SUSAN GIFFORD

PLAYING BY THE NEW RULES:
A CRITIQUE OF THE 1996 STANDING ORDERS IN NEW ZEALAND'S HOUSE OF REPRESENTATIVES.

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ABSTRACT

The Standing Orders of New Zealand's House of Representatives were redrawn in 1996 after the advent of MMP (Mixed Member Proportional Representation) in Parliament. Standing Orders are the permanent rules or orders of the House: in the words of the current Speaker, (they) "are designed to maintain order and facilitate debate". [1] *They are also the base upon which Parliament operates.*

Standing Orders were established in New Zealand's first Parliament in 1854 (largely lifted from the procedures used in Britain's House of Commons) and they are frequently amended. The most radical changes occurred in 1951 when New Zealand's Parliament changed from a bicameral to unicameral system. In 1985, the Labour Government made several changes, particularly in reconstructing Select Committees but the 1996 changes are more significant. They substantially alter the way Parliament operates.

This paper assesses the impact of these changes, highlighting the positive outcomes as well some of the anomalies and inconsistencies which have emerged. It also attempts to judge whether the new Standing Orders have been modernised sufficiently to cater for multi-party Governments possible (and probable) under MMP. Conclusions are drawn that the legacy of two-party dominance of the House was hard to shake and, that while the changes were an honest attempt to accommodate interests of all parties under MMP, there is still some way to go before Standing Orders can be said to fit neatly the more difficult requirements of an MMP Parliament.

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[1] Hon Doug Kidd, *Radio New Zealand*, 3 June, 1999.

INTRODUCTION

Standing Orders (SO) can be amended at any time if the House gives notice of a motion to that effect. In 1993 New Zealanders voted by referendum to change the style of Government from FPP (First Past the Post) to MMP. As promised, Parliament called for a Standing Orders Committee to be established [2] to review, and where necessary, amend SO to suit what was anticipated a Parliament based more on accommodating a range of party positions rather than on two-party Government/Opposition certainties.

Chaired by the Speaker, this Committee comprised MPs from the two main parties plus one Independent, [3] as well as the Clerk of the House of Representatives (also, clerk office staff), and specialist advisors. The Committee met 31 times over the following three years, heard 54 public submissions, [4] and in May 1995, a subcommittee led by Speaker, the Hon. Peter Tapsell, visited five European MMP Parliaments [5] to observe operative procedures and note constitutional issues in those countries. The group reported back, [6] its recommendations were adopted (as is usual practice by agreement of the House as a whole) [7] and

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2 Unlike other Select Committees, the SO Committee is not a permanent Committee.

3 Hon Winston Peters previously National MP for Tauranga, became an Independent MP for Tauranga, May 1993. Other personnel were: Hon Peter Tapsell (L) (Chairman), Hon David Caygill (L) Hon Dr Cullen (L), Hon Wyatt Creech (N) (replacing Hon Paul East November 1994), Jim Gerard (N), Hon Phil Goff (L), Peter Hilt (N), (replacing Hon Ruth Richardson, July 1994), Rt Hon Jonathan Hunt (L), Rt Hon Don McKinnon (N).

4 Of the 54, 21 were from MPs, several were from other Select Committees and the remainder from interested groups.

5 Ireland, The Netherlands, Germany, Denmark and Norway.

6 *Report of the Standing Orders Committee,* NZ House of Representatives, 1995. Other than the MPs' review, two reports were commissioned by the Committee:
(i) Financial Aspects of the European Parliaments by Peter Lorimer, Treasury, 325.
(ii) Constitutional Issues by Nicola White, Cabinet Office, 348.

7 David McGee *Parliamentary Procedure in New Zealand* Government Print Publishers, 2 ed. 1994, 83.

the new SO came into effect with the start of the 1996 session on February 20.

Notwithstanding their functional base, the 1996 changes have had a significant impact on Parliamentary procedure - the most obvious being the new system of **proxy voting.** They have also:

* enhanced the **Speaker's role**
* established a **Business Committee**
* streamlined the legislative process for a **bill's passage**
* introduced a **crown financial veto**
* redefined the way Parliament operates under the **Bill of Rights Act 1990** (by ensuring provisions on **natural justice** are adhered to)
* changed **entrenchment procedures**
* formalised and defined areas of **contempt of the House**
* altered **sitting times** to provide a more even spread of sessions throughout the year.

Many of these changes had been mooted well before MMP but had never materialised. The 1996 redraft was therefore an opportunity to reappraise substantive issues, such as how the natural justice provisions in the Bill of Rights affect Parliamentary proceedings. Political commentators noted the 1993 SO Committee "interpreted its mandate broadly and with confidence". [8] The Committee did make bold revisions - many of which had been long awaited.

The idea of several wise people getting together to draft rules for their governance brings to mind the jurisprudential theory of John Rawls in '*A Theory of Justice*'. [9] While there was always going to be a critical difference between his theory and Parliament's SO reality, the theory helps to give a framework for assessing the changes in SO. Rawls'

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[8] *New Zealand Under MMP*, Jonathan Boston, Stephen Levine, Elizabeth McLeary, Nigel S Roberts, Auckland University & Bridget Williams Press, 1996, 84.

[9] John Rawls, Professor of Philosophy Harvard University *A Theory of Justice*, London Oxford University Press, 1973.

ideal [10] is that persons shaping 'just' principles for social organisation, should have no knowledge of their place in the future plan. In other words, they should be 'original actors,' able to leave their particular political, social and philosophical interests behind (as Rawls describes it, behind a 'veil of ignorance'). The actors would then devise rules of justice based on two principles: liberty (equal rights to every person) and the ability to curtail liberty in order to defend liberties. By coupling these two principles, Rawls acknowledges realism is part of the ideal; actors can individually aim for the best for themselves but at the same time be aware they might be in the disadvantaged position and so prepare for the worst. [11]

Without consciously following the Rawlsian philoposhy the SO Committee would have aspired to behave as if they were the 'original actors.' Drawn from the two main parties, the Committee had to subjugate any preference for the two-party system and prepare rules for a Parliament about which they had no working knowledge. The two largest parties believe now that this Committee did a fair job; the new rules are 'about right.' However larger third parties do not agree. They point out there are inconsistencies and anomalies in the new SO which clearly benefit the two large parties and disadvantage third parties.

Further, despite all parties having the opportunity to make submissions to the current review of Standing Orders [12] it is predicted only minor changes will be made. The question is: do the 1996 SO favour those who mastered the plan? The answer appears to be yes. Whether this was

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[10] John Rawls, Above n 9, 136-7.

[11] Hilaire McCoubry & Nigel White (Nottingham University) *Textbook on Jurisprudence* Blackstone Press Ltd, London 1993, 235-241.

[12] A Standing Orders Committee is meeting currently and its report is due out in October. Both the Speaker Hon Doug Kidd and Rt Hon Jonathan Hunt have said the Committee is making 'minor alterations' only. (This would discount altering the voting system).

intentional or an unexpected outcome is irrelevant. If there are inconsistencies these should be addressed.

ANALYSIS OF THE KEY CHANGES TO STANDING ORDERS

1. The Speaker's role and the *Business Committee*

The Speaker's position has been enhanced under the new Standing Orders. As well as controlling/administering parliament grounds and buildings, [13] maintaining order and decorum in the House, [14] and calling members for debate,[15] the Speaker now convenes and chairs the new **Business Committee**. [16] (See Below).

Though not prescribed by Standing Orders, the Speaker's other key role is to chair the Parliamentary Services Commission. Established under the Parliamentary Services Act 1985, this role underpins the Speaker's status. For the purposes of the Parliamentary Finance Act, the Speaker is Minister of the House responsible for a substantial budget. The two roles (Speaker of the House and PSC) are quite separate. [17]

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13 SO 33.
14 SO 82.
15 SO 104.
16 SO 76 (1).
17 "The Speaker is Chairman of the Parliamentary Service Commission as well as being Speaker. While in the Chamber the Speaker is Speaker of the House, not the Chairman of the Parliamentary Services Commission. (*A point of order relating to correspondence with the Speaker as Chairman of PSC not permitted to be developed*). **Hansards,** 1992, Vol. 532, 13236. Reported in *Speakers' Rulings 1867 to 1996 inclusive*, Editors, various, including present Clerk, David McGee. 1996, 13.

The process of appointing the Speaker is the same as before (decided by acceptance, or when there are two or more candidates, by personal vote). [18] While two main parties dominate the House, it is likely the Speaker will continue to be drawn from either one. The position is generally voted along party rather than personal lines.

The Speaker's vote is now a deliberative rather than a casting vote. The Review Committee made this change to avoid disturbing the proportionality of Parliament and to reinforce the Speaker's independence in the House. (If a vote is tied, instead of providing the casting vote, the Speaker simply declares the question lost. [19] This has not been tested in the current (45th) Parliament).

The question of a Speaker's independence in the House is often debated. When the SO Committee looked at the issue it decided against the British/European Parliaments' custom of having the Speaker resign from the party once appointed to the position. Committee members felt the two roles (being an electorate MP, as well as Speaker), did not pose 'significant difficulties'.[20] However, there is potential for conflict because Speakers are not able to express opinions on policy or matters raised in the House.

The present Speaker, Hon. Doug Kidd says the Speaker's need to exercise discretion can be a serious restraint on his/her relationship with the electorate. By definition, an MP must satisfy their constituents to secure another term in office. Hon Doug Kidd notes the job of Speaker is 'high risk'. Looking at his predecessors over the last thirty years, none except Sir Roy Jack and Sir Richard Harrison have had more than a term as Speaker. However, this has mostly been due to other factors such as resignation,

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18 SO 15-20.
19 SO 158.
20 *Report of the Standing Orders Committee,* As above n 6, 13.

retirement or death. [21]

To an extent, the MMP list system can ease the problem of having a Speaker perform as electorate MP as well as bi-partisan Speaker, because potential (or incumbent) Speakers can simply switch to being list MPs before an election. Parties will know their preferred Speaker in advance of an election [22] and ensure that candidate has a high list placing in the party.

2. The Business Committee

Similar to Britain's House of Commons Services Select Committee [23], and modelled on committees serving MMP Parliaments visited in Europe, the Business Committee has been established to act as the House's Executive. Membership comprises representatives from all parties with more than six members, and smaller parties can nominate a representative between them. Its tasks include formally directing the flow and order of business, allocating debating time for parties and individuals, [24] deciding on the length of debates and speaking times (set out in Sessional Orders, February 1999), and deciding where the members sit in the House.

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21 Speakers: 1967-72 Sir Roy Jack, (Nat) lost seat with Party loss
1972 - Alfred E Allen (Lab) died in office
1973-75 Stanley Whitehead (Lab) lost seat with Party loss
1976-77 Sir Roy Jack (Nat) died in office
1977-84 Sir Richard Harrison (Nat) lost seat with Party loss
1984-87 Gerald Wall (Lab) resigned
1987-91 Kerry Burke (Lab) retired
1991-93 Sir Robin Gray (Nat) retired
1993-96 Hon Peter Tapsell (Lab) lost seat while in position as Speaker for the National Government
1996-99 Hon Doug Kidd (Nat).

22 Rt Hon Jonathan Hunt has indicated his desire (June 3, 1999) to be Speaker should there be a Labour-led coalition Government after the 1999 election.

23 *Erskine May's Treatise on the Law, Privileges, Proceedings and Usage of Parliament* Butterworths, London. 21st edition, Editor: CJ Boulton, 1989. 657.

24 SO 76-80.

The Committee certainly reflects the proportionality basis of an MMP Parliament. All substantial procedural matters (as well as membership of the Committee itself) are decided or divided according party proportionality. On its deliberations, the Speaker must seek unanimity - or near - and in determining whether or not this is reached, must be satisfied the decision is fair, having regard to party representation in the House. [25]

There is however, no fear that the apparent 'overly democratic' Committee will thwart Government's ability to govern because when a matter is not resolved, the Government effectively uses its majority in the House to make the determination. With this in mind (and the fact the Opposition, when it is in power will wish the same courtesy), the Business Committee generally agrees to Government's agenda and responds reasonably to requests (for extensions of time, for example). Meetings are generally short and predictable. [26]

At the beginning of this 45th Parliament, the Committee decided on the allocation of debating times in a 4/4/4 split between National, Labour and the smaller parties. This was an obvious division in the present Parliament. [27] The minor parties parley their allocation, normally on a two-way split with half supporting and half negating the bill under discussion. On a Government Bill, Sessional Orders grant 12 speeches each lasting 10 minutes. A convention has now evolved whereby speeches can be further subdivided into 5 minute speeches if parties so decide. This convention

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[25] SO 77.

[26] Minutes of the BC meeting 1 June 1999, reveal the meeting took 9 minutes and agenda matters related to requests to extend reporting times for Bills. The first meetings in a Parliamentary Session would clearly be longer with Committee membership and procedural matters to establish.

[27] The National Party has 44 seats, Labour, 37 and the minor parties make up the remaining 39 in the 120-member Parliament.

has developed notwithstanding the SO requirement that leave of the House must first be sought.

The speaking allocations are designed to be proportionate and make for greater efficiencies in the debating chamber. On the latter, ACT leader Hon Richard Prebble believes this notion runs counter to the purpose of Parliament, whose primary objective is to check the executive's power. By definition, Parliament should be inefficient - debates should extend until the issue has been discussed to the satisfaction of the majority in the House. (The United States Senate has no time limits on its speakers). Parliament pays the price for efficiency on the floor - discussions are limited but the Government's programme is less likely to be held up. According to the Clerk, the SO Review will probably address this issue, although a more flexible approach would most likely apply for particular and possibly named debates only.

At present if a member is not granted permission to speak by the Business Committee, there is an opportunity to request time from the Speaker while the debate is in progress. Under SO 105, when two members rise to speak, the Speaker decides who has the right to be heard, basing the call on SO 105's provisions: (a) if possible, a member from each party should be able to speak in each debate (b)overall participation should be approximately proportional to party membership (c) priority to party spokespersons in order of size of party and (d) the consideration should be taken of individual members' seniority and expertise.

The proportionality appears fair. However, Hon Peter Dunne contends the four requirements do not necessarily work together. During a recent debate on the Fire Service Commission,[28] the Business Committee did not at first

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28 *Weekly* ***Hansards*** No. 73, 19 May 1999, 16529.

grant him speaking rights and when he took his chance on the floor, he was still not given speaking time. He raised a point of order (SO 105 (a) and (d)) [29] and was finally granted permission to enter the debate.

The incident highlights the potential anomaly between SO 105's subsections. It also reminds members that the decision on how the debate is played out in the House is finally the Speaker's domain, not the Business Committee's. Speaker Hon Doug Kidd [30] says decisions over who has the right to speak come down to a balancing exercise. He believes there is broad satisfaction with the way he calls speakers to debate although acknowledges the process is not an exact science, and the calls may not always be able to reflect exact factions. In making a decision (or ruling), the Speaker says he is not only guided by SO 2 (applications of Standing Orders) but also by his experience of the political system and requirement to be fair.

Recommending appointments to Select Committees is another function of the Business Committee [31] though in practice, parties organise their own candidates and arrange to support each others' candidates. The Committee also has power to stop Bills proceeding to Select Committees even when the House has agreed they should proceed. [32] In this case the bill passes straight onto the third reading. [33] On balance, MPs agree the Business Committee works well. Opposition parties are alerted to the House's business and Government is alerted to likely resistance in advance.

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[29] Hon Peter Dunne has been in Parliament since 1984 and is among the 20 most senior members in the House. In the present coalition Government, he is Minister of Revenue and Internal Affairs.

[30] Interview with Hon Doug Kidd, 17 June, 1999.

[31] SO 188(2), 191.

[32] SO 293.

[33] See Appendix 'Passage of Bills through Parliament.'

3. Voting

A key change in the new Standing Orders has been the method of voting. Bells which used to precede the vote have been abolished in favour of a two-layered voting system, by voice in the first instance, [34] and then (if the parties wish), a party vote. [35] If voting is close, (or on matters of conscience), a personal vote can be requested [36] although there must be more than 20 people in the debating chamber for this to occur. Members asserting suspicious votes can call for a personal vote though the Speaker rarely grants this demand. The fact that votes are received in written form means a personal vote (after the party vote) is generally unnecessary. Personal votes are still taken on issues involving matters of conscience (such as liquor licensing and gambling) and are now called 'personal' rather than conscience votes.

The number of times party (and personal) votes have been taken by the Committee of the whole House this Parliament (997) is twice that of the previous Parliament (495). [37] The 1998/99 provisional figure alone is 540 votes for the Committee of the Whole House, whereas second reading debate votes for the same period is 129. There is usually a greater volume of legislation in an election year, but by comparison, the 1995/96 'election year' debates only called for 101 votes for the Committee of the whole House. No analysis has been conducted on why this should be the case but one could surmise that there is greater scrutiny at the Select Committee process yielding more amendments on which to vote. Had the old

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[34] SO 145.
[35] SO 146.
[36] SO 149.
[37] Figures are from the Annual Reports of the Office of the Clerk. The 1998/99 figure, incorporated in the Session total, is provisional, and also supplied by the Clerk's office.

voting system been in place (the eight-minute division bells voting time) an absurd amount of debating time would have been consumed in the voting process this year.

The new voting system allows for party whips to submit votes on behalf of the total number of MPs they have in Parliament, so long as 75% of their members remain in the precincts. The remaining absent 25% cast **proxy votes**. [38] Members must give the proper authority for proxy votes and can also record a proxy abstention if they wish. For minor parties, these proxies can be allocated to another party of their choice and every party (even with a membership of one), is entitled to a minimum of one proxy.

Advantages of the proxy system:

* Overcomes the problem of having MPs in the House at all times. The informal 'pairing' mechanism (when an absent member counted on an opposition member not to vote during a division would not work under MMP).

* Members are elected on party lines, and are expected to vote accordingly. The debating chamber is simply the place to air party views, not to change members' minds about an issue: the party vote carries the day. The Proxy system merely formalises the obvious.

* Voting is quick (one minute compared with up to eight). Deputy Prime Minister Wyatt Creech described the old voting system as a "pointless activity". [39]

* The whips can organise members' availability well in advance of the week, (usually by Tuesday morning) and members can also plan in advance to be absent.

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[38] SO 160(2).

[39] Hon Wyatt Creech's observations as Leader of the House addressing Canterbury University, Aug. 1996. Reprinted in Philip Joseph's *Constitutional Law*, NZLR (1997), 221.

Disadvantages of the proxy system

* The 25% absent member restriction penalises middle-sized minor parties, such as The Alliance, New Zealand First and ACT. These parties must ensure they always have 9, 6 or 5 members respectively in the House at any time, otherwise their proxies are disallowed. This can be difficult to achieve (especially allowing for unforeseen absence) and restricts electorate and national commitments by these parties.

* A party of one member is better off than a party of two, (three, four, five etc) because it can always cast a proxy vote [40] and is free to request to be absent at all times. The other small parties are constrained by the 75% requirement and are arguably disadvantaged (proportionately) by having to remain in the House precincts.

* Members who declare themselves Independent can offer proxies without having to worry about being in the precincts of Parliament. Even when a party has registered as such with the Electoral Commission, [41] as long as the individual members remain as Independents they can still submit proxy votes en masse and on party policy. Speaker Hon Doug Kidd notes all members must still must apply for absence from the House and leave is granted on two grounds only:

(a) illness or other family cause of a personal nature

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[40] SO 160(2).

[41] Mauri Pacific registered with the Electoral Commission as a party on 12 February 1999. However, its five MPs remain as Independents because they have not informed the Speaker of the party's Parliamentary membership [SO 34 (2)]. They can therefore use their proxy votes to vote with Government (or Opposition) while being out of the House. The disadvantages of not being recognised by the Speaker is lack office allowance and other bonuses provided under the Parliamentary Services Act.

(b) to enable MPs to attend other public business (NZ or overseas).[42]

The wider interpretation of 'family' can encompass many situations.

Who checks attendance in the House? According to representatives from all parties, there is potential for breach. To date, there has been one instance when a party was 'caught out.' This was the ACT party, which upon realising its mistake, alerted the Speaker and the voting record was corrected. The system comes down to trust and works by mutual interest and the 'balance of terror.' [43]

There was also certain merit in 'turning up' to vote. Under the former system their presence gave MPs a chance to mix with colleagues, and be seen to participate. MPs are arguably more isolated from each other now and this can work against 'team' spirit and general affability within the House.

A further point against the new voting system is the possibility for MPs to vote on Bill changes of which they are completely unaware. When a Bill is brought back to the House, a myriad of recommendations may have considerably altered the original Bill. A member (or party) who has already assigned a proxy vote(s) might not even agree with these changes.

4. Legislative Procedures for the passage of Bills

In previous Parliaments, Governments have been able to group into one Bill, entirely unrelated amendments to a number of Acts for the purpose of speeding up the

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[42] SO 38.

[43] Hon Doug Kidd, Speaker of the House of Representatives, 17 June 1999.

legislative process. These were the 'omnibus Bills' and normally non-controversial. While a seemingly efficient way of dealing with minor reforms the SO Review Committee decided the practice was not satisfactory as more controversial reforms were being 'fast-tracked' without the opportunity for public input. [44] As a result, SO 256 requires a Bill must relate to one subject area only (though it) may make consequential amendments to a number of Acts affected by its provisions. The Speaker scrutinises each Bill to ensure the Standing Order is complied with. [45]

(a) Streamlining Debate

To make the passage of Bills easier, a new SO 273(1) has eliminated the introductory debate when a Bill is first brought to the House. There is still provision for introductory debates for an Appropriation Bill, Imprest Supply Bill or a Bill whose passage is accorded urgency, [46] but the Bill's second reading (on the third sitting day following) [47] is now the main debate (Appendix 1). The Select Committee to which the Bill is referred then recommends amendments or decides to pass it in the form in which it was introduced into the House. [48]

The benefits of the new system are obvious:

* The system eliminates repetition (two debates on the same Bill before Select Committee consideration).
* Members have a better opportunity to understand the issues before the debate takes place.

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[44] *Report of the Standing Orders Committee*, As Above, n6, 49.
[45] SO 257. Note: some omnibus Bills are still allowed - for example Finance or Confirmation Bills authorising illegal action, local legislation affecting particular localities, Maori Purposes Bills, Reserves & Land Disposal Bills and Statute Amendment Bills.
[46] SO 273(4). Note: SO on matters requiring Urgency remain unchanged.
[47] SO 278.
[48] SO 282.

* Select Committees are better informed of Parliament's intentions. This avoids wasting Select Committee time if Government intends to discard the Bill. [49]

It was hoped the changes would also improve the quality of the debate [50] and a crude sample of members [51] say this has generally occurred. The quality of work now coming through the Select Committees is also regarded as being of a higher standard. (The Clerk's office notes the volume of public submissions coming through has increased dramatically - a Bill at present has attracted 6000 - which could indicate the Public's faith in the Select Committee process). The perceived higher standard of work could be due to MPs' greater expertise (and qualifications) in their fields of interest. Also Committee membership is more evenly spread among parties.

The latter point is significant for other reasons. Under FPP, when Government had a majority on Select Committees, the House would nearly always agree (by its Government majority) on a Committees' majority ruling. This is not the case under MMP and often the House will not agree with the majority view of the Select Committee. When this occurs (most often with Private and Members Bills), the Bill will not proceed.

Another change is that Bills must be reported back to the House within six months unless the House (for a Government Bill) or the Business Committee extends this time. [52] Members have an opportunity to scrutinise changes as amended Bills are reprinted and available when the Select Committees report back to the Clerk. The

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[49] *Constitutional Law*, Philip Joseph, (1997) NZLR, 223.

[50] *Report of the Standing Orders Committee*, As Above n6, 53.

[51] Six MPs representing National (John Carter), Labour (Rt Hon Jonathan Hunt), Alliance (Jim Anderton), ACT (Richard Prebble), United (Hon Peter Dunne), and the Speaker (Rt Hon Doug Kidd), were asked to assess the standard of debate.

[52] SO 284-286.

considered Bill is debated by the whole House (clause by clause) on the third sitting day following its presentation. If the House does not agree a Bill should proceed it is immediately discharged. [53] Government or Members' Bills introduced during an adjournment can, if the Business Committee agrees, be automatically referred to a Select Committee. The main debate on these Bills therefore takes place after a Committees' consideration.

(b) More or Less Legislation?

Streamlining a Bill's passage was designed to speed matters up, though the SO Committee was determined to ensure "legislative solutions to problems be a last resort, not a first reaction" (and the process) "should be onerous enough to discourage resort to it unless it is really necessary." [54] The SO changes have provided a more efficient legislative process but there are still the same number of Bills going through the House. Compared to the 44th Parliament, where the Government Bills receiving Royal Assent was 418, [55] in this Parliament to date, there have been 387 Government Bills (59 are still with the House or its Committees). [56]

5. The Crown's Financial Veto

In the past a private member was unable to move any proposal which involved even minor expenditure unless the Government agreed and approval had been sought from the Governor-General. Called the 'appropriation rule', the SO Committee considered this unfair and inconsistent with the Select Committees' authority which allowed them to

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[53] SO 290, 293.
[54] *Report of the SO Committee*, Above n6, 53.
[55] *Parliamentary Bulletin 96.20* (20 December 1996) Clerk's Office, House of Representatives.
[56] *Parliamentary Bulletin 99.13* (21 June 1999).

recommend costly amendments not requiring Government approval. [57] The rule was therefore removed in the 1996 Standing Orders, with the rider that a Private Member's Bill (now referred to as a Member's Bill [58]) can only be introduced if the impact on Government expenditure is minor. The Government of the day decides what it regards as minor. If the Bill is seen to impact on the fiscal aggregate, the Government may use this veto. [59]

The Treasury [60] reports the measure has been used rarely in the last Parliament. These occasions were (i) Casino Control Bill, December 1997 (this became a conscience vote but fiscal implications for the Government meant it could still induce the veto), (ii) Taxation Bill relating to Life Insurance and Superannuation 1998, and (iii) Recommendations in the ACC Bill, 1988. [61]

The financial veto is really a tool of last resort because Government can vote down Member's Bills with fiscal implications without ever having to resort to the Veto provision. Where there are many amendments, it might be easier (as in the case (iii) above) [62] for Government to wait until the amendments have been debated and then veto all Amendments together.

In any event, most Member's Bills do not get to the debate stage, having been voted down at their introduction. A

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57 *Report of the Standing Orders Committee*, Above n 6, 61.

58 SO 252 (Classification of Bills) states: (a) a Government Bill is a bill dealing with a matter of public policy introduced by a minister (b) a Member's bill - deals with a matter of public policy but introduced by a member who is not a Minister (c) a local Bill is promoted by a local authority which affects a particular locality, (d) a private Bill is promoted by a person or body of persons, for the particular benefit of that person(s).

59 SO 313-317.

60 Information supplied by Peter Wilson, Director of Tax Policy and Systems, The Treasury.

61 The Bill became the Accident Insurance Act 1998.

62 The Government's supporting party ACT voted with the Opposition on the Bill.

Member's Bill before the House at present (Laila Harré's Paid Parental Leave Bill) has fiscal implications for the Government (impacting on government servants), so the Bill's fate will be interesting to follow. It may become a personal vote but the Government can still veto the outcome if it can provide certification which states "with some particularity the nature of the impact on the fiscal aggregate or aggregates concerned and the reason why the Government does not concur in the change" (of the Bill).[63]

The Cabinet Office has instructed Government Departments to monitor developments in the House and Committees to assess fiscal effects of a Bill or Amendment(s). [64] This forewarning enables Government to defend its use of the Financial Veto. Further, SO 317 (1) requires members intending to propose an amendment with fiscal implications to lodge this with the Clerk's office 24 hours before the House meets on the day the amendment is to be discussed.

Political commentators in 1996 [65] anticipated there would be few disruptions to the Government's spending programme as a result of Members' ability to introduce Bills with even minor fiscal implications. This is clearly the case. In the present Parliament to date, 59 Members Bills have been introduced and only three have received Royal Assent. All were Amendments and none have financial consequences associated with them. [66] However, the provisions in SO 313-317 still give encouragement to Members to persevere with policies or proposals which have fiscal impact.

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[63] SO 314.
[64] Phil Joseph, *Constitutional Law* NZLR (1997), 222.
[65] Boston, et al. Above n8, 84.
[66] These were all Amendments: (1) Education (Tertiary Students Association Voluntary Membership Amendment 1998), (2) Misuse of Drugs Amendment 1997 (3) Trade in Endangered Species Amendment 1997.

The SO Committee noted the SO concerning the financial veto does not fit with the requirements of section 21 of the Constitution Act 1986 [67], which says the Crown must recommend to the House all Bills involving appropriation or expenditure. An interim sessional order to accommodate the inconsistency was suggested at the time for the Minister to, in effect, recommend that the Bill and its appropriation be accepted by the Crown. However, no such sessional order has been written so it is as well, the circumstances have yet to arise for this inconsistency to be tested.

6. The New Zealand Bill of Rights Act 1990 and Natural Justice

Despite literature to the contrary, (in the words of Paul Rishworth), New Zealand's Bill of Rights Act 1990, is "the Bill of rights you have when you also want parliamentary supremacy," [68] Parliament acknowledges its functions are bound by the Bill of Rights Act 1990. Parliament now interprets 'legislature' in s3 (a) as referring not only acts done by the legislature but also to the functioning of the House. [69] This position was taken only after the release of the Interim Report of the Finance and Expenditure Committee following the 'Wine Box Inquiry.' [70] The Select Committee decided that s 27 of the Act, (every person has the right to the observance of the principles of natural justice) should be followed in Parliamentary proceedings.

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[67] *Report of the SO Committee*, Above n6, 65.

[68] *Rights and Freedoms, Affirming the Fundamental Values of the Nation*, G Huscroft & P Rishworth (eds), Brookers, Wellington 1995, 80, 102.

[69] *Report to the standing Orders Committee on Natural Justice*, Philip Joseph, September 1995, reported in Report of SO Committee, Above n6, 215.

[70] *Interim Report on the Income Tax Amendment Bill* AJHR 1994 1.3C. The Wine Box Inquiry, set up in 1994, investigated allegations of corporate tax fraud.

As a result, (and after recommendations from Philip Joseph's *Report on Natural Justice* to the SO Committee), the 1996 SO have included provisions which are designed to protect an individual's reputation. Standing Order 226 (1) allows a person to be informed about allegations made during a Select Committee hearing which may seriously damage their reputation, and (2) have the right to respond to these allegations. Standing Orders 237 - 239 allows witnesses 'reasonable access' to this material regardless of its nature although the Committee decides whether or not the information is delivered.

Witnesses called to Select Committees now formally have a right to counsel. This was accepted procedure before 1996, but the new SO 230 outlines the nature of this assistance.

On questions of bias, the SO Committee followed the recommendations put forward in Phil Joseph's Report that members must declare their position in advance of Select Committee consideration. If the member has made an allegation of crime or expressed a view on someone's conduct, they may not participate on the Select Committee hearing. Any complaint of apparent bias must be made in writing to the Chairperson, and if the complainant is not satisfied with the Chairperson's decision, the matter can be referred to the Speaker for decision. [71]

A further change with regard to the Bill of Rights Act 1990, is a requirement that a request under s7 (for the Attorney General to bring to the attention of the House a Bill which appears inconsistent with the Bill of Rights Act 1990), be made in writing. [72] The Attorney General must now present a paper for publication by the order of the

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[71] SO 217-218.
[72] SO 260.

House and include as much detail as possible of the reasoning behind any inconsistencies found.

7. Entrenchment procedures

A possible constitutional issue arises with SO 261 which states that a proposal to entrench provisions in a Bill must be carried by more than a bare majority. This alters the constitutional entrenchment procedures in the House, which accepts that a bare majority can make legislation. A Bill with entrenchment provisions must therefore be passed by the same majority the entrenchment provision calls for. In effect, this allows a present Parliament to bind future Parliaments. This runs completely counter to the rules of Parliamentary Supremacy and would obviously have significant constitutional impact in New Zealand's Parliament. However, the supremacy doctrine would out-manoeuvre Parliament's attempts to exploit its legislative powers. In any event, the entrenchment procedure has yet to be tested in the House. [73]

8. Behaviour in the House

When Parliamentarians come under attack from the public for being too boisterous, difficult, obstructive and rude, the members will defend their 'behaviour' by declaring the obvious - that Parliament is a debating chamber, not a Boardroom. Generally MPs [74] believe their behaviour is no worse or better since the new SO. In fact the SO Committee made no recommendations on behavioural matters, except to note it supported the Speakers' attempts to discourage 'patsy' questions. [75] Hon Doug Kidd

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[73] Philip Joseph, Above n 49, 225.

[74] MPs canvassed by the writer. Above n 51.

[75] A 'patsy' question is a device used by a Government backbencher which allows a Minister to 'answer' a question put, but which is merely self-congratulatory and an

indicated his intolerance of the practice in April this year.[76] The Speaker says the behaviour is not "so bad" during the normal course of debate and question time. One should expect outbursts 'occasionally' because of the tremendous tension between two (or more) groups of people contesting for the right to govern. The public, he says, hears the worst of it because the most outrageous behaviour catches the media's attention.

The Speaker's patience is still tested. One does not have to read far into the Hansard reports to find statements such as "so often we see standards reduced to the floor of the basement".. and... "we do have an inability like none to control ourselves. We are all over the place. I wonder what the public thinks about that." [77]

9. Parliamentary Privilege

The Parliamentary Privileges Committee tries to ensure the right to freedom of speech is exercised responsibly. The Speaker, Hon Doug Kidd says despite the quasi-judicial look to the Privileges Committee, it is a purely political facility with its members reflecting Parliament's proportionality. Where a decision is not reached over privilege complaint, the matter is referred back to the House and Parliament itself will decide on whether the conduct breached rules of the House.

Various new SO concerning privilege were introduced in the 1996 changes and several comply with the natural

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opportunity to air the Government's achievements.

[76] ***Hansards,*** Vol 566, 3/3/99. "In the past patsy questions used to be indulged as long as there were not too many.....but after hours and hours of debate, and the House is expected to sit in silence to hear things that all members have heard umpteen times....is it any surprise I have difficulty in controlling the House. The impossible ought not to be asked of me."

[77] ***Hansards*** Vol. 566, 24 February 1998. 6700 "Questions for Oral Answer"

justice criteria. For instance, an allegation of breach must be formulated precisely to give the person against whom it is made, a full opportunity to respond to it. [78] Also the maker of the allegation may not serve on the inquiry [79] and permission of the House is not required for reference to be made to proceedings before a court (though these are always subject to Article 9 of the Bill of Rights which prohibits the impeaching or calling into question in a court of such proceedings). [80]

However, the Privileges Committee has its own rules when it comes to complaints of bias or misleading the Committee during the course of a hearing. Such a complaint can be lodged with the Speaker, who generally refers the complaint back to the Privileges Committee. The circular route is not a guarantee the matter will be dealt with fairly as the Committee itself will decide whether the allegation is a matter into which it will inquire. Proceedings of the Committee are not recorded as a matter of course (indeed, it is optional for Select Committees under SO 235, to record/transcribe evidence during hearings), so the House cannot be sure the allegation was either accepted for discussion let alone considered.

Examples of contempt are now coded (modelled on *Erskine May*) though the 19 areas of contempt listed are indicative, not exhaustive. [81] Five matters have been referred to the Privileges Committee in this session to date [82] compared with three matters in the previous Parliament.[83] It is difficult to conclude whether the near doubling of instances has a direct bearing on the existence

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[78] SO 389.
[79] SO 394.
[80] Privy Council ruling in *Prebble v Television New Zealand* [1994] 3 NZLR 1.
[81] The Clerk's office advises the list was never designed to be exhaustive because Parliament would not wish to restrict itself to a conclusive list.
[82] Information from the Clerk's Office.
[83] Journal of the House of Representatives, Vol 3, 1993-1999. 161.

of a code (definitions making contempt easier to identify), or whether this particular Parliament - with its greater numbers - is merely more prone to contemptuous behaviour.

Conclusion

Rewriting a set of rules for a parliamentary system yet to operate was a challenge for the 1996 SO Committee and judging from views of those who work by them, the Committee formulated a fairly satisfactory set of new rules. The principles seem right. However, some of the new rules need correcting, particularly those which disadvantage third parties.

The voting system is one area which calls for scrutiny. Apart from saving time, which is a substantial advantage, there are several disadvantages with the proxy vote - particularly for the smaller parties. The situation whereby a party of Independents can have as many proxies as it can get approval for, clearly needs to be tightened to ensure other small parties are not disadvantaged. Although this is an area which needs to be addressed, it is unlikely the new SO review will make any changes to voting. [84]

The Financial Veto, which for the most part was designed to offer encouragement to members to persevere with their Bills, clearly has limitations. While it is rare for Oppositions to get their policies through the House, it ought to be difficult for Governments to quash a member's Bill which has wide public appeal, albeit with minor financial implications. However, Governments can simply vote the

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[84] Above n 12.

Bill out before it reaches the stage of requiring the veto, or they can devise their own 'matching' Bill to appease the public. [85] Members Bills can also be stalled. MP Phillida Bunkle in trying to get a Casino Bill through the House, found that the day the Bill's debate was due to take place, was the day the Queenstown Casino Licenses were granted. She noted "the Government has used every Parliamentary device to block (the Bill's) coming forward to give us a vote." [86] Over a matter of conscience (or personal vote), this was interesting timing on the Government's behalf.

Committing the House to natural justice principles was a positive move and brings the House in line with the requirements of the Bill of Rights Act 1990. However, there are still loopholes in the SO relating to natural justice. What is deemed to be confidential in a Select Committee hearing? At present the rule is a Committee can hear evidence 'in private' if a person's reputation might be damaged by this evidence. The sensitive material then becomes the property of the Committee, until it is reported to the House - which hardly makes the information 'private or confidential'. It is all very well to have access to incriminating information to which (at the Speaker's discretion) one has a right to respond to. But allegations, once made, even if incorrect are difficult to shake off.

Of course the rules of Parliamentary Supremacy established in the Bill of Rights 1688, mean Parliament has authority to access any information and use this as it wishes within the House. But this point should be made clear to witnesses - whatever is given in 'confidence' is still accessible to a large number of people (the whole House).

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[85] On May 5, 1999, the Government introduced a Taxation (Parental Tax Credit) Bill which had a second reading, committal and assent within four days. By contrast, a Member's Bill - Paid Parental Leave Bill - was introduced on 2nd February 1999 but waited for its second reading until 9 September, 1999.

[86] ***Weekly Hansards*** No. 76, 17451.

Witness protection should therefore be more assured. The House could use the Australian Senate model which compares favourably to New Zealand's when it comes to protecting witnesses before the House. Australian Senate Practice allows for witnesses who have been punished for contempt (due to failure to appear before the Senate), to seek judicial review of the penalty, on the basis that failure to appear did not obstruct the Senate. [87] The Senate Practice notes however, that this course of action is unlikely to succeed except in exceptional circumstances. But the mere fact of the possibility is a step closer to natural justice than we see in New Zealand's Parliament, which does not allow any judicial review of its own proceedings (potentially possible under Section 27 of the Bill of Rights Act 1990).

The Australian Senate offers witnesses the same protection and legal status as it does members and will use its powers to protect witnesses against adverse consequences arising from their giving evidence. [88] There is similar protection in New Zealand while the matter is in the House (giving evidence in the House is absolutely privileged under Article 9 of the Bill of Rights 1688), but once in the public domain, the Select Committees cannot grant immunity from investigation or conviction.

Parliamentary Privilege is not an area which is likely to be reviewed - despite concerns, particularly from smaller parties, about the way the House runs this Committee and the potential for unfairness.

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87 *Odger's Australian Senate Practice* 7th ed, Harry Evans, Australian Government Publishing Service, Canberra 1995, 434.

88 The "action of a witness in giving evidence and producing documents and the evidence given therefore cannot be used against the witness in any sense in subsequent proceedings before a court or tribunal" (*Australian Senate Practice*, Ibid).

Some MPs would like to have tighter controls on 'question time', arguing that the present SO give Ministers too much freedom to avoid accountability. SO 378 requires Ministers to provide an answer which addresses the question "if it can be given consistently with the public interest." The question is: if a Minister declines to answer at all, how can the House (more precisely the Speaker), determine whether the matter is in the public's interest? The minister alone is making that judgement by not answering and therefore exercising executive powers over the legislature.

The present Standing Orders thoroughly overhauled many Parliamentary procedures, but they were obviously written by Members grounded in the two party system. From the Rawlsian perspective, the Committee was not entirely behind the 'veil of ignorance'- they were too steeped in the system from which they came to be objectively fair to the new players. If this is unjust criticism then third parties would not be anxious to change the present Standing Orders.

The hallmark of the new SO is proportionality, but it surprising how this can be overridden. Third parties still feel the weight of two-party dominance in Parliament. As the Speaker Doug Kidd notes, few changes will emerge after the next review of SO. [89] Third party concerns will therefore not be ameliorated with this review. So while the 1996 Review Committee produced a thorough and largely workable set of rules for MMP, significant changes are still needed to suit the requirements of all parties in New Zealand's MMP Parliament. The evolutionary process is, at best, slow.

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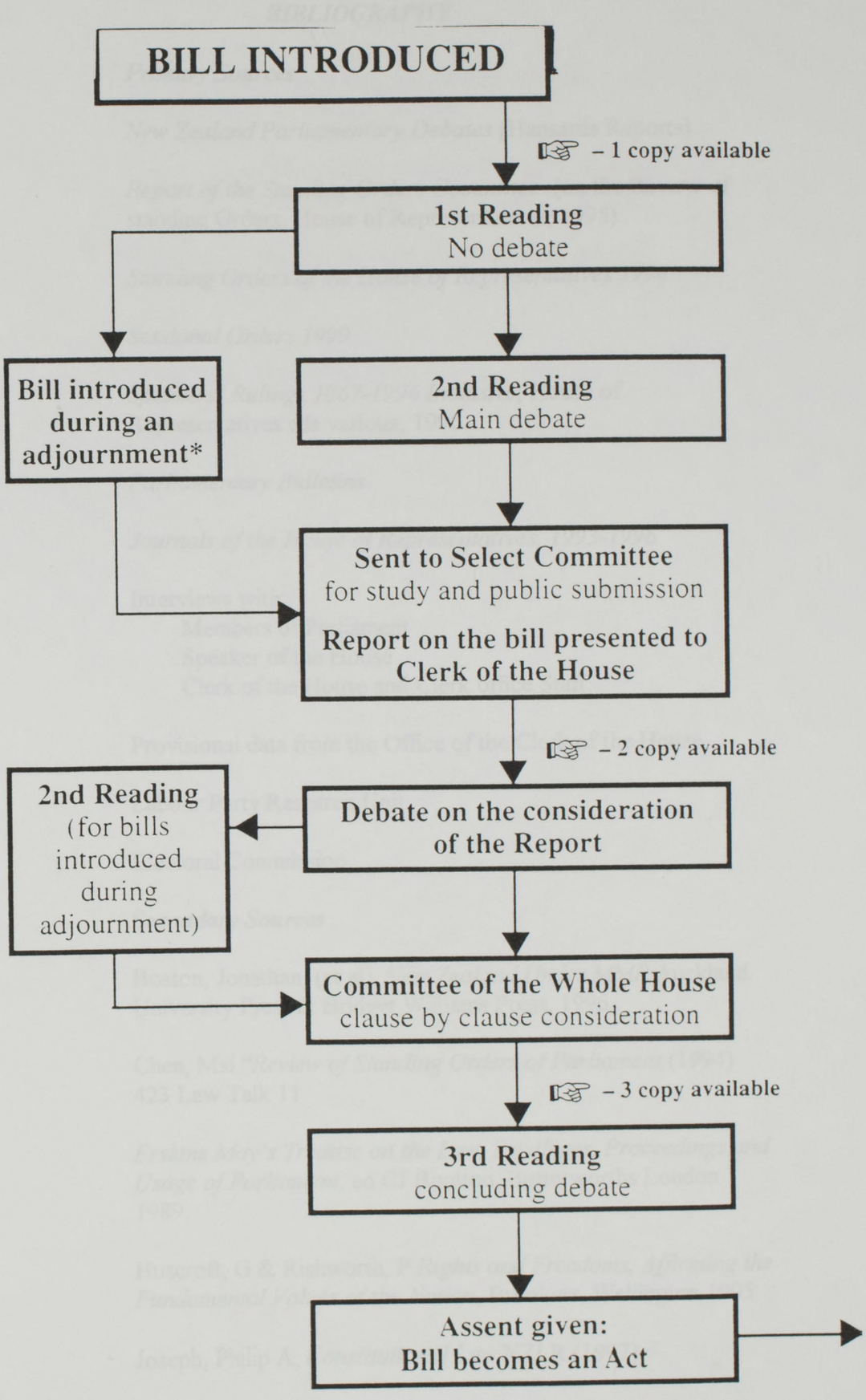
[89] Above n 12.

APPENDIX



Soure: Parliamentary Bulletin, Office of the Clerk of the House of Representatives.

BIBLIOGRAPHY

Primary Sources

New Zealand Parliamentary Debates (Hansards Reports)

Report of the Standing Orders Committee (on the Review of standing Orders, House of Representatives, 1995)

Standing Orders of the House of Representatives 1996

Sessional Orders 1999

Speakers' Rulings 1867-1996 Inclusive, House of Representatives eds various, 1996.

Parliamentary Bulletins

Journals of the House of Representatives, 1993-1996

Interviews with:
Members of Parliament
Speaker of the House
Clerk of the House and Clerk office Staff.

Provisional data from the Office of the Clerk of the House

Labour Party Research Unit

Electoral Commission

Secondary Sources

Boston, Jonathan, (et al), *New Zealand Under MMP* Auckland University Press & Bridget Williams Press, 1996

Chen, Mai "*Review of Standing Orders of Parliament* (1994) 423 Law Talk 11

Erskine May's Treatise on the Law, Privileges, Proceedings and Usage of Parliament, ed CJ Boulton, Butterworths London 1989.

Huscroft, G & Rishworth, P *Rights and Freedoms, Affirming the Fundamental Values of the Nation*, Brookers, Wellington 1995

Joseph, Philip A, *Constitutional Law* NZLR (1997).

McCoubry, Hilaire, & White, Nigel, *Textbook on Jurisprudence*, Blackstone Press Ltd, London 1993.

McGee, David *Parliamentary Practice in New Zealand* 2nd ed, GP Publications, Wellington, 1994.

Odgers Australian Senate Practice 7th ed, Harry Evans, Australian Government Publishing service, Canberra

Palmer, Sir Geoffrey *New Zealand's Constitution in Crisis: Reforming Our Political System* ed McIndoe, Dunedin 1992

Radio New Zealand Interview (3 June, 1999)

Rawls, John, *A Theory of Justice*, London Oxford University Press, 1993.