University of Tasmania: Graduate Certificate in Parliamentary Law and Practice L5C

Title: **The 1992 New Zealand Senate Option: An Acceptable Second Chamber Model?**

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Introduction

Since the abolition of New Zealand's Legislative Council in 1951 there has been the occasional call for the reintroduction of a second chamber in Parliament. But anyone attempting to do so is faced with the challenge of devising an acceptable model. One that can perform the traditional checks and balances function of a second chamber and one that is also conceptually acceptable to New Zealand society. This was the task the National Government set itself in 1992 when it promoted the creation of a Senate as a counter-proposal to proportional representation. What was put before the public was the constitutional mismatch of several proportional electoral systems versus the status quo, with or without a second chamber. It was less than a fair fight, particularly for the Senate, because of the public expectations of a change to proportional representation that had been generated following a Royal Commission recommendation.[1] In November 1993 the weight of public opinion prevailed and New Zealanders voted for a change to a Mixed-Member Proportional (MMP) system. The lack of public support sidelined the Senate option and since that time there has been little interest in what would have been a significant constitutional change.

The form and functions of the proposed Senate were detailed in over one hundred clauses of the Electoral Reform Bill 1992 and although substantial work had been done there was some debate in the media over whether it was a red herring designed to cause confusion in the debate for electoral reform.[2] The purpose of this paper is to consider in detail the Senate that was proposed by the National Government in 1992 and, by comparing it to other New Zealand plans for second chambers, attempt to determine whether it was an acceptable model. The two previous initiatives were the *Legislative Council Act 1914*, that was intended to reform the existing Legislative Council but was never implemented and a proposal by a

[1] New Zealand. Royal Commission on Electoral Reform, *Towards a Better Democracy* (1986), 295.
[2] Editorial, 'Electoral Confusion', *Evening Post* (Wellington), 10 September 1992. 4.

select committee, the Constitutional Reform Committee in 1952. While there have been a number of proposals for second chambers these are probably the most comprehensive and importantly emanated from Parliament itself as opposed to outside sources. They provide a useful contrast to the 1992 Senate option in attempting to understand what the New Zealand Parliament would have been like if the electorate had voted to retain the First-Past-the-Post (FPP) electoral system and also in favour of the creation of a Senate.

Unicameralism (or a rejection of bicameralism) has become the default position in New Zealand and some consideration will be given to re-examining the reasons forwarded in the past for this national preference. Commentators have pointed to New Zealand's small geographic size, the non-federal system and various aspects of the national identity such as egalitarianism as being influential. The views of Keith Jackson, G.A. Wood and Lord Cooke will be revisited to determine if they still appear accurate today. This is essentially a second test of any second chamber model, however theoretically perfect it might be, will it be acceptable to the people?

The events of 1992 suggest the timing for a Senate proposal was not favourable and was not well communicated to the public. In comparison, the abolition of the Legislative Council in 1950 was spearheaded by the Prime Minister, based on an election promise and with favourable public opinion. As Professor Keith Jackson surmised, 'abolition was a testimony to the power that can be wielded by a determined party leader given propitious circumstances.'[3] Past experience with various proposals for the reintroduction of a second chamber suggests this is a constitutional option that will be periodically revisited and given the right circumstances, as in 1950, could possibly be successful. For example, the recent announcement by the current National-led Government to hold a referendum on the MMP

[3] W. K. Jackson, 'The Failure and Abolition of the New Zealand Legislative Council' (1973) 54 *Parliamentarian* 17, 24.

voting system at the 2011 general election introduces the question of whether this government will attempt to promote the creation of a Senate. [4]

Lead-up to the Senate Option

The issue of a second chamber seems to have been of interest to only one New Zealand political party, the conservative National Party. In the late 1940s, after several failed attempts in opposition to bring about the abolition of the Legislative Council, National Prime Minister Sid Holland succeeded in passing the *Legislative Council Abolition Act 1950*. But it was members of the same National Party that began to advocate for the reintroduction of a second chamber throughout the 1980s and into the early 1990s. In the years before abolition there was a general agreement that the old nominated Legislative Council had not operated effectively for years and should be removed. But there was no agreement on what, if anything, should replace it. Time moved on without any apparent constitutional difficulties and in 1961 a select committee confidently declared the unicameral experiment in New Zealand had been a success.[5] In 1978, a former National Prime Minister, Sir John Marshall stated he had always favoured a bicameral system but unless there was a need felt in the community or Parliament there was no chance of it being established or functioning successfully.[6] Four years later, as the National government under the leadership of Robert Muldoon gripped the country, Marshall became more outspoken. He advocated for a special senate based on Sir Francis Bell's 1914 proposal and that 'an upper house would … ensure

[4] Simon Power, 'MMP Referendum to be held at 2011 Election' (Press Release, 20 October 2009) <http://www.beehive.govt.nz/release/mmp+referendum+be+held+2011+election> at 29 October 2009.
[5] Public Petitions M to Z Committee, Parliament of New Zealand, *Report* (1961) 63.
[6] Sir John Marshall, 'The Reform of Parliament: A Commentary' in Sir John Marshall (ed). *The Reform of Parliament: Contributions by Dr Alan Robinson and Papers in his Memory concerning the New Zealand Parliament* (1978) 7, 12.

the actions of the Government of the day are more closely scrutinised and that hasty unwise and ill-considered legislation is less likely to clutter up the statute books'.[7]

The use of the term Senate to describe a new second chamber was not Bell's. It had been suggested by the Constitutional Reform Select Committee in 1952. They had felt 'there were good and obvious reasons [for the] title "Legislative Council" to lapse … and recommend the use of the term "Senate" … a word that has a well-known and widely respectable connotation'.[8] The debate on the reintroduction of a second chamber was taken up by the National Party leader Jim Bolger. He began promoting the introduction of a Senate during the tumultuous years of the 1984-1987 fourth Labour Government. In 1985 that Government established a Royal Commission on Electoral Reform in response to concerns about the fairness of the electoral system. Although the question of a second chamber was not in its immediate terms of reference it was briefly considered. The reasons considered by the Royal Commission for having a second chamber were to place a curb on the abuse or excessive power of a first chamber, to assist it in its duties and provide an additional means of representation.[9] However the Commission recommended that, 'the reintroduction of a satisfactory Second Chamber would be very difficult to achieve. In our view better progress is likely to be made through the other channels we have indicated, and in particular through the establishment of an enlarged House of Representatives with members elected by the Mixed Member Proportional (MMP) system.'[10]

After 1986, the momentum for a change to the electoral system generated by the Royal Commission, combined with the perceived excesses of the Labour Government, was

[7] 'Former PM Advocates Two-tier Parliament', *New Zealand Herald* (Auckland), 4 September 1982, 12. Sir Francis Bell's proposal was the *Legislative Council Act 1914* (NZ). Although the act was passed there were protracted delays and the legislation was never implemented.
[8] Constitutional Reform Committee, Parliament of New Zealand, *Reports* (1952) 19. Marshall was a member of this committee.
[9] New Zealand. Royal Commission on Electoral Reform, *Towards a Better Democracy* (1986), 280.
[10] Ibid 282.

beginning to build. The frustration felt by some was expressed in the following newspaper article:

> New Zealanders are disenchanted and angry with politics and politicians. They are sick of legislation being rushed through with little debate on its merits; sick of politicians reneging on their election promises: and unimpressed by the two major political parties which, under close scrutiny, differ little in substance or style.[11]

A referendum on a second chamber was included in the National Party's 1990 election manifesto and in the months leading up to the election several themes emerged about the possible reintroduction of a second chamber. Outspoken National MP Winston Peters publicly agitated for the National Party to detail its proposals for a second chamber.[12] Some church groups suggested that a second chamber would provide an opportunity for the Crown to honour the Treaty of Waitangi with equal Māori and Pakeha representation.[13] Jim Bolger continued his advocacy of the idea amongst the National Party constituency and established a caucus committee to consider proportional representation, an upper house and citizens initiated referendums.[14] Advocates of a change to the electoral system, the Electoral Reform Coalition, suggested a Senate was a dinosaur that would entrench the two-party system.[15] Editorials declared it a 'pointless diversion'[16] and reforms needed to be introduced into 'the engine-room of politics, not the attic'.[17] The drive for change was underscored by result of the General Election on 27 October 1990. The National Party won 67 of the 97 seats, equivalent to approximately 65 per cent of the seats, but they only received 47.8 per cent of the popular vote. The Labour Party won 29 seats and the only third party to win a seat was

[11] Wendy Frew, 'Upper House Revival Gains Momentum', *Financial Review* (Wellington), 10 July 1990, 17. Of particular concern to the author was the legislation enabling the sale of the state asset Telecom passed late at night at the end of the parliamentary session.
[12] John Armstrong, 'Peters Sends Challenge', *New Zealand Herald* (Auckland), 23 March 1990, 1:5.
[13] Anna Price, 'Bicultural Upper House Suggested', *Christchurch Star* (Christchurch) 8 March 1990, 9.
[14] 'Poll Views Submitted', *Evening Post* (Wellington), 18 May 1990, 12.
[15] John Armstrong, 'Second Chamber idea Meets Criticism', *New Zealand Herald* (Auckland), 9 April 1990, 1:2.
[16] Editorial, 'Resurrected Farce', *New Zealand Herald* (Auckland), 10 April 1990, 8.
[17] Editorial, 'Second Chamber', *Otago Daily Times* (Dunedin), 10 April 1990, 8.

Jim Anderton's NewLabour. If the House of Representatives had been made up of proportions reflected in the popular vote the allocation of seats would have been National 48, Labour 35, Green Party 8 and NewLabour 6.[18]

The Created Second Chamber

Exercised by the prospect of a second chamber various models were suggested by members of the public that may not have assisted the National Party's cause. P. J. Downey proposed two schemes. The first, a 48 member chamber elected by registered organisations or interest groups. The seats would be distributed amongst the groups in the following way; farmers three, manufacturers three, commerce three, trade unions nine, legal profession three, medical profession three, Maoris [sic] nine, women six, universities three, arts organisations three, sports organisations three.[19] A month later he proposed a second chamber of 100 members, 50 elected by proportional representation and the remainder nominated.[20] Sir Ross Jansen suggested a 30 member Senate; eight members elected by Māori, eight by local authorities, eight by Parliament and six members co-opted by the Senate itself.[21] These examples illustrate the first and often greatest hurdle faced by any advocate of a second chamber namely, its composition. The questions that must be resolved are the number of members and the method of their selection. A nominated chamber carries with it many negative connotations associated with political patronage yet the electoral mechanism to create an elected chamber should encourage a point of difference between the members of the respective houses. The next questions that needs to be resolved are its powers and functions

[18] P. J. Downey, 'Electoral Reform' (1990) *New Zealand Law Journal* 377; Elections New Zealand, *General Elections 1890-1993 – seats won by party* (2005) <http://www.elections.org.nz/record/resultsdata/fpp-seats-won.html> at 21 September 2009.
[19] Downey, above n 18, 379.
[20] P. J. Downey, 'A Second Chamber', (1990) *New Zealand Law Journal*, 423.
[21] Sir Ross Jansen, 'The Case for a NZ Senate', *New Zealand Herald* (Auckland), 23 May 1991, 1:8.

along with the procedures around the relationship between the two chambers. A difficult task eloquently expressed by Sir John Marriott:

> But to derive a good Second Chamber ; to discover for it a basis which shall be at once intelligible and differentiating ; to give it powers of revision without powers of control ; to make it amenable to permanent public sentiment and yet independent of transient public opinion ; to erect a bulwark against revolution without imposing a barrier to reform – this is the task which has tried the ingenuity of constitution makers from time immemorial.[22]

The use of the word 'good' is echoed in similar adjectives used by New Zealanders that have applied themselves to devising second chambers, with words such as 'suitable',' effective' or 'efficient'. Whatever the language used, the New Zealand experience underscores that the task can be an unforgiving one for those who have embarked on the intellectual exercise. Lord Cooke agreed with many others before him that the perfect second chamber did not exist and that it is beyond the wit of man to create it and adding, 'assuredly the wit of New Zealand man has proved unequal to the task'.[23]

The Indicative Referendum

In 1991, after six months in government, the National Party began to address their promise of a referendum on electoral reform. Prime Minister Bolger made no secret of his opposition to proportional representation to elect the House of Representatives that, in his opinion, 'would inevitably lead to coalitions and prevent parties from implementing specific policies'.[24] The process for reform began with an announcement by the Minister of Justice, Hon. Doug Graham that an indicative referendum would be held in September 1992 in which voters would have the opportunity to choose from several electoral system alternatives. The Electoral Poll Bill[25] was introduced in August 1991 and it established the machinery for holding the referendum. The referendum questions would be in two parts, first a choice

[22] Sir John A. R. Marriott, *Second Chambers: An Inductive Study in Political Science* (new revised ed. 1927) 238.
[23] Lord Cooke of Thorndon, 'Unicameralism in New Zealand: Some Lessons' (1999) 7 *Canterbury Law Review* 233, 239.
[24] John Armstrong, 'MPs Study Second Chamber' *New Zealand Herald* (Auckland), 16 May 1991, 1:1.
[25] The select committee recommended a new short title the Electoral Referendum Bill.

between retaining the FPP system or for a change. The second part offered a choice between four proportional representation (PR) systems; Supplementary Member, Single Transferable Vote, Mixed Member Proportional or Preferential Voting. The explanatory note of the bill stated that if the majority vote was for the retention of FPP no further poll would take place but, if the majority voted for change, a second poll held at the next general election would be between FPP and the preferred system. In the Bill's introductory speech Doug Graham stated that the Government was fulfilling a manifesto promise to seek direction from the public because of criticism of the FPP system and the lack of checks on executive power.[26] But in the two stage process any vote on the creation of a Senate would be part of a second binding referendum. The rationale being:

> the voter when voting on the senate question will know that the electoral system for the House of Representatives will be either the first-past-the-post system, which is the status quo, or the system referred to in the previous question on the ballot paper, which would be the preferred reform option. Therefore the senate question will be worded in such a way that the person voting can vote for the creation of a senate whatever system is used, or only if the present first-past-the post system is retained or only if the preferred reform option is introduced. Alternatively, the voter can simply vote against the creation of a senate.[27]

The inclusion of the Senate option in the discussion about a change to the electoral system appeared to be a recipe for confusion – even for the Minister in charge of the bill. According to the above statement the possible outcomes of a binding referendum could be one of four; a single chamber elected by FPP, a single chamber elected by a form of PR, an FPP elected House with a Senate or a PR elected House with a Senate.

As the date for the indicative referendum drew closer Ministers Doug Graham and Murray McCully, who had chaired the National Party caucus committee on electoral reform, travelled to Australia to study their federal system. They stated whatever the result of the indicative referendum the Senate proposal would form part of the second binding

[26] New Zealand, *Parliamentary Debates*, House of Representatives, 22 August 1991, 4316 (Hon. D. A. M. Graham, Minister of Justice).
[27] Ibid 4318.

referendum.[28] But the result of the indicative referendum on 19 September 1992 sent a strong message for electoral change. The voter turnout was 55.2 per cent, of whom 84.7 per cent voted for change and, of the four PR options, MMP received 70.5 per cent of the votes.[29] While some members of the National Party, such as Don McKinnon, said 'the people had sent a clear message to Parliament' the Prime Minster was being increasingly criticised in the press for attempting to scare the electorate away from MMP.[30] His suggestions that the Māori seats would be scrapped, political parties would receive state funding and Parliament would increase in size to 120 members were labelled as 'electoral reform bogeys'[31] and issues that had already been addressed by the Royal Commission. In the fall-out from the result of the referenda Doug Graham indicated that, in the next binding referendum, only those who voted for retaining FPP would be offered the further option to vote for the creation of a Senate.[32] This appeared to eliminate the possibility of having two chambers elected by different forms of proportional representation, now bringing the possible outcomes down to three; a single MMP elected chamber, the FPP status quo or an FFP elected chamber with a second chamber, the Senate.

Electoral Reform Bill

The Electoral Reform Bill was introduced under urgency into Parliament on 15 December 1992. It was in three parts that could be divided and, if passed, become: the Electoral Referendum Act 1993, to enable electors to choose at a referendum between FPP or MMP and whether they favoured the creation of a Senate; The Electoral Act 1993, that would

[28] Roger Foley, 'Justice Minister likes Aust System', *Evening Post* (Wellington), 8 September 1992, 3. The Ministers' fact finding mission was slightly derailed by reports from Australian politicians they would be 'bonkers' to inflict an Australian-style Senate on New Zealanders. 'Senate idea "Bonkers"', *Press* (Christchurch), 10 September 1992, 1.
[29] Elections New Zealand, *Referenda* (2009).
< http://www.elections.org.nz/democracy/referendum/referendums_plain.html> at 14 August 2009.
[30] 'Three Bills for Referendum', *Press* (Christchurch), 24 September 1992, 5.
[31] Editorial, 'Bolger's Electoral Reform Bogeys' *Evening Post* (Wellington), 23 September 1992, 6.
[32] 'Third Option Likely in Next Year's Electoral Referendum', *Otago Daily Times* (Dunedin), 2 November 1992, 3.

introduce the MMP system if it was carried at the referendum; and The Senate Act 1993, that would provide for the creation of a Senate only if voters rejected the introduction of MMP and carried the proposal that a Senate be created.[33] The bill consisting of 441 clauses was drafted by Ministry of Justice officials in the 12 weeks following the indicative referendum.[34] It was introduced before the Christmas break to give people an opportunity to prepare submissions to present to the Electoral Law Committee. In the introductory speeches the inclusion of the Senate option received little support from opposition members. Labour member Steve Maharey urged the Minister of Justice to remove the Senate option and that the referendum should be a clear option between FPP and MMP saying, 'this is one of the most significant choices that will be made this century as it comes to a close. I do not think the Government will serve the public well if it asks people to make a series of confusing choices.'[35] Hon. David Caygill, another Labour member, stated:

> [the Senate] has not been the subject of any referendum and it is not, in my view, the subject of any large, pressing demand from the public. It is an issue that has been raised from time to time over recent years, but that is as far as one can go. It has not had anything like the groundswell of support that proportional representation has had, nor in my judgement, is there anything like the same case for it. Those who have a different view will now be free to come to the select committee to express their view. That is their right.[36]

Other members described the Senate option as a red herring, extraneous, contentious or an unnecessary duplication. Doug Graham retorted that he was a 'little surprised' at their comments pointing out that 'most countries seem to have two Houses. Very few countries have a unicameral, one-House Parliament. So New Zealand is the exception rather than the rule, and I thought that the time had come for the country to decide whether a small, compact Senate, with somewhat constrained powers, had merit.'[37]

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[33] Explanatory Note, Electoral Reform Bill 1992 (NZ), i. The Senate Bill consisted of Parts XI to XIV and the fourth schedule of the Electoral Reform Bill 1992.
[34] New Zealand, *Parliamentary Debates,* 15 December 1992, 13177 (Hon. D.A.M. Graham, Minister of Justice).
[35] Ibid 13172 (Steve Maharey).
[36] Ibid 13164 (Hon.David Caygill).
[37] Ibid 13176 (Hon. D.A.M.Graham, Minister of Justice).

The Electoral Reform Bill was referred to the Electoral Law Select Committee for consideration. If passed, the Senate Bill would come into force on 1 July 1994 and it would also amend parts of the *Constitution Act 1986,* the *Legislature Act 1908, Civil Lists Act 1979, Evidence Act 1908, Higher Salaries Act 1977, Parliamentary Service Act 1985* and *Regulations (Disallowance) Act 1989.* Of the submissions received on the Senate by the select committee the majority were opposed to its inclusion in the referendum.[38] The departmental report of the Department of Justice officials on the Senate option provides useful background information. In their advice to the committee they acknowledged that it was 'desirable for Governments to honour manifesto promises unless there are sound reasons for not doing so'.[39] They considered the level of public support for a second chamber, which appeared to be low, but decided that was an insufficient reason not to proceed with the bill. A lack of understanding of the Senate option was also set aside but the potential for confusion on the ballot paper was a major concern because it could lead to 'a result that was unintended by the electorate'.[40] The possibility of an MMP elected House and a Senate, elected by a different form of proportional representation, 'would be an unduly radical departure from existing arrangements within a short space of time and … considered to be an irresponsible option to put to the voters'.[41] In its report the Electoral Law Committee recommended the House separate out the Senate Bill but it should 'remain available for future select committee consideration should the option of the present first-past-the-post be carried at the following

[38] 'The public submissions were really quite clear: 270 submissions were against the Senate and 3 submissions were in favour of it'. New Zealand, *Parliamentary Debates,* 7 June 1994, 1450 (Richard Northey).
[39] Advice to Electoral Law Select Committee. Parliament of New Zealand, Wellington, 3 May 1993, 24.
[40] Ibid 26.
[41] Ibid. Doug Graham had talked about a vote for a Senate only being available to those who first selected FPP to discount this eventuality but this does not seem to have been considered by the committee.

referendum.'[42] This course was accepted by the House and the Senate Bill was retained by the committee while the Electoral Referendum (No.2) Bill and the Electoral Bill proceeded.[43]

Previous Second Chamber Proposals

The Senate Bill having been set aside became redundant when the November 1993 binding referendum on the voting system returned a result in favour of a change to MMP.[44] But if events had delivered an alternative scenario and the Senate option was carried what would the New Zealand Parliament have looked like and would it have delivered the promised checks and balances on the executive? Can an examination of the bill against previous proposals enable us to put some shape to the New Zealand Senate? The first of those proposals was the reforming *Legislative Council Act 1914.* The bill was promoted by Sir Francis Bell who was a member of the Legislative Council and a Minister. However the act languished on the statute books after being subjected a number of delaying amendments and was never bought into force. Of the many proposals for reform of the Legislative Council Sir Francis Bell's act is regarded by commentators such as Geoffrey Palmer as the most important and therefore a worthy template against which to consider the 1992 Senate option.[45] The second proposal under consideration is in the form of a select committee report.[46] Following the abolition of the Legislative Council in 1950 the Constitutional Reform Committee undertook the task of recommending an alternative second chamber plan. The report under the chairmanship of Hon R.M. Algie was presented in 1952. The opposition had not participated on the committee or in any debate on the report and Algie's nominated

[42] Electoral Reform Committee on the Electoral Reform Bill, Parliament of New Zealand, *Report* (1993) 9.
[43] Both bills were passed on 17 August 1993.
[44] The binding referendum was held alongside the General Election on 6 November 1993 46.1 per cent voted for the FPP system and 53.9 per cent voted for the proposed MMP System. The voter turnout was 85.2 per cent. Elections New Zealand, *Referenda* (2009).
< http://www.elections.org.nz/democracy/referendum/referendums_plain.html> at 14 August 2009
[45] Geoffrey Palmer, *Unbridled Power: An Interpretation of New Zealand's Constitution & Government* (2nd ed, 1987) 233.
[46] Constitutional Reform Committee, Parliament of New Zealand, *Reports* (1952).

chamber proposal 'met with a mixed reception'.[47] But in the course of their work the committee had fully canvassed bicameralism both in theory and practice and the resulting substantial proposal is a testament to their consideration of the topic.

Electoral Districts

If the 1992 Senate option had carried, before the election, the Representation Commission would have divided New Zealand into six senatorial districts with two in the South Island and four in the North Island. Each of the four Māori electoral districts[48] would be allocated to a different senatorial district. For each of the six senatorial districts five Senators would be elected making a total of thirty. Subject to certain electoral provisions, any person registered as an elector could be a candidate for the Senate but a person couldn't be elected for both the House of Representatives and the Senate.[49] Under the Single Transferable Vote or STV system candidates could make a joint request for their names to be grouped together on the ballot paper. This and other clauses in the Electoral Reform Bill were directly derived from the Australian *Commonwealth Electoral Act 1918*.

In contrast, the earlier *Legislative Council Act 1914* had divided the country into four electoral divisions, two in the North Island and two in the South Island in a fairly basic bisection of the country. In a departure from what had been a nominated chamber, under this act, the Councillors would have been elected by proportional representation in the form of a transferable vote system.[50] For the second of the proposed schemes under consideration, the 1952 recommendations of the Constitutional Reform Committee, electoral districts or the electoral method was not a consideration as the members would have been nominated.

[47] W. K. Jackson, The New Zealand Legislative Council: A Study of the Establishment, Failure and Abolition of an Upper House (1972) 201.
[48] There are currently seven Māori electorates.
[49] Electoral Reform Bill 1992, s 285 (2).
[50] Legislative Council Act 1914 (NZ) Second Schedule (3) Ballot Paper, Third Schedule, Method of Counting Votes.

Elections and Terms

The 1996 General Election would have been the first time New Zealanders could vote for both the House of Representatives and a Senate. The elections would have been held simultaneously and in a country where voting is not compulsory this would guarantee the best possible voter turn out. There would have been two ballot papers. One for the House of Representatives would require voters to select one electorate candidate from a number under FPP. The other ballot paper would be for the Senate and use the STV voting system. This would give the option of voting for a party ticket 'above the line' or by numerically ranking candidates by preference.[51] Potentially any change to the voting system can cause confusion and responsibility for public education would rest with an agency such as the Electoral Commission. More fundamental is the debate around staggering the election terms of Senators. In some jurisdictions, the Australian Senate for example, Senators serve longer terms than the members of the House and there are elections where half of the Senators are re-elected with the rationale being to ensure a greater degree of continuity. The bill intended that members of the House of Representatives and the Senate would be elected on the same three year cycle but it is clear from the departmental papers they had revisited and rejected possible alternatives such as all the Senators in half the Senatorial districts stand for election every three years or half the members of all Senatorial districts stand for re-election every three years.[52] The select committee received the following advice from Ministry of Justice officials:

> After discussions with various experts in Australia, an assessment was made that having a longer term of office for members of the Senate is not a particularly important consideration in ensuring the achievement of its functions. In any event, a reasonably high level of continuity of membership is likely, even with three yearly elections for all Senators, by using the Single Transferable Vote (STV) voting system. More importantly, a system where all Senators come up for re-election at each general election gives full effect to public opinion,

[51] A sample senate ballot paper is included in the Electoral Reform Bill, s 322 (1).
[52] Advice to Electoral Law Select Committee. Parliament of New Zealand, Wellington, 3 May 1993, 27.

> and is more likely to engender public confidence in the institution of the Senate, if established, than a series of staggered elections.[53]

The 1914 *Legislative Council Act* took the approach of electing members at different times with a set length of tenure. If the act had been put into operation, at the first election seven members in each of two divisions and five members in the remaining two divisions would be elected. Thereafter, forty members would be elected but alternatively eleven from two divisions and nine from the other two.[54] The length of tenure of an individual Councillor would be until the dissolution of the Parliament that would take place five years after their election.[55] The 1952 Constitutional Reform Committee, under the chairmanship of Hon R.M Algie, considered the tenure of their nominated Senators in some detail. It was intended that the members of the second chamber would be nominated by the party leaders, 'proportionate to the relative numerical strength of the [parties] in the House of Representatives'.[56] The life of both chambers would be the same and the members of the Senate would be appointed for three years but eligible for reappointment. The reason for having the terms of both Houses the same was because a party structure would undoubtedly exist in a second chamber and if the term was longer than the lower chambers electoral cycle a new incoming government could be faced with a second chamber that was naturally hostile to their policies. The committee stated, 'a Prime Minister must go forward with the programme of legislation upon which he has been elected to office by the electorate … why should a party that has in fact been rejected by the electorate retain such a commanding position in a non-elective part of the Legislature?'[57] The committee concluded the duplication of party strength in the second

[53] Ibid.
[54] Legislative Council Act 1914 (NZ) s 14.
[55] Ibid s 11.
[56] Constitutional Reform Committee, Parliament of New Zealand, *Reports* (1952) 11.
[57] Ibid 22.

chamber was a positive feature and would ensure it would work with the popular assembly and 'be the ally, and not the opponent, of the public will'.[58]

Senate Membership

Based on the provisions of the Electoral Reform Bill 1992 the New Zealand Senate would have had 30 members. This would have made it about one-third the size of the 97 member House in 1990 and bring the combined number of MPs and Senators to a higher number than the proposed 120 member MMP House. This is fewer than the 40 Councillors in Bell's *Legislative Council Act 1914*, when the seats in the House were 80 and the 1952 proposal of 32 Senators when there were 80 seats in the House. The Electoral Reform Bill did not provide for separate Māori representation in the Senate. When the reintroduction of a second chamber was discussed in the early 1990s there were suggestions that it could be a forum for Māori representation. For example, Bishop Peter Atkins promoted a 34 member chamber 'to represent the wisdom of non-politically aligned citizens, or kaumatua, Maori and Pakeha'.[59] But any initiative to seek increased Māori representation in a second chamber was overtaken by concerns about the proposals for an MMP Parliament that would remove the Māori seats that had been in existence since 1867. This became a major issue during the select committee process with the committee holding over 20 nationwide hui or meetings to discuss the implications with Māori. As a result the select committee's recommendation to retain the Māori seats in the House of Representatives was accepted. But if the creation of a Senate was a matter for public debate today, based on the recent controversy over Māori representation on the Auckland 'super city' council, it is probable the question of Māori representation would be an issue.[60] In Bell's 1914 forty-member elected Council there was

[58] Ibid 24.
[59] 'Upper House Plan', *New Zealand Herald* (Auckland), 17 September 1990, 1:3.
[60] The Royal Commission on Auckland Governance recommended the new council should have permanent dedicated Māori seats but the National government decided against it. There were many submissions on this point to the Local Government (Auckland Council) Bill 2009. The committee noted that there were options for

the provision for the Governor to appoint Māori men to the Council. There could be three at any one time and they would be appointed for six years.[61] Bell's act also included a clause that 'when and so soon as women are eligible for election as members of the House they shall also be eligible for nomination and election as members of the Council'.[62] The Algie Committee did not consider the question of Māori representation in a second chamber but they did go into considerable detail on the party nomination process that would deliver a hand-picked Senate.[63] The 1992 bill proposed amendments to the *Constitution Act 1986* that would mean a member of the Executive Council or a Minister of the Crown could be either a member of Parliament or a Senator. However, the Prime Minister must be a member of the House of Representatives. [64] At its first meeting the Senate would choose one Senator to hold the office of President.[65] Although there is little detail in the bill the office of President of the Senate appears to be an equivalent role to that of Speaker of the House of Representatives.

If the Senate option had been carried, following the 1996 general election, Parliament would have consisted of two chambers, a House of Representatives of about one hundred members, elected by FPP and a Senate with thirty members, elected by STV. Because the election for both houses would be held simultaneously it is likely there would be a similarity in party strengths but it could potentially introduce other members such as independents. The potential administrative impact on Parliament itself is also worth noting. While a second chamber still physically exists in Parliament House what refurbishment might have been required? The Senators would also need support staff and services and there would implications for the Office of the Clerk in managing the two chambers and the related

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Māori representation available and it was up to the people of Auckland to decide how that should be realised. Auckland Governance Legislation Committee, Parliament of New Zealand, *Report on the Local Government (Auckland Council) Bill* (2009) 9.

[61] *Legislative Council Act 1914* (NZ) s 21.

[62] Ibid s 18(2).

[63] Constitutional Reform Committee, Parliament of New Zealand, *Reports* (1952), 28-31.

[64] Electoral Reform Bill 1992 (NZ) s 401.

[65] Ibid s 402.

publications. Although public debate on the details of the Senate option was circumvented by events there is likely to have been vigorous opposition to the perceived additional costs. By way of illustration, when the introduction of MMP increased the size of the House to 120 members a group that were opposed forced an indicative Citizens Initiated Referendum where 81.46 per cent of the voters supported reducing the numbers to 99.[66]

Functions and Powers

According to the explanatory note of the bill the primary functions of the 1992 Senate would be to:

> Give further consideration to legislation passed by the House of Representatives. Its secondary function [was] to reduce the workload of the House by providing a channel for the introduction of private Bills, local Bills, and governmental Bills (other than Money Bills), by carrying out long-term investigations into topics of concern to the nation and by providing a forum for small parties that would not have an opportunity to air their views in the House of Representatives.[67]

The New Zealand Senate would not have the power to reject a bill but it could amend a bill. Any amendments made by the Senate would need to be agreed to by the House of Representatives. All bills (except money bills) could be introduced into either the House or the Senate and then embark on a process that moved them between the two chambers both of which had powers to suggest amendments within a defined time period. Money bills, as defined in s 272 of the bill and certified as such by the Speaker, could only be introduced in the House of Representatives and not be amended by the Senate (although the Senate could ask that the House amend it). They could only be delayed by the Senate for a maximum of one month before they would be presented to the Governor-General for Royal assent. In all other instances a typical process would begin with a bill being introduced in the House of Representatives and sent to a select committee for consideration. It is important to note that in

[66] Elections New Zealand, *Return of Citizens Initiated Referenda Poll Votes – Reducing the Number of MPs in Parliament* (1999) < http://www.electionresults.govt.nz/electionresults_1999/> at 25 October 2009.
[67] Electoral Reform Bill 1992 (NZ) iii.

the early 1990s the reporting time for select committees was shorter than the current six month period. At the point the bill was reported back to the House the Senate would be invited to comment and submit recommendations on the bill. They would have one month to do so and the recommendations would take the form of a Supplementary Order Paper. During this time the bill could progress through the second reading stage in the House but must wait for the Senate's recommendations for the committee stage. After the third reading in the House the bill would be sent to the Senate and they would have six months to consider any further amendments. If none were recommended it would be submitted to the Governor-General but if it was amended it would be sent back to the House. Further amendment and delay periods could come into play at this point. A bill that was introduced and passed in the Senate would also go through a similar approval or amendment process in the House of Representatives. But what is different is that the House had the power to reject bills passed by the Senate.[68]

Some might question what a second chamber could bring to the legislative process that a select committee process could not? The Ministry of Justice officials advice on the Electoral Reform Bill offers an insight from the perspective of public servants where 'the enhanced role given to select committees in recent years is that [they] are given more freedom to alter the policy proposals set out in legislation, there are fewer opportunities to "polish" the drafting by refining successive drafts implementing the same policy.'[69] The technical correction of legislation was seen by the officials as a review role that could be undertaken by the Senate. The Electoral Law Select Committee was advised the powers of the Senate were intended to steer a middle course:

> To enable the House of Representatives to ultimately override resistance to Government measures on the part of the Senate, but at the expense of delay. There would accordingly be

[68] Electoral Reform Bill 1992 (NZ) s 278.
[69] Advice to Electoral Law Select Committee. Parliament of New Zealand, Wellington, 3 May 1993, 28.

> clear incentives for the Government of the day to make changes to legislation in response to concerns voiced in the Senate, in order to ensure the speedy passage of legislation.[70]

But an examination of the complexities of the passage of bill suggests anything but a speedy process without the intervention of an urgency motion or the often criticised practice of a lower house putting pressure on a second chamber to agree to bills by sending up a large number at the end of a session. The explanatory note and bill give no further guidance on the other stated functions of the Senate namely long term investigations or a forum for small parties. Examining the bill does give the impression that once the drafters had worked through the various elements of the design of the Senate the procedures relating to the passage of bills and resolution of disputes between the Houses (which there are none) would ultimately be left to Parliament to decide as the bill had progressed.

Bell's proposed 1914 Legislative Council had the power to review and revise public bills following their passage through the House. Money bills could not be amended but the Council could suggest changes within a month of its being sent to the Council. Section 6 of the *Legislative Council Act 1914,* that referred to a money bill automatically progressing for Royal assent after a month before the Council is reproduced as s 275 in the Electoral Reform Bill. Where there was a disagreement between the Houses s 7 of Bell's Act allowed the Governor to convene a joint sitting where the members would vote together on the disputed bill. The proposed 1952 Senate would have the power to delay a bill (that was not a money bill) for two months to confer with the House regarding amendments. At the end of the time, if the two chambers had not reached an agreement, 'the decision of the House of Representatives – in its original form, or with such amendments as may be agreed to – must prevail'.[71] This Senate proposal also included the establishment of several Joint Standing

[70] Ibid.
[71] Constitutional Reform Committee, Parliament of New Zealand, *Reports* (1952), 12.

Committees to take over the work of the Statutes Revision Committee, Public Petitions Committee, Local Bills Committee and examine all delegated legislation.

A Functional Model

When compared to the two earlier models the 1992 Senate option seems superior in most areas but could still not be considered a fully functional model. There seems to be good arguments for having the election for both chambers on the same day. But, there may be questions about whether the FPP/STV combination would have delivered a sufficient distinction in party make-up between the two Houses. The proposed size of thirty senators seems sound but the omission of Māori representation was not fully debated and would undoubtedly be contentious today. The bill's main focus was on the legislative review functions of the Senate which could have merit, particularly in technical revision. In a triennial electoral cycle the Senate delay provisions of six months, and potentially longer if a bill is also delayed in the House, would be a feature that a government would need to manage in order to successfully advance their legislation. This is the 'middle course' in the Senate powers promoted by the Ministry of Justice officials. The House would ultimately have the power to override the amendments of the Senate the delay function would be an incentive for a government to accept changes. For those citizens used to the passage of legislation in a unicameral parliament, at first glance, the circular passage of bills, amendments, recommendations and delay provisions seems overly-complicated. However, being able to introduce bills in the Senate could be a useful feature when the legislative programme is particularly demanding.[72] Undoubtedly some of the procedural deficiencies would have been addressed if the bill had progressed. But when it became increasingly clear that the inclusion of the Senate option in the binding referendum question was opposed from all quarters, it was

[72] For example, the full legislative programme of the current National Government that has lead to a number of urgency motions.

quietly set aside. As the decision filtered through to the news media a cartoon in the *Press* summed up the thinking of many. It showed the Prime Minister Jim Bolger on top of the Parliament buildings examining what appears to be a toilet or an 'out-house' and saying 'but I said I wanted an upper house'.[73]

Following the vote for MMP in November 1993 the Senate Bill remained before a select committee until June 1994 when it was reported back to the House with the recommendation it not proceed. Some members did not restrain themselves from less than complimentary comments about the bill. But Hon. Winston Peters did attempt to offer some reasons as to why the bill had failed:

> The background to this Bill is whether there is a need for checks and balances upon the Lower House. That is its purpose, that is its constitutional background, and that is its historical justification. I am saying to members it would be total misnomer, given as the Senate would be the mirror image as the Lower House as they have sought to create it. That is why it has lost any public sympathy, even from those like me who believed that there was good cause to look seriously at the proposal.[74]

Richard Northey believed the issue of the powers of a second chamber had not been satisfactorily resolved. 'either we have an Upper House that really has no powers – it might delay things a little bit, but it is useless – or we have an Upper House that has powers equal to those of this House and can frustrate the will of the people and lead to a deadlock in Government.[75] Similar sentiments were expressed, in slightly more colourful language, by National MP Michael Laws, 'at the end of the day, a Senate either has some teeth or it is gutless. This Senate Bill was going to present us with a gutless Senate that had the ability merely to delay'.[76]

[73] Al Nisbet, Cartoon, *Press* (Christchurch), 29 May 1993, 20.
[74] New Zealand, *Parliamentary Debates*, House of Representatives,7 June 1994, 1449 (Hon. Winston Peters).
[75] Ibid 1451 (Richard Northey).
[76] Ibid 1453 (Michael Laws).

An Acceptable Model

Since the abolition of the Legislative Council in 1951 the preferred New Zealand option has been to divest the review functions of a second chamber within the existing institutional structure of the unicameral Parliament through the development a strong select committee system. MMP, although not without some anomalies, has broken the single-party dominance and delivered on the promise of a more representative House. The triennial election cycle provides the public with opportunity to give a government another three years in power or not. The fact that the New Zealand Parliament has devolved from the bicameral Westminster model seems to be of little concern to the average citizen and for some a matter of pride. When the Senate option was proposed there was little attempt in the press to understand or articulate the constitutional arguments for a second chamber. It was summarily dismissed as something that had failed in the past and was a relic of a time when the nation had stronger associations with Great Britain.

Following his study of the Legislative Council Professor Keith Jackson concluded that its failure had been due to the small size of the country, the non-federal system that strengthened the power of the Lower House but fundamentally, 'the lack of any firm foundation in New Zealand society and a general lack of acceptance in the political arena'.[77] In his consideration of New Zealand's unicameral status, when compared to Great Britain's House of Lords, Lord Cook of Thorndon stated, 'the New Zealand society and ethos have always been essentially egalitarian'.[78] The symbolism of the rejection of an institution that harked back to a class-system that had been equally rejected by British settlers is therefore not surprising. After nearly one hundred years the imposed political institution that the upper

[77] W. K. Jackson, above n1, 20.
[78] Lord Cook of Thorndon, above n 21, 234. Although there is undoubtedly a gap between the cultural ideal and the reality.

house represented was swept away and any proponents for its reintroduction need to acknowledge the significance and symbolism of those events.

The architects of the bill had undoubtedly looked to the Australian Senate as a potential model. But there are many differences between the two countries, with the most obvious being the size which has influenced the governance structures. The development of individual parliaments in the Australian states and territories followed by federation in 1901 under the *Australian Constitution Act 1900* has put the two countries on very different constitutional trajectories. The *New Zealand Constitution Act 1852* (UK) had established a quasi-federal system of six provinces but they were abolished in 1875 and the Legislative Council received the same treatment in 1950. In terms of local government, a major reorganisation in 1989 amalgamated many small local councils into larger authorities. The current reorganisation of the governance of the Auckland region to create a 'super city' suggests a national preference for streamlining bureaucratic structures. In 1983 G.A. Wood wrote:

> New Zealand might be described as a straight "ballot box democracy" with one sole focus of institutional power, and a power grounded in triennial elections and unlimited between elections. In a small and largely homogeneous society, even today comprising only three million people, it has been possible to maintain close, intimate, relationship between government and electorate.[79]

Since 1983 the population has grown by over one million and is undoubtedly less homogenous. Although occasionally discussed the triennial electoral cycle does not appear to be under any immediate threat.[80] New Zealand still has a single chamber, now elected by MMP necessitating coalition governments, but what stands out from Wood's statement is the concept of maintaining a close relationship between the people and their representatives. In a

[79] G.A. Wood, 'New Zealand's Single Chamber Parliament: An Argument for an Impotent Upper House?' (1983) 36 *Parliamentary Affairs* 334.

[80] The question of increasing the term of Parliament to four years was put before the electorate in referenda in 1967 and 1990. On both occasions nearly 70% voted to retain the three year term. The relevant section 17(1) of the Constitution Act 1986 is a reserved provision requiring a majority of 75 per cent of the House of Representatives or the majority of valid votes cast at a poll of electors to amend or repeal.

small country, both in geographical size and population, the intimacy of that space has been transposed onto our political institutions. When this preference for uncomplicated governance structures is combined with an egalitarian ethos, in the public mind, a second chamber reflects both of those components in a negative way. Any perceived attempt to throw up another institutional structure and populate it with Senators would undoubtedly be treated with some degree of suspicion and mistrust.

Conclusion

If New Zealand's involvement with two chambers of Parliament was described in terms of a human relationship it would read like an epic saga, with an arranged marriage, orchestrated divorce, occasional regret and the odd flirtation. But the preferred option has been for the single life and since 1951 the New Zealand Parliament has been unflinchingly unicameral. While New Zealand has moved away from bicameralism the traditional review functions of a second chamber now firmly reside in the select committee process. The 'helpful workmate' model favoured by the 1952 Algie committee is expressed in the proportionality of the select committee membership. Today all bills, except those progressed under urgency, are before a select committee for a six month period where submissions from the public are considered.[81] The high public respect in the value of the select committee scrutiny of bills usually generates a public outcry if a government attempts to circumvent the process through urgency motions. Along with the consideration of bills select committees

[81] New Zealand Parliament, *Standing Orders of the House of Representatives* (2008) S. O. 286 <http://www.parliament.nz/NR/rdonlyres/81D0893A-FFF2-47A3-9311-6358590BEB3D/100828/standingorders2008_5.pdf> at 25 November 2009.

conduct financial reviews of public organisations and hold inquiries within their subject areas.[82]

The National Government's 1992 Senate proposal was another in a long line of ingenious plans none of which have captured the public imagination. The Senate option as embodied in 172 clauses of the Electoral Reform Bill did reflect a serious attempt to devise an acceptable second chamber for New Zealand. Comparing the Senate option with earlier proposals has highlighted some procedural areas that would have benefited from additional work. This is not a criticism of the drafters but an acknowledgement of the necessity of Parliament itself to ultimately determine those matters. But in terms of it being acceptable to New Zealand society the historical baggage of the Legislative Council, the cultural ethos of an egalitarian society and the preference for intimate and responsive government is an obstacle to support for the reintroduction of a second chamber.

In 1992 there were some, like the Prime Minister Jim Bolger, who had a long standing interest in bicameralism, but the proposal took on the appearance of an attempt to deliberately derail the Royal Commissions recommendations. It reinforced the public's perception of a political party attempting to cling onto the power they enjoyed, courtesy of the FPP system. Undoubtedly, some of the negative media comment about an upper house and the momentum around MMP detracted from a reasoned debate on the merits of a second chamber. The Senate option went a long way towards being a theoretically functional model but based on New Zealand's history, public attitudes towards a second chamber and the move towards PR its rejection at the time was unsurprising. Nearly twenty years later, that situation appears to be unchanged but as discussion builds towards the 2011 referendum on MMP, and given the

[82] New Zealand Parliament, *Parliament Brief: Select Committees* (2006) <http://www.parliament.nz/NR/rdonlyres/FDB2C1CD-25E6-47A9-BED7-D97AAC853A9B/19108/5selectcommittees3.pdf> at 25 November 2009.

right circumstances, history suggests a National Government may once again propose the creation of a Senate.