaced in media comment.

In December, it was reported in the *Listener* that ministers had been ‘rendered choleric’, and that Richard Prebble, the leader of ACT (a group not involved in any negotiations) wanted ‘ears boxed’. He was quoted as saying:

Look, there’s been an illegal revolution by public servants, and no one’s noticed ... These bureaucrats are working off a convention which they made up themselves ... Who elected them?¹⁸⁶

Similarly the minister of education had difficulty completing funding decisions relating to tertiary education in the following year; he was advised this was a new policy and beyond the remit of the caretaker administration. He said:

The constitutional convention is whatever the constitutional advisers tell you the convention is. They’ve got you over a barrel because, if they give you advice not to do something, and you do it, and then it comes out under the Official Information Act [1982] that you defied constitutional advice, then you are going to look pretty awful.¹⁸⁷

And mandarins seemed to be equally aggrieved at being misunderstood. The state services commissioner was described as having:

two unnatural tasks to perform: Chinese-walling politicians away from officials, and stopping officials climbing the walls to make helpful suggestions ... Acknowledging the tensions [the state services commissioner] reckons it has been just as traumatic for officials having to disoblige their political masters.¹⁸⁸

Despite all the angst, by the time the *Listener* article emerged a coalition agreement was concluded on 10 December and published as a 109-page document outlining detail in 50 policy areas.¹⁸⁹ In early 1997, in response to many requests, the state services commissioner published all the questions and answers that were exchanged during the negotiation process.¹⁹⁰

186 Clifton (1996, p 16, quoting Richard Prebble).

187 Clifton (1996, p 16, quoting Wyatt Creech).

188 Clifton (1996, p 14).

189 Coalition Agreement (1996).

190 State Services Commission (1997a).

Making governments work, not doing the work of government

Clearly, the case study demonstrates that the public service is capable of providing information during coalition negotiations, and that the information may even be helpful sometimes. In their own review after the event, officials could see means of tweaking the system to make it more flexible, but generally they thought it useful enough to retain.¹⁹¹ As a result, the guidelines remain in place largely in the same form that they were promulgated in 1996, with the biggest change being their extension to cover all of the state services, rather than simply focusing on the public service. But, although officials may have thought it worth retaining, this system is one that nobody has sought to use again. Since 1996, there have been four elections. Each election has been followed by negotiations to form a government, but no parties have asked for information or advice from the public service. Why?

There may be several reasons why politicians have found it expedient to act without relying on the words of the public service's best and brightest. Some are simply the realities of politics; in 1999, 2002 and 2008, there was no serious question who would lead the government, so negotiations on policy were less significant. And in 2002 and 2005 the government continued under the same leadership, so less assistance was needed. But there are other issues inherent in the process of government formation that discourage the use of advice from officials. First, the process of government formation is complex enough without adding more voices that may confuse with extra information. Second, the risks inherent in future public knowledge of topics discussed is not worth the potential gains of access to public service expertise. Third, coalition agreements (or support agreements) have become simpler and more political rather than policy-based.

Problems of complexity

A rationalist view of decision-making will tend to favour the use of all available information. But politicians are people, not computers, and there comes a point where extra information may confuse, not inform.

Negotiations to form a government are inherently complex. They involve at least two parties; in recent cases, they have involved more, and the current government includes ministers from National, the Māori Party, ACT and United Future. The negotiating parties must involve at least 61 MPs (more if the voting

191 IPRO (1998, p 17).

system has produced extra MPs). A majority government has at least that number and a minority government must organise some form of support arrangements to enable it to survive a confidence vote; even an agreement to abstain comes at a price. And all those parties must take account of the views of their members.

The policies to be discussed can be wide-ranging, from the introduction (or maintenance) of a families commission to the devolution of control of services to Māori. They may be as contentious as the control of the seabed and foreshore or the future of superannuation policy. And then there is the issue of who holds what office. It seems that the decision of the National party to offer the position of treasurer to Winston Peters in 1996 may have finally tipped the balance in the formation of that coalition government.

In the middle of all this the arrival of 600 pages of bureaucratic analysis, even if it is in answer to questions put by the negotiating parties, can be a mixed blessing. Certainly the evidence from the eventual coalition agreement in 1996 is that the parties did not seize on the officials' thoughts as the solution to their problems; far from it. The example of the superannuation referendum shows that the political imperative for New Zealand First trumped the cautious advice of officials.¹⁹²

The possible provision of ministerial briefing papers to assist negotiating parties seems to be even more unwelcome. After the 1996 negotiations, the State Services Commission surveyed the views of chief executives. About a third of respondents supported a proposal to release briefing material just after the election.¹⁹³ Presumably, this was with a view to ensuring that politicians were advised on the matters that seemed most pressing to officials. There was some public support for this from ACT,¹⁹⁴ but little other public comment from politicians. In private, there is no evidence that politicians involved in negotiations wanted the reports. For example, the records refer to private communication from the Labour party resisting the early release of briefings: 'the Labour Party did not want them floating around for a month before ministers got a chance to address the issues'.¹⁹⁵

192 With hindsight, perhaps the politicians were right. A scheme was designed at high speed and, though it was voted down resoundingly, *The Economist* recognised it as a well-designed policy. But implementation would still have been a challenge: 'When pay stops' (1997, p 37).

193 IPRO (1998, p 6). Some even wanted release before the election, which suggests a frustrated desire to enter politics.

194 Derek Quigley MP was among those who requested the briefings during the time that negotiations were continuing.

195 IPRO (1998, p 6).

During negotiations the parties must focus on making a government; governing comes later. They know that once in government they will have to deal with issues as they arise. They also know that officials are often an unwelcome source of the issues that must be addressed. But that does not mean they should address all the issues of government during the few days or weeks while they assemble a cabinet.

The advice to ‘keep it simple’ is just as apt for government formation as it is in any other endeavour. Extra information or advice from officials would tend to complicate, not simplify.

The risk of exposure

To officials and analysts the fact a decision-maker has weighed the benefits of different policy options is simply evidence of professionalism. To a politician, locked in combat by the iron rule, it can be a chink in the armour. Evidence that the leader of the party seriously considered ‘selling out’ a plank of election policy, possibly dear to the hearts of zealous party supporters, is always problematic. When such sell-outs are considered as part of the process of clambering into ministerial office it can be a bad look. That is the essence of why the political negotiations are usually conducted in private.

Officials have long demonstrated their ability to give private advice and to keep confidences. But in New Zealand most advice will generally become public when released under the operation of the Official Information Act 1982. It is certain that any information provided by officials to assist government formation will be requested by somebody; it is almost certain that information on policy advice will be released. That is a thoroughly good thing; public knowledge of the work of officials is hugely beneficial. But to a politician involved in negotiations it adds a large and avoidable risk.

Being explicit in private negotiations is a lot easier than considering options in public. Discreet as officials may be, they work as public servants, and the presumption in New Zealand is that their work is (eventually) public. The use of public service information to inform political negotiations towards a government that may never happen is, therefore, very unattractive to many politicians.

The nature of coalition agreements

With hindsight it is clear that 1996 was a very odd year. The process of dual negotiations over seven weeks, with multiple questions of officials, culminating in a detailed policy-laden coalition agreement, may never return. While officials

seemed to think that their part of the process went reasonably well, the behaviour of politicians suggests they learnt rather more; they learnt not to do it again.

All subsequent coalition agreements and support arrangements have been much simpler than the 1996 documents. Since that time they have tended to identify just a small number of policies of particular importance to the parties, and have focused mostly on process. In particular the innovation of ‘agreement to disagree’, now enshrined in the *Cabinet Manual* has allowed the glossing over of irreconcilable differences.¹⁹⁶ It is no longer necessary to resolve every issue before the government is formed; issues need not even be resolved during the term of the government, so long as all members of the government hang together on agreed issues and on confidence matters.

That is, coalition agreements are not a means of predetermining all the decisions of government. Officials need not fear that all policies will be predetermined in a coalition agreement before they can talk with a minister. On the contrary, the agreement is a highly political document about political processes, and the negotiation is an inter-party political process. That is not the place for non-political officials, and there is little room for briefings or reports.

Ministers and servants

The selection of a government is important to all New Zealanders, and especially important to officials, particularly senior officials. Working for a minister who reverses a much-loved policy can be depressing. Working for a minister who is querulous and uncertain can be stressful. Working for a minister who is abusive can be hell. It is not surprising that some officials would like to find a means of informing the process of government formation; it could be that this will influence the agenda of their future minister (or even who their minister will be). But, though it might be nice for a public servant to influence the choice of the minister, just as many people might like to choose their boss, it will not and should not happen.

More significantly, there are occasions in the aftermath of an election where urgent advice might be needed to manage a crisis; this occurred in 1984 and in 1990. If officials cannot get the information to the negotiating parties, what is to be done? But this is not an excuse to involve officials in government formation as other methods are available. Since the passage of the Fiscal Responsibility Act 1994, The Treasury produces a public economic and fiscal

196 Cabinet Office (2008, paras 5.25–5.27).

update in the weeks before the election; the report must identify emerging risks. There is now less chance of politicians being ignorant of problems needing attention. In addition, if any matter needs urgent attention, officials can always talk with the caretaker government, and the prime minister can authorise discussion with other parties.

Officials have privileged access to ministers and have the opportunity to influence affairs by the provision of careful analysis. But in the selection of a government officials have the same voting rights as any other member of the public. The reality is that making governments is parliament's business. Of all the activities of parliament it is the most significant to the work of officials, and it is the area in which officials have the least involvement. That is as it should be.

Making Laws

How are laws made

Statute law is perhaps the most enduring of parliament's products. Long after the debates and political compromises have been forgotten a statute will remain as part of the law of the land, continuing to affect the lives of New Zealanders. Statutes cover all sorts of topics. There are the grand constitutional measures, establishing the institutions of government; social provisions defining the law around personal relationships; law and order matters, protecting people in the streets and their homes; economic laws, establishing rules in the marketplace; environmental Acts protecting species and habitats; and there are many local Acts and private Acts that establish or empower people in various ways – Christ's College, for example, has no fewer than five Acts with the most recent being made in 1999.

Making statutes is a parliamentary function. A member of parliament (MP) introduces a bill, MPs consider the bill in select committee, and it is the votes of MPs that pass the bill. But there is also a large public service role, providing advice and drafting the clauses of the bill.¹⁹⁷ There is no single process for the creation of statutes. Some statutes arise from political upheaval, some emerge from a crisis, some arise from manifesto commitments or coalition agreements, and some reflect ongoing deliberations of groups such as the Law Commission as it aims to tidy up the law. Most government bills are introduced following an extensive process of policy debate as the public service interacts with ministers. A brief review of the making of laws illustrates the interactions between officials and politicians. The account that follows is stylised.¹⁹⁸

Many bills originate from policy papers prepared by a government agency for the minister. As officials and the minister consider how to address the public policy issue that concerns them, it may appear that a change in the law would be

197 Here the focus is principally on the process for making public Acts. Local Acts and private Acts are sponsored by a local MP to meet a local need; they generally have less significance for relations between parliament and the public service.

198 There are valuable sources for those needing more detail. Cabinet Office (2008, p 86) outlines the key steps. Malone (2008) contains an account of how law-making has changed since the introduction of proportional representation.

helpful. Though any MP could introduce a bill, the minister is part of the government and must have the support of colleagues to introduce a government bill. This need to achieve cabinet agreement is the reason for interdepartmental working groups; if a joint view can be achieved between departments, so much the better. The minister takes a paper to cabinet so that ministers can ponder the issue; if there is support, then work can get under way on a bill.

One of the first steps is to get the bill on the government's legislation programme. This programme is the list of all the bills the government aims to enact in the coming year. The legislation programme is assembled by the Cabinet Office from bids put forward by ministers. The bills are organised into various priority categories and agreed by cabinet (often after considerable debate).

The essential purpose of the list is to ration the work that is put into bills; those with no hope or low priority are not worth wasting time on. This prioritisation can sometimes seem odd to officials. While they may be enthusiastic to put in the necessary effort to sort out the policy and administrative issues and that seems to them to remove the need to ration effort, policy analysis is not usually the constraining factor.

There are two ever-present constraints on the production of statutes; drafting time and parliamentary time. As a general rule, statutes are drafted by the experts in the Parliamentary Counsel Office. Compared to other officials and other lawyers, parliamentary counsel are a breed apart. They have legal training, but they are also expert in writing law. They have to cope with urgent demands of zealous officials and dogmatic select committees, and grab peaceful moments to write complex provisions that will stand up to scrutiny in the courts. Officials will often take months to consider policy matters, and a judge may spend weeks considering the meaning of a section in an Act, but parliamentary counsel may only have hours (sometimes less) to get the words right. Though thousands of officials work as policy analysts, only around 30 people work as parliamentary counsel; it is vital they work only on bills that have some future, hence the need for prioritisation.

The second constraint is parliamentary time. Every bill must pass through a series of stages in parliament. Each stage takes a certain amount of time, with a certain number of speeches each of a certain length; this is all laid out in parliament's Standing Orders. But parliament will not generally keep working until it has enacted every law that the government wants; parliament is in session for limited hours, three days per week, three weeks per month, with adjournments at various points through the year. It is the government's job to ensure that it has priority legislation ready and drafted to use the time available.

The job of organising the government's legislation falls to the leader of the House, supported by the legislation coordinator, a public servant based in the Cabinet Office. It is an amazingly complex task; juggling the priorities of 20 ministers, ensuring time is available for key provisions such as money bills, and making deals with other parties to make progress in parliament.¹⁹⁹ The saviour is urgency, by which parliament can agree to take more time to complete the passage of some bills. But urgency requires a majority vote in parliament and under proportional representation that needs the support of a minor party. Commonly, in exchange for their support the minor party may extract some policy concession. Officials may look on in bewilderment as the minister agrees to a change in the bill. Unknown to officials the change may be needed to allow the bill to move at all.

The most detailed scrutiny of legislation happens at parliament's select committees. These are committees of members drawn from across parliament. The select committee will commonly call for public submissions and may hold public hearings. Following those hearings, the committee will deliberate in private to decide any changes it considers necessary. The minister will normally agree that the committee may retain one or two officials from the department that originated the bill to assist the committee.

The job of assisting the committee is subtle. The official is a public servant employed by a government department, responsible to the minister. But while working with the committee, attending its private deliberations, (unless the minister instructs otherwise) the official must assist the committee to do its job, even though the committee may get into conflict with the minister's priorities. The same officials will commonly advise the minister on how to deal with the amendments the committee has made.²⁰⁰

The committee may make substantial changes to the legislation before it reports back to parliament. If the government does not like the amendments it can delay further progress on the bill or it can look for support from other parties to restore the bill to the policies that the government favours. Getting that majority may involve concessions; once again the logic of those concessions is not always apparent to officials. The brutal truth is that the

199 It is remarkable that for several years Dr Cullen was both minister of finance and leader of the House; this meant he was responsible for two of the government's critical constraining factors (money and parliament minutes). He must have had numbers drifting past his eyes whenever he tried to sleep.

200 State Services Commission (2007, paras 38–49).

opinions of officials do not count; all officials can offer is analysis, while what the government needs is a majority.

Some of the issues that can come up in the passage of legislation are shown in the next case study.

Case study – Real Estate Agents Act 2008

In late 2009, a search of the government website showed the existence of the Real Estate Agents Authority. It looked like a well-established office, showing many of the signs of a fully mature government entity: a chair, a board, a chief executive/registrar, 12 brochures and 25 forms available for downloading from its website,²⁰¹ four sets of regulations, a set of rules and a fees notice.²⁰²

It was not always like this. The authority came into existence only on 17 November 2009. Real estate agents were previously supervised by an industry body, the Real Estate Institute of New Zealand. Following some sharp practices in the industry and reviews that led nowhere, the institute felt the delicate touch of Clayton Cosgrove, the associate minister of justice. He repeatedly expressed his concern about malpractice in the real estate industry, referring to ‘land sharks’, ‘cowboys’ and ‘rogues’, and the weakness of the institute (‘a B-grade *Goon Show*’).²⁰³ Eventually, in late 2007 he persuaded his colleagues to support a Real Estate Agents Bill to abolish industry-led supervision and introduce a government agency.

Though public debate had been going on for some time, detailed policy work was not complete. Parliamentary counsel started drafting the Real Estate Agents Bill while officials were still preparing policy papers for cabinet. After some high-speed work the bill was introduced on 3 December 2007, early enough to have a reasonable prospect of passing before the election that was due in late 2008.

In the bill’s first reading, it met with scepticism. Katherine Rich responded to the tone that had been set by the minister:

in that John Wayne meets Buzz Lightyear style – ... there to shoot up the town, to reform this industry, and to drag it kicking and screaming into the new century²⁰⁴

201 Real Estate Agents Authority (2009).

202 Parliamentary Counsel Office (2009).

203 ‘Real Estate Agents Bill: First reading’ (*Hansard*, 2007, p 13,819, Katherine Rich MP, quoting the minister during the first reading debate).

204 ‘Real Estate Agents Bill: First reading’ (*Hansard*, 2007, p 13,813).

Much of the ongoing debate throughout the passage of the bill was characterised by colour and heat rather than clarity or light.

The select committee called for submissions, and the Real Estate Institute worked hard to make sure there were submissions. The committee received 1,328 submissions,²⁰⁵ many of them on form letters. This was an early sign of a very active lobbying effort. The institute retained a prominent Wellington lawyer to act on their behalf. The lawyer prepared two submissions, the first of 402 pages and a follow-up of a further 76 pages; she also appeared before the committee and argued with vigour. Once the committee had endured all that argumentation it is safe to assume any sympathy it might previously have had for the institute was thoroughly tested.

The committee's sympathy was further strained by the process of hearing public submissions. Many estate agents had ticked the box seeking to be heard orally and the committee put aside several days (including a special session in Auckland) to hear 767 submissions. It transpired that many of the submitters had not read or understood the bill, and could not explain the views they put forward.

One issue that came up repeatedly was the absence of controls on property managers. Though some tenanted properties are managed by real estate agents, many other property managers are not real estate agents. The institute argued that the absence of controls on property managers meant that a new risk was being unleashed on the public. If this argument had succeeded, it would have required a massive re-write of the bill, jeopardising its passage. The drafters were saved by the clerk of the House, who advised that property management was beyond the scope of the bill as introduced, so its inclusion would be against Standing Orders.

The select committee reported back on 6 June 2008, having made substantial revisions to the bill; a word count shows that the committee changed 25% of the bill. That looks like a lot of amendments, but it is not an unusual amount of change, particularly for legislation that was prepared in haste.

After all that rush things came to a halt. It seems that though the bill had passed the select committee there was not a majority in the House. After some weeks the minister had officials advise him on discussions with Winston Peters, the leader of New Zealand First, during which he achieved agreement. The price of that agreement was several provisions the Real Estate Institute had sought, including the removal of provisions that would have tightened up the rules for

205 Justice and Electoral Committee (2008).

auctions. In many respects, however, the bill still contained much that the institute did not like, including its own demise.

On 2 September 2008, the House took urgency. Several pieces of legislation were progressed, including the bill; it went through all remaining stages, the second reading, the committee stage (which involves the whole of the House) and the third reading, in one day. During that process, the amendments agreed with New Zealand First were incorporated. The officials attending to support the minister were required at parliament for 13 hours as they waited to do their job.

It was a day of some drama; Winston Peters, who was central to the passage of the bill, was simultaneously deeply embroiled in a privileges hearing into his declaration of pecuniary interests. It is an example of parliamentary multi-tasking that the bill ploughed on regardless, and was signed into law on 16 September 2008.

It's about votes

In the above account, officials are a recurrent presence, but they are not always at the centre. The fundamental responsibility in making an Act lies with MPs, not officials. In that context the iron rule of political contest is more important than rules of logic. Analysis does not pass statutes; votes do.

Officials were important in sorting out the policy issues in the Real Estate Agents Bill, but that largely came after the minister had announced his plans. Officials did participate during the select committee process and were called on to advise the minister as he negotiated amendments with New Zealand First, but the decision to omit property managers was largely the result of a procedural ruling, not policy analysis. It is parliament's processes and political priorities that dominate, not reports from officials.

The extent of lobbying on this bill is also educational for officials. Though officials often have the time, resources and expertise to apply to an issue, those will not always be enough. In part, this is because of the differences between the communication methods of officials and lobbyists.

Officials deal with ministers; generally, this means two or three ministers in a parliament of 120 are exposed to the full detail of officials' thinking. The ministers get reports that examine the issues. Where possible, the reports are supported by data and costings. Using that information, officials expect that ministers will lead parliament to a new rationality.

Lobbyists, on the other hand, will talk with any MP who will listen. They aim to get into the room with any influential MP, including select committee members, and senior party members. Those they cannot talk with may receive emails and pamphlets. Where possible, lobbyists will marshal facts and analysis. Sometimes the facts will be different from those that seem significant to officials. The lobbyist will not be restricted to the society-wide effects of a bill; instead, the lobbyist may put more emphasis on the number of supporters feeling strongly about the proposed legislation. In some cases, backbench members may receive more information on a bill from lobbyists than they do from the government.

However, the Real Estate Agents Bill demonstrated that intensive lobbying will not always work, especially if it is on behalf of a commercial interest group. Select committees do not like being told what to do. Committees will put up with the occasional lecture from an upset voter, but they expect professionals to know better than to browbeat or patronise parliament. Officials must not hector committees or waste their time with excess material. Similarly, spending a lot of money on massive submissions and wasting the time of the committee by organising submissions from people with nothing original to say may irritate more than persuade.

But, irrespective of the role of officials and lobbyists, the deals that make legislation are the work of members. As they make those deals, they are always mindful of the iron rule. Decisions on whether to support or oppose a bill will depend on the merits of the case, but also on parliamentary tactics. Many bills are passed with little controversy; presumably, the opposition has no major concern and can see no gain to be made from differentiating its position from the government. But in other cases, an opposition spokesperson may see an opportunity to enhance her reputation or to put extra pressure on a minister who is in trouble; as a result, the bill may be fought at every stage, using substance, rhetoric and process. To complete the bill in such circumstances the party leading the government may need support on substance and procedure from a minor party. There is always a price for such support.

The laws that parliament makes are made in good faith and are intended to do what they say they will do, but they are also the product of tactics. This means attempts to appraise the work of parliament solely in terms of the clarity and rationality of statute will never see the full picture.

Law-making and politics

It is not possible to assess the quality of legislation that parliament produces. That assessment would be a massive task. But a few issues can be explored. The first two issues show how parliamentary tactics can affect the content and form of statutes. The third shows how parliament has moved away from an oppressive form of legislation.

Log-rolling

Log-rolling is an activity identified with the United States congress. It relates to the means by which congress members give their support to a bill, at the price of requiring their colleagues to support an unrelated provision. As a result, legislation may become a bundle of local and sectoral measures, intended to benefit small groups rather than society as a whole.

The term comes from the timber industry, where it applies to the assembly of rafts of logs, ready to float down river to a mill. To organise the logs, the workers jump onto a log as it floats, use spikes on their boots to get the log spinning, and then roll the log into the raft. Similarly, members of congress use their influence to get traction for a favourite piece of policy, and then roll the item into the bill. By that means the item favoured by the individual gets momentum from the rest of the bill and may make its way into legislation.

Log-rolling used to be unknown in New Zealand for a couple of reasons. First, unlike in the United States, our parliament has adopted procedures to stop irrelevant items from being attached to a bill.²⁰⁶ As with the example of the Real Estate Agents Bill, matters that are outside of the scope of the bill may not be added to it. Second, log-rolling is not feasible in a parliament where large and disciplined parties have tight control; a strong party leadership in a dominant party is unlikely to be beholden to individual members.

But recently the first signs of log-rolling are emerging. In late 2009 passage of the amended emissions trading legislation²⁰⁷ depended on an agreement between National and the Māori party. The debate in parliament made it quite clear that part of the price for support from the Māori party was a settlement of a Treaty of Waitangi claim, to the benefit of various iwi.²⁰⁸ This was well outside the range of matters that the government had envisaged when it introduced the

206 Standing Order 156 (1) says a bill must relate to one subject area only.

207 Climate Change Response (Moderated Emissions Trading) Amendment Act 2009.

208 'Third reading debate: Climate Change Response (Moderated Emissions Trading) Amendment Bill' (*Hansard*, 2009, 8,052).

bill, but was of particular interest to the Māori party. The Māori party was able to roll its log (a Treaty of Waitangi settlement) into the deal.

The emissions trading treaty settlement did not incorporate a new element into the bill, but other processes can see legislative amendments being made across different areas to secure a deal. To progress legislation the government must often seek support for urgency. A minor party may agree to support passage of the government's priority bill, but only at the cost of progress on its preferred agenda item, which may be in a completely different bill. The minor party may even extract an amendment to its (unrelated) priority, in exchange for its support for urgency on government business. Log-rolling can happen in New Zealand.

Recently, a small-scale version of log-rolling emerged. On 29 September 2009, the Primary Production Select Committee reported back on its consideration of the Reserves and Other Lands Disposal Bill. The bill is a good example of the miscellaneous work that parliament must attend to. It covers reserves across the country, proposing various detailed changes to amend the powers available to reserve authorities. As introduced, all the provisions seem to have been for some public purpose, such as for the benefit of the Auckland Art Gallery, the users of the Dunedin Octagon, and the Nelson–Marlborough District Health Board.

The select committee report added some new clauses relating to the Opuā esplanade reserve, administered by the Far North District Council. Unlike the other provisions, however, these clauses relate specifically to the current registered proprietor of the adjoining land';²⁰⁹ the clauses would permit the district council to issue an easement over the reserve so that the owner (Doug Schmuck) may carry on his boat-building business.

There is probably little concern in many households across New Zealand whether or not Doug Schmuck can operate his business on the Opuā esplanade reserve, but there is debate in Opuā.²¹⁰ Not all the locals agree with this use of the esplanade. Introducing such a clause into a public bill at the select committee implies dominance of one private interest over other priorities.

In December 2009, the Speaker ruled that the amendment was unacceptable,²¹¹ but this seems to be because the wording relates to a particular

209 Clause 34C(3).

210 There is a very long history to this case, and Doug Schmuck has strong arguments to support his case; see Schmuck (2007), a submission he made on the Regulatory Responsibility Bill. The concern expressed here is not about the substance of the argument, it is about process.

211 'Clauses don't belong in bill, says Smith' (2009, p A2).

person. More general wording to the same effect may be acceptable. The concern remains that, if ‘Schmuck clauses’ are deemed acceptable in public bills, private interests may override public interest.

Purpose clauses

The purpose of a statute is to make law. It is the law that counts, and it is the law that must be followed. It is generally held among lawyers that laws should be as clear as possible. They should be simple. They should omit unnecessary words. The more words there are, the more opportunity for confusion, as various parts of a bill pull in different ways.

Parliamentarians also seek to make clear law, but the theatre of the courtroom is not the only place that matters to them. It is not sufficient to make technically precise laws, it is also necessary that supporters know that the law will do good things. If it takes a lawyer to explain what the law will do, then it is unlikely to be good politics. Politicians solve this problem by inserting preambles and purpose clauses.

A law setting up complex provisions for registering and trading property is easy to oppose; its bureaucratic processes or its market orientation are both big targets. But if the purpose clause explains that this bill will help fight global warming, and make life safe for our grandchildren, then those who oppose it are climate change deniers. In that context MPs and the public may endorse a set of technical measures that would otherwise be unacceptable. Similarly, the courts will interpret the Act with that purpose in mind.

According to legal traditionalists purpose clauses are bad law. They would say that the law should be clear and a statute should be interpreted only from the words in its sections. But the law is never that simple; statutes are always interpreted in context, and with common law presumptions in mind. The Interpretation Act 1999 decrees how parliament wants Acts to be interpreted; it says in section 5(1) that the meaning of an Act must be found ‘in the light of its purpose’. In recent decades, purpose clauses have assisted that.

Some lawyers still abhor this change. A debate between lawyers on this topic can kill social events. Alert hosts will quickly change the subject to something more diverting like drying paint or their last golf round.

Henry VIII laws

Some recent changes are definitely for the better. In particular, in the last couple of decades parliament has reduced the use of measures that would give the executive greater authority, most noticeably Henry VIII laws.

The term comes from a device that Henry VIII used to circumvent parliamentary control. He used powers to set aside statutes when he deemed it expedient. In modern times that seems extraordinary, but such powers were used in New Zealand only 30 years ago.

In 1979, parliament passed three laws controlling wages and commerce; these laws authorised the making of regulations notwithstanding any Act or specified Acts. That is, rather than regulations being confined by statute, regulations could overturn statute. In 1982, the Economic Stabilisation Act 1948 was amended to ensure the regulations of the wage and price freeze would override other legislation.²¹²

This was not simply a technical or transition provision. The wage and price freeze was an extraordinary regulatory device to control the economy; it affected every workplace, every business and every household. The attraction in using regulation was speed; most of the provisions of the freeze were drafted and in place within days of the announced policy. For those who hope to use the power of the state to control activity, such speed and certainty are seductive. For those who value democracy, they are abhorrent.

But, as with all discussion of the constitution, the matter is not black and white. Flexibility in government means in some areas it is sensible to allow some discretion. For example, the State Sector Act 1988 contains a schedule that lists all the government departments that comprise the public service (as strictly defined). Under section 30A of the Act, the list of departments in the Act may be modified by the government using an order in council. This seems reasonable; the various reorganisations of government departments might excite officials but they need not use parliament's time.

The restriction of Henry VIII clauses to technical matters is not a matter of widespread interest now; most people have no idea what they are. But changes in recent decades are a welcome blow for democracy and officials should remember that attempts to circumvent parliament are not encouraged.

Parliament and officials in law-making

More than many of parliament's other activities, law-making involves officials. The role of select committee adviser brings a few officials into proximity with MPs. As they carry out that role officials must be careful not to trespass on parliament's business, lest they feel the pain from the everyday paradox; they are non-political officials supporting a political process. The officials who are

212 Joseph (2007, p 504).

closest to the process are policy advisers and law drafters. The policy advisers tend to be mid-level head office staff; the law drafters may be very experienced at their craft.

But, though officials are involved, making statutes is not the work of public servants; it is parliament's business. Parliament is quite capable in law of enacting statutes without any reference to officials. This means officials must offer clear analysis and advice. It also means officials must suffer mortification as others contribute their opinions. An official who has spent years working on an issue may see parliament being swayed by the emotional contributions of the public or even the self-seeking input of vested interests. Such is life. It may not be tidy or technocratic, but it is democracy.

Funding Governments

An ancient role

The provision of taxes for the monarch was one of the first functions of parliament. The regular necessity for funds was the reason successive kings continued to call parliaments. The need for funds is still the main imperative that drives calling parliament.

Without the permission of parliament, the government has no access to funds. This permission is enshrined in section 22 of the Constitution Act 1986:

It shall not be lawful for the Crown, except by or under an Act of Parliament,—

- (a) To levy a tax; or
- (b) To borrow money or to receive money borrowed from any person; or
- (c) To spend any public money.

This is comprehensive; all sources and uses of funds are covered. Perhaps some imaginative government could try going into business as a means of making money, but they could not get an overdraft without parliamentary permission. And even if they made money in the business, they could not spend it without permission.

The need to have an Act of parliament to spend a dollar sounds impossibly restrictive. The legislation process outlined in the previous section demonstrates that getting an Act of parliament is not a simple matter.²¹³ Nobody could run a business or a household like that. And, to make it even more restrictive, taxes and spending have to be authorised annually; most of the government's income and outlays must be authorised by parliament every year.

On top of the controls on funds (known as supply), parliament also demands information on the use of money; the government must account to parliament every year for all money raised and spent. This is no different from any company that must account to its shareholders, but the government's

213 Parliament's Standing Orders provide some different and simpler processes for budgetary matters, but the basic point applies.

business is uniquely large and diverse so the process of accounting raises many challenges. A full treatment of these matters would need a book on accounting;²¹⁴ here the focus is on the issues raised by parliamentary control and supervision of government funds.

It is complex, but processes have been developed to make it work. As always, they are not the simplest or most efficient processes; democracy is never simple or efficient. The processes cover both raising money and spending money.

Raising money

Governments are different from other beings. Most businesses and individuals get their money through some kind of exchange, such as selling their labour for wages or selling goods for profit. Governments, on the other hand, get money by their power to collect tax. Anyone within range of the government's reach may be required to pay. Those who resist do not suffer physical duress, but the government might simply remove the money from their bank accounts. If anyone else used such methods to support their activities it would be a crime, even organised crime. But when the government does it, with the democratic consent of the people's representatives in parliament, it is called tax.

All modern economies have a wide variety of taxes, and tax policy is an important part of public policy. Taxes intrude in many parts of daily life. Every employer must subtract tax from every employee's pay-packet. And virtually every seller whether providing medical advice, movies or marmite must add tax to every bill. Computers have made many tax payments simple and fast, but though the process may be easy tax remains a major imposition. The democratic control of the government's power to impose taxes is a vital function of parliament. It is entirely proper that parliament should maintain a close oversight on taxation.

All taxes are authorised by tax Acts. These Acts lay out the transactions or goods to be taxed, the information that taxpayers must supply and requirements about the time and means of payment. In addition, the law sets the tax rate. For the largest tax, income tax, the law requires that the rates of tax be confirmed by parliament every year. Whether there has been a change in the rates of tax is

214 The Treasury (2005) provides an introduction.

irrelevant; for income tax to be valid in any tax year parliament must pass an annual taxing Act to confirm the rate of tax.²¹⁵

This means that every year parliament must make time to consider income tax, and pass the bill by 31 March. Just as importantly, it means the government must convene parliament and subject itself to all the associated inconvenience, such as parliamentary questions. If the government wants income tax, then it has to have parliament too.

If an annual tax bill were not passed by 31 March, the consequences would be extraordinary. All PAYE payments that employers had made during the year and provisional taxes paid by the self-employed would be due to be refunded. Inland Revenue Department staff and computers would have a massive job handling the repayments. Though the Inland Revenue Department makes hundreds of thousands of payments each year, the logistics of refunding all PAYE and provisional tax payments would be impossible.

The administrative implications are just a start; there also would be a financial and economic impact. Something over half of all the government's income for the year would be lost at a stroke. The government would still have the power to fill the gap by borrowing, because the power to borrow is a separate power conferred by the Public Finance Act 1989.²¹⁶ But lenders would be wary of providing funds to a government that could not organise its taxes; interest rates could be ruinous. If the government's cost of funds rose, then interest rates would rise for everyone. Recession would be inevitable.

Those technical and economic consequences are scary, but they are not the main issue that would preoccupy a government faced with the prospect of being unable to pass the annual tax bill. Before matters played through to a financial crisis, there would be a constitutional crisis. A government that cannot get money bills (including annual tax rates²¹⁷) through parliament is a government that has lost the confidence of parliament. Without the confidence of parliament a government falls. A focus on the theoretical possibility of administrative chaos, financial ruin and economic collapse would miss the point. Under the iron rule of political conflict the issue for parliament is the struggle for control. A government that cannot maintain its tax flow has lost control.

A similar imperative can be seen on the spending side of the ledger.

215 Income Tax Act 2007, section BB1 (similar provisions existed in earlier versions of the Income Tax Act).

216 Under sections 46 and 47 of the Public Finance Act 1989, the minister of finance (and only the minister of finance) may borrow as required. For more detail, see The Treasury (2005).

217 McGee (2005, p 98).

Spending money

The central provision to control spending is in section 4 of the Public Finance Act 1989. In the characteristically negative language of statute, the section says:

The Crown ... must not incur expenses or capital expenditure, except as expressly authorised by an appropriation, or other authority, by or under an Act.

The jargon translates to say that the government may not spend (expenses) or acquire assets (capital expenditure) without a specific, usually annual, approval from parliament (appropriation) or another explicit authorisation in a statute.

A small number of ongoing approvals are found in statute; these are known as permanent legislative authorities. For example, the Public Finance Act 1989 includes an ongoing authority to repay debt without specific authority from parliament. That recognises that few bankers would be prepared to lend if their repayment were dependent on the goodwill of some future parliament. Similarly, the independence of the judiciary is protected in the Judicature Act 1908, which provides an ongoing authority to pay judges' salaries without separate parliamentary approval. The Civil List Act 1979 provides funding to pay the salaries of members of parliament (MPs) and ministers; that avoids the risk of an uncomfortable debate on parliamentary salaries each year.

More generally, the power to spend is contained in annual appropriations. Each appropriation allows a designated minister to spend up to a specified sum, for a particular purpose. The government does not get an open right to spend or a simple overall limit. The approval is much more detailed. A few decades ago the approval was to spend money on certain things; that is each department had a limit for salaries, for travel and communication, and for office expenses. In the 1980s, the focus changed from those inputs departments buy to the things that departments do and the purposes of expenditure. The approval now is for the purchase of various departmental products (outputs) to achieve results (outcomes). Parliament now has the chance to consider not just what the money is to be spent on, but what it is to be spent for.

Similarly, until the 1980s, parliamentary appropriations were for cash to allow the government to pay its bills. That was updated when, in a world-leading move, parliamentary authority was changed to an accrual basis. Without going into a technical discourse on accrual versus cash accounting, the essential point is that this change has allowed parliament to take much firmer grip on government spending. By authorising accruals, parliament is permitting departments to operate with total costs up to a certain value; without such approval departments may not do business, including hiring staff or buying

office equipment. The old cash approval was silent on the question of departments making commitments and took effect only at a later stage when determining whether bills could be paid. If parliamentary authority is to be meaningful, it is a little late if authorisation arises only after liabilities have been incurred. In addition, some operating costs, such as depreciation, are ignored by a cash system, but are covered by the accruals system. The current system of approval to do business to achieve particular results provides parliament with detailed oversight of all of the government's planned activities.

Every year at budget time, the minister of finance presents a schedule of spending plans for every minister supported by details relating to each planned expenditure. These are brought together in the Estimates, which offer parliamentarians 10 volumes of plans and goals. Once passed, the Estimates become the appropriations that license all spending by every department. Chief executives report monthly to their ministers and The Treasury, comparing expenditure with appropriation. Any risk of spending more than parliament has appropriated causes a flurry of concerned reports. Sometimes the minister of finance seeks more funds in the end-of-year Supplementary Estimates. Sometimes systems fail and the department spends more than is appropriated (over-expenditure). This always leads to negative management reports for those concerned, often with consequences for their income, and the embarrassing requirement for retrospective parliamentary approval for the extra funds.

Though all government spending must be authorised by a parliamentary appropriation, it is not always possible for funds to be appropriated before they are spent. Each year the Estimates are introduced with the budget in May, before the beginning of the next financial year on 1 July. But it takes some weeks for parliament to consider the Estimates, so appropriations are not usually passed until August. That means that for the first couple of months of the financial year no appropriations are in place and no spending is authorised. If no other facility existed, the government would have no power to spend and would have to resign because (in the jargon) it had no supply. Parliament has addressed this need by using imprest supply bills.

Imprest is a means by which parliament provides a lump sum that the government may spend, so long as it later seeks an appropriation to authorise the spending. Where an appropriation offers a specific authority, imprest offers a blanket power to spend. This power was tested in court when archivists objected to the secretary of internal affairs using savings in the archives area of the department to offset spending elsewhere. They claimed he was unlawfully diverting money appropriated for archives and using it for another purpose. The

court found he was lawfully spending from imprest, using a legal fiction that he had funds available, and that the spending could properly be validated later.²¹⁸

In a normal year, there are two imprest bills. The first imprest bill is passed just before the financial year begins to tide the government over until the Appropriation Bill is passed in August. The second imprest bill is passed with the Appropriation Bill to take account of the risk that there may be spending beyond the levels set by appropriations (or perhaps outside any appropriation) that will not be validated until the Supplementary Estimates are passed at the end of the financial year. Each imprest bill provides a sum for expenses (current spending) and another sum for capital expenditure.

Calculating the amount that should be requested in the imprest bill is a job to make treasury managers nervous. Ask for too much and the government seems to be writing itself a blank cheque. Ask for too little and the government might run out of supply. In the normal course of events running out of supply would require another imprest bill. That is significant because the Leader of the House must find time for a three-hour debate; more importantly, any imprest debate is a confidence matter in parliament and the prime minister will not look warmly on the public servant whose incompetent forecasting required an extra confidence vote.

But parliamentary procedure is only part of the point; what if the government loses the motion? In that case the government would no longer have supply, and the governor-general might call for an election. In the interim, until a new government is formed, funding might run out.

If the loss of income taxes would be extraordinary, the loss of supply would be catastrophic. Once appropriations were used up, then without imprest the government would not be able to employ staff, retain consultants or rent offices. It could not even hire polling clerks to run an election.

When the government ran its business on a cash basis the problem of running out of supply was expressed as an inability to pay staff or suppliers. Now that funding is organised on an accrual basis it would not be lawful to employ them at all, because offering an IOU still involves accruing expenses. Police could not be employed to maintain order nor corrections officers to guard prisons. The Treasury could not continue to employ its staff to work on the problem

Imprest bills are not widely known; among those who are aware of them they are generally seen as a technicality, a parliamentary debate that offers some

218 *Archives and Records Association of New Zealand v Blakeley* [2000] 1 NZLR 607, 630.

entertainment because it is wide-ranging. But it is not just an entertaining political sideline; it is the historic basis of parliamentary authority. And as well as the historic interest, in recent years, as the following case study illustrates, extraordinary circumstances have forced the government to introduce a third imprest bill to maintain supply.

Case study – buying Air New Zealand

September 12, 2001 (New Zealand time), was a critical day in New Zealand aviation. In the small hours of the morning, people woke to turn on their televisions where they saw appalling images of aeroplanes destroying the World Trade Centre in New York. By the time the first domestic flights took off that morning an early-morning meeting of officials in Wellington had agreed to have security measures in place across New Zealand to check all passengers boarding flights. Those security measures continue to this day.

But terrorism over the United States was not the only issue affecting New Zealand aviation that day. Jockeying for space on page 1 of the news was another aviation item: Air New Zealand placed its Australian subsidiary, Ansett, into voluntary administration that evening.²¹⁹ After a day coming to grips with the state of the company, at 2am on 14 September the administrator abruptly stopped all Ansett flights. There was chaos that morning at airports across Australia. In Melbourne, baggage handlers blockaded a flight to New Zealand, which had the effect of capturing Helen Clark, New Zealand's prime minister, as she was passing through the airport. It took the combined efforts of the Australian and New Zealand air forces to rescue her and get her back to New Zealand.²²⁰

As well as changing the face of trans-Tasman flying, these events had a major financial impact as the government grappled with the results of Air New Zealand's disastrous attempt to operate in Australia. The close of Ansett was sudden, but not completely out of the blue. In previous months Air New Zealand had flirted with Singapore Airlines and Qantas attempting to find a friendly investor.²²¹ By 11 September Air New Zealand was trying to sell Ansett for one dollar.²²² Negotiations failed and the collapse of Ansett followed immediately. But the severing of Ansett still left Air New Zealand in a critical

219 'Ansett Australia in voluntary administration' (2001, p 1).

220 'Air force rescues Clark' (2001, p 1).

221 'Rivals put Air NZ cases for last time' (2001, p 2).

222 "'Qantas verdict on Ansett expected today' says PM' (2001, p 2).

state with massive debts. Within a day the government came to the rescue with a loan of half a billion dollars.²²³

That loan was a stopgap that kept Air New Zealand flying while a real rescue was hastily arranged. The losses were already well over \$1 billion dollars, and Air New Zealand's balance sheet could not handle more debt. If the airline were to survive, it needed a buyer to bring more capital. Three weeks later the government announced that it would put up funds and buy an issue of new shares, giving it ownership of 80% of Air New Zealand; this was expected to cost nearly \$900 million.²²⁴

The government may be rich, but \$900 million is a lot of money; money that parliament had not yet authorised. The funds would have to come from imprest. Through the second Imprest Supply Bill for that year the government already had access to \$1.4 billion for capital expenditure (this was referred to as liabilities in 2001, but the effect is the same). But that sum included planned investments in railways, the health system, electricity and schools.²²⁵ Some allowance had been made for Air New Zealand; sufficient funds existed to cover the initial loan, but there was not enough for a bail-out of this size.

In October, The Treasury recommended a third Imprest Supply Bill, to provide \$585 million to invest in Air New Zealand, plus a further sum to provide for investment in a new superannuation fund.²²⁶ By the time the bill was introduced in December, the total for Air New Zealand had increased to \$735 million to allow a planned further \$150 million to be paid later in the year.²²⁷ In total, the bill sought funding of \$1.35 billion for Air New Zealand and the superannuation fund, on top of the existing funds available through appropriations and imprest.²²⁸

After months of officials' reports on aviation and commercial issues, forecasts of finances, and intense negotiation with airline representatives, parliament was to deliberate on a major financial outlay. Those involved with the detail might have hoped for a considered debate on the government's approach to Air New Zealand, aviation policy or financial management. But of the 18 speeches in the debate only four gave any serious consideration to the

223 'Taxpayers rescue Air NZ with \$550 million loan' (2001, p 1).

224 'Air New Zealand rescue package' (2001, p 1).

225 Imprest Supply (Second for 2001/02, p 4) Bill, explanatory note.

226 The Treasury (2001).

227 'Second reading debate on the Imprest Supply (Third for 2001/02) Bill' (*Hansard*, 2001).

228 Imprest Supply (Third for 2001/02, p 2) Bill, explanatory note.

investment in Air New Zealand.²²⁹ For the rest, the iron rule of political conflict meant there were much more interesting issues to discuss. Even the speech from the minister of transport made no reference to Air New Zealand.

During that week, a strike at Christchurch Hospital required patients to fly around the country for treatment. National devoted most of its speeches to a demand for more funds for health care. There was also a scandal about the expenses and salary for a member of the Employment Relations Authority. ACT had requested an urgent debate on the scandal that day; when the debate was declined parliamentary tactics dictated that one of its two speakers had to devote his whole speech to the Employment Relations Authority, missing a golden opportunity to outline ACT's views on nationalising airlines.

The main topic in the debate, and the only item to be reported in the media, was a decision by the Green Party to abstain from voting on the bill.²³⁰ This was news, because all imprest bills are confidence measures, and the Green Party had offered its vote to the government on confidence matters. The abstention did not affect the result, however, because it was still clear that the government had the votes to pass the bill.

In the event, the bill passed by 64 votes to 46, with 7 abstentions. Later in the year this was confirmed when, in the Supplementary Estimates, parliament approved a total of \$1,035 million for the investment in Air New Zealand.

Money matters

Appropriations and imprest supply may be antiquated names, but the system works. Parliament continues its ancient role of authorising the government's raising and spending of money. Since the reforms of the 1980s, New Zealand's fiscal management system is one of the most complete and coherent in the world. But examples from recent decades show risks that still affect the coherence of parliament's oversight of spending. The first issue is the management of changes that affect parliament's responsibilities. The second issue is the quality of scrutiny offered by parliament.

229 'Second reading debate on the Imprest Supply (Third for 2001/02) Bill' (*Hansard*, 2001). This and the subsequent comments on the debate are based on this second reading debate.

230 'Greens rebel on Government vote' (2001, p 2).

Fiscal regulator and financial veto

In recent years tax cuts have been a matter of political controversy. Supporters have claimed that cuts would reduce the burden of government and improve incentives to work. In the 1970s, tax rates were seen as a device to regulate economic activity; a timely tax cut might improve spending power and stave off a looming recession. The problem was it could take months for parliament to authorise a change in tax rates, and in that time a recession could already occur.

In the 1979 budget Robert Muldoon, the prime minister and minister of finance, proposed a solution:

The effectiveness of our present policy instruments would be improved if the Government was empowered to reduce income tax rates when the House was not in session. With such legislation, action could be taken in the summer months when Parliament is not traditionally in session, thus permitting more flexible and precise policy responses for changing circumstances.²³¹

Robert Muldoon went on to announce that the government planned to introduce enabling legislation later that year.

This was a remarkable proposition. There are many technical arguments about this idea. It is not clear that economic forecasting was then, or may ever be, accurate enough to allow such fine tuning of the economy. In addition, the administrative lead time required to introduce tax cuts is many months; parliamentary approval is simply one step of the process. But irrespective of the technical debate, it represented a substantial constitutional proposal.

The fiscal regulator, as it became known, was another attempt to introduce a Henry VIII law: tax rates as set by parliament could be changed by executive power. But this was an extension of the Henry VIII proposition into parliament's earliest power; parliament's historic hold over the government would be loosened. It is reassuring to constitutionalists that the subsequent debate was so vigorous that the idea died. On the contrary, the traditional summer parliamentary recess that Robert Muldoon used to justify the proposal has been replaced by sittings that now run through most of the year; if the government wants a change to tax rates, parliament is there to consider it.

The financial veto, on the other hand, is the result of a constitutional change that has occurred with virtually no debate. For many years up to the 1990s backbench MPs could not introduce any measure to parliament if that measure involved new or increased spending. All spending proposals had to be moved by

231 Muldoon (1979, p 8).

a minister. The idea was that financial control is central to the government's programme and, though parliament might approve or disapprove that programme, the government could not add its own priorities. This was an old practice that was codified as section 21 of the Constitution Act 1986.

Before the introduction of proportional representation, parliament's Standing Orders Committee conducted a special review to see what changes might be needed to reflect the new reality of a weaker government and a more powerful parliament. One change the committee made (despite the provision of the Constitution Act 1986) was a new power for MPs to propose spending. The government's need to manage fiscal risks was protected by a new veto power. If an MP moves a proposal that the government considers 'would have more than a minor impact on the government's fiscal aggregates if it became law',²³² then the house will not pass that proposal. Some 10 years after the change was brought into practice, the Constitution Act was amended in 2005 to repeal section 21, and so the law was changed to reflect parliamentary practice.

Unlike the fiscal regulator, the introduction of the power for MPs to propose spending attracted little interest. A few dozen staff members in The Treasury were shaken to the core by this attack on government control, and some constitutional lawyers were mildly intrigued, but others took no notice. So far, it seems the majority were right; this constitutional change has not destroyed fiscal rectitude.

But when combined with the discussion of log-rolling in the previous chapter, this power for MPs to propose spending has the seeds of a new risk: pork-barrel politics. In the United States, the term 'pork-barrel politics' relates to the practice of congressmen and women attaching provisions to legislation so that government money will be spent in their electoral district. In New Zealand, though local MPs will commonly draw attention to the construction of new roads and schools in the district, they have not previously had the power to initiate such spending. That could change; if it is acceptable to move Schmuck clauses, will pork-barrel practices be next? The protection is a provision in Standing Orders that forbids amendments that are irrelevant to the bill; pressure on that provision would create a threat to fiscal management and a path to pork-barrel politics.²³³

232 *Standing Order* 316(1).

233 *Standing Order* 119.

Parliament's oversight

Parliament's scrutiny of tax and spending is important because these are big issues. Fiscal mismanagement can lead to heavy debts that taxpayers must service for years to come. Poor tax regimes can undermine the economy. Weak financial controls lead to waste or even corruption. Informed scrutiny from parliament is one of the most substantial protections against these threats.

Much is strong and robust about the financial management systems of the New Zealand government. The Organisation for Economic Co-operation and Development, for example, recently compared New Zealand favourably to other countries on the flexibility of budget management and the use of performance monitoring, and found that medium-term systems for managing expenditure (the third area of the budget that it monitored) was in line with the standards of other member countries.²³⁴ But if these systems are to remain strong parliament needs to maintain a close and intelligent interest. That interest should be revealed in probing scrutiny from select committees and debate in parliament about major fiscal developments. Sadly, neither of those practices is the norm.

The quality of select committee scrutiny can be seen in the questionnaires sent to every department as they consider their financial performance. For example, the questionnaires sent by the Government Administration Committee in 2009 for response by the State Services Commission, including the answers from the commission, are available on parliament's website.²³⁵ There were a total of 78 questions. To the committee's credit about a third of its questions related to aspects of the department's performance and its plans. But over 50 of the questions sought detail on departmental spending. This detail related to numbers of media staff, polls conducted by the department, credit cards, every consultancy over \$5,000, renovations, advertising, conferences, software licenses, fringe benefits, personal grievances, stress consultants, and every overseas trip paid for by the department. Far from reflecting a wish to debate the big picture, select committee questionnaires reflect the reality of the iron rule; they are a list that contains the echoes of every scandal and mismanagement that has hit the headlines in the last decade.

If select committees can get lost in trivia, perhaps things are better in the debating chamber. The performance of parliament as a whole can be seen in the quality of the major debates. The imprest debates provide a good opportunity for the government to defend its record and for the opposition to explore any

234 OECD (2009).

235 Government Administration Committee (2009).

financial issue. During 2008 and 2009, government finances suffered a massive reversal of fortune. The surpluses of the last decade were gone; deficits were forecast to remain for years and debt to rise. It is hard to think of a more telling fiscal issue to probe in an imprest debate, but the two imprest debates of 2009 contain little reflection of fiscal matters.²³⁶

The debates had a total of 36 speeches. Since, like any imprest debate, these were confidence matters there was strong participation from senior members. Bill English, the minister of finance, opened both debates. He focused on the fiscal position and the implications of the prospect of years of deficits. Few other speakers explored that topic.

In August, for example, Phil Goff (leader of the opposition) led the attack. But he had little to say on fiscal matters. Instead, he seized on a recent war of words between a backbench National MP and the minister of local government (the leader of ACT) on the issue of whether Māori representatives should have dedicated seats on the planned Auckland super-city council. The opportunity to expose division between coalition parties was an irresistible gift, and the iron law said the opposition must exploit it. Other speakers also wandered wide during both debates; some focused on economic matters such as unemployment, but others went into education policy, violence in society, climate change, police numbers, health, the probation service and migrant workers. One devoted his whole speech to the right of parents to smack their children; the Speaker did interrupt that speech to find some connection with spending, but the right to smack continued for 10 minutes.

A careful reading of all the speeches showed that some did discuss fiscal matters including the possible impact of rising debt on New Zealand's credit ratings. A generous estimate of the proportion of speech content devoted to fiscal matters would be around 5% of the debate; that is, during a time of major fiscal difficulty, parliamentarians spent about 20 minutes on fiscal issues during the total of six hours allowed for the debates on imprest. Of those 20 minutes, more than half were accounted for by Bill English. Between them, all other MPs spent less than 10 minutes on the prospects of a decade of fiscal difficulties. It does not inspire a lot of confidence.

236 'Supplementary Estimates, imprest supply debate' (*Hansard*, 2009, p 4,511); 'Appropriation (2009/10) Bill: Third reading, imprest supply debate' (*Hansard*, 2009, p 5,905).

Financial overseers and financial managers

Senior public servants spend a lot of time on financial management; the requirements of meeting parliamentary appropriations and regular reporting demand that effort. That, combined with careful long-term systems planning from The Treasury, has produced robust financial management for taxpayer funds. That management is conducted under the authority of parliament, but the oversight is not always as robust as the management.

The meeting between parliament and officialdom on financial matters tends to be at two levels. The production of the massive documents of the Estimates, and the follow-up through parliamentary reporting and questionnaires, involves middle- to junior-level finance and planning staff across Wellington supported by managers throughout the government system. For most of the year, those staff focus on systems to achieve efficiency and results from government activity. When select committee questionnaires arrive, the same staff turn to details on individual spending items. The explanation and defence of departmental performance falls to senior officials as they appear before select committees.

It is a constant disappointment to officials when parliamentarians focus on trivia, but that is to be expected under the iron rule. More attention is to be captured in an attack on apparent mismanagement than in a debate about medium-term prospects.

Parliamentarians are not wrong to focus on mismanagement; it can be harmful. But officials wistfully hope for a focus on the future implications of policy. The frustration felt by officials is clearly another result of the everyday paradox; those arriving at parliament with a non-political managerial message must cope with MPs whose efforts are driven by the need to win the political struggle.

Scrutinising Government

Thirst for information

Parliament is supposed to hold the government to account. Formally, this means parliament has the power to bring down a government by passing a motion of no confidence. This, however, is the nuclear total-destruction option. Before that, there are a great many tactical opportunities to criticise, embarrass and humiliate. Every mistake and mishap is liable to be held up for ridicule. While this serves the worthy goal of assisting the government to learn from experience, it mainly serves to reduce the government's credibility, and so to improve the opposition's prospects. It is all about the iron rule.

If mistakes and mishaps are to be publicised by the opposition, first it must know what is going on. Ministers and officials have a huge advantage; they are part of the executive, with direct access to information. Much of the work involved in scrutinising the government revolves around members using the processes of Standing Orders to extract information. Providing information for parliament is a large industry, involving officials all across Wellington and beyond.

Annual reports

The first item is the departmental annual report. Every department and agency of state prepares an annual report, which is tabled in parliament. The report outlines the achievements for the year, including data on finances and employment. Members use the report in select committee as they conduct the annual review. Senior officials appear before the select committee for questioning, commonly for up to one or two hours. Members leaf through annual reports, looking for curly questions.

Sometimes the conversation is so desultory that it seems members have found the report a little dull. They can comfort themselves with the knowledge that the annual report that they find so uninteresting will have previously ruined a weekend for each of the senior departmental staff who now sits before them. No chief executive can afford to release the annual report without having pored over it for unexploded munitions. Some years ago, in a fit of managerialism, some agencies produced exciting annual reports, with glossy paper and smiling

pictures of the boss. That was a mistake; the report may be public, but it is not a report to the public, it is a report to parliament. Members of parliament (MPs) want information, not razzmatazz. Officials should not attempt to use their select committees hearings as an opportunity for self-promotion.

The annual report, however, is but the first and most predictable step in the annual review. In addition, the select committee will generally send a list of questions, about a week before the hearing. It is common that there will be over 50 questions to be answered in a few days.²³⁷ The questions might be about anything: the use of information technology, employment disputes, contracts for consultants, rent for offices, energy conservation, overseas travel or compliance with government policies. Teams of people work long hours to provide answers at speed.

Generally, nothing further is ever heard about the questions. That is because they are not necessarily for use by an MP during the forthcoming hearing; often the questions are placed on behalf of party research groups for use later. In theory, the questions are from the committee, and have the authority of parliament to demand an answer. Around 20 years ago, committees gave careful thought to their questionnaires, removing duplication and aiming for consistency of questions. The practice has changed, and committees generally include any question a member asks; the procedural grief that could be generated by an MP whose questions are declined is too high to buy a fight. As a result, the cost is transferred to departments.

Annual reviews are not always a matter of tedious compliance. Occasionally, the annual review hearings are exciting; perhaps there is some controversy. A normally quiet committee room fills with journalists and television cameras. Members take turns to ask pointed questions; officials slowly turn on the spit. There is an art in such circumstances. For the official, it is a very good day at the office when two hours of questioning with cameras rolling lead to nothing on television that night. Journalists' eyes droop as the bureaucrat gives a series of measured answers, carefully avoiding quotable quotes.

237 One set of questions was analysed in the previous chapter; see footnote 235 and the accompanying text.

Questions

Moving on from the annual review, a much larger source of information is the parliamentary question, oral or written. Oral questions occur on most sitting days, with 12 questions each day. Questions are lodged at the clerk's office between 10 and 10.30 each morning. Each question is referred to the appropriate minister's office, and on to the department. At about 11 o'clock Blackberries start to buzz as senior officials are informed of the question. Generally, the department has about one and a half hours to prepare a draft answer, plus material that may be useful for supplementary questions. It can often be very difficult to anticipate the areas that may be explored in supplementary questions. Between one and two o'clock many ministers require senior officials in their office as they go over possible questions and answers; that is not a good time to eat lunch. During that time, ministers and their senior political staff work on their tactics, asking officials for the facts and evidence they need to make their case. Then, in parliament, it is all on for an hour as members and ministers compete for supremacy. The careful non-political process of assembling information within departments translates into political tactics in the minister's office and magically mutates into political confrontation the moment question time begins. This process occurs throughout the year, every sitting week. In 2009, over 1,100 oral questions were asked.

Oral questions provide great theatre, but written questions are a much more serious process for collecting information. The questions and the answers are published in the parliamentary order paper for all to see. Any member may ask questions of any minister but, unlike oral questions where political balance demands that government MPs use their share of question time, most written questions come from the opposition. Written questions have always been a major enterprise, but over the years changes to the rules have seen their numbers grow. There was a time when they were asked only while parliament was sitting; now they run throughout the year. They used to be produced on typewriters over the signature of the MP; now they are submitted electronically. Electronic questions have been a huge boon for the opposition; the same question may be put to every minister by means of file merges, and work is generated all over Wellington.

In 2009, there were over 20,000 written questions, every one demanding an answer. Each question needs some assembly of facts, drafting, checking and sign-off by a senior manager; then they are reviewed by the minister's office and the minister before the answer is lodged. Using a very conservative estimate that each question takes only about two hours' work, that means the equivalent

of at least 20 people worked full time through 2009, providing answers to written questions; the real number is probably much higher.

On top of written questions, parliamentarians and their research groups have the same rights as anyone else to ask for information under the Official Information Act 1982. Every day departments receive requests from MPs for information on policies and practices.

Inquiries

All these processes of review and question are time consuming, but none is feared as much as a select committee inquiry. A select committee may initiate an inquiry within its area of expertise.²³⁸ Though a parliamentary inquiry is not a commission of inquiry, the committee may ask the Speaker to summon witnesses; those who ignore a summons may be in contempt of parliament. Likewise, a committee may ask for information for its inquiry; a refusal could also constitute contempt.

A select committee inquiry is inherently less predictable than other forms of inquiry; a room full of competing politicians is not conducive to measured cross-examination. Though parliament is bound by the New Zealand Bill of Rights Act 1990 and must respect natural justice, that does not stop members bringing strong political views into inquiries. Whereas other inquiries are focused on the report, some select committee members seem more interested in the process of public questioning; there are often more headlines to be gained in the questioning than there are in the report. Because of the politicised process, reports of inquiries are sometimes neither cogent nor convincing, but they are generally measured and clear documents. That is largely attributable to hard-working staff in the office of the clerk of the House.

Only a few dozen staff members support the work of parliament's select committees. Between them, they produce between 300 and 420 reports per year.²³⁹ For legislation, they are supported by officials from government departments. For inquiries into the work of those departments that is not feasible.

In the last few decades, there have been several major select committee inquiries into some aspect of public sector performance. One of the most demanding was the Scampi inquiry in 2003.²⁴⁰ After repeated allegations of

238 Standing Order 185(2).

239 Office of the Clerk of the House of Representatives (2009).

240 Primary Production Committee (2003).

corruption in the Ministry of Fisheries, officials found themselves in front of a parliamentary inquiry and a State Service Commission inquiry at the same time. After many months of tension officials were completely exonerated by both inquiries; there was no evidence to substantiate the allegations. I have been caught up in two parliamentary inquiries; one into the management of a demonstration in the streets of Christchurch in 1999²⁴¹ and one into an alleged release of genetically modified corn seed.²⁴² During the proceedings, the pressure generated by an inquiry looms so large it seems to fill the horizon; the only sensible response is to trust the process and tell the truth.

But the review of the Inland Revenue Department in 1999 was larger and more significant than fisheries, demonstrations or corn. It is the subject of the next case study.

Case study – inquiry into the Inland Revenue Department

On 18 February 1998, Rodney Hide, then a first-term ACT MP, rose in parliament to criticise the Inland Revenue Department (IRD):

the Department has not lived up to its commitments ... it has not performed up to section 6 of the Tax Administration Act [1994]. We can also see the Commissioner has not lived up to section 6 of the Tax Administration Act²⁴³

The section that Rodney Hide was concerned about requires officials to protect the integrity of the tax system. These comments marked the beginning of a series of concerns that Mr Hide raised about the IRD during the following year.

That criticism snowballed into a bad couple of years for the IRD. The *National Business Review* carried frequent criticism, particularly in its weekly 'Inside Cover' column. Newspapers carried reports of taxpayers driven to suicide by outstanding tax debt.²⁴⁴ Morale was affected as staff members from the IRD faced the repeated suggestion that they came to work to kill people.²⁴⁵

241 Justice and Electoral Committee (1999).

242 Local Government and Environment Committee (2004).

243 'Debate on the Prime Minister's Statement' (*Hansard*, 1998, p 6,588).

244 See, for example, 'MPs to look into IRD's methods of collecting' (1999, p A2), referring to the reports that a Kapiti Coast woman said her husband was driven to suicide by the IRD.

245 Peters (1999b): 'Staff morale is low, hate mail is flooding in and scepticism at the IRD's claim to fairness is endemic'.

In March 1999, after a year of mounting pressure, the Finance and Expenditure Committee decided to conduct an inquiry into the powers and operations of the IRD. The committee had 12 members, including the chief critic, Rodney Hide. The committee also included Michael Cullen (within a year he would become the new minister of revenue) and was chaired by Peter Dunne (a past and future minister of revenue).

The committee called for submissions from the public. It also required the IRD to supply every internal document that outlined policies and processes of tax administration.²⁴⁶

These steps had immediate legal and practical consequences. First, it was clear the committee would be hearing from individual taxpayers with allegations of mistreatment of their tax affairs. It was also obvious that IRD staff members might come forward to offer evidence. The issue was not procedural, as the IRD had assured the committee and staff members there would be no recrimination against any witness for their testimony. The concern was how the department would be able to respond on the substance of submissions. The IRD and the committee had to consider how the requirements of disclosure to parliament would interact with the commissioner of inland revenue's obligation to maintain tax secrecy.

The committee was advised by both the solicitor-general and the clerk of the House that the secrecy provisions should prevail. Accordingly, the committee decided to ask the IRD to respond to correct errors of fact and to provide information at a general level without revealing taxpayer specific details.²⁴⁷

The second consequence of the committee's request was administrative. The IRD set up a small team of about eight people (including two lawyers provided by the Crown Law Office) to handle all aspects of the department's response to the inquiry. The first task was to assemble and review all departmental documents covered by the committee request. This was complex, as it did not just include head office manuals, but also included regional and local systems. In just five weeks, the IRD provided 37,000 pages of documents.²⁴⁸ In addition, the select committee report lists 21 submissions from

246 Inland Revenue Department (1999c). IRD files show that this was a result of a request from Mr Hide; he tabled a request with 10 questions on 17 March, and the select committee referred them to the IRD for answer. The requests covered reports, memoranda, manuals, circulars, training courses, procedures, plans and documents.

247 Finance and Expenditure Committee (1999, p 10).

248 Finance and Expenditure Committee (1999, p 58).

the IRD, totalling hundreds of pages. These departmental submissions included a broad initial briefing; 11 responses to requests for information; 6 responses to issues raised in specific submissions; and final submissions, including 2 in response to draft adverse findings. All submissions involved extensive input from senior staff.

Most of the 37,000 pages of departmental documents were unremarkable but a couple caused headlines. The first headline was 'IRD admits flouting law on large debtors'.²⁴⁹ This arose because the IRD acknowledged it was writing off tax debt without seeking the appropriate ministerial authority. The irony that this demonstrated flexibility by the department at a time when it was accused of excessive rigidity was largely ignored. Instead, the focus of attention was on the IRD for breaking the same laws it was penalising taxpayers for breaking.

The second headline related to the clip-art scandal. The documents included a guideline on tax penalties produced in the Auckland office. Regrettably, the cover of the document showed a taxpayer strung on a meathook, presumably in an attempt to introduce some levity. In addition, a newsletter sent to all staff nationwide included a picture of a taxpayer stabbed through the heart by an IRD officer, wielding a spear-like pen. That image was widely reproduced as an indication of the joy felt by IRD staff as they imposed tax penalties.²⁵⁰

In that context, the public hearings were highly charged. A succession of submitters outlined their concerns about their tax assessments, their dealings with the IRD, and the distress they felt.

In the interests of natural justice, the committee provided those submissions to the IRD before the public hearings. Staff around the country hurriedly assembled background on each case. Initially, the IRD used this material to provide the select committee with an account of what had happened. The committee, still in the spirit of natural justice, passed those departmental comments on to the individuals before their appearance before the committee.

The outcome was not a measured discussion that sorted out confusion. Instead, the IRD's rebuttals were seen by some submitters as a further provocation and sometimes they became the centre of more public complaint about the IRD. Committee members tended to side with taxpayers.

Some MPs are becoming increasingly intolerant of what they see as belligerent and aggressively defensive position that the department is taking in seemingly indefensible illustrations of poor performance.

249 'IRD admits flouting law on large debtors' (1999, p A2).

250 See, for example, 'No excuse for IRD meathook cartoon' (1999, p A2).

An emerging sympathy is present even among the National MPs who opposed the enquiry ... [They] are now incredulous at some of the department's responses²⁵¹

A review of the submissions shows how the IRD reacted. The initial lengthy responses to submitters' concerns were replaced by more cryptic departmental submissions as the inquiry continued. Apparently, the view that full responses would be helpful was modified in the face of experience.

Stress rose further as some staff members outlined their concerns. One former staff member claimed on television that a colleague had been proud about driving taxpayers to suicide.²⁵² The number of suicides attributed to IRD pressure eventually rose to seven.²⁵³ During the hearings, management sent out at least 17 updates to staff to keep them informed on the inquiry process. These updates contained over 90 pages of explanations, in addition to the departmental submissions. Several staff meetings were held to explain proceedings.

In the middle of this furore, the IRD appeared for over 12 hours of evidence, largely in public, and largely led by the commissioner, Graham Holland. The pressure must have been intense.

In the end, after the IRD had opportunities to respond to allegations and to a draft of adverse findings, the committee issued its report in October 1999, just weeks before the election. The report itself was a measured and thoughtful paper. Much of it covered issues of tax law, but there were also significant findings about various areas of administration. The report acknowledged several areas where the IRD was already improving its processes, and it acknowledged 'that examples of the department misapplying its powers are relatively rare'.²⁵⁴ However, the report also concluded:

While fault was not always one-sided, the department in our view sometimes dealt with ... taxpayers in a heavy-handed and dictatorial fashion. When the department's officers act towards taxpayers in such a way it can only serve to undermine the integrity of the tax system.²⁵⁵

251 Parliamentary Monitor Select Committee Information and Analysis Service (1999).

252 Brockett (1999).

253 Peters (1999a).

254 Finance and Expenditure Committee (1999, p 13).

255 Finance and Expenditure Committee (1999, pp 13–14).

Consequences of the inquiry

The case study tells a story of public revelations, taxpayer distress and pressure on senior officials, but that was merely what appeared on the surface. Any inquiry has an immediate impact on those involved, and some have lasting effects, for good or bad.

One valuable source of information on the effect of the inquiry is the IRD's annual internal management document, the *Health Report*. The report does not make happy reading, concluding:

The inquiry has ... had significant impact on both:

- taxpayers' behaviour with regard to overdue debt collection (i.e. they are now less likely to pay overdue tax in full) and their perceptions of the fairness and integrity of the tax administration
- staff morale, particularly with regard to the collection of overdue tax.²⁵⁶

The report included no quantified data on staff morale, but presumably the authors saw no need to substantiate that assertion for an internal audience. It seems that IRD management staff took it as read that morale was down. Other assertions were supported by evidence, as outlined below.

Internal impacts, however, are only part of the story; what about long-term effects? A complete appraisal of this inquiry would be a major research task, but some impacts are apparent from the record. It is helpful to look at several areas including departmental leadership, taxpayer perceptions, payment of taxes, policies and practices, and politics.

Departmental leadership

Leading the IRD is never an easy job. Thousands of staff are handling billions of dollars, with millions of public interactions every year. The IRD has one of the largest computer systems in the country, handling complex transactions of great importance to every taxpayer. Even when things are going well, it can be a thankless task: tax gatherer is not a popular profession. Public complaints are always hard to handle because the law prevents the IRD from disclosing taxpayer details, but that does not go well on television. The addition of a public inquiry, with public testimony spread over four months, was an extra burden on the camel's back.

²⁵⁶ Inland Revenue Department (1999a, p 6).

A few months after the committee produced its report, the commissioner of inland revenue, Graham Holland, announced that he did not intend to renew his contract when it came due in early 2000. It is not clear whether the process of the inquiry had encouraged that decision, but the select committee process must have used a lot of his energy.

The difficulty of leading the IRD in such circumstances was apparent to others. Evidence of this comes from comments made by the new minister of revenue, Dr Cullen, who was asked in parliament about progress toward the appointment of a new commissioner. In response, he gave an unusual public insight into the work of the state services commissioner as he expressed concern about the time taken, and the need for an acting appointment, saying:

it clearly would be preferable for a permanent appointment to be made but circumstances have made that very difficult; notably, the number of people who have been approached and who cited the continued personal attacks upon the outgoing commissioner ... especially by Mr Rodney Hide ... as reasons for not wanting to take up the job.²⁵⁷

In time, a capable acting commissioner was found, and eventually a very good appointee for the permanent job was found in Australia. The ongoing uncertainty through the transition must have been unsettling for the senior team at the IRD.

Taxpayer perceptions

The IRD's *Health Report* shows that public perceptions of the department deteriorated in 1999. The IRD regularly surveyed public views on whether the department administered tax laws fairly; whether it did a good job administering tax laws; whether it treated 'your business' as an honest taxpayer; and whether it did a better job in administering tax laws than it had a few years earlier. Every one of these results fell in 1999. In particular, whereas in 1998 51% of respondents thought the IRD was performing better than it had a few years earlier, that figure fell to 38% in 1999.²⁵⁸

The IRD went further to check whether this change in perception came from personal contact with the IRD or from other influences. It was clear that personal experience was not the main factor driving the results for 1999:

Of those respondents whose impression of the Department had changed, what they read, saw or heard in the media and what they had

257 Question for oral answer' (*Hansard*, 2000, p 1,278).

258 Inland Revenue Department (1999a, p 18).

heard from others they trusted had the greatest negative impact on their impressions.²⁵⁹

In 1999, 70% of respondents said their perceptions had been influenced by the media, and of those 91% had been negatively influenced.²⁶⁰

Clearly, the IRD's public relations took a pounding. That is not just a feel-good issue; perceptions seem to influence tax payments. In the same survey, taxpayers were asked whether their decision to comply with their tax obligations was influenced by their view of the IRD's fairness towards businesses. In 1999, 73% said perceptions of fairness were important or very important in their decision to comply; that was an increase of 10% on the result for the previous year.²⁶¹

Combining this result with the figures for the previous paragraph suggests that in 1999 nearly half of all taxpayers may have been less inclined to comply with their tax obligations because of material they saw in the media that year – and the inquiry dominated media coverage of IRD.

Tax payments

Tax flows in New Zealand are largely made up from automatic deductions; such payments proceed with proverbial inevitability. But some tax payments permit more variability. One area where taxpayers can exert more (temporary) influence is the settlement of tax debts. Since this was a major focus of the inquiry, it is interesting to see whether there was any fluctuation in debt repayments around that time. IRD annual reports contain the data shown in Table 1.

In almost every year, collectable debt rose, but cash collected shows a large fluctuation. Part of that fluctuation is attributable to changes in the amount of debt the IRD had agreed could be paid by instalments, but the fluctuation in 1999 is too big to explain on that basis.

In 1999/2000, cash collected fell nearly 30%; this is the largest fall in the table, and came on top of a fall in the previous year. The 2000 annual report said the IRD had predicted a fall in that year, but only to a target of \$855 million; that leaves an unexpected fall of \$171 million.

259 Inland Revenue Department (1999a, p 19).

260 Inland Revenue Department (1999a, p 19).

261 Inland Revenue Department (1999a, p 24).

Table 1: Settlement of tax debts, 1996/97–2004/05

Year	Collectable debt (\$m)	Cash collected (\$m)	Under instalment arrangement (\$m)
1996/97	750	1,186	287
1997/98	804	1,050	213
1998/99	802	972	231
1999/2000	887	684	295
2000/01	1,108	838	327
2001/02	1,219	771	359
2002/03	1,360	1,042	450
2003/04	1,296	1,099	570
2004/05	1,553	1,492	639

Source: Table provided by the Inland Revenue Department in December 2009, compiled from annual reports of the Inland Revenue Department, 1996/97–2004/05.

Among the explanations the IRD identified in its annual report was, ‘adverse media publicity about Inland Revenue created a difficult environment for our debt collection staff’.²⁶² In addition, the IRD reported that debt collection staff were diverted to:

correspondence as a result of the [Finance and Expenditure Committee] Inquiry, as taxpayers sought to enter into instalment arrangements or apply for penalty remissions – most of the effort devoted to this correspondence did not result in debt reduction.²⁶³

Clearly, the inquiry had an effect on cash collections, but what did that cost? The cost was felt through the government’s finances as it paid for more government debt than it would otherwise have had. Yields on government debt were about 7% during 1999/2000.²⁶⁴ This suggests that if only \$100 million of the decline in cash payments is attributable to the inquiry and if the delayed debt was repaid after only one year, the government’s financial loss attributable to the inquiry would be about \$7 million. Any other tax losses caused by taxpayers reducing their level of voluntary compliance or staff being less productive as a result of lowered morale would be on top of that estimate.

²⁶² Inland Revenue Department (2000, p 16).

²⁶³ Inland Revenue Department (2000, p 16).

²⁶⁴ Calculated by averaging the tender results on the New Zealand Debt Management Office website; see New Zealand Debt Management Office (2009).

Changes to policy and practice

The impact of the inquiry, however, is not just about costs: there were significant changes in management practices and tax legislation. The select committee made 26 proposals in its report. When the government tabled its response in May 2000, it agreed to most of the changes.²⁶⁵

Straight after the select committee reported, a review of the compliance and penalties regime of the tax system was undertaken. In the following months and years, there was a series of changes such as reducing the incremental penalty on overdue taxes from 2% per month to 1% per month and increasing the grace period before use-of-money interest starts to accrue. Further legislation, the Taxation (Relief, Refunds and Miscellaneous Provisions) Bill, was introduced in 2001, as a response to the report.

The IRD followed on from that government endorsement by modifying its practices. In the first annual report after the inquiry report, the acting commissioner said:

Responding to the [Finance and Expenditure Committee] Inquiry was afforded the highest priority by the department's senior management. To date, the department has completed, or is working on implementing, all of the FEC recommendations that were agreed to by the Government.²⁶⁶

Major changes in the following years included a new taxpayers' charter, a new complaints management process and a new code of conduct. These changes were supported by training in the new standards and a system to monitor computer use, to detect unauthorised access to data. Management demonstrated its commitment to the standards when four staff members were dismissed for inappropriate use of taxpayer information.²⁶⁷

These changes all contributed to a steady improvement in the image of the IRD. During 2009, it was again in the headlines for tax enforcement matters. It was striking, however, that the IRD received widespread plaudits for its (and the Crown Law Office's) success in achieving judgments for substantial sums against major banks. Successful tax collection is not always unpopular.

265 Government (2000).

266 Inland Revenue Department (2000, p 11).

267 The points in this paragraph are drawn from the IRD's annual reports for 2000 and 2001.

Political implications

Many factors led to the IRD inquiry, but Rodney Hide could reasonably claim that his repeated criticism of the department was a major factor; eventually, parliament responds to a steady drum-beat of complaint. There is no doubt Mr Hide was motivated by the concerns he was hearing from taxpayers, but it is also apparent that the iron rule was operating. Tax is at the heart of any government; attack on the government is the function of opposition members; Mr Hide was then an opposition MP.

The inquiry happened well before Mr Hide appeared in the living rooms of the land, wearing glitter and dropping his dancing partner.²⁶⁸ It was a major step in establishing his reputation as an effective opposition politician. For a first-term MP it was a big achievement, one that could happen only in parliament.

In other contexts, it is unacceptable to launch a series of accusations, and then participate in the inquiry considering those concerns; in parliament it is normal. Standing Orders do contain natural justice provisions, but this simply prevents participation on an inquiry where the member has alleged criminal behaviour.²⁶⁹ There was no allegation of criminal behaviour, so he could participate in the inquiry. Mr Hide provoked the inquiry, required many thousands of pages of documents, examined witnesses and was a party to the conclusions. During that time he was active in ensuring the issues remained before the public; he even monitored the IRD's internal communications, presumably to ensure the department was telling the truth to its employees.²⁷⁰

All that effort created a new political reality. Irrespective of whether the new government would have made tax administration a priority issue, by 2000 it had no option. The level of concern the inquiry revealed could not be ignored.

It was to be another five years before the vote for the leadership of ACT and many things must have played a factor in that vote. His success with the IRD inquiry cannot have harmed Mr Hide's candidacy.

Scrutineers and scrutinees

Parliament's role in reviewing the government is the activity that most brings senior officials and parliamentarians into direct contact. It is also an activity that causes much disquiet among officials. They know they should celebrate

268 Rodney Hide appeared in the New Zealand television series *Dancing with the Stars* in 2006.

269 Standing Order 228. This begs the question of why parliament would investigate allegations of crime; most of us call the police, but parliament controls its own process.

270 Inland Revenue Department (1999b).

democratic accountability, but some cannot understand why it should be so uncomfortable.

The issue arises as people confuse management ideas about accountability with political ideas about scrutiny. Many managers aim to avoid blame and shame; they want people to own their mistakes, fix them and learn from them. But democracy is not a management theory, it is a political contest. The opposition does not criticise the government in order to improve it; it criticises with the hope of replacing the government.

It is inevitable that the everyday paradox will trap unwary non-political managers. These events are not a sign of failure of systems and processes; they occur as a result of democracy working as it should. Of course it is uncomfortable for bureaucrats; they have been brought out of their comfort zone into a public political fray. There they stand, unarmed, hoping to avoid injury.

It is hard to think of further steps IRD managers could have taken to reduce damage during the IRD inquiry. They cooperated with the inquiry; they informed staff of their right to appear; they supported staff who endured personal attacks; they assembled vast amounts of information for MPs; they kept staff informed as events unfolded; and the boss appeared to take the heat.

After all that, was the inquiry into IRD a success? Clearly, it was costly, in cash, energy and emotions, but it provoked significant improvements in policy and practice. Managers may question whether the cost was worth paying; democrats would have no such doubt – it was a triumph for democracy.

Representation

Getting out and about

Much that is tangible and substantive about parliament relates to functions such as law-making and inquiries; these functions occur in the parliamentary chamber or in select committee rooms. Likewise, the process of making government takes place in caucus rooms or in the offices and corridors of parliament. Representation is different; it involves individual members of parliament (MPs) meeting with their constituents in their electorates and advocating on their behalf.²⁷¹ It involves travel and communications. It occurs in electorate offices, in church halls, at sports grounds and in government offices all over the country.

Representation is a very large part of the job for every MP. Having spent three days per week in the chamber of parliament, in select committee rooms, or in caucus meetings, reading bills, questioning officials and delivering speeches, MPs must then keep in touch with the electorate. Clearly, some of the motivation for this is re-election, but the task considered here is not canvassing for votes, it is representation (or advocacy). It involves being available and responsive, and looking out for the interests of the constituency. Technically, things are different for list MPs because they do not have a constituency, but every party requires its MPs to cover parts of the country where it has no local MPs, so there are similar representational demands on all MPs.

In practical terms this process of representation launches MPs out towards their electorates every weekend, but they do not go for relaxation. On Thursday evening as parliament adjourns MPs pour onto the forecourt to get into taxis or VIP cars to the airport. They always cut it fine; it is not generally a good time to try to catch them for a chat. Officials must often resort to jumping in the car with a minister for 10 minutes of discussion as they drive to their plane.

In the electorate MPs may well have a party meeting that evening and in the morning they will often hold an electorate clinic. There they are available to hear concerns of constituents. Over the weekend, they may appear at a number

271 Professor Joseph thinks of representation as an abstract process of political legitimization, but here we will focus on the more mundane idea of representative as advocate.

of school gala days, sports grounds or cultural events. That may not seem too onerous; most parents enjoy an hour or two at the annual gala day. But not many people subject themselves to another gala every weekend, followed by the local football club prize-giving and the national day celebration of an immigrant group. MPs regularly attend such functions; ministers and even the prime minister squeeze these activities into their regular cycle.

Most people attend these events for pleasure, but MPs attend for work. Most people use the time at these events to relax with friends, but MPs are there to be available to everyone. Often they hear friendly words of encouragement and support; sometimes they hear angry or even abusive criticism. Frequently, they are asked for help with personal matters. On their rounds MPs hear many immigration worries, problems of social welfare eligibility, frustration about various approvals that may be needed and a host of other issues. In many cases they can do little; in some cases they can offer helpful advice drawn from their own knowledge and experience; occasionally, they will use their contacts to access good advice; and sometimes they will intervene in an issue, perhaps by writing to the minister or contacting a district office. Often the MP will undertake this role personally, but frequently an assistant employed in the MP's electorate office will do the job.

An intervention by an MP is the most common way that local departmental officials have contact with an MP. Such events are simple, and generally they occur without difficulty. There are many who act to represent a frustrated citizen, including welfare groups, clergy or lawyers. In theory, an MP has no greater standing than anyone else when acting as an advocate; the public service does not work for MPs, it serves the minister. The reality is a little different.

Being an MP, the parliamentarian has privileged access to the minister, and an opportunity to request advice from the top. Rather than attract unnecessary attention from on-high, most local officials will treat an MP with considerable respect, answering calls promptly and tidying issues where that can be done. This does not imply any bending of the rules, simply responsiveness. But where issues cannot be easily resolved this may lead to more complications. If there is an opportunity for an opposition MP to attract attention to a sad or difficult case, then the iron rule predicts that the opportunity will be taken. If the difficult case involves the exercise of discretion by the official, then the everyday paradox suggests the official may suffer as the MP pursues the issue.

Officials quickly learn that the MP has a unique ability to acquire information by asking written questions through parliament, or even elevating an issue to an oral question. The process of answering such questions can be time-consuming; dealing with an irritated minister's office that would like the

issue to go away is enervating. But, as a means of venting issues that might otherwise go unresolved, parliamentary questions are valuable.

Backbench MPs are not part of the government, but their availability to the public provides an informal means of providing constant feedback to the government and correction of mistakes. Their weekend work as representatives makes this feedback possible. The next issue is: what makes the weekend work possible? This turns the focus from the work of MPs to the support they receive.

Support for MPs

As MPs go about their work they receive support from the Parliamentary Service. This is an agency like a government department, but it is not part of the executive. The service is led by a general manager, who is responsible to the Speaker. The Parliamentary Service provides all security, information, communication, travel, catering and secretarial support for MPs, including electorate offices and staff. The Parliamentary Service is expected to provide exemplary and flexible support for the various needs of 120 MPs. Not all MPs are reasonable or patient with their requirements; it is a hard job.

Support is provided by a combination of direct provision of services, reimbursement of costs, and provision of budgets that MPs can manage. Budgets apply particularly to electorate offices; they cover rent of the office, pay for staff and other incidental expenses. In some parts of the world, including Australia, electorate offices are owned by the government and are provided to MPs for their use, but in New Zealand the MP selects the office that suits.

The choice of offices by MPs has caused difficulties for the Parliamentary Service. The issue is not that MPs find sumptuous offices; far from it. On the contrary, a combination of a wish to avoid wasting the electorate budget, and an aim of projecting personal frugality has led to many very humble offices around the country. Some are so humble they could raise health and safety issues for those who work there. The problem is that though the MP selects the office and the electorate staff, the employer is the Parliamentary Service; any occupational safety issues would be the responsibility of the Parliamentary Service, but it has no effective means of controlling the working conditions for its staff.

The Parliamentary Service is well used to handling these kinds of issues out of the glare of publicity. But in late 2009 another issue hit the headlines.

Case study – electorate offices

On 10 October 2009, *The Dominion Post* newspaper used a banner headline to report on the rent of electorate offices.²⁷² The paper showed the smiling faces of six parliamentarians whose electorate offices were rented from themselves. That is, the MPs had acquired an office in their own name or in the name of a fund or trust and nominated that office as their electorate office. Once they had received an independent valuation to prevent overcharging, the Parliamentary Service duly paid them rent to occupy their own office.

Apparently, several long-serving National MPs have organised their affairs this way. The Labour party has offices that the party owns and that it rents to the Parliamentary Service as electorate offices. It is striking that three first-term MPs have already made similar arrangements; they are Amy Adams (National, Selwyn), Aaron Gilmour (National, list) and Stuart Nash (Labour, list). Apparently, Ms Adams bought her office in November 2008 and Mr Gilmour in January 2009; it is not reported when Mr Nash bought his office.

This was not the first time MPs had used parliamentary funds to rent their own property for an office. In 2003, the auditor-general reported on an investigation into the use of an out-of-parliament Wellington office by ACT.²⁷³ The office was located in an apartment owned by Richard Prebble, then the leader of ACT. At that time, the issues complained of revolved around whether ACT had secured extra support, and whether the office had been used; not whether it was appropriate for an MP to own an office that was rented to the Parliamentary Service. In the event, the auditor-general found no problem with the arrangement, noting that the rent had been struck after receipt of an independent valuation.

Though *The Dominion Post* expressed concern in 2009,²⁷⁴ the Speaker saw no problem in members putting their allowances towards property in which they had a financial interest. He criticised the journalism, ‘To me that’s just dumb. It’s so lacking in objectivity’.²⁷⁵ There is real force to the Speaker’s point; this is not a new practice, rentals are probably no higher than they otherwise would have been,²⁷⁶ the total cost is contained within a capped budget per MP, and members get to ensure the office is set up in a way that matches their style of

272 Small and Kay (2009a).

273 Auditor-General (2003).

274 ‘Advantages for MP landlords’ (2009, p B4).

275 Watkins (2009b, p A2, quoting the Speaker).

276 Apparently, the prime minister charges only a peppercorn rental for the use of the electorate office he owns in his Helensville constituency: ‘MPs’ money-go-round’ (2009, p A1).

work. It has long been decreed that MPs may not use part of their own home as an electorate office, but the use of an MP's property for an electorate office is within the rules.

But the very fact this practice is within the rules raises concern. A realistic change in the scenario will illustrate the point. Suppose the issue is no longer an electorate office for a new MP to be based in Napier; instead, consider the case of a senior fisheries officer for the Hawke's Bay district office, required to establish a new district office. If that officer were to propose locating the office in a building she owned, the conflict of interest would be apparent immediately. The department would promptly remove the fisheries officer from any further involvement in selecting the office, and would need to direct that the officer either be a landlord for the department's office or an employee managing the office; doing both at the same time would be unacceptable. Why is it acceptable for an MP to do the same thing?

Parliamentary expenses

The funding of electorate offices for New Zealand parliamentarians was only one of a very large number of parliamentary expenses issues that arose around the world during 2009. In Britain, starting in May, the *Daily Telegraph* used leaked documents to run a series of revelations about use of expenses; the most eye-catching involved an MP using allowances to clear a moat, and another who used the funds for a duck house. Several others used accommodation assistance to purchase or renovate property, both in their constituency and in London. Within a couple of months, the Speaker was replaced as his defence of the old system became untenable. By the end of the year, an independent committee, chaired by a former senior civil servant, was developing rules for the future, and there was great tension within party caucuses as MPs faced the loss of the assistance they had been using.

In Ireland, newspapers ran a similar campaign; there a big issue was travel costs. Eventually, this led to the resignation of the Speaker in the face of revelations about his own expenses. His total bills had averaged around NZ\$175,000 per year over eight years.²⁷⁷

In New Zealand it is ironic that controversy erupted following an important reform initiated by the Speaker and the prime minister. For years it has been hard to acquire details on expenses; the Parliamentary Service has been exempt from the Official Information Act 1982. On 30 June 2009, the Speaker and the

277 'Irish speaker quits' (2009, p B3).

prime minister jointly released full details of expenses for every minister and MP and undertook to continue those releases quarterly.²⁷⁸ For the first time it is now easy for anyone to examine the record to see who has received what. All expenses of all MPs are included, irrespective of party or position.

There was an immediate poring over the details. An opposition MP, Chris Carter, was an early target as the records showed he was the highest spender other than ministers and the leader of the opposition. The minister of finance, Bill English, was the focus as it became apparent that Ministerial Services was paying rent to his family trust so he could occupy his own home.²⁷⁹ And the disclosures for July to October showed that the leader of ACT, Rodney Hide, had used his parliamentary allowances to pay for his partner to accompany him as he travelled overseas on ministerial business. This last was not against the rules, but was contrary to the prime minister's expressed wish that ministers should pay personally for travel costs of partners.

After some outcry, Bill English and Rodney Hide refunded the controversial expenses, even though at the time it was not apparent there had been a breach of the rules, and both could demonstrate they had sought advice before accessing the allowances. The emotional strain of this process was visible as both ministers looked defensive before sacrificing tens of thousands of dollars. Statements from Rodney Hide illustrate the pressure as his position shifted over two weeks. In October he was reported as deploring the rules that allowed him to claim the costs of his partner's travel, but defending his use of the allowance to maintain his personal relationship, 'I don't think I would achieve a good result by being a martyr'.²⁸⁰ By November he had changed his mind, and he spoke of his shame at his 'casual use' of taxpayers' money, 'That was wrong'.²⁸¹ He returned a total of \$21,974.40. Bill English repaid a total of \$32,000 in two payments as the controversy continued.²⁸²

The public commentary regularly returned to accommodation arrangements and partner travel; both are matters of great importance to the families of MPs. Though MPs may put each other under stress on policy issues, it is generally

278 Department of Internal Affairs (2009) and New Zealand Parliament (2009). Regular updates, an outline of the system for funding expenses, and links to the relevant determinations that authorise the regime are available at the same places.

279 Ministerial Services is a section within the Department of Internal Affairs that provides accommodation, office, travel and communication services for ministers; it is distinct from Parliamentary Service, which provides support for MPs.

280 Watkins (2009a, p A2, quoting Hide).

281 'I'm sorry – Hide surrenders' (2009, p A1, quoting Rodney Hide).

282 Small and Kay (2009b).

accepted that they avoid dragging each other's families into debate. In this case it was public comment that put families under pressure.

The Speaker attempted to defuse things by providing more background for journalists. He referred to his concern at the pressure that families were feeling, 'anyone's wife is really, really troubled by the current focus ... and it is causing a lot of stress'.²⁸³ Later, as he saw ongoing pressure from reporters 'parroting a view', he started to threaten the media:

If the newspapers do want to have a view and want to lobby on it, I am very happy to issue them with a lobbyist card and relieve them of their [press gallery] offices here, and if they want to be lobbyists – fine.²⁸⁴

How did things reach this state? The media are reporting righteous indignation about the income and support received by MPs while parliamentarians feel beleaguered, misunderstood and unappreciated. The issue of substance is whether the level and structure of support to MPs is appropriate.

Pay and conditions: The whole package

Parliamentarians have good grounds for being defensive about their conditions. The idea that they are paid more than they are worth is common; after all, they are paid well above the average. But debate about MPs' pay is not just afflicted by jealousy; there is also the fact that the assessment of the work of any given MP is always affected by bias. Many are biased to think favourably of the work of politicians from the party they favour, and unfavourably of politicians from other parties. This means there is always a pre-existing majority who are biased against any given politician, because no politician or party scores above 50% in the elections. It is not surprising that many people doubt that most politicians earn their pay; everybody voted against most of the people in parliament.

An assessment of the package of pay and conditions for MPs needs criteria that might encourage some objectivity. The parliament website suggests six principles for assessing expense allowances: accountability, appropriateness, openness, transparency, value for money and cost-effectiveness.²⁸⁵ Some of these principles seem repetitive and others are so bland as to be meaningless. For example, it is hard to disagree with the proposal that support for MPs should be 'appropriate'.

283 'Outrage over perks stressing MPs and families – Speaker' (2009, p A2, quoting the Speaker).

284 'Speaker fires shots at media over expenses' (2009, p A3, quoting the Speaker).

285 New Zealand Parliament (2009).

An alternative list would include: *adequacy*, enough but not too much; *separation*, so reward for the job done is distinct from reimbursement for costs incurred; *certainty*, so administration is straightforward, the position of the recipient is clear, and an individual's choices cannot determine the benefit they receive; and *independence*, so those receiving the benefit do not set the rules. Every one of these issues can fill chapters in those expensive-looking management books that clutter bookshop shelves. This text ventures only brief assessments.

Adequacy of the package

Despite popular opinion, MPs' packages (that is salary, superannuation subsidies and expenses) are not excessive; they may not even be enough to provide an appropriate recognition for the job done.

Comparing packages is always subjective; techniques such as job-sizing provide little precision. In this case, the range of tasks undertaken by MPs makes it hard to compare their job with anyone else's. Parliamentarians all play a role, to varying degrees, in all of the functions of parliament. This means they must be highly analytical in different ways; they need precise language skills as they consider proposed laws; numeracy and financial analysis when considering funding issues; and investigative skills as they review the work of the government. They must work closely with colleagues and sometimes rivals as they form governments, and they must present clearly in all theatres as they take their representative role. To do these tasks they must keep up with developments and maintain exemplary skills in oral and written communication. According to the auditor-general the job may require MPs to act as counsellors, experts in government processes, advisers and advocates.²⁸⁶ Ministers must do all these things as well as their executive responsibilities.

These tasks are carried out in public to a degree that is hardly matched elsewhere. Every mistake will be magnified by opposing politicians, of whom there are more than there are friends. If other politicians do not publicise an MP's failings, there is always the possibility that the media will take an interest; often not a friendly interest.

It is a hard job and an important one. Senior managers' jobs will often have more responsibility for expenditure and employment matters, but their range does not generally extend beyond their organisation. The decisions MPs make

²⁸⁶ Auditor-General (2001b, pp 16–17).

affect us all. The government they put in place will control decisions for years; the laws they make will endure for decades, sometimes longer.

Despite all that, and even taking account of personal biases, everyone can think of some MPs who they believe are not up to the job. They appear too inarticulate, excitable, slow or lazy. But though not all MPs are as good as each other there is no one who can appropriately be given a job to assess pay for performance. Therefore, they must all receive pay for the job and it will always be difficult to arrive at a fair rate. The job of setting that rate falls to the Remuneration Authority, which exists to set the pay for MPs, ministers and other senior positions in the government system.

November 2008 was the most recent occasion that the Remuneration Authority made an increase for MPs and ministers. The authority set a basic pay for a backbench MP of \$131,000, plus an expense allowance of \$14,800. Ministers have a salary of \$204,000 plus the same expense allowance as backbench MPs, and the prime minister has a salary of \$393,000 plus an allowance of \$19,700. At that time, the authority acknowledged that it had long given up trying to link parliamentary pay to private salaries, and it was even having difficulty maintaining a fair link to the salaries received by public sector executives and by judges; instead it was linking to inflation, so parliamentary pay was falling behind.²⁸⁷

The facts substantiate that assertion. Data collected annually by the State Services Commission shows that of the 47,052 people employed in the public service on 30 June 2009, 1,165 had a base salary (not including performance pay or other one-off payments) over \$140,000 in the year to 30 June 2009; that is, nearly 1,200 were paid about the same or more than backbench MPs. It is safe to assume that almost all the public service officials who appear before select committees receive more than the parliamentarians on the committee. On the same basis, 202 public servants are paid more than ministers (over \$210,000) and 7 get more than the prime minister (over \$410,000).²⁸⁸

These numbers relate only to the core public service, which, according to the State Services Commission's annual report, pays the most conservative salaries in the public sector.²⁸⁹ The same State Services Commission report shows that in the tertiary education sector, for example, another 700 people have total packages (including one-off payments) above the income of backbenchers.

287 Remuneration Authority (2008, p 6).

288 Salary data in this paragraph is supplied by the State Services Commission from the Public Service Human Resource Capability Survey 2009.

289 See, for example, State Services Commission (2009).

On the same basis, the annual report for the New Zealand Police for 2009 shows another 90 who have a total package higher than the pay of backbenchers. And there are more. The total state sector, including district health boards and state-owned enterprises employed more than 290,000 people at 30 June 2009;²⁹⁰ that is over six times as big as the core public service. It is safe to assume that several thousand state employees received more than MPs, several hundred got more than ministers, and several dozen got more than the prime minister.

These comparisons cannot be definitive. State sector senior managers would generally control significant budgets and manage many staff members; MPs do neither of those things. In addition, because of complexities in the way some expenses are reimbursed, the Remuneration Authority figures underestimate the full benefits MPs received. In addition, the salaries published by the authority omit a generous superannuation allowance of up to 20% of a backbencher's pay. This amounts to some \$26,000 per year, and MPs need to contribute only 40 cents for each dollar of superannuation subsidy they receive. But even when these measures are taken into account, the disparity is not large enough to overturn the comparisons in the previous paragraphs; MPs are not overpaid.

In 2009, because the Remuneration Authority awarded a zero increase, the relative position of MPs has deteriorated further. Though many senior positions have not seen a pay increase, some have. For example, the authority awarded a 1.2% increase for judges. There are good grounds for parliamentarians to feel they are targeted unfairly, as their pay is not excessive. On other criteria, however, the support for MPs is harder to justify.

Separating reward from reimbursement

In theory, there is a clear separation between MPs' salaries, as set by the Remuneration Authority, and their reimbursement for the costs of the job. But on closer examination some of the expense allowances have the potential to spill over into rewards rather than reimbursement.

This has been a matter of concern for many years. In 2001, the auditor-general considered more should be done to clarify the allowance component of the MPs' package, to ensure it really was a reimbursement for actual expenses. This might seem fiddly and bureaucratic, but in the absence of receipts for expenditure (as is a normal requirement for other public sector reimbursement) it is not easy to tell whether the allowance is a reimbursement or an income top-up.

290 Statistics New Zealand (2009).

This issue is compounded by the fact some of the expense entitlements are explicitly intended to act as rewards. In particular, the Speaker's directions that outline the rules by which MPs are to be reimbursed for expenditure include provision for a subsidy for private international air travel.²⁹¹ There is no suggestion that this should be seen as reimbursement for the cost of the job; it is explicit that it should be used for private (non-business) purposes. The Speaker's directions extend over the lifetime of some former MPs, as past low salaries are compensated by lifetime access to the travel subsidy (up to an annual cap). In terms of its value it may be that this subsidy is a reasonable component of the package for MPs. The Speaker has pointed out that MPs' salaries reflect an adjustment that was intended to offset the cost of the subsidy.²⁹² Despite those points, it still fails the test of separation. When rewards and reimbursements are blurred, transparency is not achieved.

Certainty

The rewards and compensations available to MPs ought to be clear to members and the public. Such certainty would make it easier for the public to form its view on the fairness of the system and for MPs to plan their lives. In various ways the current system fails the certainty test.

First, no pay system can be certain if the recipients can, by their own actions, determine the value of the rewards they will receive. Though there is an average offset to MPs salaries for the air travel subsidy, the value received by each MP varies according to the amount they travel. That is, the reward is not based on contribution or effort but on the amount that the member and their partner like to travel. Those who enjoy a regular break in the Northern Hemisphere derive more value than those who take their holidays in Taupo. It is hard to see any virtue in that.

Provisions that allow members to be paid rental for use of their own properties provide another means by which MPs may adjust their own rewards. Accommodation allowances and electorate office support are intended to assist members to attend parliament, not to build a property portfolio. Even where there are independent valuations, there is potential for decision-making to be affected by conflicts of interest. Even if it works out cheaper for the taxpayer, the risk of conflict of interest may not prove worthwhile.

291 The Speaker (2008).

292 'Speaker defends MPs over perks' (2009, p A2).

Second, no reimbursement system is certain if recipients cannot get clear guidance as to their entitlements. The recent report of the auditor-general shows that Bill English sought advice as to his housing entitlements and that staff at Ministerial Services paid his housing subsidy even though they had concerns about his financial interest in the house.²⁹³ The fact Mr English ended up repaying \$32,000 demonstrates the impact uncertainty can create.

This is not the first time that uncertainty of administration has led to repayment. In 2001, the auditor-general reported that Marian Hobbs had been advised by the Parliamentary Service that she was entitled to an accommodation allowance. When this became a matter of controversy, she privately repaid \$18,540. The auditor-general reported that:

She had done so, not because she thought she had not been entitled to the payment, but because, as she put it, she had been deeply wounded by the suggestions which had been made publicly to that effect and would rather not accept the allowance than be considered a cheat.²⁹⁴

The good name of MPs is important to them, and to us. When administrative uncertainty creates an impression of opportunism nobody is well served. That administrative uncertainty comes from the complexity of the rules and the separation in the treatment of ministers and other MPs. That complexity can trap MPs and officials.

Clearly, the pay package of MPs does not pass the certainty test.

Independence

Any pay system where the recipient is among those who set the rules is inherently open to doubt; how can anyone be sure that the conditions were set objectively? This situation is surprisingly common; boards of director face it all the time. But a key difference between companies and parliament is that discontented shareholders can sell their shares, but citizens have only one parliament.

The Remuneration Authority exists to cope with this problem. It sets the salaries and allowances, including superannuation provisions, for all MPs. But the rules for expenses are different; the rules applying to members are set by the Speaker, and the rules for ministers are set by the prime minister. In both cases the person setting the rules is covered by the rules, and is also put into the position by the votes of those MPs who benefit from the rules.

293 Auditor-General (2009, p 10).

294 Auditor-General (2001a, p 51).

The pattern of determinations issued by successive Speakers and prime ministers demonstrate that they have been scrupulously fair, and have not bent the rules to favour themselves or their colleagues. But it remains difficult for them to achieve an appearance of independence. This is especially problematic when part of the system of rewards (the travel subsidy) is not controlled by the Remuneration Authority, but by the Speaker. Similarly, the decision by the prime minister in 2009 to allow ministers to use their self-drive cars in Wellington is an effective increase in the value of their package, but it was not determined by the Remuneration Authority.²⁹⁵

An associated issue is the management of reimbursements. Every accounts section in any organisation can face pressures from other staff who interpret the rules to claim entitlements. Accounts officers may feel browbeaten as they handle the imaginative claims of senior staff. This can be even more significant if they are dealing with an MP. Even if the MP is not aggressive, it is hard to avoid the fact of a disparity in power; accounts staff know that the MP might appeal to the Speaker or the prime minister, and that could create unwelcome pressure for management. During the expense debacle in Britain, it became apparent that the small parliamentary accounts section had become overwhelmed as it coped with pressure from members. This led to the approval of unjustified expenses. There is no suggestion that the same has occurred in New Zealand, but the risk exists.

A further problem arising from the lack of independence is the absence of anyone to speak up in defence of members' conditions, other than members themselves. The Speaker has explained and defended, and clearly feels the issues keenly, but he cannot separate himself from the issue because in the eyes of the media and the public he is part of the issue.

An opaque system

Taken together, the criticisms that the system does not separate pay and expenses and is not certain and not independent describe a process that is not transparent. It is hard to make comparisons of pay and conditions for MPs because the components are complex and disparate. That conflicts with the openness that characterises New Zealand's government systems and cannot be justified. How did this come about?

295 'One rule that drove Key mad' (2009, p A2).

On this occasion, the driver is not the iron rule of political conflict. In fact, it is the test case that demonstrates (by its absence) that the iron rule is beneficial and contributes to good government.

Parliamentary pay and conditions is one of the few areas where the iron rule of political conflict is suspended. The occasional maverick criticises perks, but that has not translated into a coherent push for reform. A succession of opposition parties have not wanted to take up the issues. This means the searing scrutiny that parliamentarians apply to other areas is absent. The democratic safeguards the iron rule applies to the rest of the government system are not applied to parliament.

The solution when the iron rule fails is to remove the issue from parliament. This has been proposed previously; change would not be difficult.

Possible reform

The issues of pay and expenses are not new; they have been canvassed many times in the last decade. The auditor-general has made six reports into various aspects of funding for members and parties during the current decade. All have found some confusion in the rules and have encouraged improvements. Every three years the Parliamentary Service Commission commissions a report into support services for parliament; these have called for more clarity and rigour around expenses for members and parties.

The most significant report was provided in 1999, by a committee chaired by Stan Rodger, a former minister.²⁹⁶ That report proposed a series of changes designed to address all the issues outlined above. In particular the report proposed placing control of salaries and expenses with the Remuneration Authority. The Auditor-General endorsed that approach in his 2001 report on parliamentary salaries.²⁹⁷

Legislation giving effect to the reforms was introduced, and referred to the Standing Orders Select Committee for consideration. The reform came to a halt as the select committee reversed the main reform in the bill, and left control of expenses with the Speaker and the prime minister. The committee was concerned that any outside authority would be able to constrain the travel of MPs; they saw that as problematic because it would involve decision-making by an organisation unfamiliar with parliament and inappropriate because outsiders should not control the work of members.

296 Rodger et al (1999).

297 Auditor-General (2001b, p 167).

A non-parliamentary body should not be responsible for determining what services should be funded as parliamentary business.²⁹⁸

The underlying point is that representation is a critical function of parliament. That task imposes extraordinary demands on members. Travel up and down the country is not fun, it is tiring work. The electorate office and the home phone are not perks, they are essential tools. Attending social functions is not an optional extra; it is part of the daily grind.

Given the hostility that regularly attends discussion of parliamentary pay and conditions, the committee's view is understandable. The members are correct; they should be supported in their work, not controlled. Parliament is different from any other organisation and it must be accorded respect rather than suspicion. How can members be sure that any outside authority will understand and sympathise with their needs?

The committee's view may also be a reflection of the cultural void dividing politicians and officials. MPs see the rule-bound behaviour of officials, and dread its impact on themselves. They know it is only by maintaining flexibility that they can get the job done.

But keeping control in the hands of parliament has created a system that does not stand up to scrutiny. Far from supporting members in their work, the current structure is corrosive; ongoing challenge is undermining the credibility of parliament. Members deserve better; we all deserve better. But until members feel less beleaguered, little change is likely.

One idea could be added to the proposals that parliament rejected in 2002 that might make change more successful; this would be a small change in the expectations of the chair of the Remuneration Authority. If that organisation were to take on a wider responsibility for parliamentary expenses, it would be reasonable to expect it to defend its decisions and to defend parliamentarians from unfair attack. That has not been the norm in the past, but that is partly because the authority could not defend a system that it did not control. A more involved authority could be more active to front the issues and absorb some of the pressure.

The use of officials in advocacy roles is not common, but it has been done with considerable success. When the Reserve Bank was made independent Dr Brash, the first governor under the new system, set out to explain and defend his role. If he was to be responsible for decisions made at arm's length from the government, he saw the need to defend the decisions himself. Likewise, if the

298 Standing Orders Committee (2002).

Remuneration Authority were to take on a wider role, MPs could reasonably expect that the Authority would explain and defend its decisions, and allow members to get on with their job as parliamentarians.

The need for reform is pressing. Parliament is a fine institution, but one of its key support systems, the pay and conditions of MPs, is damaging parliament's image. Worse, it may be damaging the integrity of MPs. Using benefits that they are entitled to is not corruption, but reorganising their affairs to benefit from parliamentary expenses is murky water. It seems that some MPs have become so inured to their system of rewards that they actively encourage new colleagues to take advantage of the rules. When the Green Party announced it was reorganising its housing to stop exploiting parliamentary benefits, the party's co-leader, Metiria Turei, gave an unusual glimpse at how questionable activities are encouraged.

When I first got into Parliament MPs from other parties told me that is the first thing I should do – buy a flat in Wellington – because the [mortgage] interest would be paid.²⁹⁹

Similar pressures were reported by MPs in Britain as their scandals unfolded. The fact the case study reported on three new MPs who have arranged things so they might benefit from the rent of an electorate office shows they too have learned of the opportunities available for them to exploit. It is unfortunate that their first decisions on taking office seem to have reflected personal interest rather than the public interest.

The fall from grace of Phil Heatley, the minister of housing, demonstrates another erosion of values. Newspapers report that he had ignored warnings from officials as he used his ministerial credit card for private expenses and made at least one false declaration in his expense claims.³⁰⁰ Did he feel he was beyond reproach or that these purchases represented his fair entitlement? Whatever he had used to justify his behaviour, his resignation may help to shock his colleagues into a realisation that parliament is being undermined by its own processes. Reform and the adoption of the proposals put forward by Stan Rodger could solve the problem. A fully autonomous process of setting pay and expenses should leave MPs financially no worse off but their morality would be less open to question.

299 Small (2009, quoting Metiria Turei).

300 Watkins (2010).

Members of parliament, officials, and the electorate

Representation is a quintessential political process. Public servants could never be comfortable moving among the community, voicing public aspirations, and interceding for individuals; politicians do it all the time. Despite that, this is an area where public servants play significant roles.

The first role is that of the staff in local offices of government agencies. This is the location for most of the interaction between officials and MPs. Most public servants involved are mid-level district office staff. Such interactions happen every day all over the country, usually without difficulty.

The second role is the administration of support services for MPs, including the reimbursement of expenses. This is a thankless task, performed by low-level administrative staff dealing with issues that are extremely important to MPs. Tempers can get frayed. Staff can feel they are in the front line in someone else's quarrel.

The third role is setting salaries and superannuation, which is done by the Remuneration Authority, a group of senior part-time office-holders. The Remuneration Authority could be given more authority and more responsibility to set, explain and defend a more open system of pay and expenses. In that way, some officials could make a major contribution to strengthening parliament.

Conclusion to Part Three

Each of the five activities of parliament has produced its own tale about the interactions between officials and parliament. Making government is a process remote from officials; legislation involves officials as one group among many others; funding largely involves mid-level finance officials; scrutiny brings senior officials into direct contact with members of parliament (MPs); and representation involves interaction with relatively junior and local office staff. But there is one thing in common; officials must know their place: Parliament rules; officials serve.

In all those activities the central point is that nobody, other than 120 members, has any say in parliament. Officials are not members, so they do not count. That may seem arrogant, but most MPs find that coping with the reality of the iron rule, combating their opponents while competing with their colleagues, leaves little time to consider the needs of officials. When officials interact with parliament, it is on parliament's terms. Parliament's rule is the iron rule, so the official is caught in the everyday paradox.

Parliamentarians are just as interested in solving the problems of humanity as officials are, but they must do it through the political contest. This means a reasoned focus on the big issues of the time, maybe involving billions of dollars, can be swept aside in a dash to focus on a consultancy contract for a few thousand dollars. This may seem frivolous to the official, and it is certainly not good management; but the official does not set the agenda, parliament does.

Despite the apparent fixation with trivia, parliament manages a lot of substance. The noise is not always an indication of the real work. The chapters reviewing the functions of parliament were not intended to assess parliament's performance, but it is apparent much good work is achieved in parliament. This work occurs through the operation of the iron rule. Governments are formed, laws are made, funding is provided, scrutiny occurs and people are represented.

A few activities suggest some divergence from a focus on the public interest. If the emergence of log-rolling were to move on to pork-barrel politics, that would be a setback. It may be that proportional representation encourages some MPs to focus on sectoral interests rather than the common interest, but that is not explored here. It is a matter to consider in the run-up to the proposed referendum. Similarly, funding processes that encourage members to profit from the support they are offered erode public confidence in parliamentarians.

It is ironic that the public concern about parliamentary expenses is partly a learnt response to parliament's behaviour. Everyone can see that MPs would be

highly critical if other parts of the government system handled expenses in the way that parliament does. The argument that parliament is different and that different rules should apply is not persuasive and it undermines parliament. The aim is not to get parliament to adopt bureaucrats' rules; it is to persuade parliament to apply its own standards to itself. If parliament would fix that, it would help to improve its credibility in discharging its other roles.

But it is not for officials to promote reform of parliament; it is not their place. Officials have large responsibilities, but they are always subordinate to parliament. That is proper; only MPs have a democratic mandate. Parliament is the source of the moral authority behind any action of the executive. Technocrats may believe they serve the interests of the people, but only MPs accept the discipline of checking whether the people agree.

Parliament deserves respect because it carries a huge responsibility; MPs earn that respect by working for the public interest.

Part Four

Conclusion

Conclusion: Their parliament, and ours too

The previous chapters have told a story of constitutional principles, political contest and cultural confusion. History has carved the shape of parliament and the state services. As a result New Zealand has a government system to be proud of; in at least one respect it rates best in the world. In 2009, New Zealand scored the best of every nation in Transparency International's Corruption Perception Index.³⁰¹ The institutions of government must be doing something right. But, oddly, they sometimes seem to do their best work despite each other.

There is only one government, and all its component parts are broadly engaged on the same endeavour, to make the country a better place. Why is it so hard for the different branches of government to work together? In part, the answer is that they are not supposed to work together; the whole idea of separation of powers means the different branches of government work separately. History saw many lives lost as that principle was established.

At the same time as the constitution has developed its separate institutions, it has moulded the participants into different tribes with foreign cultures. Some might claim they seem like different species from different planets. For those who find it helpful to think of men as originating from Mars and women from Venus, the idea that parliamentarians are from Jupiter and public servants from Neptune may be easy to understand.³⁰²

Jupiter was the king of the gods; he looked to nobody for authority. He strode around confidently expecting respect and obedience. Neptune was also important; he was god of the sea. But if your workplace is the sea, you do not stride, you wade, or even swim out of sight, in the depths. Such is the difference between parliamentarians and officials.

301 Transparency International (2009).

302 For others, do not panic, it is only a metaphor. For the avoidance of doubt, please note that no New Zealand MP or official was born on or descends from any living thing from, or has ever been abducted and taken to, Jupiter or Neptune or any other extra-terrestrial location; nor are our lives and polity significantly influenced by the movement of planets. It seems that the only legislator in world history who may be said to come from (and whose life was therefore influenced by) space is United States senator and astronaut John Glenn. But, as with law and physics, this book makes no claim to be an authoritative text on cosmology. Others, such as conspiracy theorists and astrologers, may dispute the claims in this note.

But the parallels are not just mythical; consider the planets. Humanity has observed Jupiter since prehistoric time as one of the seven stars in the heavens. That is because Jupiter, though very distant, is the largest planet in the solar system. That means it exerts the strongest gravitational pull, and it has a host of at least 16 satellites. It is also the planet that generates the greatest heat from its massive core – more heat than it receives from the sun. It has huge storms; the Great Red Spot, for example, has raged for at least 300 years. This massive planet spins at a frantic speed, revolving once every 10 hours and it swings around the sun in a majestic elliptical orbit, once every 12 years.³⁰³

Neptune is a lesser thing. It is smaller and orbits far further away from the sun; it is a much colder, less passionate place. On the other hand it is more stately and takes a dignified 165 years in its orbit. Generations of public servants can come and go before everything turns over. It revolves at a modest speed; faster than once a day, but slower than Jupiter. But though it is smaller, Neptune is not without influence on other planets, including Jupiter; that is how it was discovered. Neptune was found in the 19th century as astronomers detected anomalies in the orbit of other planets that could be explained only by a previously unknown influence – not unlike the establishment of the non-political civil service at around the same time. Ever since then the public service has exerted its modest influence.

Judges presumably orbit the sun on some other planet; something weighty but not too showy. And various other players could be located in a constitutional solar system. Officers of parliament including the auditor-general and the ombudsmen may be moons of Jupiter. Wherever various players are located, the point is that their different roles place them each on their own orbit.

Of course, members of parliament (MPs) and public servants do not understand each other. Their different career paths have largely sealed them off from each other; like space travellers locked in different spaceships. Both may work on the same endeavour, but they have different jobs and different experiences. But though there are differences, both represent important values. The public service works to managerial values; aiming for efficiency, propriety and good employment. Parliament represents the values of democracy.

As they do their work parliamentarians are right to be precious about their privileges. Democracy cannot be served if parliament is subject to external direction. MPs do a unique and important job; they deserve our respect and our understanding. But the job they do is ours because they are elected as our

303 MPs are not so lucky, they must 'return to go' every three years.

representatives. It is their parliament, and it is our parliament too. New Zealanders expect parliament to evolve and respond to the expectations of a changing society. We expect parliament to observe ever-higher ethical standards. So far parliament has generally met that expectation.

Sometimes the operations of parliament can compromise the public service's managerial values; democracy can be inefficient, and even brutal to its participants or naïve bystanders. But the weaknesses of parliament pale beside its strengths. It is a vigorous place for the contest of ideas. Democracy has its problems, but rule by the bureaucracy would be much worse.

But it is not the system that matters. It is the people. This book attempts to explain why MPs and officials tend to behave in the ways they do. The lesson for both groups is that it is useful to understand the pressures faced by others. Both groups have an important role to play, and both can improve their own effectiveness by understanding and supporting the role of the other group. Sensible people can make the constitution work well.

The last word falls to William Gladstone. As chancellor of the Exchequer in 1853 he commissioned the Northcote–Trevelyan report into the civil service, and in his first premiership he presided over the development of the non-political civil service in Britain.³⁰⁴ By those means he did more than anyone else to bring integrity to the relationship between parliament and professional public servants. But despite that, it was not the rules that mattered to him, it was people. He said that the constitution depends 'on the good sense and good faith of those who work it'.³⁰⁵

304 Jenkins (2002, pp 164–167).

305 Quoted by Lord Carswell in *R (Jackson) v Attorney-General (Foxhunting Case)* [2005] 3 WLR 733, 788.

Afterword

A Summary

In court, from the bench, they're judicious
Departments are sometimes officious
But in Parliament House
Even when they carouse
They are dreadfully disputatious

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