

The evolving role of Parliament

A series of roundtables organised by the Institute of Policy Studies
as part of the Emerging Issues Project November 2006-March 2007

1) Background

The 'Parliament series' was one of the Emerging Issues Projects the IPS/School of Government has undertaken in cooperation with Chief Executives from across the public sector. The impetus for horizon-scanning discussions organised by the IPS arose initially from discussions amongst Chief Executives at a retreat at 'Boom Rock' in 2002 and continued as the Emerging Issues Project after 2005 under the chair of the State Services Commissioner, Dr Mark Prebble. Several projects have been completed under these auspices¹ and work continues on others.

Most projects in the EIP follow the well-branded IPS process:

- background papers commissioned and presented;
- roundtable discussions with an invited and informed group;
- circulation to participants of (anonymised) notes of the discussions;
- and, where appropriate, the preparation of a final publication.

For the 'Parliament Series' the first three of these steps took place between the end of 2006 and March 2007. Discussion notes were circulated shortly thereafter. The final publication for this series should be completed late in 2007. This summary outlines the main topics of the discussions and includes an overview from the Convenor of the series, Colin James, of some of the ground covered.

The core goal in the Parliament Series was to explore how continuing changes in the work of the House affect the rest of the state sector. A wide-ranging set of discussions canvassed new technology ('e-representation'), the effects of MMP, how 'ancient powers' (like the power to punish for contempt) were relevant today and the role of 'officers of parliament'. There was no simple conclusion from the series, rather a much better appreciation of the interaction between the legislature and other branches of government and the strong sense that this constantly-evolving branch needs to be better understood as an integral part of a 'balanced constitution' not simply for its role in 'making and un-making governments'. The resulting publication will develop these issues in what should be a book that is both practical for public servants and anchored in the political and legal history of the New Zealand Parliament.

2) The Discussions

These generally took place following breakfast at 7.30am and ending at 11am. The same invited audience generally attended, allowing participants to build some continuity as the sessions proceeded. Papers were presented, MPs or other 'practitioners' followed with comments and analysis and then the invited audience contributed actively to the discussion. Notes were taken and summaries circulated to participants. Five main topics were covered in this series as outlined below.

a) 27 November 2006: E-Representation

David Hume (SSC) presented a paper on how e-tools might help elected representatives work on behalf of their constituents, and on the interaction that the fast-developing technology

¹ Previous projects have included the 'Policy Implications of Diversity', 'Pasifika', various discussions on climate change and energy efficiency, and the policy implications of changing demography (including ageing).

would both enable and require with the rest of parliament and the state sector. Darren Hughes MP led further discussions.

b) 2 March 2007: The House at Work

This session discussed the working balance between Parliament and the executive (where change has been hastened by MMP, but not driven exclusively by it). Discussions canvassed changes in the approach, workload and relationships around parliamentary questions, select committees and other House business and the mix of politics, administration and policy that sets the scene for the various protocols and guidelines. Papers were presented by Jacki Couchman, Robert Buchanan, Bill English MP and Tim Barnett MP.

c) 12 March 2007: Parliamentary Sovereignty in an interdependent world

This session unpicked concepts of sovereignty, both national and international, to set out a conception of a balanced constitutional system, with the various branches 'knowing their place' whatever the rhetoric of parliamentary supremacy. From the international perspective, issues of interest included the role of the House in treaty-making as well as the possibility of shared government institutions (eg a Trans-Tasman therapeutics agency) – and the domestic politics that would inevitably call on sovereignty arguments. Papers were presented by Nicola White, Ben Keith and Andrew Ladley.

d) 17 March 2007: Privilege and Contempt: ancient powers in a modern age

The focus here was on the ability of the House to control its own proceedings, including the recently asserted power to fine for contempt. The session discussed what these powers should look like (and their importance for the wider state sector) today. Papers were presented by Simon Power MP, Andrew Ladley and Ryan Malone, and Andrew Geddis.

e) 31 March 2007: Officers of Parliament

Here the discussion canvassed the evolving role of Officers of Parliament. The clear framework is that Officers of Parliament assist the House in holding the government/administration to account and to promote effectiveness across the state sector. The papers and participants discussed how that has been developing and what the implications for the state sector are. Papers were presented by Nicola White, Robert Buchanan and Morgan Williams.

3) Overview from Colin James, convenor of the discussions

In 2004 Deputy Prime Minister Michael Cullen asserted the 'sovereignty' of Parliament in a speech to commemorate its 150th anniversary. "New Zealand is a sovereign State in which sovereignty is exercised by Parliament as the supreme maker of law, the highest expression of the will of the governed," he said. But was he right?

Dr Cullen went on to state that judges' role is to make "impartial rulings on what the law says and how it applies in individual cases, but if they then begin to express views on what the law should be, or on what it says, they enter dangerous territory... The courts are not free to make new law."

In fact, the courts have made "new law" for centuries. That is how the common law developed and continues to develop. In an incremental process, principles derived from earlier cases are applied to a new set of facts and a new precept set. That is what the Court of Appeal did in mid-2003 in the "foreshore and seabed" case, which gave the government a difficult political headache, Dr Cullen had the very difficult task of drafting legislation to override the court's decision, a power Parliament has long had and continues to have, and to

assemble a majority for the legislation. Cullen also objected to three statements by the Chief Justice which he interpreted as challenging Parliament's "sovereignty".

Dr Cullen's protestation was a starting point for a series of roundtables organised by the Institute of Policy Studies in late 2006 and early 2007. The roundtables examined Parliament's changing role and operations under the impact of influences inside and outside the institution. In a globalised world international treaties and rule-making bodies increasingly shape domestic law and constrain domestic legislation and administration. The switch to a proportional voting system has loosened the grip of the Executive which characterised single-party-government rule from the mid-1930s to the mid-1990s and has changed the way Parliament does its business. Officers of Parliament, the media and the public each in different ways demand at the same time more rigorous and a more theatrical conduct by members, not an easy balance to strike. And new, internet-based technology is both posing demands on and opening opportunities for Members of Parliament.

The premise underlying the roundtables and affirmed in the discussions was that Parliament's place in the constitution, its role, its conduct and its relationship to the Executive, the courts and the public are not fixed but constantly evolves. Conventions and practices change incrementally and at times almost imperceptibly, driven and reflecting changing social, economic and political circumstances.

So Dr Cullen's assertion was almost academic. While no one at the roundtables disputed Parliament's capacity to override the common law with statutes and to override judges' interpretation of statute law with new statutes, Parliament has never been "sovereign", in the sense of being all-powerful. A range constraints, some formal, some semi-formal and some informal, have always qualified Parliament's power. Moreover, since the introduction of universal suffrage and the need for parties forming a government to represent a majority of voters, it can be argued that "the people" are sovereign. From that point it is a short distance to the more commonly understood notion of sovereignty, that it is the nation that is sovereign. The public debate over the ill-fated legislation to give effect to a treaty with Australia to establish a joint agency to regulate therapeutic drugs reflected that conflation in the public mind and even in the minds of some participants at the roundtables.

Technically, in legal terms power still flows from the monarch, the Crown: contracts are signed in the name of the Crown. It is the Governor-General's signature on a bill or an Order-in-Council that makes it law, not the passing of a bill through Parliament or a regulation or order through the cabinet. Executive power, in this technical sense, trickles down from the Crown to the cabinet and, via ministers, to the departments and other agencies of the state.

But the practical political reality is that power flows up to Parliament from the people by way of elections of Parliament's members. The ministry and the cabinet are drawn from the ranks of Parliament and are answerable to Parliament. The Prime Minister "advises" the Governor-General who must, except in circumstances not put to the test in New Zealand since the early 1890s, act on that advice.

This duality of legal form – power flowing from the top – and political practicality – power flowing from the bottom – sets up a tension which is managed by convention, which are adjusted as circumstances change.

An example of this duality is the conduct of foreign and military affairs. It is, by convention, now unthinkable that the government could commit New Zealand to war without parliamentary approval or even make a significant military contribution, as in Afghanistan in 2001. Legally, the government has the power. Political reality requires Parliament's endorsement - and, of course, it has always needed funds, which are voted (or not) by Parliament.

Treaty-making authority is heading down the same path. Legally, the government has full power to sign and ratify treaties. But since 1998 treaties have been notified to Parliament's select committee on foreign affairs, defence and trade, which may report on them but the reports are not debated. Parliament has always had the formal power to block a treaty if it needed incorporation into domestic law to take effect; Parliament could refuse to pass the legislation. But there was no real likelihood it would - until 2001, when the opposition National party initially threatened to vote against the legislation giving domestic effect to the closer economic partnership free trade agreement with Singapore. That would have resulted in its rejection, since three minor parties, including one in the governing coalition, also opposed the bill. The bill eventually passed but with some careful wording to avoid suggesting the House had approved the treaty. In 2007 the government could not assemble a majority for the trans-Tasman therapeutics agency legislation, which effectively froze the treaty - at least until the treaty, and as a result the legislation, might be amended. Parliament appeared to have assumed the power not just to reject treaties but even to force their renegotiation.

There is another dimension. Treaties are no longer one-off events. It is increasingly the practice not just to agree an international regime (for example, to administer civil aviation or to set banking standards), the rules of which could be changed only by multilateral renegotiation of the treaty, but to set up international, or supranational, authorities which make and remake their own rules, thereby in effect making rules for New Zealand without realistic scope for New Zealand to influence them. The same goes for United Nations conventions, for example, one requiring member states to proscribe "terrorist" organisations, defined by the United Nations: this comes close to resembling a Bill of Attainder, which was ruled beyond Parliament's competence in the seventeenth century. Climate change, which cannot be mitigated without concerted international action, may over time come into the same category. The nominal 'full powers' of Parliament have in effect been dramatically reduced in respect of those international regimes, except for taking the extreme, and therefore not practical, step of passing legislation requiring the government to withdraw New Zealand's membership of the international regime or refusing "good international citizen" compliance with a United Nations regime.

The roundtable spent some time discussing this rebalancing of responsibility and scope. One view was that international regimes protect the weak: New Zealand benefits from membership of a rules-based regime governing international trade. "Why would New Zealand be the country to lead a reversal of that trend?" was one participant's view. Another: "The old way was that we joined an instrument and if we didn't like an amendment to it we could say so. Now they have governing bodies which make decisions on an annual or semi-annual basis. We are being picked up and taken along by them. And they are challenging. But I don't think we have much choice."

The changing place of Parliament in relation to international treaties brings into focus agreements made by the Crown and iwi for compensation under the Treaty of Waitangi Act.

For now Parliament either enacts or rejects a settlement in toto. Might that change over time? [Some Maori argue that the Treaty of Waitangi is analogous to, or actually, an international treaty but this had no support at the roundtables.]

The Treaty of Waitangi is also an element in the changing relationship between the courts and Parliament: just as Parliament's scope seems to be growing at the expense of the vestiges of the Crown's prerogative to act, the courts' scope seems to be growing in shaping Parliament's statute law. One roundtable participant put it thus: "There are lots of indications in what the courts have said [on the Treaty] that there is a gradual constitutionalising of [Maori] rights for consultation and fair discussion."

This reflects the greater attention courts have been paying to human rights and indigenous rights in their interpretations of statute law and the common law, based on international treaties and domestic legislation which gives effect to, or requires respect for, the principles of the Treaty of Waitangi. The courts presume that Parliament legislates consistently with international obligations and import that presumption into their judgments. Since the wording of treaties, often hammered out in fraught circumstances, is sometimes obscure and capable of conflicting interpretations, a court's interpretation may differ from Parliament's as to what the law flowing from a treaty is.

This all falls far short of the situation envisaged by Sir Robin Cooke (as he then was) when he said in 1984 that: "[s]ome common law rights presumably lie so deep that even Parliament could not override them." The implication is that the courts would not uphold such a statute. But the general feeling at the roundtables was that it is inconceivable Parliament would ever attempt to pass such a law. Political reality would intervene.

Nevertheless, some around the table felt that the courts were on occasion taking interpretation of statute to the point of in effect challenging Parliament or coming close to doing so and that Dr Cullen's outburst had some merit.

But "sovereignty" was felt to be too grand a word. Better to think of the relationships between the Executive, Parliament and the courts in terms of spheres of "autonomy". Each branch has a measure of autonomy, constrained by the autonomy of the other two branches but also respected by them: Parliament does not discuss matters before a court and the courts do not, as a rule, intervene in parliamentary proceedings; the Executive does not presume to make law without the authority of Parliament and Parliament, as a rule, does not presume to organise departments.

But what about citizens? Periodically there are demands for referendums, notably by opponents of reforming legislation such as the Supreme Court Act and the Civil Union Act. Some countries make more use of referendums. But (apart from the triennial liquor referendum from 1918 to 1993) Parliament has resisted this encroachment on its role as representative of the popular. But it did accept to be bound in 1993 by a referendum on the voting system and it is now unlikely the voting system would be substantially changed without a ratifying referendum. And after two failed referendums on extending the parliamentary term in 1967 and 1990, it is highly unlikely a change in the term would be legislated without a referendum. Parliament also did legislate for non-binding citizens-initiated referendums in 1993 but has felt free to ignore the results, including one in which there was a 92% vote in favour of demanding longer prison sentences.

But, the roundtables noted, there is no widespread demand for binding referendums and public opinion polling and talkback radio provide informal channels for popular expression which politicians do take notice of.

And Parliament has adopted what one roundtable participant called “self-denying ordinances”, which are also (in one roundtable participant's words) “self-protecting”: too cavalier or heavy-handed actions diminishes Parliament's already low public respect.

A major “self-denying ordinance” is the incorporation of protections included in the 1990 Bill of Rights Act in the way Parliament goes about its business. For example, it adopted a rule of natural justice, including representation by counsel, for those who have been accused of breaches of its many self-ascribed “privileges” or who have been impugned in speeches within the Chamber which are absolutely protected from an action for damages. Generally Parliament's privileges committee, which inquires into and reports on alleged instances of contempt of those privileges, has in recent times operated consensually, which eliminates partisan decisions, as sometimes happened in the past. Generally Parliament has treated with relative constraint those who transgress those privileges. Up to the early twentieth century it imprisoned transgressors for contempt. An apology now usually suffices.

But Parliament is also jealous of its privileges. One reason is that it has to be able to do its job of holding the Executive and state agencies and corporations accountable. So, for example, it must be able to insist on being supplied with information it requests (with rare exceptions, such as national security). When in 2005 Television New Zealand disciplined its chief executive for statements made to a select committee, Parliament fined the corporation - a power which had not up till then been assumed or exercised and which some at the roundtables disputed Parliament had and suggested might therefore have been contestable in court (itself a contestable proposition). Since Television New Zealand paid the fine, it de facto accepted Parliament did have that power. The roundtables debated inconclusively whether it would be preferable for the privilege and contempt provisions to be in statute (and therefore justiciable) rather than in Parliament's standing orders.

The roundtables discussed the accountability process at some length. Generally, departments were said to be more responsive to Parliament's and select committees' requests than Crown entities and state-owned enterprises, some of which gave the impression to committee members they saw appearances before select committees as a distraction from their real work. There were some complaints from MPs that departments were too deferential to their ministers and at times insufficiently forthcoming and Official Information Act requests were evaded or foot-dragged. On the other side of the table, MPs were said to be sometimes abusive or disrespectful of public servants, though this was also said to be unusual and often the result of inexperience and therefore corrected: “An MP who oversteps the mark in his/her treatment of public servants or in other ways is highly visible to the rest of Parliament and usually then pulls back,” one roundtable participant said. The roundtable was told that departments devoted considerable resources to collecting material to answer oral and written questions from MPs, Official Information Act requests by MPs (and others) and supplying ministers with material to counter actual or anticipated attacks in Parliament.

This tension between Parliament and state servants and Parliament and the public posed the question to the roundtables of whether there should be a code of conduct. Opinion was divided. Parliament is, after all, an intensely political place, in which, and from which, parties and MPs project themselves to the public and attack their opponents. Much of MPs' energies

is devoted to the pursuit of political and electoral advantage. Parliament makes its own rules and only periodically adjusts them and then at long intervals. But, said one participant: "Parliament is an odd mixture of rules, conventions, dynamism and commonsense. A code of conduct would disappear because in the end Parliament will do what Parliament wants to do." A contrary view was that there is "more of a mood" among the public and among MPs for a code now. The roundtable was told of four reports and reviews of financial administration which were likely to lead to more individual accountability for MPs.

How much has changed under MMP? The government cannot push through its programme willy-nilly. Now it must negotiate with other parties for majorities on its programme and on procedural matters. Select committees change legislation in response to submissions and parties' positions to a greater extent than under first-past-the-post. They conduct more inquiries, including into topics which discomfort the government and even into alternative policy options. Ministers routinely submit themselves to questioning by select committees.

But much has not changed. The House remains asymmetric: the government has much more information and greater room for initiative and the confidence/supply agreements give the government leverage over small parties, which both cannot cover all bases and have little scope to influence procedure if the two big parties agree. Parliament still does not easily respond to big events on the outside (though urgent debates have become more frequent). Select committees still do not provide a career path, as some expected they might: MPs' ambition is still to join the ministry. Select committees are still not "lavishly resourced" with advisers and are limited in time and scope. Consequently, financial reviews of state agencies are cursory. Policy development is still done almost entirely outside Parliament, by way of negotiations between the government and other parties.

Among other changes: the rise of the select committees has been accompanied by a truncation of the committee-of-the-whole-House stage and routine part-by-part instead of clause-by-clause debate on bills at that stage; and question time has become longer and rowdier (probably in part the result of it being televised).

The roundtables examined the role of the three Officers of Parliament: the Controller and Auditor-General, the Ombudsman and the Parliamentary Commissioner for the Environment. These officers support the role of Parliament, but in their functions they are independent even of Parliament, which decides whether to act on their reports but which does not 'hold them to account' as such. This gives them a unique place in the state apparatus.

Should there be more? The general view of the roundtables was that reform of Crown entities had removed one ground for making some Crown entities Officers of Parliament by enhancing their independence from the Executive. A widely shared (though not universal) view at the roundtables was that the Parliamentary Commissioner for the Environment would be more appropriately a Crown entity. An argument was put that the commissioner could be seen as being part of Parliament's representative function, representing "the natural capital necessary for wellbeing" and future generations; Parliaments in a number of developed countries are wrestling with how to respond to including those dimensions within their purview. But this did not win wide support around the table. An alternative is a body directly reporting to the head of government, as in Britain.

Are there other candidates for Officer of Parliament? Some thought the Electoral Commission should be. Some would like a body capable of assessing departments' forward

fiscal projections and strategic plans, currently a gap in Parliament's select committee capability. But there was not wide support for these proposals and there was no enthusiasm for developing the equivalent of the Congressional Budget Office. There was some feeling that it would be helpful if the criteria for establishing an Officer of Parliament were spelt out. There was also some inconclusive discussion over whether there should be some way of requiring Parliament to take note of and act on an Officer of Parliament's report and recommendations; there is no requirement now to do so and some reports are ignored.

There was also some concern over “who watches the watchers”. Officers of Parliament are not subject to monitoring. They are required to act independently and hence are effectively final arbiters. The Executive can veto an Ombudsman's order to issue information under the Official Information Act but has not done so since the power was made a collective Executive Council decision in 1987. It is the Executive's role, not Parliament's, to write the rules and set departments' managerial and administrative systems. Yet sometimes there is concern that the scrutiny agencies get too close to the line and start to set rules themselves. Generally, these boundaries have been managed without conflict and Officers recognise that some restraint is needed to retain respect and therefore effectiveness (not to mention reappointment). In 2006 the Controller and Auditor-General clashed with Parliament itself with a report classifying as unlawful expenditure the election campaign spending by most parties using part of their parliamentary funding allocations, which are intended to enable parties and MPs to carry out their parliamentary functions.

Technology is also changing Parliament. This is most visible in the digital televising of the Chamber and in the development of the parliamentary website to greatly improve access to parliamentary papers, bills and records. But do MPs take advantage of the opportunities the internet has made available? The roundtable's answer was a resounding no. Even the small minority of internet-savvy MPs did not fully exploit the possibilities for two-way communication with constituents and the public generally. In part that is because of woefully inadequate resources and support and that is in part a factor of Parliament's budget process which has limited flexibility and total funding. Parliament has been uncomfortable requesting more funds from the Treasury.

Colin James, 18 October 2007