

## Brexit adventures—comparing the UK and NZ Parliaments

The United Kingdom has recently experienced some unusual constitutional and parliamentary scenarios. Could they happen in New Zealand?

### How are the UK and NZ Parliaments different?

The Parliament of New Zealand (NZ) derives many of its traditions from the United Kingdom (UK) Parliament at Westminster, but there are also some major differences:

- **Devolution**—In the UK, much power to make laws has been passed down (devolved) to separate parliaments in Scotland, Wales and Northern Ireland.
- **Electoral systems**—The UK's parliamentary elections still use the First Past the Post system (FPP), which NZ used to operate until switching to the Mixed-Member Proportional system (MMP) in 1996. These electoral systems have very different outcomes for parliamentary membership, especially the number of MPs for each party compared with the proportion of votes the parties received.
- **Deciding who governs**—The electoral systems and the results that flow from them affect how Governments are formed—minority and coalition Governments are normal in NZ, but not in the UK, where they still describe such a result as a **hung parliament**.
- **One House or two?**—The Parliament of NZ is **unicameral**—the House of Representatives is the only body of members—but the UK Parliament is **bicameral**, that is, it has both an elected lower house (the House of Commons) and an appointed upper house (the House of Lords).
- **Size of Parliament**—The UK Parliament is much bigger: the House of Commons has 650 MPs and the House of Lords currently has about 800 members, while the Parliament of NZ has only 120 MPs. In the UK, several parties have many more MPs to manage than parties in NZ, and there is a much larger population of MPs who are not Ministers. These differences of scale affect relationships and attitudes within and between parties.

### What is prorogation?

**Prorogation** is the suspension of Parliament part-way through a parliamentary term. Prorogation closes Parliament, but it doesn't end it—a Parliament doesn't end until **dissolution**, which takes place when Parliament finishes up shortly before a general election.

During prorogation, all parliamentary business stops—the House stops sitting and committees can't meet—but members keep their seats and the Government remains in place.

Parliament closes when the Sovereign declares it to be prorogued, and opens when the Sovereign summons it to return. In NZ, the Governor-General acts on the Sovereign's behalf.

When Parliament resumes, there is a **State Opening of Parliament** during which the Sovereign reads the **Speech from the Throne**. The speech sets out the Government's legislative programme for the next year.

### **Does prorogation happen in New Zealand ... and why not?**

Prorogation has fallen out of use in NZ, as it now serves very little practical purpose. Until 1991, Parliament was still prorogued from time to time, but no prorogations have happened since then. Since 1996, our parliamentary year has begun with the Prime Minister making a statement to the House about the Government's legislative and policy intentions for the coming year. So the Government doesn't need to use the Speech from the Throne to announce its legislative programme each year.

Prorogation could be used to—

- call the House back sooner than its next scheduled sitting (this was why it was used in 1991)
- mark a visit by the Sovereign with a special occasion at Parliament.

However, the House's own rules now allow for these things to happen without prorogation being necessary.

### **What happens in UK, and why was prorogation controversial?**

The UK Parliament has an established pattern of proroguing once a year. A short recess is followed by a State Opening and Speech from the Throne. In a break with this pattern, the session of the UK Parliament that started in late 2017 was not ended in 2018 and no Speech from the Throne was delivered that year.

Many MPs in the UK considered the Government's request to prorogue Parliament to be undemocratic or unconstitutional. These MPs were concerned that the prorogation would have suspended parliamentary debate and scrutiny for five weeks, at a time when this work was particularly important, given the 31 October deadline for the UK to leave the EU.

## Are there limits to how prorogation could be used in NZ?

Shortly after NZ's Parliament was established in 1854, it was actually prorogued twice without a date being set for sittings to be resumed. In each of these cases, the suspension of parliamentary business lasted nearly two years! The Parliament did not meet at all in either 1857 or 1859.

Fortunately, such long prorogations have never happened again and prorogation has fallen into disuse. But there are still few explicit limits on the use of prorogation in NZ:

- The end date of a prorogation must be specified in the proclamation proroguing Parliament. However, this end date can be extended or brought forward by a further proclamation or proclamations.
- If Parliament is prorogued when a state of national emergency is declared or an epidemic notice is made, and certain circumstances apply, it must be summoned to meet.

The NZ courts might choose to rule upon the limits of the use of prorogation. In declaring Parliament to be prorogued, the Sovereign is exercising what is known as a **Royal prerogative power**. If a case about the prerogative power of prorogation came before a NZ court, it might assess the legality of a particular exercise of that power.

If such a case arose, a NZ court would be likely to find the recent decision of the UK Supreme Court in *Miller and Cherry* highly persuasive. In *Miller and Cherry*, the UK Supreme Court found that the Prime Minister's decision to advise the Queen to prorogue Parliament was unlawful. The court found that the Prime Minister's decision had the effect of frustrating or preventing the ability of Parliament to carry out its constitutional functions without reasonable justification.

## Could the Sovereign or Governor-General refuse to prorogue?

There is a strong constitutional convention, both in NZ and the UK, that the Sovereign (or her representative, the Governor-General) accepts the advice of her ministers. This means that, if the Government of the day advises the Queen to prorogue Parliament, she is extremely likely to do so.

In declaring Parliament to be prorogued, the Sovereign is exercising a **Royal prerogative power**. In principle, it is the Sovereign's personal decision whether to act on the advice of the Government and exercise this power. In practice, though, if the Sovereign decided not to follow the advice of the Government, a significant constitutional crisis could arise.

## How are elections called and Governments changed?

Recent changes in UK legislation mean that there are now significant differences between the UK and NZ processes for calling elections and changing Governments.

### Calling elections

NZ's Constitution Act 1986 limits the term of Parliament to 3 years, at which time the Parliament expires. Parliaments may, however, be dissolved at any time. Parliament is dissolved by proclamation given by the Governor-General, on the advice of the Prime Minister.

Within 7 days of dissolution, the date of the next general election must be specified by the Governor-General.

In the UK, the Fixed Terms Parliaments Act 2011 provides that general elections are scheduled to take place on the first Thursday in May in every fifth year. An election outside this five yearly cycle may occur only if:

- a motion for an early general election is agreed by at least two-thirds of the whole House; or
- a motion of no confidence is passed and no alternative government is confirmed by the Commons within 14 days.

The Parliament is dissolved automatically 17 working days before polling day for the next general election.

### Changing Governments

In NZ, it is a constitutional convention that a Government that has lost the confidence of the House must resign. When a Government resigns, there are two options. The Governor-General can:

- appoint a new administration from the existing Parliament if the Governor-General is satisfied that administration would have the confidence of the House; or
- dissolve Parliament and call an election.

In the UK, the Fixed-Term Parliaments Act provides the exact wording of confidence and confidence motions. In accordance with that Act, where a no confidence motion is passed by the House, there is a 14-day period during which an alternative administration may be formed and demonstrate that it is able to command the confidence of the House. If no alternative Government is formed within those 14 days, a general election is held.

## Could MPs in NZ “seize control of Parliament’s Order Paper”?

MPs in NZ could not use the same mechanism as was used recently in the UK House of Commons to control parliamentary business, but that doesn’t mean a similar outcome isn’t possible.

The “Order Paper” is like an agenda, listing the order in which the House will deal with bills, motions, questions and other business. The Government’s business is usually at the top of the list, except when the House’s rules give priority to business proposed by members who are not Ministers (on “Members’ Days”). The House can vary the order of its agenda, but normally there is no opportunity for members to propose such a rearrangement, unless they are Ministers.

In the UK, the opportunity to vary the House’s business arose from a procedure called an “emergency debate”. Both the UK House of Commons and the House in NZ allow for special debates about urgent issues, if the Speaker decides that such a debate is appropriate. The Speaker of the UK House of Commons allowed an emergency debate to take place on 3 September 2019. In doing so, he permitted the motion for the debate to include an extensive set of arrangements for the House’s business over the following days. The motion was agreed by a majority of the House, and so the next day the House devoted its attention to a bill even though the Government was opposed to this course of action.

The urgent debate procedure in NZ could not be used in this way. While an urgent debate starts with a motion, the words of the motion are spelled out in the House’s rules and cannot be amended, and the debate ends without a decision being made about the motion.

This is not to say that there is no mechanism in NZ for backbench MPs to take the initiative in highly unusual circumstances, as occurred in the UK. The Speaker has the final say about the appropriate interpretation and application of the House’s rules and can decide how to deal with new situations that the rules do not cover.

## What does “losing the whip” mean?

The term “losing the whip” is used in the UK to describe situations where MPs have been excluded from their **caucus**, which is the collective group of MPs who belong to the same party. A **whip** is an MP who co-ordinates the voting and attendance of a party’s MPs, and may be responsible for following up on lapses of party discipline. Generally, losing the whip means an MP ceases to be regarded as representing that party, and so becomes **independent**. But the MP remains in Parliament.

In NZ, a similar situation might be described as an MP being excluded or expelled from caucus. This can be temporary, and could be done as an internal

party matter, for example by a member being told not to attend caucus meetings. In such a case, the party's overall voting strength in the House would be unaffected. In other situations, a change in party membership can be officially communicated in writing to the Speaker, after which the party's votes in the House would need to be adjusted.

A law passed in 2018 means that MPs in NZ can lose their seats in the House if they cease to be members of the parties for which they were elected. This law has effect only if certain legal criteria are met—in other circumstances, it is still possible for MPs to remain in Parliament if they leave their parties.

### **Would an entrenched Constitution make a difference?**

This is becoming a hot question in the UK. It is highly relevant in NZ, because NZ and the UK are two out of only three democracies where there is no Constitution set out in a single, entrenched law (the other is Israel). An **entrenched** law is one that is more difficult to change than other laws, for example, if a change requires the support of more than the usual majority of MPs or the agreement of a majority of voters in a referendum.

NZ and the UK do not lack constitutions—we each have laws, rules and conventions about how public authority is distributed and limited among the three “branches” of the State: Parliament, Government and the Courts. Any move for either country to adopt an entrenched Constitution would require careful consideration of its contents, and would inevitably result in changes to constitutional arrangements. For example, the process of codifying the Royal power of prorogation would probably alter how it operated. So it is hard to say how an entrenched Constitution could have affected recent events in the UK.

Constitutions vary greatly in the values and principles they express, the level of detail they contain, and the extent to which Courts are given powers to apply them. But countries with entrenched Constitutions do not always have greater certainty about the limits of power, and sometimes experience actions that seem unconstitutional. And, as the UK Supreme Court's decision in *Miller and Cherry* has demonstrated, the lack of an entrenched Constitution does not prevent the Courts from determining that one of the branches of the State has tried to act in a way that goes beyond the limits of its lawful authority.

The UK's political difficulties over Brexit have shown how major constitutional issues can arise during momentous national debate and change. It is essential that, especially in divisive times, public authorities always respect constitutional arrangements, norms and values. Constitutional attitudes and behaviour ultimately are what underpin democracy, rather than the particular way the constitution is expressed.