



# REVIEW OF REGULATORY FRAMEWORK FOR THE SALE AND SUPPLY OF LIQUOR

## PART 1 ALCOHOL LEGISLATION AND THE CONSCIENCE VOTE







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The Law Commission is an independent, publicly funded, central advisory body established by statute to undertake the systematic review, reform and development of the law of New Zealand. Its purpose is to help achieve law that is just, principled, and accessible, and that reflects the heritage and aspirations of the peoples of New Zealand.

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The Hon Simon Power  
Minister Responsible for the Law Commission  
Parliament Buildings  
WELLINGTON

May 2009

Dear Minister

NZLC R106 – REVIEW OF REGULATORY FRAMEWORK FOR THE SALE  
AND SUPPLY OF LIQUOR: PART 1: ALCOHOL LEGISLATION AND THE  
CONSCIENCE VOTE

I am pleased to submit to you Law Commission Report 106, Review of Regulatory Framework for the Sale and Supply of Liquor: Part 1: Alcohol Legislation and the Conscience Vote, which we submit under section 16 of the Law Commission Act 1985.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Geoffrey Palmer', with a horizontal line underneath.

*Geoffrey Palmer*  
President

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The Commissioners responsible for this project are Geoffrey Palmer and Val Sim. The Legal and Policy Advisor for this report was Ryan Malone.

# Review of regulatory framework for the sale and supply of liquor

## Part 1: Alcohol legislation and the conscience vote

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# Chapter 1

## Summary

### WHY IS THE LAW COMMISSION CONCERNED ABOUT THE USE OF THE CONSCIENCE VOTE?

- 1.1 The Law Commission wishes to draw attention to the use of the conscience vote to determine laws related to the sale and supply of alcohol. The Commission believes the conscience vote, where Members of Parliament cast their votes free from the usual expectation of party discipline, can reduce the quality and effectiveness of the alcohol laws that Parliament enacts.
- 1.2 While there are clearly topics where the exercise of a conscience vote is entirely understandable – capital punishment and abortion law, for example – the Commission believes there are compelling grounds for dispensing with the historical practice of applying the conscience vote to alcohol Bills.
- 1.3 Alcohol is an important social issue. While the consumption of alcohol can bring considerable enjoyment, the harmful use of alcohol contributes to a wide variety of serious social harms, in particular in the areas of crime and public health. Continuing to treat alcohol Bills on the basis of a conscience vote may produce legislation that fails to deal with these issues effectively. Amendments stand a much greater chance of being incorporated into a Bill in a situation where voting is highly fluid and outcomes are unpredictable. The resulting statute can lack coherence and structural logic.
- 1.4 The Commission suggests it is preferable that the House of Representatives vote on alcohol Bills using standard party-based voting rather than the conscience vote. In doing so, the House would be treating alcohol Bills in the same way it does issues of comparable seriousness, for example, Bills controlling the sale, supply and use of illegal drugs.
- 1.5 The Commission recognises that the decision to grant a conscience vote in any given instance is not a subject for the Executive Government so we make no recommendations to the Executive Government.
- 1.6 Whether there is a conscience vote is a question for the caucus of each political party represented in Parliament. The Commission recognises that the use of the conscience vote can be a politically contentious issue within the House. Nevertheless, our concern lies with the quality of future laws that will regulate the sale and supply of alcohol.

- 1.7 Organisations and individuals besides the Law Commission have expressed concerns about the use of the conscience vote for alcohol Bills, including the New Zealand Police, the Alcohol Advisory Council of New Zealand, the New Zealand Drug Foundation, the Liquor Licensing Authority, and several medical professionals. In recent decades some Members of Parliament have also argued against the use of the conscience vote for alcohol Bills. The Law Commission is not alone in calling for a change.
- 1.8 The Parliament has in front of it important legislative proposals in relation to alcohol. It would be helpful if decisions on limiting conscience voting on alcohol Bills were decided before those substantive decisions are made.

# Chapter 2

## Parliamentary law-making in New Zealand

### THE LEGISLATIVE PROCESS

- 2.1 Before analysing the use of the conscience vote in the New Zealand House of Representatives (the House), this chapter will briefly outline the relevant aspects of the parliamentary legislative process. This is followed by an overview of party discipline in the House and its role in facilitating accountability to the electorate.
- 2.2 The process of a Bill becoming an Act of Parliament involves several stages.<sup>1</sup> After the Bill has been drafted it is introduced into the House. If the House decides to proceed with the Bill it is given a first reading. It is then sent to a parliamentary select committee for scrutiny, which includes taking public submissions on the Bill.<sup>2</sup> The Bill may then be given a second reading. If so, the House will have committed itself to the essential principles of the Bill.<sup>3</sup> A Committee of the Whole House will then consider the Bill to ensure that its provisions are consistent with the Bill's underlying principles as agreed to on second reading.<sup>4</sup> The Bill is then given a third and final reading. The Bill becomes an Act of Parliament when it receives the Royal Assent from the Governor-General.<sup>5</sup> This process is outlined in the chart below.

1 See generally *Parliament brief: The legislative process* (Office of the Clerk of the House of Representatives, Wellington, August, 2006).

2 Select committee scrutiny may be bypassed if the House takes urgency on a Bill, while Appropriation and Imprest Supply Bills are not referred to a select committee. McGee has estimated that 95 % of all government Bills are referred to a select committee for examination: David McGee *Parliamentary practice in New Zealand* (3 ed, Dunmore Publishing, Wellington, 2005) 348-349.

3 McGee, above n 2, 363.

4 McGee, above n 2, 367.

5 The New Zealand Parliament is unicameral, meaning that there is no second chamber that approves a Bill before it is submitted for the Royal Assent.

HOW A BILL BECOMES AN ACT OF PARLIAMENT	
Stage	Votes
Introduction	No vote
1st reading	Vote
Select committee	Multiple votes in committee
2nd reading	Vote
Committee of the Whole House	Multiple votes in committee
3rd reading	Vote
Royal Assent	–

- 2.3 At the conclusion of the first, second, and third reading debates, the House votes on the motion that the Bill be read.<sup>6</sup> If the motion is agreed to, the Bill progresses to the next stage. If it is negatived, the Bill will be defeated. The voting members of a select committee decide whether to recommend that the Bill be passed by the House, and if so, what amendments (if any) should be made to it. The Committee of the Whole House considers each part of a Bill, and votes on any proposed amendments to the Bill's individual clauses. Any Member of Parliament (MP) can move an amendment in a Committee of the Whole House, although in practice government amendments are usually the responsibility of the Minister in charge of the Bill. Large sets of proposed amendments are typically contained in a separate Supplementary Order Paper (SOP).<sup>7</sup>
- 2.4 The House may vote on a motion in three ways.<sup>8</sup> First is the 'voice vote'. Those MPs in favour of a motion will answer 'Aye' and those opposed 'No'. The Speaker makes a determination where the majority lies. If an MP in the minority calls for a further vote, the House then moves to the 'party vote'.<sup>9</sup> Here a representative of each party informs the Clerk of the House of the numbers of votes cast by their party, either for or against the motion.<sup>10</sup>
- 2.5 If there is some doubt as to the result of the party vote, and the Speaker allows it, a 'personal vote' may be held. Here MPs physically divide into the 'Ayes' or 'Noes' lobby (a division). Tellers will count the votes and report back to the Speaker who then announces the result to the House. The written parliamentary record (known as Hansard) records how individual MPs voted on the motion. Personal votes are now relatively uncommon in the House given the availability of the party vote. They are still however used for conscience votes.

6 The introduction of a Bill is not debated or voted on by the House.

7 Amendments can only be considered if they "are relevant to the subject-matter of the Bill, are consistent with the principles and objects of the Bill, and otherwise conform to Standing Orders and the practices of the House": SO 292(2) Standing Orders of the House of Representatives (as amended 11 September 2008).

8 See generally McGee, above n 2, 202-214.

9 The party vote was introduced in the 1996 Standing Order changes to accommodate the multi-party House that would result from the pending Mixed Member Proportional electoral system (MMP). Previously a voice vote was followed by a division (the equivalent of a personal vote) if one was called for by a member of the minority.

10 There is also a third option of abstention.

## THE EVOLUTION OF PARTY DISCIPLINE

- 2.6 The party vote mechanism does not prevent an MP from voting contrary to his or her party. At the party vote stage, a party may cast what is known as a ‘split-party vote’.<sup>11</sup> Here the members of a party vote differently on a motion, and the Clerk of the House is informed of the voting decisions of the members of the party.<sup>12</sup> Although the split-party vote allows for individual voting decisions to be recorded in Hansard, it is not a personal vote. This only occurs when MPs divide into the Ayes and Noes lobbies.
- 2.7 Furthermore, MPs from the same party may vote differently from one another even though there is no official split-party vote. This may occur where an MP ‘crosses the floor’ and votes against his or her own party. That an MP does so when the party has not declared the vote to be a split-party vote can signal that the MP is acting contrary to the wishes of the party and outside the usual rules of party discipline that exist in the chamber.<sup>13</sup>
- 2.8 Finally, there are four categories of Bills that the House considers.<sup>14</sup> Government Bills dominate the proceedings of the House and together comprise a government’s legislative agenda. Accordingly, only a Minister can introduce a government Bill. By contrast, members’ Bills are mostly in the name of non-ministerial members of the House.<sup>15</sup> They are fewer in number because Standing Orders limits their number to four members’ Bills awaiting a first reading at any one time. Local Bills and private Bills differ from government and members’ Bills to the extent that their application is limited either by locality (local Bills) or to specified private interests (private Bills). Local Bills and private Bills tend to be few in number. The order and voting procedure in the House is the same for all categories of Bills, although the introduction and notification requirements differ.<sup>16</sup>
- 2.9 To place the conscience vote in its proper context, it is necessary to recognise the highly disciplined nature of New Zealand parliamentary parties. It is now uncommon for an MP to defy the ‘whip’ and cross the floor to vote against his or her own party. But this has not always been the case. Between 1854 (when the first Parliament sat in Auckland) and the late 1880s there was no such thing as party discipline. While MPs did coalesce into liberal or conservative factions depending on their view of the contentious issue of land ownership, parties in the modern sense of the word did not exist.<sup>17</sup> In the absence of parties, individual MPs largely made their own decisions on votes taken in the House.<sup>18</sup>

11 McGee, above n 2, 206-207.

12 For example, Labour, National, and New Zealand First all cast split-party votes on the first reading of the Marriage (Gender Clarification) Amendment Bill, with some members of each party voting in favour of the Bill and some against it: (7 December 2005) 677 NZPD 6287.

13 For example, Hon Tariana Turia (Labour) and Hon Nanaia Mahuta (Labour) voted against the first reading of the Labour government’s Foreshore and Seabed Bill: (6 May 2004) 617 NZPD 12743. Labour cast a standard party vote, while the votes of Hon Tariana Turia and Hon Nanaia Mahuta were recorded under the ‘Other’ category in Hansard.

14 McGee, above n 2, 305-312.

15 That is to say government backbenchers, or members of opposition or support parties. Technically Ministers may introduce a members’ Bill in their capacity as a Member of Parliament.

16 McGee, above n 2, 341-344.

17 Keith Sinclair “The significance of the ‘Scarecrow Ministry’” in Robert Chapman and Keith Sinclair (eds) *Studies of a small democracy* (Blackwood and Paul, Auckland, 1963) 106.

18 B. J. Dalton *War and politics in New Zealand* (Sydney University Press, Sydney, 1967) 10.

- 2.10 This situation changed markedly when the Liberal party came to power in 1891. The party won the election by directly appealing to small farmers and urban workers with a pledge to institute favourable reforms.<sup>19</sup> When the House assembled the Liberals voted as one on the election of the Speaker and ousted the Government nominee.<sup>20</sup> The Atkinson ministry then resigned, and the Liberals took office. The party subsequently implemented the policies that had won favour in the electorate and held office for the next 22 years. Two important precedents had thus been established. First, electoral success was to be found in directly appealing to the electorate rather than the accustomed practice of building loose coalitions in the House. Second, in order to retain public support, parties had to vote in the House as a unit in order to facilitate the passage of legislation that implemented policies that a majority of the electorate preferred.
- 2.11 What the Liberals established, the newly emerged Labour party perfected. Beginning with a trickle of MPs from 1905, by 1919 the party had become a well established force in Parliament. Labour MPs were bound together by their collective commitment to the interests of the working class and to achieve their goals they presented themselves as a highly disciplined unit in the chamber.<sup>21</sup> Prior agreement was reached on a position in caucus, and speeches and votes in the chamber were synchronised towards the agreed party position.<sup>22</sup> Faced with a highly disciplined Labour opposition, the Liberal and Reform parties eventually followed suit and employed the same disciplined approach, particularly after they merged into a single National party in 1936.<sup>23</sup>
- 2.12 Once the two-party system was established levels of party discipline became exceptionally high. Between 1947 and 1954, Kelson noted only three instances of MPs crossing the floor to vote against their party on a division not subject to a conscience vote.<sup>24</sup> May's examination of the following nine years revealed just one such instance.<sup>25</sup> Writing in 1987, Professor Keith Jackson suggested that Labour and National were probably the most cohesive parliamentary parties in the Western world.<sup>26</sup> He argued that the small size of the House (compared to the United Kingdom House of Commons, for example, which has in excess of 600 members) produced small party caucuses, which in turn created an environment well suited to highly disciplined parties. There were too few MPs in each caucus for strong ideology based factions to develop within each party. Furthermore, a small team encouraged cohesion and camaraderie. Perhaps most

19 R. S. Milne *Political parties in New Zealand* (Oxford, London, 1966) 29-30.

20 On the choice of Speaker, Hamer observed that "from the ensuing discussion it was clear that the majority wished 'party' now to be the ruling principle. The era of 'the best man' was to be at an end": David Hamer *The New Zealand Liberals: The years of power 1891-1912* (Auckland University Press, Auckland, 1988) 13.

21 See generally John E. Martin *The House: New Zealand's House of Representatives 1854-2004* (Dunmore Press, Palmerston North, 2004) 166-167.

22 Austin Mitchell *Government by party: Parliament and politics in New Zealand* (Whitcombe and Tombs, Christchurch, 1966) 54. Labour election candidates were required (and are still required) to sign a pledge agreeing to vote in accordance with the decisions taken by caucus if elected to Parliament.

23 Keith Jackson *The dilemma of Parliament* (Allen & Unwin, Wellington, 1987) 46.

24 Robert N. Kelson "Voting in the New Zealand House of Representatives, 1947-54" in L. Cleveland and A. D. Robinson (eds) *Readings in New Zealand government* (Reed Education, Wellington, 1972) 95, 104.

25 Therese May "Parliamentary discipline in New Zealand, 1955-63" in L. Cleveland and A. D. Robinson (eds) *Readings in New Zealand government* (Reed Education, Wellington, 1972) 108, 109.

26 Jackson, above n 23, 46.

telling of all though was that, given time and diligent effort, a ministerial position was a very real possibility for a backbench MP. Any backbenchers who crossed the floor of the House might jeopardise their prospects of joining a future cabinet. Jackson concluded that:<sup>27</sup>

Attitudes, expectations and agreements all serve to ensure that the group ethos continues to prevail in New Zealand politics. MPs can only succeed by carrying their party with them; the lot of the individualist is notoriously lonely and ineffective.

- 2.13 The shift to a new electoral system did contribute to some party instability. Prior to the first MMP election in October 1996, a number of MPs defected from National and Labour either to join or establish another party. Following the dissolution of the National-New Zealand First coalition government in 1998, the New Zealand First party divided, resulting in a number of its former members becoming Independent MPs. The Electoral (Integrity) Amendment Act 2001 was subsequently passed, which created an additional ground on which an MP's seat could be declared vacant, namely if the MP ceased to be a parliamentary member of the party for which he or she had been elected.<sup>28</sup> The Act thus provided statutory reinforcement of party discipline, in so far as repeated dissent from the party line may have resulted in an MP being deemed to have left his or her party. In 2002, the Alliance fractured into two separate components, while two years later Hon Tariana Turia left the Labour party to establish the Māori Party.
- 2.14 Despite these short-term upheavals in party membership, which were inevitable given the shift to proportional representation, party discipline remains high under MMP. The notion that parties establish a joint position on an issue beforehand and then collectively pursue that position in the chamber remains paramount. Indeed arguably party discipline is even more imperative in an MMP environment on account of the multi-party nature of government. When Ministers from a minority government build a legislative majority for a government Bill, they need to be confident not only that the votes of the government caucus (or caucuses) can be guaranteed, but that non-government parties that have pledged support for the Bill will duly provide the necessary votes when the Bill comes before the House.
- 2.15 It should be recognised that crossing the floor and voting against their party is not the only means by which MPs can show dissent. An MP might oppose a Bill in debate but reluctantly support it when the motion is voted on. More subtly, an MP might absent himself or herself for a particular debate so as to be away from the House when the vote on a Bill is taken.

## PROS AND CONS OF PARTY DISCIPLINE

### *Advantages of party discipline*

- 2.16 A highly disciplined party system has advantages and disadvantages. 'Responsible government' requires the political Executive to hold the confidence of the legislature to remain in office. Party discipline is the means by which this is achieved. Governments hold office because they win votes on matters of confidence before the House.<sup>29</sup> These votes are won because members of the

<sup>27</sup> Jackson, above n 23, 48.

<sup>28</sup> Phillip Joseph *Constitutional and Administrative Law in New Zealand* (3 ed, Brookers, Wellington, 2007) 346-348. The Act expired upon the close of polling day for the 2005 general election.

<sup>29</sup> No government has lost a vote on a matter of confidence since 1928: McGee, above n 2, 96.

governing party (or parties) vote together as a unified bloc in favour of the government. Members of support parties do likewise in accordance with the terms of their confidence and supply agreements. Party discipline is low in presidential systems, in the United States for instance, primarily because the Executive does not need the confidence of the legislature to take and retain office. This authority comes directly from the electorate, usually for a fixed term.

- 2.17 Not only does party discipline allow governments to hold office, it is also the mechanism by which governments ensure that the House approves their annual appropriations (the ‘Budget’) to allow government departments and agencies to carry out their various functions. Party discipline also facilitates the enactment of government legislation by predisposing a majority of the House to vote in favour of government Bills as they pass through the House. Only once in recent decades has a government suffered the outright defeat of one of its Bills.<sup>30</sup> From a governance perspective this is beneficial. It allows governments to implement their chosen policies, while providing the necessary statutory mechanisms for the exercise of good government.
- 2.18 Party discipline empowers the electorate. Parties can appeal to voters on the basis that the governing party (or parties) will be able to implement their election policies because a majority of the House will support the government’s initiatives.<sup>31</sup> Conversely, where party discipline is lacking, and the successful enactment of government measures depends on temporary *ad hoc* alliances of sufficient numbers of individual MPs (as with the pre-1891 House) the electorate is denied a meaningful choice between alternative governments offering competing sets of policies. Explicit policy pledges are less effectual if the resulting government lacks the means to achieve them.
- 2.19 Party discipline also promotes political accountability to the electorate. A clear demarcation of responsibility for policy is achieved through party-based voting. When legislation is visibly the responsibility of a government, pushed through the House by its disciplined majority, voters can rebuke or reward the government depending on how the policies implemented by the legislation are viewed by the electorate (or at least the majority of it).
- 2.20 In the absence of party discipline, accountability to the electorate for legislative decisions diminishes significantly. Government measures succeed only because a sufficient number of individual MPs – each with their own motivations and justifications – align themselves in favour of the proposal. In this sense the decision to enact a Bill is a collective choice of the individual MPs within the House rather than the governing party (or parties) acting as a cohesive unit. Consequently, responsibility for legislation is diffused across the chamber, meaning that voters are less able to punish or reward those responsible for enactment since it may not be clear precisely who this was in any given instance.

30 Local Government Amendment Bill (No. 5) ((1998) 567 NZPD 8195). Of course, if a government is uncertain as to the level of parliamentary support for a Bill it is likely to delay the Bill until sufficient support can be garnered, or alternatively, allow the Bill to lapse at the end of the session.

31 Jackson, above n 23, 44.

### *Disadvantages of party discipline*

- 2.21 Party discipline can also bring disadvantages. In 1976, Lord Hailsham claimed that the United Kingdom constitution had fallen into an ‘elective dictatorship’ on account of the Executive’s dominance of Parliament occasioned by strong party discipline.<sup>32</sup> Similar criticisms were made in New Zealand where party discipline has traditionally been stronger than in the United Kingdom Commons.<sup>33</sup> It was argued that the highly cohesive single-party governments dominated the House, which in turn severely limited Parliament’s ability to act as a check against Executive power. While opposition parties could voice disagreement and delay progress as a form of opposition, they could not defeat the government, which relied on its disciplined majority in the chamber to win any matter (procedural or substantive) put to the vote. Thus, very high levels of party discipline, while facilitating strong and decisive government, could simultaneously produce a badly weakened legislature.
- 2.22 This said, Executive dominance is now less of an issue in New Zealand than it was in the past. MMP has, as expected, increased the strength of the legislature while reducing the ascendancy of governments.<sup>34</sup> This has been achieved not by a lessening of party discipline (although as noted MMP did cause a rapid increase in the number of parties in the House) but by changing the nature of government from predominantly single-party majority governments to multi-party governments, and especially minority governments.<sup>35</sup> This had made the process of forming a government and enacting legislation more complex, requiring greater cross-party negotiation than used to be the case given that no single party holds a majority of seats in the House.

32 Lord Hailsham *The dilemma of democracy: Diagnosis and prescription* (Collins Sons & Co, London, 1978) 126.

33 Jackson, above n 23, 14; Geoffrey Palmer *New Zealand’s constitution in crisis: Reforming our political system* (John McIndoe, Dunedin, 1992) 12.

34 Geoffrey Palmer and Matthew Palmer *Bridled power* (4 ed, OUP, Melbourne, 2004) 13; Joseph, above n 28, 196.

35 The sole period of majority government since the advent of MMP has been the National-New Zealand First coalition government (1996-1998).

# Chapter 3

## The conscience vote

### DEFINING THE CONSCIENCE VOTE

- 3.1 As outlined in chapter two, voting in the House is ordered along disciplined party lines. The exception is if the matter before the House is a ‘conscience issue’ and subject to a ‘conscience vote’ or ‘free vote’.<sup>36</sup> McGee records that “conscience issues are those decisions that the House takes free of the dictates of party loyalties and allegiances”.<sup>37</sup> So when a motion before the House is subject to a conscience vote, the party whip is lifted and MPs are able to debate the motion and cast their vote as they personally consider appropriate. The result is that MPs from the same party may vote differently from one another, with some voting in favour and others opposed. This is in contrast to normal practice where differential intra-party voting is rare.
- 3.2 It is not always obvious when a vote has been decided on the basis of a conscience vote.<sup>38</sup> The clearest example occurs when the Speaker or MPs refer to the vote being treated as a conscience vote during a debate, and this is followed by MPs taking a personal vote in which members of the same party vote differently from one another. However, in a variety of other instances the line between standard party voting and conscience voting is not so easily discerned.
- 3.3 First, some MPs may refer to the matter before the House being subject to a conscience vote, but the motion is then subject to a voice vote and not a personal vote. In other words, MPs do not separately file into the ‘ayes’ and ‘noes’ lobbies and record an individual vote. For example, during the second reading of the Rotorua District Council Empowering Bill, Hon Dr Michael Cullen (Labour) told the House that:<sup>39</sup>

This Bill will be treated as a conscience matter on the Labour side of the House, as it involves liquor licensing. But I have a strong suspicion that when it comes to the vote, nobody’s conscience will stretch so far as to call a vote against this particular measure.

36 The terms conscience vote and free vote are interchangeable. The former is used in Australia and New Zealand, while the latter is more common in Canada and the United Kingdom.

37 McGee, above n 2, 99.

38 See David Lindsey “A brief history of conscience voting in New Zealand” (2008) 23 Australasian Parliamentary Review 144, 150.

39 (1 May 1996) 554 NZPD 12235.

- 3.4 Indeed no personal votes were called for, and all stages of the Bill, including the Committee of the Whole House stage, were voted on the basis of a voice vote only. It is debatable whether instances such as this should be considered examples of conscience voting. While the conscience vote label is applied to an issue, MPs are not actually called on to cast individual votes according to their own judgements and policy preferences as distinct from that of their party as a whole.
- 3.5 A second situation arises when a conscience vote is signalled during a debate, and a personal vote is held, but all MPs vote the same as the other members of their party. For example, in 1983 all Labour MPs voted against the first reading of the Broadcasting (Television Advertising of Liquor) Bill.<sup>40</sup> Labour speakers confirmed the issue was a conscience issue for the party, but that its members had arrived at a joint position of opposition:<sup>41</sup>
- The truth is that, freely, voluntarily, and with no tie whatsoever, we arrived informally at a collective opinion on this procedure. Therefore, our leader rightly said that we had collectively, on the basis of our own free consciences, arrived at a position that would be consistent...[Labour] members have a common purpose. They are responsible, and they know that when the public interest is at stake and a conscience matter is raised on which they all see eye to eye, their leader will have no difficulty in intimating the position on which they all freely stand.
- 3.6 This approach, sometimes referred to as the exercise of a ‘collective conscience’, poses challenges as to whether it should be considered a genuine conscience vote. MPs from the same party will tend to share similar ideological views. So it is plausible that the members of a party voluntarily arrive at the same position on a conscience issue. Research undertaken in the United Kingdom observed that party membership was the most dominant variable in predicting voting patterns on conscience votes, well ahead of MPs’ age, gender or religious affiliations.<sup>42</sup> Lindsey made similar observations in relation to New Zealand MPs.<sup>43</sup> Consequently, uniform or near-uniform party voting will be a feature of some conscience votes in the House.
- 3.7 Nevertheless, it is equally feasible that in a collective conscience situation some MPs vote as they do because there is an implicit understanding that party unity on a particular issue overrides individual voting preferences. Where this is the case, there is some difficulty in categorising the issue as having been subject to a conscience vote. The essential element of conscience voting is that MPs are free to vote on an issue as they see fit. When party expectations encroach on MPs’ voting discretion arguably this becomes something more akin to normal party voting.

40 (4 August 1983) 451 NZPD 1049.

41 Sir Gerard Wall MP (29 July 1983) 451 NZPD 947-948.

42 Phillip Cowley “Unbridled passions? Free votes, issues of conscience and the accountability of British Members of Parliament” (1998) 4 *The Journal of Legislative Studies* 70, 83-85.

43 Lindsey, above n 38, 147. See also McGee, above n 2, 99.

- 3.8 A third situation of note is where some parties in the House treat a matter as being subject to a conscience vote while other parties do not. This is not uncommon in a multi-party chamber. For example, during the debate on the Justice and Electoral Committee's report into the Property (Relationships) Amendment Bill, Hon Tony Ryall (National) told the House that "while at the end of this debate there will be a free vote, National MPs have agreed to vote en bloc against the reporting back of this bill".<sup>44</sup> Here National applied the party whip as a protest against the manner in which the select committee's scrutiny of the Bill was undertaken. Mostly though it is objection to the substance of a Bill, rather than concerns about procedure, that will result in a party openly using normal party discipline to deal with an issue while other parties use a conscience vote.<sup>45</sup> To illustrate, in relation to the Casino Control (Poll Demand) Amendment Bill, Patricia Schnauer (ACT) explained that "the ACT caucus did not need a conscience vote on this issue. The ACT party and the ACT members of Parliament are unanimous in opposing this Bill and opposing this report back".<sup>46</sup>
- 3.9 The conscience vote label becomes clouded in situations where some parties allow a conscience vote while others do not. If all parties in the House but one opt for a conscience vote, the label may be suitable. However, if half of the parties in the House allow a conscience vote and the other half do not, it may be misleading to state that the House decided the matter by way of a conscience vote. In 2009, the ACT party announced that its MPs would be entitled to a free vote on all matters before the House outside of matters of confidence or supply.<sup>47</sup>
- 3.10 A fourth complicating factor is the split-party vote.<sup>48</sup> As outlined, split-party voting allows a party to cast different votes (for, against, or abstain) on a motion before the House. Because of the quasi-individual nature of voting (each member of the party has their vote recorded separately in Hansard), split-party voting might be seen as a form of conscience voting when used for conscience issues. As McGee has noted, the split-party vote has become increasingly popular as a means of voting on conscience issues because it obviates the need to divide into the lobbies as is required under a personal vote.<sup>49</sup>
- 3.11 Yet the degree of personal voting freedom that MPs have in a split-party vote compared to a full conscience vote may vary from Bill to Bill and between different parties. If a party is evenly divided for or against a motion, as National was on the Shop Trading Hours (Abolition of Restrictions) Bill,<sup>50</sup> then the split-party vote may simply be a conscience vote under another name. However, where a solitary MP votes differently from his or her party colleagues the split-party vote may in fact be little more than a sanctioned crossing of the floor of the House. The number of parties that use a split-party vote is also relevant. If, for example, only one party in a multi-party House uses a split-party vote, this would hardly qualify as a *de facto* conscience vote.

44 (14 November 2000) 588 NZPD 6518.

45 This is similar to the collective conscience situation, i.e. where the policy preferences of the party trump the voting discretion of individual MPs. The difference is that the parties concerned openly acknowledge that the whip applies to their MPs.

46 (16 June 1999) 578 NZPD 17459.

47 John Armstrong "ACT gives MPs right to vote against caucus line" (16 March 2009) New Zealand Herald Auckland A4.

48 Lindsey, above n 38, 151-152.

49 McGee, above n 2, 206.

50 (5 May 2004) 617 NZPD 12652.

## USE OF THE CONSCIENCE VOTE

- 3.12 Non-legislative issues in the House can be decided by the use of a conscience vote.<sup>51</sup> One such instance is the House's recommendation to the Governor-General of the appointment of members of the Abortion Supervisory Committee.<sup>52</sup> This reflects the contentious nature of the abortion issue generally. The debate on the appointments often extends into a broader debate on the suitable criteria for, and desirability of, lawful pregnancy terminations.<sup>53</sup> Non-legislative instances of conscience voting are few however and the conscience vote is used mainly for legislation.
- 3.13 A conscience vote will not necessarily apply to an entire Bill. Particular parts of a Bill, or even individual clauses, may be singled out and treated as conscience issues. In 1993, for example, National and Labour MPs were granted a free vote on the issue of mandatory reporting of possible cases of child abuse.<sup>54</sup> All other aspects of the Children, Young Persons, and Their Families Amendment Bill were subject to normal party-based voting. Again, some parties may allow a conscience vote on a part or clause of a Bill that other parties do not. Thus, while opposition National MPs were entitled to a free vote on the entire Gaming and Lotteries Amendment Bill, Labour MPs were granted a free vote only on those clauses of the Bill that related to the introduction of 'Lotto'.<sup>55</sup>
- 3.14 Since the development of the disciplined party system late in the 19<sup>th</sup> century, the conscience vote has been used for legislation covering a number of policy areas. Lindsey lists a number of issues as having been subject to a conscience vote in the House at some point, including:<sup>56</sup>
- alcohol;
  - gambling;
  - family and relationship laws;
  - shop trading hours;
  - mandatory vehicle seat belts;
  - mandatory fencing of swimming pools;
  - smokefree laws;<sup>57</sup>
  - corporal punishment;
  - death penalty;
  - removal of the defence of reasonable force for child discipline;
  - male homosexual acts;
  - prostitution;
  - euthanasia; and
  - electoral reform.<sup>58</sup>

51 Lindsey, above n 38, 152.

52 Contraception, Sterilisation, and Abortion Act 1977, s10.

53 See for example (14 June 2007) 639 NZPD 9907-9926.

54 (24 March 1993) 545 NZPD 5215.

55 (7 April 1987) 479 NZPD 8363.

56 Lindsey, above n 38, 158.

57 Although the Smoke-Free Environment Act 1990 was not treated as a conscience vote, National allowed its MPs a conscience vote on the Smokefree Environment Amendments Act 1991. This Act allowed the 1992 Cricket World Cup, principally sponsored by a tobacco company, to be played in New Zealand.

58 The Electoral Reform Bill 1992 was treated as a conscience issue. The Bill provided for a binding electoral system referendum to be held in conjunction with the 1993 general election.

- 3.15 Some of the policy areas listed above were single issues, for example the abolition of the death penalty or the mandatory fencing of swimming pools. Others have had a number of sub-issues below them. Conscience votes on gambling, for example, have covered the regulation of casinos, the minimum age for gambling, and the introduction of ‘Instant Kiwi’ scratch tickets and ‘Lotto’.
- 3.16 Of all the policy areas treated on the basis of a conscience vote, alcohol Bills are the most prevalent by quite some margin. In his analysis of conscience voting in the House between 1893 and 2007, Lindsey recorded 131 instances of the conscience vote being used.<sup>59</sup> Of these, 53 (40%) related to alcohol. This was followed by 25 instances of conscience voting on gambling issues (19%) and 20 instances related to marriage and family law matters (15%) covering divorce, civil unions, matrimonial property, contraception and abortion. Consistent with this finding, Lindsey observed that “conscience voting on alcohol related matters continued to be the predominant subject for conscience votes and have remained so to the present day”.<sup>60</sup>
- 3.17 There are some similarities between the issues that tend to be treated as conscience votes in New Zealand, the United Kingdom, Canada, and Australia.<sup>61</sup> For example, the abolition of the death penalty has been treated as a conscience vote across all four countries. There are some important differences nevertheless. First, some conscience issues are country-specific, for example, fox-hunting in the United Kingdom, and a new national flag in Canada. Second, there are some issues that are treated as conscience votes in one country but not another. For example, while the crime of male homosexual acts was subject to a conscience vote in New Zealand, Australia, and the United Kingdom, it was not in Canada.<sup>62</sup> To some degree this reflects the culture that exists in each jurisdiction around the use of conscience votes. In New Zealand, conscience voting has been used frequently, particularly since the 1960s,<sup>63</sup> whereas its use in Canada has been limited to a small number of issues.
- 3.18 But even where conscience voting is used frequently, as in the United Kingdom, and to a lesser extent by the Australian Federal Parliament, there are differences in the issues that are dealt with on the basis of a conscience vote. Of these, the most noticeable is alcohol legislation, which, as noted, constitutes just under one half of all instances of conscience votes in the New Zealand House of

59 Lindsey, above n 38, 158. Three points should be made about these statistics. First, they included mostly legislative matters, but also a handful of non-legislative matters. Second, if a Bill was subject to multiple conscience votes it was still classified as being a single instance of a conscience vote. Third, the criteria for the classification of an issue as having been decided on the basis of a conscience vote was specified in the paper (it does not include instances of split-party votes for example).

60 Lindsey, above n 38, 160.

61 See Phillip Cowley “Introduction” in Phillip Cowley (ed) *Conscience and Parliament* (Frank Cass, London, 1998) 1-5; Dianne Pothier “Parties and free votes in the Canadian House of Commons: The case of capital punishment” (1979) 14 *Journal of Canadian Studies* 80-96; C. E. S. Franks “Free votes in the House of Commons: A problematic reform” (1997) *Policy Options* 33-36; Deidre McKeown and Rob Lundie “Free votes in Australian and some overseas Parliaments” (2002) 1 *Current Issues Brief* 1-23; and John Warhurst “Conscience voting in the Australian Federal Parliament” (2008) 54 *Australian Journal of Politics and History* 579-596.

62 Franks, above n 61, 33.

63 Lindsey, above n 38, 159.

Representatives. By contrast, the United Kingdom does not use the conscience vote for the sale and supply of alcohol laws, nor does Canada or Australia.<sup>64</sup> New Zealand stands alone in this regard.

MORALITY AND  
INDIVIDUAL  
LIBERTY

- 3.19 Whether the House decides an issue on the basis of a conscience vote is not something that is regulated by Standing Orders. Standing Orders prescribes the manner in which votes are conducted, not the basis upon which MPs cast their votes. Rather, the choice between party-based voting and conscience voting is a decision that is made by each party caucus.
- 3.20 Why then are some issues subject to a conscience vote and not others? In other words, what are the drivers that determine whether the party whip will be lifted for MPs to vote free of party dictate? Many issues voted on the basis of a conscience vote are considered to have a high moral content.<sup>65</sup> Certainly there are numerous examples of this, including gambling, marriage, pornography, and abortion. An issue may also be deemed suitable for a conscience vote because it involves questions of the appropriate balance between the authority of the state and the liberty of the individual. The mandatory fencing of swimming pools would fall into this category.
- 3.21 As will be discussed shortly, the existence of moral considerations or questions of personal liberty in a Bill can act as useful indicators as to the likely use of a conscience vote. However, on its own their presence is not determinative. In reality, all Bills have some moral content in that they implement choices between alternative, and often competing, policy options. Finance legislation is a good example of this. Increasing or decreasing government spending on social welfare, health, or education, or modifying the rates of personal income tax to achieve wealth distribution objectives, are decisions that draw heavily on the personal values of legislators. They require the balancing of such factors as the adequacy of social services and human compassion, against the reward for individual effort and rate of return for taxpayer resources. Yet there is never any question of Appropriation, Imprest Supply, or Taxation Bills being subject to a conscience vote.
- 3.22 In addition, a vast quantity of legislation enacted by Parliament infringes the liberty of the individual in order to serve the wider public good. Transport legislation obliges drivers to carry licences.<sup>66</sup> Building laws restrict the type of work that owners can carry out on their own homes.<sup>67</sup> With limited exceptions, parents are obliged to enrol their children in a registered school.<sup>68</sup> Persons suspected of committing particular offences can be compelled to provide blood samples.<sup>69</sup> These are but a handful of examples. There are scores of Acts on the statute book that encroach on civil liberties that have been enacted under the normal rules of party discipline and not on the basis of a conscience vote.

64 Although one state in Australia (Victoria) has used conscience vote for alcohol related legislation: McKeown and Lundie, above n 61, 13.

65 Richards has characterised conscience votes as “social questions which have strong moral overtones”: P. G. Richards *Parliament and conscience* (George Allen and Unwin, London, 1970) 7.

66 Land Transport Act 1998, s31(1).

67 Building Act 2004, s84.

68 Education Act 1989, s20.

69 Criminal Investigations (Bodily Samples) Act 1995, s16.

### THREE REASONS FOR A CONSCIENCE VOTE

- 3.23 This demonstrates that no subject areas are inherently conscience issues. Rather, the decision to use a conscience vote in any given instance is a political one, made by each party caucus bearing in mind three particular factors: first, the potential for the issue to publicly split the party; second, the electoral risk it presents; and third, whether it has a history of being decided on the basis of a conscience vote.

#### *Party split*

- 3.24 There is nothing unusual about MPs from the same party disagreeing about questions of policy. It happens frequently at a Cabinet level and within party caucuses. This is to be expected and is a sign of a healthy democracy. What is distinctive about the New Zealand context is that those differences rarely reveal themselves in the public domain. Caucus discussions are closed affairs, and Cabinet ministers are bound to publicly support decisions taken by Cabinet.<sup>70</sup> Thus, to an overwhelming degree, where intra-party divisions exist, they are internal matters.
- 3.25 Issues that are the subject of a conscience vote are often those that threaten the ability of a party to maintain a single public stance. In other words, if the whip were applied to MPs, there would be a real risk that some would simply ignore it. Not only might rebel MPs criticise the party's position in the media, but they may go as far as crossing the floor and voting against their own party. This would be a significant political event, since as noted, the long-established tendency in New Zealand politics is for parliamentary parties to present a unified front on each issue, with all MPs publicly supporting the agreed party position. The conscience vote can, therefore, serve as something of an escape valve for parties by removing the expectation (amongst MPs, the media, and voters) that the party speaks with a single voice.<sup>71</sup> What Professor Dean Jaensch has written of conscience votes in Australia can, in some situations, apply equally to New Zealand: "A conscience vote, then, is not a case of a party offering freedom for its members – it is a case of parties protecting themselves".<sup>72</sup>
- 3.26 The kinds of issues that may jeopardise the public unity of a party are varied but the most pertinent are those that involve acute questions of morality. In this context the importance of some MPs' religious beliefs must be acknowledged.<sup>73</sup> Legislative proposals that are perceived by MPs as being directly opposed to deeply held religious convictions have often attracted a conscience vote. For example, debates in the House on Bills dealing with male homosexual acts, abortion, and euthanasia have been notable for the number of MPs stating that their voting decisions are dictated by their belief in religious principles. On such

<sup>70</sup> Cabinet Manual (Cabinet Office, Wellington, 2008), clause 5.22.

<sup>71</sup> It should be noted however that the granting of a conscience vote does not guarantee that a party will avoid personal acrimony between its own MPs. The National party, for example, was damaged by public disagreement between its members over the Contraception, Sterilisation, and Abortion Act 1977 notwithstanding that the Bill was subject to a conscience vote: Barry Gustafson *His way: A biography of Robert Muldoon* (Auckland University Press, Auckland, 2000) 162-163.

<sup>72</sup> Dean Jaensch *Getting our Houses in order: Australia's Parliament: How it works and the need for reform* (Penguin, Melbourne, 1986) 45.

<sup>73</sup> For a general discussion of the relationship between religion and conscience voting see Darryn Jensen "Faith, conscience and legislation" (2008) 27 *The University of Queensland Law Journal* 85, 97-101.

issues, MPs may prioritise their desire to adhere to personal religious convictions ahead of their party's interest in the appearance of public unity. So while, as noted, the presence of moral questions alone will not guarantee the granting of a conscience vote, the likelihood of this is higher where a Bill does contain questions of a high moral and/or religious character, given the real likelihood that some MPs would defy any party line imposed on them.

### *Electoral risk*

- 3.27 A second reason why a party may treat an issue on the basis of a conscience vote is the risk the issue poses to the party's electoral well-being. Such a risk may exist where an issue is highly controversial, attracts significant media interest, and where the public holds strong and polarised views on the matter. The difficulty facing any government in this situation is that a Bill that proposes significant reform in a contentious area is likely to aggravate a large section of the electorate who are opposed to the proposed changes, often vehemently so. This may be complicated by those at the other end of the argument claiming that the measure does not go far enough and is overly-compromised.
- 3.28 In these cases, there is a risk that the governing party will suffer a loss of popularity, either in the short or long term, for introducing the Bill and passing it through the House using its disciplined majority. Opposition parties may find themselves in an equally delicate situation. Taking a single view on the issue likewise risks alienating a core section of the electorate who disapprove of the party's stance.
- 3.29 The conscience vote can be a response to this dilemma. By declaring that MPs will have a conscience vote, parties shift the focus from the party onto individual MPs. So when a conscience vote is held, media organisations will typically poll each MP and report how they intend to vote for the Bill. During the debate, speakers will repeatedly refer to the issue being 'above politics' and 'not a party matter'. Finally, after the vote is held, the voting decisions of MPs may be listed in newspapers and on websites, invariably with some MPs singled out and identified as having being determinative of the result.<sup>74</sup>
- 3.30 The use of the conscience vote in this way is understandable, though not necessarily justifiable. At the least, it is inconsistent with instances where other major controversial reforming Bills are enacted under normal party discipline, for example the Employment Contracts Act 1991, the Electricity Industry Reform Act 1998, the Foreshore and Seabed Act 2004 and the Electoral Finance Act 2007.
- 3.31 More fundamentally, if parties seek to absolve themselves of responsibility for legislative decisions there is a consequential weakening of the accountability link between parties and voters. As discussed in chapter two, the normal rules of party discipline facilitate party accountability to the electorate. Where party discipline is removed in respect of a government Bill, and 120 (or more) MPs vote as they personally see fit, the electorate is denied the opportunity to hold the government (and indeed other parties in the House) to account for the decision to enact the Bill given that the parties will have formally removed

74 For example, consider the media attention devoted to Ashraf Choudhary MP following his decision to abstain on the third reading of the Prostitution Reform Bill. This Bill was decided on the basis of a conscience vote, with the Bill passing its final stage 60 votes to 59.

themselves from the decision-making process. As Professor Phillip Cowley has noted in regards to the United Kingdom, conscience votes can “allow controversial legislation to be enacted, for which no one takes responsibility”.<sup>75</sup>

### *Tradition*

- 3.32 The third factor that can account for a party’s decision to grant its MPs a conscience vote is that the issue has in the past been decided on this basis. This in itself is not a particularly persuasive reason for continuing to do so. However, it may explain why parties are reluctant to apply the whip to certain matters deemed to be long-standing conscience issues. If a party applied the whip in relation to an issue where a conscience vote has traditionally been granted, the risk of internal party dissent spilling into the public domain may increase as backbenchers rally against a perceived curtailing of their freedom in the chamber. In this sense, the use of the conscience vote becomes self-reinforcing and a difficult habit for parties to break. As will be discussed in the next chapter, this historical treatment of alcohol legislation in the House has been an especially important factor in the continued use of conscience voting for alcohol Bills.

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<sup>75</sup> Cowley, above n 42, 79.

# Chapter 4

## Alcohol laws and the conscience vote

### PARTY DIVISION

- 4.1 It was noted in the previous chapter that conscience votes are likely to be used where an issue threatens the public unity of a party, presents a significant electoral risk, and has an established conscience vote tradition. All three factors have been relevant in the case of alcohol Bills in New Zealand.
- 4.2 In 19<sup>th</sup> century New Zealand, certain segments of the burgeoning society saw the misuse of liquor as responsible for a variety of social ills. This was also the case in the United States where the prohibition movement was gathering strength, resulting in Maine and 11 other states adopting prohibition by 1855.<sup>76</sup> In New Zealand, the most important off-shoot of American prohibition activism was the Woman’s Christian Temperance Union (WCTU), which was established in New Zealand in the 1880s and become a powerful advocate for prohibition.<sup>77</sup> Other strong voices also emerged, principally the New Zealand Alliance for the Abolition of the Liquor Traffic (the Alliance).
- 4.3 The ‘liquor question’ was highly contentious and one of the most politically divisive issues of New Zealand’s early decades.<sup>78</sup> Many of the arguments around alcohol at this time were marked by strong religious, often evangelical, overtones. The link between liquor consumption and sinfulness was prominent. The high point of the prohibition movement was the 1919 national poll, with ‘continuance’ narrowly defeating prohibition by a little over 3,000 votes. Prince has suggested that “the strongest moral crusade in New Zealand’s history, and certainly the one with the longest staying power, was that of the fight to ban alcohol”.<sup>79</sup>

76 The so-called ‘Maine law’ prohibited the sale or supply of alcohol except for medicinal, mechanical, or manufacturing purposes.

77 See Jeanne Wood *A challenge not a truce: A history of the New Zealand Woman’s Christian Temperance Union 1885-1985* (NZWCTU, Nelson, 1986).

78 See Paul Christoffel “Removing temptation: New Zealand’s alcohol restrictions, 1881-2005” (PhD thesis, Victoria University of Wellington, 2006) 32-60.

79 John D. Prince “Looking back in amber: The general licensing poll in New Zealand, 1919-87” (1996) 48 *Political Science* 48, 49.

- 4.4 In a climate such as this, the imposition of the party whip in relation to alcohol Bills was fraught with difficulty. The Liberal party that assumed office in the 1890s was divided over the liquor issue, with a prohibitionist faction led by Robert Stout, and the anti-prohibitionists led by William Pember Reeves. Premier Richard Seddon's Alcoholic Liquors Sale Control Act 1893 was primarily a response to an earlier liquor Bill promoted by Stout, who was a rival for the Liberal leadership. But in ceding the 'local option'<sup>80</sup> in his Bill, Seddon deliberately attempted to defuse the conflict within the party over liquor by transferring licensing decisions to a local level.<sup>81</sup>
- 4.5 As the prohibition movement gathered force, MPs' sensitivities to the views of such organisations as the Alliance and the WCTU grew accordingly.<sup>82</sup> Many MPs in the House took a fervent line on the liquor question, but especially those on the prohibition side such as 'Tommy' Taylor. Consequently, the sale and supply of liquor was a deep-seated and divisive issue within party politics. Applying the party whip would have been difficult and, in many cases, simply futile. It is no coincidence then that the first recorded instance of a conscience vote was on Stout's liquor Bill in 1893.<sup>83</sup> This first established the precedent for treating alcohol laws on the basis of a conscience vote.

#### POLITICAL RISK

- 4.6 Once introduced, conscience voting for alcohol Bills continued through into the 20<sup>th</sup> century. This was largely attributable to the reluctance of successive governments to legislate in this area. Liquor was seen as very dangerous political territory. This was for two reasons: first, the dual pressure applied by temperance advocates and the liquor trade, and second, public ownership of the liquor question.

#### *Twin pressure*

- 4.7 Although the prohibition movement lost a good deal of its momentum following the close loss in the 1919 poll, the voice of moderation emerged in different guises. During World War I, for example, the level of resources used to produce alcohol, and the money spent on its consumption, was considered a hindrance to the war effort. The introduction of six o'clock closing was a direct result of the push for national efficiency.<sup>84</sup> As Christoffel noted, it was widely believed that limiting the availability of alcohol (including the number of hotels and opening hours) suppressed consumption.<sup>85</sup> Given that the existing regulatory regime tightly limited alcohol availability, pressure to keep these laws in place was considerable. Any government that contemplated a wholesale loosening of the rules around the sale and supply of liquor knew that it would face fierce opposition from advocates of a tight, restrictionist approach.

80 The local option gave voters in each licensing district the option of going 'dry', i.e. no retail sales of alcohol.

81 Hamer, above n 20, p118.

82 The Alliance's constitution pledged to secure the return to Parliament of candidates who were committed to prohibition irrespective of which party they stood for: "Prohibition" in A. H. McLintock (ed) *An Encyclopedia of New Zealand* (1966), Te Ara – The Encyclopedia of New Zealand <http://www.teara.govt.nz/1966/P/Prohibition/en> (last accessed 30 March 2009).

83 Lindsey, above n 38, 154.

84 Christoffel, above n 78, 18.

85 Christoffel, above n 78, 3.

- 4.8 The other main protagonist in the skirmishes over alcohol regulation was the liquor industry. Initially a disparate group made up of publicans, brewers, wine producers and distillers, the industry would come to be dominated by an ever dwindling number of breweries. The industry was well funded and in a position to mount comprehensive campaigns against proposals clearly adverse to its interests.
- 4.9 What made governments particularly hesitant about major legislative reform was that the temperance groups and the liquor industry often worked for the same aims. This was because the liquor industry came to support a number of the restrictions that had been imposed. The breweries in particular enjoyed the benefit of being established hotel operators in a highly regulated market where retail licences were scarce. In this way, the temperance movement and the liquor industry formed something of an unholy alliance in order to resist a fundamental liberalising of alcohol laws; the former because they believed that reduced availability would mean less consumption and associated social harms, and the latter because it stifled competition and increased revenues. This commonality of purpose was a central theme of Conrad Bollinger's book *Grog's Own Country*.<sup>86</sup> Bollinger cited a long list of instances in which the interests of temperance advocates and the liquor industry dovetailed. For example, mandatory closing of hotel bars at 6pm, while prima facie restricting drinking, encouraged excessive consumption during the legal sales period (the 'six o'clock swill') and allowed some hotels to charge excess prices for illegal after-hours sales.<sup>87</sup> Similarly, temperance groups opposed any attempts to normalise drinking and so opposed the provision of food and furniture in hotel pubs. This found favour with the industry because it kept costs down and meant more customers could squeeze into the drinking rooms.<sup>88</sup> Together both groups formed a strong bulkhead against significant legislative change.

### *Public ownership of liquor policy*

- 4.10 A further factor which made alcohol a sensitive political issue was that the public directly decided the existence of many of the laws regulating the availability of alcohol. For instance:
- Until 1918, voters could choose to make their district 'dry'. Even after the local option was removed by the Licensing Amendment Act 1918, those districts that had previously opted to be 'dry' still voted on whether to return to being 'wet'.
  - From 1919, voters at each general election chose between nationwide prohibition, continuance, or state control (government ownership of the production and supply of alcohol). The last such poll was conducted in 1987.<sup>89</sup>
  - In 1949 and 1967, there were referenda on closing hours.<sup>90</sup>
  - Trustees on Licensing Trusts were locally elected.

86 Conrad Bollinger *Grog's own country: The story of liquor licensing in New Zealand* (2 ed, Minerva, Auckland, 1967).

87 Bollinger, above n 86, 51-55. See also Tim Mulcare "The political economy of six o'clock closing" (New Zealand Institute for the Study of Competition and Regulation, Wellington, 1999). Although compare Christoffel, above n 78, 49.

88 Bollinger, above n 86, 56-58.

89 The national prohibition poll was removed by the Sale of Liquor Act 1989.

90 The 1949 referendum retained 6pm closing, while the 1967 referendum extended trading hours to 10pm.

- 4.11 In this way, many of the difficult questions around the sale and supply of alcohol had been handed to the voting public to decide rather than being the subject of legislation enacted by Parliament. This approach was not without its critics. Rt Hon Sir Keith Holyoake's National government was berated for submitting the issue of six o'clock closing to a referendum and not simply adopting the extension of sales hours as government policy and legislating accordingly. Likewise the triennial prohibition poll was widely criticised as being unnecessary.<sup>91</sup> Christoffel argued that "by instilling in voters and politicians alike the idea that referendums and liquor went hand in hand [the polls] made politicians wary of initiating reform. Polls inhibited government action on liquor issues by providing politicians with a regular reminder of the strength of the prohibition lobby".<sup>92</sup>

### *Defaulting to the conscience vote*

- 4.12 Political sensitivity to the liquor question meant that the 19th century practice of using the conscience vote for alcohol Bills became entrenched.
- 4.13 Successive governments took the view that if they were going to change the liquor laws, this was best done by continuing to allow MPs a free vote in the House. This put the issue 'above party politics'. As outlined in chapter two, party discipline ensures governments can pass their Bills, which in turn promotes policy accountability to the electorate. Conversely, by making the fate of a Bill and its various clauses dependant on the voting whim of individual MPs, that accountability is diminished and the electoral risk mitigated. Given the climate that existed around the regulation of alcohol sale and supply during the middle decades of the 20th century, the conscience vote for alcohol legislation was seen as politically safer than that putting clearly defined alcohol policies before the electorate and implementing them through standard party-based voting.<sup>93</sup>

### THE POWER OF PRECEDENT

- 4.14 The conscience vote on alcohol Bills remains in place today. Important reforming laws throughout the second half of the 20<sup>th</sup> century were debated and voted on using conscience votes, including the Sale of Liquor Act 1962, the Sale of Liquor Act 1989, and the Sale of Liquor Amendment Act 1999. This has continued into the new century, for example with the Sale of Liquor (Youth Alcohol Harm Reduction) Amendment Bill (2005).
- 4.15 The continued use of the conscience vote for alcohol Bills is somewhat incongruous. The factors that led to its use for alcohol Bills are much less relevant today than was historically the case. First, the regulatory framework for alcohol laws is no longer the kind of issue that poses a serious threat to the public unity of a party, at least not in the way that it did over a century ago for Seddon's Liberal Party. While there is likely to be disagreement within parties on certain alcohol related issues, there is nothing unusual about internal party disagreements over important policy. As noted earlier, this occurs frequently at a Cabinet level and within party caucuses. Such is the nature of a representative democracy.

91 Prince, above n 79.

92 Christoffel, above n 78, 93.

93 Christoffel, above n 78, 53-60.

- 4.16 This is not to say that issues with the potential to publicly divide a party no longer exist. There remain certain issues on which MPs hold deep personal convictions and where the party whip, if applied, would most likely be openly disavowed. Abortion, euthanasia, and same-sex marriage are likely examples.
- 4.17 Second, alcohol does not pose the electoral threat to governments that it used to. Through until the 1930s, elections could truly be won or lost depending on the extent to which powerful pressure groups were aggravated by the action or inaction of sitting governments in relation to alcohol issues. Yet the current social climate regarding alcohol is markedly different from what it was. The temperance movements faded long ago, closing hours are no longer put to the public vote, and the triennial prohibition poll is no more. The public debate about alcohol is no longer cloaked in terms of morality and sinful temptation. Despite these significant changes in the social and political framework, the conscience vote remains in place.
- 4.18 Again, this is not to suggest that alcohol laws are no longer politically contentious; they can be, particularly in regard to the legal age of purchase and the proliferation of liquor outlets. But there can be little doubt that the issue is far less socially divisive now than it was in late 19<sup>th</sup> and early 20<sup>th</sup> century New Zealand. From a policy perspective, the issue now is not whether alcohol should be produced and sold at all, but whether the regulatory regime facilitates an appropriate balance between individual enjoyment of alcohol and harm minimisation objectives. This type of legislative balancing act is one that Parliament regularly deals with by way of party-based voting.
- 4.19 In reality, conscience voting for alcohol Bills remains in place largely for reasons of historical precedent. In other words, it still exists today because the House has always dealt with alcohol Bills this way. Thus, during a debate on the Sale of Liquor Act 1989, Dr Bill Sutton (Labour), responding to a suggestion from Hon Venn Young (National) that large parts of the Bill were ill-suited to a conscience vote, stated:<sup>94</sup>
- The member for Waitotara said that perhaps two-thirds of the Bill are non-controversial and should be introduced as Government policy. He suggested that all of those matters dealing with administration of liquor licensing could fall into that category. Unfortunately, that cannot happen, because of the very strong tradition in New Zealand, in both major parties, that votes on all matters relating to liquor are conscience matters....Government members would still want to have a conscience vote on matters relating to the sale of liquor, and I am certain that that would be equally true for the Opposition.
- 4.20 This comment reflects the entrenched nature of the conscience vote for alcohol legislation in the minds of many MPs. Comments of this ilk have been repeated frequently during parliamentary debates, for example Hon Jim McLay (National) in 1979 (“Government members will be exercising a free vote on

94 (30 May 1989) 498 NZPD 10984.

this provision, as is the case with all matters relating to the sale of liquor”)<sup>95</sup> and Rt Hon David Lange (Labour) in 1983 (“...liquor, which is, as it has been for more than 100 years, profoundly a conscience issue”).<sup>96</sup>

- 4.21 Lindsey argued that “conscience voting has developed something of a life of its own, and at least partially exists today as a convention independent from the tenor of the issue it is applied to”.<sup>97</sup> Alcohol legislation stands out as the prime example.

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95 (14 November 1979) 427 NZPD 4364.

96 (27 October 1983) 454 NZPD 3450. As will be discussed, not all MPs were in favour of the conscience vote for alcohol. Lange, for example, was critical of conscience voting generally. Writing in the *New Zealand Law Journal*, he observed that “oddly enough conscience votes are often lauded by the news media as Parliament at its most impressive. Speeches are thoughtful, often written by the members themselves, and not the dogged repetition of the party line. Hearts are worn on sleeves. The result of the vote is often uncertain, adding an entertaining element of suspense to the proceedings. The outcome is a shambles, a kind of legislative lottery in which consistency is the first casualty. So it is that the law forbids children from buying a scratch lottery card but allows them to buy a lotto ticket. Without party discipline, the prospect of a coherent approach to the legislative programme quickly diminishes.” [1995] NZLJ 245, 247.

97 Lindsey, above n 38, 149.

# Chapter 5

## Quality and coherence of alcohol laws

### THE PROBLEM WITH THE CONSCIENCE VOTE

- 5.1 Chapter four outlined how the conscience vote for alcohol Bills developed in the 19<sup>th</sup> century as a means of dealing with intra-party dissent. It subsequently came to provide a useful mechanism for governments legislating in an especially politically sensitive area. But both factors lost much of their relevance with the passage of time. The conscience vote for alcohol Bills remains in place today largely because of historical precedent.
- 5.2 The traditions and customs of Parliament are important and should be recognised as such. However, the historical practice of using conscience voting to deal with alcohol Bills is problematic because of the risks it poses to the quality and coherence of the laws Parliament passes. These risks exist primarily because the amendments that are made to Bills cannot be controlled by governments in a way that normally occurs when standard party-based voting applies. The result can be that major policies contained in a Bill are unduly compromised, and the resulting statute can be inconsistent and in need of future amendment.
- 5.3 Two points in the parliamentary legislative process are relevant in this context: the point at which amendments are recommended by a select committee; and when amendments are made to a Bill by a Committee of the Whole House.

### SELECT COMMITTEE AMENDMENTS

- 5.4 Select committees do not have the power to directly amend Bills sent to them for scrutiny by the House. Rather they can recommend amendments which the House may then choose to incorporate into the Bill at the second reading stage.<sup>98</sup>
- 5.5 Amendments recommended by a select committee nevertheless stand a high chance of being incorporated into a Bill. In fact, they are automatically deemed to be adopted and read into a Bill upon its second reading in the House. Under a new Standing

98 See McGee, above n 2, 356-358.

Orders procedure adopted in 1996, the House must specifically agree to any amendments recommended by a majority of a select committee (as opposed to amendments recommended unanimously).

- 5.6 Although select committees have traditionally operated in a more bi-partisan atmosphere than the plenary chamber,<sup>99</sup> the members of select committees still act as representatives for their respective parties. As such, it is standard practice for committee members to report back to their respective party caucuses before a committee makes its recommendations. The amendments recommended to a Bill by a select committee will in part reflect the views of the individual committee members (particularly in light of public submissions), but also the position of the party caucus, and in the case of government members, the Minister in charge of the Bill. Thus, when a government enjoys a majority on a select committee (i.e. the committee has more government members than non-government members), or where it can construct majority support from amongst party allies represented on a committee (usually support parties), the government has considerable influence over the number and nature of the amendments a select committee recommends.<sup>100</sup>
- 5.7 Conversely, when a Bill is treated on the basis of a conscience vote, the role of the party caucus and the Minister diminishes because MPs are free to make up their own minds on the issue rather than adhering to any agreed party line. Indeed the Bill may not even be formally discussed at a caucus meeting because decision-making is individual rather than collective. This significantly increases the select committee's autonomy over the Bill because its members act with much greater freedom than is normally the case under standard party-based voting. The result can be that in a conscience vote situation a select committee recommends major changes to a Bill that significantly lessen the Bill's policy cohesion.
- 5.8 The Sale of Liquor Act 1989 provides an example of this. The Sale of Liquor Bill (introduced in 1988) was based on the recommendations of the Report of the Working Party on Liquor, chaired by Sir George Laking.<sup>101</sup> One of the key recommendations of the Laking Committee, duly incorporated into the Bill, was the removal of the monopoly rights of Licensing Trusts to sell alcohol in their respective areas, while at the same time removing the prohibition on Trusts trading beyond their designated area.<sup>102</sup> In effect, Licensing Trusts were to be treated the same as commercial entities. This was consistent with the underlying policy objective of the Bill to simplify and rationalise what had become a complicated regulatory framework governing the sale and supply of alcohol.
- 5.9 However, the Committee on the Sale of Liquor Bill (a specially appointed *ad hoc* select committee) recommend amendments that overturned the proposed changes.<sup>103</sup> As amended, the relevant Licensing Trusts retained their monopoly rights to sell alcohol, while remaining unable to trade beyond their own

99 Jackson, above n 23, 125-127.

100 See generally Ryan Malone *Rebalancing the constitution: The challenge of government law-making under MMP* (Institute of Policy Studies, Wellington, 2008) 131-168.

101 Report of the Working Party on Liquor "The sale of liquor in New Zealand" (October 1996) [*Laking Report*].

102 *Laking Report*, above n 101, 22-23.

103 The recommended amendments were subsequently incorporated into the Bill on second reading.

boundaries. The removal of monopoly rights and cross-area alcohol retailing, could now only happen if a majority of voters agreed to it in a local poll.<sup>104</sup> This was a significant reversal of an important policy in the Bill and was contrary to the legislation's general deregulatory approach. It happened because National party committee members supported the existing legal position of the Licensing Trusts and were able to persuade the Labour party members of the select committee to preserve the legal status quo. Had the party whip been applied, it is unlikely that the committee would have recommended the amendments to the Licensing Trust laws that it did.

- 5.10 It should be acknowledged that select committees often make significant changes to government Bills that are subject to standard party-based voting. This is particularly the case since the advent of a proportionally elected House. However, the crucial difference remains that where party-based voting applies, the government still has considerable influence over the number and nature of amendments a select committee recommends. Thus a select committee may recommend major changes to a Bill with the government's support. For conscience votes, that influence dissipates and a select committee enjoys the freedom to recommend amendments more or less as it sees fit. Accordingly, the risks increase that the committee may recommend amendments that take the Bill in a significance new policy direction, potentially at the expense of the legislation's overall policy coherence.
- 5.11 Even where government members constitute a minority of a select committee (as has been common under MMP), the government still has the opportunity to reverse unwanted select committee amendments at the Committee of the Whole House stage where party-based voting applies. Yet, as discussed below, the ability of governments to do so in a conscience vote situation is limited because voting outcomes can be uncertain.

## COMMITTEE OF THE WHOLE HOUSE AMENDMENTS

- 5.12 When standard party-based voting applies, and a government has a majority in the House, that government will rely on its members to secure the amendments it seeks in a Committee of the Whole House, and to vote down amendments it opposes.<sup>105</sup> In a minority government situation, the government achieves this level of control by relying on its support party allies.<sup>106</sup>
- 5.13 In a conscience vote situation, however, the ability of governments to control the amendments made to their Bills is dramatically reduced. In particular, the absence of the party whip means government MPs are not obliged to vote one way or the other, which increases the prospects of opposition party amendments being made to a Bill. Legislative majorities can fluctuate from issue to issue and outcomes can be highly unpredictable.
- 5.14 This has two consequences. First, from a procedural point of view, a Committee of the Whole House's consideration of a Bill can become disorganised. This is caused largely by the sheer number of amendments that a Committee considers.

104 Sale of Liquor Act 1989, s215 (the competition poll) and Sale of Liquor Act 1989, s218 (the expansion poll, repealed in 2004).

105 The default procedure in Standing Order is for Bills to be examined part-by-part. Within each Bill, individual clauses can be debated and amendments moved.

106 See Malone, above n 100, 185-199.

The absence of party discipline, together with the increased prospects of amendments being incorporated into a Bill, encourages more MPs to move amendments than would usually do so.<sup>107</sup> The result can be that a Committee must work its way through such a large number of amendments to the clauses of a Bill that MPs find it difficult to comprehend exactly what amendments they are voting on and how they relate to the Bill. In the past MPs have described the Committee of the Whole House stage as “chaotic”<sup>108</sup> and “confused”<sup>109</sup> when conscience voting is used. Such conditions do not facilitate considered and rational law-making.

- 5.15 Second, the overall coherence and quality of a Bill can be threatened by amendments that impact heavily on the Bill’s underlying policies. As noted, governments are normally in a position to defeat amendments they consider jeopardise, or at least do not advance, a Bill’s policies. In a conscience vote situation, however, such amendments stand a much greater chance of success because the party whips are off and majority support cannot be guaranteed. The result can be major patchwork changes to a Bill, often without due consideration to the impact those changes have on the overall consistency and workability of the Bill as a whole. These concerns were summarised by Hon Phillip Woollaston (Labour) during the debate on the Sale of Liquor Act 1989:<sup>110</sup>

...it is very easy for the House to import inconsistencies into legislation under the conditions that prevail when the House is having a free vote. I do not question the fact that a free vote is exercised. I am merely saying that it removes the coherent policy framework under which the House normally debates legislation, and makes it easy to consider clauses in isolation from each other, and, more important perhaps, to consider proposals for amendment to clauses without necessarily bearing in mind their relationship to other clauses and to other amendments that crop up.

- 5.16 In a similar vein, Hon Peter Dunne (Labour) told the House during the same debate:<sup>111</sup>

I am very concerned that the matter is being dealt with on a conscience vote basis, because I believe that it has the potential to replace the present shambles with a new shambles, particularly when the House gets to the Committee stage. With all kinds of bright ideas, spur of the moment decisions are made about likely clauses for inclusion. In that regard I issue a warning to all members to be very careful in consideration of the Bill about being seduced by bright-eyed causes and brilliant ideas from lobby groups that ought to see their light of day in the Committee stage. If that kind of thing happens...then all of the work that has been done by the Laking working party, by the Minister, by his officials, and by all members who participate in the debate this evening will be disastrously destroyed, and the present shambles will be replaced by an even worse shambles.

107 Additionally, in a conscience vote situation the Parliamentary Counsel Office (PCO) drafts amendments for all MPs so that those amendments are as clear, and as consistent with the Bill, as possible. PCO drafting resources are ordinarily reserved for government amendments. This change in practice recognises the higher likelihood of opposition amendments being incorporated into government Bills when a conscience vote is held.

108 Rt Hon Sir Robert Muldoon MP (13 July 1988) 490 NZPD 5067.

109 Rt Hon Robert Tizard MP (30 May 1989) 498 NZPD 10964.

110 Hon Phillip Woollaston MP (13 July 1988) 490 NZPD 5066.

111 Hon Peter Dunne MP (13 July 1988) 490 NZPD 5073-5074.

- 5.17 Conscience voting contributes to policy incoherence in legislation partly because it denies MPs the advantages of party membership. Membership allows MPs to specialise in particular areas, for example in health, education, or defence. Individual MPs' expertise, research, and opinions can then be pooled together within the caucus. MPs then vote in the Committee of the Whole House with the benefit of the collective insight of the party as a whole.
- 5.18 Yet because parties withdraw from the vote on conscience issues, MPs cannot draw upon the resources of the party when considering how to cast their votes. This can be problematic because individual MPs may not have the time or resources to gain a fundamental understanding of conscience issues before the House, especially when it comes to complex regulatory reform.<sup>112</sup> The result can be that MPs must vote on amendments that are moved in a Committee of the Whole House based on incomplete or inadequate information. As Graham Kelly (Labour) noted in 1999, "we get inconsistencies in outcomes if members go by their gut reaction rather than listening to the views of colleagues who have had time to study the issue, or by relying on the way that Parliament handles such matters".<sup>113</sup>
- 5.19 It should also be noted that the withdrawal of parties in instances of conscience voting creates a vacuum for influence that pressure groups readily fill. Conscience votes are often the subject of intensive lobbying, in large part because lobbyists step into the role usually played by parties and provide MPs with information and views. As Bollinger noted, alcohol Bills have traditionally been the subject of intense lobbying campaigns, noting that "the power of the trade was able to be seen very clearly during the 'free votes' permitted by both parties in Parliament during the 1960s".<sup>114</sup> The result can be that as a Bill progresses through the House, MPs advance the positions of a variety of pressure groups, thereby increasing the risk of policy incoherence.

#### SALE OF LIQUOR ACT 1989

- 5.20 The Committee of the Whole House stage of the Sale of Liquor Act 1989 demonstrates clearly the potential for uncertain legislative outcomes when a conscience vote is held on alcohol Bills.
- 5.21 As noted, the Sale of Liquor Bill (that became the Sale of Liquor Act 1989) implemented many of the recommendations made by the Laking Committee. In particular, the Laking Committee recommended that all forms of alcohol (including beer, wine and spirits) be allowed to be sold in supermarkets, grocery shops, dairies and other stores, but not petrol stations.<sup>115</sup> As introduced, the Bill adopted

112 Geoff Thompson (National) noted that "A conscience vote means effort by individual parliamentarians, which is not a particularly satisfactory state of affairs when parliamentarians have much work to do. They are not in a position to concentrate all of their time on one issue, which might be the subject of a conscience vote. When the vote is finally taken, those parliamentarians have not given adequate consideration to the matter" (8 October 1982) 447 NZPD 3917. Ron Mark (New Zealand First) made a similar point: "I know from talk around the House that it is very difficult for members of Parliament, when they face issues such as this which are conscience issues, and have to spend some time coming to grips with the implications of the issue and adopting an informed position..." (1 June 2000) 584 NZPD 2765.

113 (26 August 1999) 579 NZPD 18850.

114 Bollinger, above n 86, 92. Until relatively recently, representatives of the liquor industry would often be present in the precincts of Parliament to advise MPs as to how they should vote on amendments moved in a Committee of the Whole House should they wish to vote in a way favourable to the trade.

115 *Laking Report*, above n 101, 41-43. The Act created a category of licence known as an 'off-licence' where the public could purchase alcohol for consumption off the premises.

a slightly different approach. It did allow supermarkets, stores, shops, or similar premises to sell alcohol, but restricted the type of alcohol that could be sold to wine. This approach is depicted in position 1 in the chart below.

PARLIAMENTARY CHANGES TO OFF-LICENCE LAWS IN THE SALE OF LIQUOR ACT 1989			
Position	Stage	Event	Effect
1	Bill introduced into the House	Bill partly adopts Laking Committee recommendations on off-licence sales	<ul style="list-style-type: none"> <li>• No restriction on the types of premises which may be granted an off-licence (other than petrol stations).</li> <li>• Supermarkets, grocery stores, shops, and similar premises limited to selling wine only (clause 35(2)).</li> </ul>
2	Select committee scrutiny	Select committee amendments incorporated at second reading	<ul style="list-style-type: none"> <li>• New clause 33A specifying the types of premises that may be granted an off-licence.</li> <li>• Clause 33A(1)(c) allows an off-licence to be granted to premises in which the principal business is the manufacture or sale of liquor, or the sale of groceries.</li> <li>• All forms of liquor can be sold (clause 35(2) omitted).</li> <li>• Clause 33A(3) specifically excludes dairies and service stations from holding an off-licence.</li> </ul>
3	Committee of the Whole House (Lee amendments)	Graeme Lee (National) amendments agreed to by Committee of the Whole House	<ul style="list-style-type: none"> <li>• Omits clause 33A(1)(c)(ii) such that no premises in which the principal business is the sale of groceries may be granted an off-licence.</li> </ul>
4	Committee of the Whole House (Gerbic amendments)	Bill recommitted to Committee of the Whole House prior to third reading. Fred Gerbic (Labour) amendments agreed to.	<ul style="list-style-type: none"> <li>• Clause 33A(1) further amended such that supermarkets and certain grocery stores may be granted an off-licence.</li> <li>• Off-licences granted to such premises limited to selling wine only.</li> <li>• Exclusion of service stations and dairies retained.</li> </ul>

- 5.22 The Committee on the Sale of Liquor Bill, in a further indication of the autonomous nature of select committees under a conscience vote, inserted a new clause into the Bill (clause 33A) which limited the types of premises that could be granted an off-licence (position 2). The Committee recommended that off-licences could only be granted to hotels, taverns, the holder of a club licence, and premises where the principal business was the manufacture or sale of liquor (clause 33A(1)(c)(i)) or the sale of groceries (clause 33A(1)(c)(ii)). It was also recommended that clause 35(2), which related to the conditions that attached to off-licences, be omitted such that all off-licences be permitted to sell all forms of alcohol, including wine, beer and spirits. This was a significant departure from the original Bill which had restricted supermarkets and stores to selling wine only and was something of a reversion back to the Laking Committee position.

As a concession, the new clause 33A(3) specified that no off-licence could be granted to any dairy or service station. These amendments were incorporated into the Bill upon second reading.

- 5.23 The Committee of the Whole House stage of the Bill saw further changes to the off-licence regime (position 3). A number of MPs from both sides of the House expressed unhappiness with the select committee's amendments regarding off-licences, and in particular that supermarkets would be able to hold an off-licence, and further, that they would be able to sell beer and spirits. Hon Graeme Lee (National) told the House during the report back of the select committee's report that:<sup>116</sup>

The committee, in changing the Bill in terms of off-licences...has not considered the issue properly. The original Bill specified that groceries, supermarkets, and other stores sell wine only. That provision has been amended to exclude dairies and petrol retailers but to include the sale of all kinds of alcohol. I do not know the exact number of extra outlets that will result from that extension, but it may be half of the estimated 5000 at present. If that is correct it would make about 7500 outlets, in all, that could sell not just wine but a full range of alcohol. That is not acceptable to me or to the public.

- 5.24 Lee subsequently moved an amendment to the Bill in the Committee of the Whole House proposing that clause 33A(1)(c)(ii) be omitted, such that only hotels, taverns, the holder of a club licence, and premises where the principal business was the manufacture or sale of liquor could be granted an off-licence. The Committee of the Whole House voted in favour of Lee's amendments. Thus, with a single amendment, the possibility of supermarkets and other grocery retailers selling any form of alcohol was removed completely from the legislation.

- 5.25 Further change was still to come. Prior to the Bill being given its third reading, the Bill was recommitted to a Committee of the Whole House specifically to deal with the issue of off-licences.<sup>117</sup> In moving the recommittal motion, Fred Gerbic (Labour) stated that:<sup>118</sup>

As the Bill stands, supermarkets, by separating their premises, will be able to apply for an off-licence to sell liquor of all kinds. Clearly, that was not the intent of the House when it considered the matter in the Committee stage. My amendment is designed to correct that matter.

- 5.26 The Bill was duly recommitted, whereupon the Committee of the Whole House once again changed the rules regarding off-licences. Under the Gerbic set of amendments (position 4), clause 33A(1) was amended such that supermarkets (of at least 1000 square metres) and grocery stores (where the principal business of the store was the sale of household foodstuff requirements) could both be granted an off-licence. However, it would be a condition of these off-licences that they were restricted to selling wine only.

116 (4 May 1989) 497 NZPD 10420.

117 For the rules on recommittal see McGee, above n 2, 387-388.

118 (25 July 1989) 499 NZPD 11441.

- 5.27 The passage of the Sale of Liquor Act 1989 shows the risks conscience voting poses to policy coherence and the enactment of clear and workable laws. The number and type of outlets that are able to sell alcohol, as well as the forms of alcohol those outlets can sell, forms part of a policy framework that is encapsulated by what is known as the ‘availability theory’.<sup>119</sup> The extent to which the availability theory applies is inevitably a crucial component of the policy fabric that underpins any major alcohol sale and supply statute. Yet with this particular piece of legislation no less than four different positions were taken as the Bill made its way through the House from introduction to third reading. This policy merry-go-round occurred because the absence of party discipline created a legislative environment in which new policy positions in the Bill were readily adopted. Ironically the Gerbic amendments returned the Bill close to its original position regarding off-licences, with the main difference being that dairies could not sell alcohol.
- 5.28 Furthermore, as per Fred Gerbic’s comments to the House, part of the motivation for recommitting the Bill was to avoid what was perceived to be an unintended consequence of agreeing to the amendments proposed by Graeme Lee. This was that supermarkets, if they so desired, could circumvent the intended restrictions in clause 33A and acquire a licence by establishing a separate store (either within the supermarket or close by) that principally sold alcohol.<sup>120</sup> This highlights the potential difficulty in a conscience vote situation when a Committee of the Whole House votes on scores of amendments, some of which are ultimately incorporated into a Bill at the expense of the workability and effectiveness of the legislation. Had the House not agreed to recommit the Bill (the recommittal motion was only won 45 votes to 31)<sup>121</sup>, it may have been deemed necessary to introduce amending legislation shortly after the Sale of Liquor Act 1989 had been enacted.
- 5.29 Interestingly, the Liquor Review Advisory Committee criticised the 1989 Act’s off-licence regime as lacking consistency and equity.<sup>122</sup> In addition, in its 1997 annual report, the Liquor Licensing Authority expressed similar concerns about the logic underpinning section 36 of the Act (the old clause 33A before the Bill was renumbered prior to Royal Assent). The Authority stated that “we instance the inconsistencies in the present section 36 as a reminder of the drafting anomalies that can arise when legislation is introduced and subject to amendment on a conscience vote basis”.<sup>123</sup> Consistent with this observation, the interpretation of section 36 has been the subject of litigation in the High Court in *Lopdell v Deli Holdings*.<sup>124</sup>

119 Thomas Babor et al *Alcohol: No ordinary commodity* (Oxford University Press, New York, 2003) 117-139 [*Alcohol: No ordinary commodity*].

120 This would qualify supermarkets as premises in which the principal business was the sale of liquor products.

121 (25 July 1989) 499 NZPD 11441.

122 Liquor Review Advisory Committee “Liquor Review” (Ministry of Justice, Wellington, 1997) 91-92.

123 Liquor Licensing Authority “Annual Report for the 12 months ended 30 June 1997” [1996-1999] XXV AJHR E8 4-6 [*Liquor Licensing Authority Annual Report*].

124 (10 December 2001) HC AK AP 97/01.

# Chapter 6

## Party-based voting for alcohol laws

### MOVING AWAY FROM THE CONSCIENCE VOTE

- 6.1 Chapter four suggested that the conscience vote for alcohol Bills remains in place today largely because of historical precedent. The Law Commission suggests it would be preferable for standard party-based voting, rather than conscience voting, to be used for future Bills relating to the sale and supply of alcohol. This is because of the risks the conscience vote poses to the quality and coherence of legislation Parliament enacts as outlined in chapter 5. Tradition alone is not a satisfactory reason to continue to use the conscience vote for alcohol Bills.
- 6.2 In stating this position, two important points are acknowledged. First, whether to use a conscience vote for alcohol Bills is a question that each parliamentary party will decide for itself. The Law Commission has no interest in seeking to prescribe parties' voting methods, or in restricting the voting discretion of MPs. Rather, the Commission's concern lies with the soundness of the laws that will come to govern the sale and supply of alcohol.
- 6.3 Second, conscience voting can increase the quality of parliamentary debate. The removal of the party whip facilitates a freedom of expression that can be absent when the expectation of party unity hovers over MPs. Interesting debate in the House can also generate greater public interest in a Bill. However, while the quality of debate and the level of public engagement in the activities of the House are beneficial by-products of the conscience vote, their attainment should not trump society's need for workable and effective laws.

### ADVANTAGES OF PARTY-BASED VOTING

- 6.4 Shifting away from the conscience vote for alcohol Bills will create a parliamentary environment that is more stable and produces more predictable legislative outcomes. Party-based voting is considerably more likely than conscience voting to produce alcohol statutes that contain coherent and effective policies, have clear and logical application, and do not require short-term amendment to rectify drafting anomalies and unintended consequences.
- 6.5 Governments are averse to changes that unduly compromise or lessen the effectiveness of their own Bills. Where party-based voting applies, governments are more able to influence parliamentary outcomes and prevent changes that may have this effect from being incorporated into the final legislation. Thus, select committees are less likely to recommend major amendments at odds

with the primary objectives of a Bill (as occurred, for example, with the Sale of Liquor Act 1989 regarding Licensing Trusts) because the voting decisions of government members of select committees will be influenced by the views of the government caucus (or caucuses).

- 6.6 The same applies at the Committee of the Whole House stage where the party-based nature of voting makes the fate of amendments, both ministerial and non-ministerial, more certain. When MPs vote along party lines, governments will usually be in a position to successfully oppose amendments that they consider undermine the quality and workability of the resulting Act. Had party-based voting applied at the Committee of the Whole House stage of the Sale of Liquor Act 1989 for example, it is unlikely the dramatic changes to the off-licence regime would have been agreed to.
- 6.7 Party-based voting would facilitate a stronger evidence-based approach to alcohol legislation because the pool of shared knowledge generated by the caucus mechanism would become available to MPs (as is normally the case). This is a particularly important point in the case of alcohol legislation given the increasing availability of national and international research relating to the effects of alcohol consumption. As Babor *et al* observed:<sup>125</sup>

During the past decade there have been major improvements in the way alcohol problems are studied in relation to alcohol policies. With the growth of the knowledge base and the maturation of alcohol science, there is now a real opportunity to invest in evidence-based alcohol policies as an instrument of public health.

- 6.8 The influence of pressure groups over the legislation will also diminish if party-based voting is adopted. As discussed, this has been a particular feature of alcohol Bills in the past. It can jeopardise the overall coherence of the law by encouraging the incorporation of a multiplicity of exemptions and inconsistent policy choices into the final statute. Lobbying is more effective in an environment where multiple legislators have potential influence over a Bill as it makes its way through the House. A shift away from conscience voting to standard party-based voting would reduce those opportunities considerably.
- 6.9 In addition, pressure on electorate MPs to support exemptions in legislation in favour of local interests would carry less weight because MPs would be required to adhere to the party position on the Bill. This would accordingly reduce the risk of a patchwork Act that allows some organisations to operate under different sets of rules from comparable organisations.
- 6.10 To be certain, the Law Commission is not suggesting that the House's role in reviewing and modifying legislation should somehow be curtailed. The Commission simply advocates that alcohol Bills be treated on the same basis as the plethora of important social and economic Bills that the House routinely deals with by way of party-based voting. In this context it is important to recognise that the advent of a proportionally elected legislature has made the process of governing a good deal more complex. In particular, the House has considerably more influence over the details of government legislation than used

<sup>125</sup> *Alcohol: No ordinary commodity*, above n 119, 6.

to be the case under the two-party system.<sup>126</sup> Under MMP it can be challenging to retain policy coherence as a Bill is exposed to the policy demands of multiple parties. A conscience vote situation, in which no party discipline applies at all, makes policy coherence even more difficult to achieve.

- 6.11 If alcohol was not such an important social issue, concerns over the use of the conscience vote might be less pertinent. However the harmful use of alcohol is an issue of major social importance, as evidenced by the increasing academic, media and public attention it has received in New Zealand in recent times. While the conscience vote for alcohol may have a strong tradition in the House, it is questionable as to whether the desire to maintain that tradition should override the community's interest in workable and effective alcohol laws.
- 6.12 Alcohol presents a significant policy challenge. The statutory regime governing its sale and supply should not impose unreasonable restrictions on individuals who choose to consume it. Yet there is growing empirical evidence as to the negative consequences of harmful drinking, especially in the domain of criminal behaviour and public health. In its 2008 *Briefing for the Incoming Minister*, the Alcohol Advisory Council of New Zealand noted that in 2007 up to 61 % of alleged offenders had consumed alcohol prior to their offending.<sup>127</sup> ALAC also noted that in 2007, alcohol or drugs was a contributing factor in 117 fatal traffic crashes, 402 serious injury crashes, and 1,182 minor injury crashes. A recent New Zealand study has estimated that in 2000 a total of 1,037 deaths were attributable to alcohol consumption (representing 3.9 % of all deaths).<sup>128</sup> The prospects of achieving a satisfactory balance between individual liberty and harm minimisation are considerably higher when the House operates under party-based voting than if it is subject to the vagaries of the conscience vote.
- 6.13 Alcohol is a drug that can have toxic effects.<sup>129</sup> Indeed, it has been argued that if it were to be treated as an illicit drug and graded according to the Misuse of Drugs Act 1975, alcohol would receive a 'B' classification given, among other things, its sedative effect, the likelihood of abuse, and its potential to cause death.<sup>130</sup> In this context it should be noted that Bills that legislate on the production, sale and use of illegal drugs (primarily the Misuse of Drugs Act 1975 and subsequent amendments) are subject to normal party-based voting in the House. Given the actual and potential harms caused by alcohol consumption, the use of conscience voting for one form of drug and party-based voting for others appears contradictory.

126 Malone, above n 100, 227-230.

127 Alcohol Advisory Council of New Zealand *Briefing to the incoming Minister* (21 November, 2008) 26. This information was based on the New Zealand Police 'Alco-link' data.

128 J. Connor, J. Broad, R. Jackson, S. Vander Hoom, & J. Rehm *The burden of death, disease and disability due to alcohol in New Zealand* (Alcohol Advisory Council of New Zealand, Wellington, 2005) 36.

129 *Alcohol: No ordinary commodity*, above n 119, 15.

130 J. D. Sellman, G. M. Robinson, and R. Beasley "Should ethanol be scheduled as a drug of high risk to public health?" (2008) *Journal of Psychopharmacology* 1-7. Section 3A Misuse of Drugs Act 1975 provides that "(a) drugs that pose a very high risk of harm are classified as Class A drugs; (b) drugs that pose a high risk of harm are classified as Class B drugs; and (c) drugs that pose a moderate risk of harm are classified as Class C drugs".

6.14 An indirect benefit of using party-based voting for alcohol Bills is that parties would be likely to develop specific policies on aspects of alcohol regulation. Christoffel observed that when the Labour party dropped state ownership of the production and supply of alcohol in 1920 it was “almost the last time any major political party had a firm policy on alcohol issues that did not involve submitting them to a referendum or establishing a Royal Commission or select committee”.<sup>131</sup> Party-based voting would create an expectation that parties will have definite positions on alcohol, just as they do on a plethora of issues listed in party manifestos. This will in turn empower the voting public by providing clear policy alternatives, while facilitating greater accountability for the policy choices governments make.

#### SALE OF LIQUOR AMENDMENT ACT 1999

6.15 The House adopted a revised process for the Sale of Liquor Amendment Act 1999. The Committee of the Whole House stage of the Sale of Liquor Amendment Bill (No 2) was divided into two phases. In phase one, the Committee debated and voted on 11 matters in the Bill previously identified by the Justice and Law Reform select committee as ‘conscience type policy issues’. All issues were decided on the basis of a conscience vote.

6.16 Phase two followed approximately four weeks later. The period in between the two stages gave the Parliamentary Counsel Office time to draft amendments reflecting: (1) the decisions taken by the House on the 11 conscience issues; and (2) amendments to other parts of the Bill affected by those decisions. Phase two of the Committee of the Whole House saw the Committee debate and vote on the entire Bill, including the drafted amendments. In phase two, no amendments inconsistent with the decisions taken in phase one were permitted.

6.17 This novel approach was an attempt to mitigate some of the difficulties associated with conscience voting at the Committee of the Whole House stage. The Justice and Law Reform Committee noted that:<sup>132</sup>

From past experience and the institutional knowledge of others we are aware that broad ‘conscience type’ issues are never dealt with easily in the Committee of the Whole House, as clause by clause consideration makes it very complicated for members to resolve the major policy elements of Bills. The complex nature of the Bill serves to augment our concern that consideration at that later stage will be confusing unless an innovative approach is taken.

6.18 This two-stage process was well thought out. It facilitated a more orderly consideration of the Bill in the Committee of the Whole House by initially focusing the attention of MPs exclusively on the 11 designated conscience issues. This in turn allowed consequential amendments to be drafted, debated, and voted on with the knowledge of the House’s view of the main contentious issues in the Bill (upon which many of the administrative parts of the Bill depended). This added greater certainty to the process, thereby reducing the likelihood that the final Act contained inconsistencies and errors requiring future amendment.

<sup>131</sup> Christoffel, above n 78, 53.

<sup>132</sup> Justice and Law Reform Committee “Report on the Sale of Liquor Amendment Bill (No. 2)” [1996-1999] LXVI AJHR 473.

6.19 What such a process cannot do, however, is to overcome the inherent policy uncertainty that exists when the party whip is lifted and MPs vote freely on the clauses of a Bill. Regardless of whether a single-stage or a multi-stage process is employed, when conscience voting is used important parts of a Bill are still decided by the unpredictable whim of the chamber. Consequently, the risk of significant policy incoherence remains. So while the two-stage process used in 1999 constitutes a marked improvement from previous practice, policy coherence objectives are better served by shifting away altogether from conscience voting on alcohol Bills to party-based voting, as is the norm with issues of comparable seriousness.

## SUPPORT FOR A NEW APPROACH

6.20 The Law Commission is not alone in calling for a change in the use of the conscience vote for alcohol Bills.

6.21 In 2008, the New Zealand Police expressed support for a comprehensive review of alcohol laws. As part of this position, the Police voiced reservations about the use of the conscience vote for the resulting legislation.<sup>133</sup>

Police's view is that, for the full benefit of any legislative changes to be realised, they need to be adopted as Government policy. The tradition of addressing alcohol-related legislation as a matter of individual choice is not conducive to delivering a comprehensive and cohesive legislative framework.

6.22 The New Zealand Drug Foundation has a policy position that alcohol laws should be decided "as a matter of policy, not personal conscience vote".<sup>134</sup> Ross Bell, the Executive Director of the New Zealand Drug Foundation, has expressed particular concern that conscience voting does not encourage an evidence-based approach to alcohol legislation.<sup>135</sup>

There is a ton of research and examples to show what good policies around alcohol should look like. This issue is so important parties need to form policies based on the evidence and these policies should go through rigorous policy review.

6.23 Gerard Vaughan, CEO of the Alcohol Advisory Council of New Zealand, has expressed the view that while conscience voting can encourage wider debate about an issue, ultimately "law making processes need to produce a cohesive alcohol policy and legislation that works together to reduce the social impact of alcohol use".<sup>136</sup>

6.24 Certain members of the medical profession have also called for an end to conscience voting on alcohol Bills. Professor Doug Sellman, Director of the National Addiction Centre (University of Otago) has argued that "when a government resorts to conscience voting it is not governing".<sup>137</sup> In a similar vein, Roger Brooking, an alcohol and drug addiction specialist, has likewise questioned the general absence of explicit party policies on alcohol related matters.<sup>138</sup>

133 New Zealand Police *Briefing to the incoming Minister* (2008) 12.

134 New Zealand Drug Foundation "Policy positions on alcohol" (August, 2003) 1.

135 "On their conscience" (2008) 8(4) Alcohol.org.nz 10.

136 "On their conscience", above n 135, 9.

137 "On their conscience", above n 135, 9.

138 Roger Brooking "The worst alcohol problem in New Zealand is in Parliament" (27 January 2009) Press Release <http://www.scoop.co.nz/stories/HL0901/S00369.htm> (last accessed 30 March 2009).

- 6.25 In its 1997 Annual Report to Parliament, the Liquor Licensing Authority, citing the uncertain state of the law surrounding off-licences under the Sale of Liquor Act 1989 as but one example, ventured that in future Parliament should clearly separate those matters that are appropriate for a conscience vote and those that are administrative in nature.<sup>139</sup>
- 6.26 Finally, over the course of several decades, a number of MPs from both major parties have questioned the use of conscience voting for alcohol Bills, including:
- Geoff Thompson (National): “We all feel that the approach to this sort of issue is highly unsatisfactory, and we should take that as a measure of our concern for the conscience vote on liquor licensing. It should be reviewed”.<sup>140</sup>
  - Norman Jones (National): “...it is time the nonsense of allowing members of Parliament to have a conscience vote on booze was stopped. I would prefer that one of the major parties had the courage to bring down in its caucus a sensible and reasonable policy on the licensing laws”.<sup>141</sup>
  - Hon Ralph Maxwell (Labour): “The conscience vote is just not adequate when it comes to taking a serious approach to the matter of liquor”.<sup>142</sup>
  - Rt Hon Jim Bolger (National): “[The Sale of Liquor Bill] has been almost totally rewritten by the select committee, and Parliament will seek to rewrite it again through the individual conscience vote of members. That is not a very efficient or sensible way in which to write law to control one of the most widespread drugs in society. Alcohol is a drug. It is abused, but, equally, it is used to the satisfaction and pleasure of many New Zealanders. The procedures by which we try to draft the law leave much to be desired”.<sup>143</sup>
  - Graham Kelly (Labour): “I think it is time for a change and I hope that this is the last time we have conscience votes on this issue”.<sup>144</sup>
  - Brendon Burns (Labour): “Liquor legislation is difficult to get right. In part, I think that is because it remains a conscience vote for members, a residue from the pro-temperance push early last century. As further liquor legislation looms in the course of this Parliament, I suggest it is timely for parties to consider whether such law changes should become matters of party policy”.<sup>145</sup>
- 6.27 Taken together, these views raise challenging questions about the use of the conscience vote for alcohol Bills, and in particular, whether it is capable of delivering a legislative framework that is rational, workable, and capable of contributing to a reduction in alcohol related harms.

139 *Liquor Licensing Authority Annual Report*, above n 123, 6.

140 (8 October 1982) 447 NZPD 3917.

141 (8 October 1982) 447 NZPD 3911.

142 (30 May 1989) 498 NZPD 10978.

143 (30 May 1989) 498 NZPD 10967.

144 (26 August 1999) 579 NZPD 18850.

145 (11 December 2008) 651 NZPD 380.

# Chapter 7

## Conclusion

- 7.1 The social and political factors that accounted for the use of the conscience vote for alcohol Bills have faded. The discussion about the regulation of alcohol is no longer cloaked in religious and moral extremes, as was the case in the late 19<sup>th</sup> and early 20<sup>th</sup> centuries. The powerful ‘wet’ and ‘dry’ pressure groups that together acted as a strong bulkhead against legislative change have lost most of their electoral significance. Voters are no longer required to decide through referenda on the closing times for licenced premises, or on the desirability of nationwide prohibition. Conscience voting on alcohol Bills remains a feature of the New Zealand Parliament largely because of historical precedent. Most parties default to the conscience vote on the basis that it is the way the House has always dealt with such Bills.
- 7.2 From both a policy and law-making perspective, the use of the conscience vote for alcohol Bills is problematic. Voting fluidity in select committees and in a Committee of the Whole House makes the fate of amendments unpredictable. Important parts of a Bill can be overturned and new parts inserted often at the expense of the coherence of the final Act and the effectiveness of its underlying policy objectives.
- 7.3 This is of particular concern in the case of alcohol laws. Alcohol related harms are of increasing concern to New Zealand communities. The legislation that governs the sale and supply of alcohol needs to be clear and logical, and it must facilitate a reduction in the harmful effects of hazardous drinking without unduly impinging on the liberty of the individual.
- 7.4 Party-based voting is better suited than the historical conscience vote to delivering this legislative framework because it provides a more stable and certain parliamentary legislative environment. It will also encourage parties to have clearly defined alcohol policies for voters to consider, while facilitating greater policy accountability to the electorate.
- 7.5 The Commission suggests that in the event that the conscience vote is retained by parties for future alcohol Bills, it would be preferable for those issues that are to be treated on the basis of a conscience vote (for example a minimum legal age of purchase) to be explicitly identified and voted on separately from the administrative parts of the Bill. The two-stage process used in 1999 for the Sale of Liquor Amendment Bill (No 2) provides a useful precedent.

- The Law Commission suggests that it is preferable for alcohol Bills to be voted on the basis of standard party-based voting rather than using the conscience vote.
- If conscience voting is to be retained for alcohol Bills, the Commission suggests that the two-stage process used in 1999 for the Sale of Liquor Amendment Bill (No 2) provides a useful precedent.
- The Commission recognises that party-based voting for alcohol legislation is a decision for each party caucus to make. The House currently has several important Bills before it dealing with the sale and supply of alcohol. More such Bills will follow. It would be helpful if the use of party-based voting or the conscience vote in relation to these Bills was decided before these Bills are voted on by the House.
- The use of the conscience vote is not a matter for the Executive Government and therefore the Law Commission makes no recommendations to it.



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