

## Panel: Proceedings of Parliament: Modernising How Parliament Operates

### *Reviewing the Standing Orders—How to Make Dreams Come True*

*How do we turn ideas for modernising and improving Parliament into reality? This presentation looks at how the House actually adopts and adapts its procedures.*

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Parliament is not modernised by conferences. By the time this paper is presented, there will have been many worthwhile contributions at the ASPG Conference, some of which will have proposed new approaches or procedures for Parliament. The presentation and contemplation of ideas, the challenging of traditional assumptions, and the championing of principles are all valuable. But while proposals, impetus and assistance are important, only Parliament can modernise Parliament.

The purpose of this paper is to challenge all people who dream of modernising Parliament to engage with the process through which this can happen, and to provide the impetus for change. All Parliaments have—or should have—mechanisms for changing their procedures. In most Parliaments, the primary means for this will be a committee of members that is charged with considering and recommending proposals for change, with recommendations being placed before the plenary for adoption. This paper focuses on the New Zealand experience of this process, but the call to engage in it is relevant for all jurisdictions.

### **House determines its own procedures**

Like other Parliaments in the Westminster tradition, New Zealand's House of Representatives has the right to determine its own rules and procedures without intervention by any other authority. The House's freedom to control its proceedings—described as a right of “exclusive cognisance” or “exclusive jurisdiction”—is an essential aspect of parliamentary privilege.<sup>2</sup> The “freedom of speech and debates or proceedings in Parliament” under article 9 of the Bill of Rights 1688, and the Parliamentary Privilege Act 2014, provide a statutory basis for this, but there is also a broader sense of mutual respect (or “comity”) between the legislature and the judiciary. The independence of Parliament from outside interference and, likewise, the independence of the judiciary are pillars of our democratic system.<sup>3</sup> Members of the Executive can initiate and, in most jurisdictions, control or block the process of parliamentary change, but they can do so only in their capacity as members of Parliament.

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<sup>2</sup> David McGee *Parliamentary Practice in New Zealand* (3rd ed, Dunmore, Wellington, 2005) at 630–632; Philip A Joseph *Constitutional and Administrative Law in New Zealand* (4th ed, Brookers Ltd, Wellington, 2014) at [13.6].

<sup>3</sup> Privileges Committee *Question of privilege concerning the defamation action Attorney-General and Gow v Leigh* (11 June 2013) [2011–2014] AJHR I.17A at 15–16.

In general the House tends to avoid including provisions in legislation that prescribe its procedures. However, even when statutory provisions do touch upon the operation of House, the court refrains from dictating how the House should implement them.<sup>4</sup> The Speaker, not the judiciary, is responsible for ruling on the interpretation or application of rules in the parliamentary context.<sup>5</sup>

This does not place the legislature above the law. It is up to the House to work out how the law is to be observed in its procedure and practice. Parliament is the supreme law-making body but it exists within a wider constitutional framework and must be respectful of this.

### **Nature of Standing Orders**

The Standing Orders are the House's rules, and they seem filled with detail and prescription. They number more than 400, and set out many particular requirements for initiating, arranging and dealing with parliamentary business, followed by four appendices with more detail still. For the most part, these dictates are adhered to in day-to-day House procedures. Questions to Ministers are lodged by 10.30 am—sometimes in their hundreds; members' speeches in the House are terminated after 10 minutes; and select committees hear most evidence in public—but only while a quorum is present.

Among the details, however, are statements of principle. The Standing Orders in many places declare what is important, what the purpose should be. Proceedings are broadcast and made available for television coverage,<sup>6</sup> Business Committee determinations must be fair to all parties,<sup>7</sup> the Speaker maintains order and decorum in the House,<sup>8</sup> motions generally require notice,<sup>9</sup> speeches and amendments must be relevant,<sup>10</sup> members can address the House in English, Māori or New Zealand Sign Language,<sup>11</sup> matters subject to court decisions cannot be referred to (subject to the Speaker's discretion) out of respect for the relationship of mutual respect with the judiciary,<sup>12</sup> hearings of evidence are generally held in public,<sup>13</sup> answers must be given that seek to address questions asked.<sup>14</sup> Proportionality is incorporated in various places, such as the membership of select committees and allocation of speaking slots and questions. The most prescriptive part of the Standing Orders, the appendix relating to the declaration of pecuniary and other specified interests, was amended in 2014 because the Standing Orders Committee considered that an overall purpose statement was needed: the declaration of interests is to promote the highest standards of behaviour and conduct by members, and strengthen public trust and confidence in

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<sup>4</sup> See, for example, *Bradlaugh v Gossett* (1884) 12 QBD 271; *Awatere Huata v Prebble* [2004] 3 NZLR 359 (CA) at [55].

<sup>5</sup> Standing Order 2.

<sup>6</sup> SO 46.

<sup>7</sup> SO 78(3).

<sup>8</sup> SO 84(1).

<sup>9</sup> SOs 97.

<sup>10</sup> SOs 111, 123, 292(1) and 302(2).

<sup>11</sup> SO 108.

<sup>12</sup> SO 115.

<sup>13</sup> SO 222(1).

<sup>14</sup> SO 386(1).

Parliament.<sup>15</sup> Such statements of principle guide the Speaker, members and other participants when deciding how the rules should be interpreted or applied—how Parliament works.

These rules protect the interests of the institution of Parliament in the progress of legislation, considered scrutiny, fair and proper process, and the representation of different perspectives. The House is a robust environment where passionately held beliefs and staunch opinions are constantly in contest. Legislating is itself an intensely political process.<sup>16</sup> The Standing Orders and the established practices of the House (many of which are expressed in Speakers' rulings) provide a stable backdrop to the tumult. One of their most important functions is to ration the House's time—a "scarce parliamentary commodity".<sup>17</sup> The Standing Orders safeguard the reasonable expectations of Government and Opposition and encompass the vague bounds of acceptable parliamentary behaviour.

As well as being a political boxing-ring, however, the House is a place where political solutions are found. It is not unusual for members across the House to agree that a particular course of action is in the public interest: that a non-controversial bill should be passed to right a wrong or improve the statute book; that a matter warrants debate; that additional scrutiny is needed. Negotiations and deals take place to work out how the usual way of doing things should be adjusted to enable outcomes that are seen as being for the common good. The rules provide a fall-back, "default" position underlying the political problem-solving that goes on all the time.

In this light, the Standing Orders can be seen as an evolving accord representing the accepted balance of the different parliamentary interests.

### **Standing Orders as constitutional rules**

New Zealand's lack of a single overarching constitutional document is well-known. Instead we turn to a mixture of prerogative powers, statutes, court decisions, and conventions.<sup>18</sup> The Standing Orders are not necessarily included in the usual list of suspects—alongside the Constitution Act 1986, the Electoral Act 1993 and the New Zealand Bill of Rights Act 1990. However, the law and custom of Parliament are regarded as one of the many sources of our "unwritten" constitution.<sup>19</sup> This is because the rules of Parliament form part of the framework that empowers the exercise of government in our democracy.<sup>20</sup>

As rules, the Standing Orders embed not only the interests of political parties, but also of the institution of Parliament and the public that it serves. In particular, the constitutional nature of the Standing Orders stems from their huge influence on the use of legislative power.

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<sup>15</sup> SOs App B 1(3).

<sup>16</sup> George E Tanner "Confronting the process of statute making", paper presented to New Zealand Legal Method Seminar (16 May 2003, Auckland) at [12].

<sup>17</sup> David McGee *Parliamentary Practice in New Zealand* (3rd ed, 2005, Dunmore, Wellington) at 116.

<sup>18</sup> For a useful summary see Rt Hon Sir Kenneth Keith "On the Constitution of New Zealand: An Introduction to the Foundations of the Current Form of Government" *Cabinet Manual 2008*.

<sup>19</sup> Philip Joseph *Constitutional and Administrative Law in New Zealand* (4th ed, Brookers Ltd, Wgtn, 2014) at [2.8].

<sup>20</sup> Geoffrey Palmer and Matthew Palmer *Bridled Power: New Zealand's Constitution and Government* (4th ed, OUP, 2004) at 2–3.

## Practice

The Standing Orders seem long and detailed, but they do not say everything about how the Parliament operates. The day-to-day working life of the House, committees, members and other participants follow precedents and patterns that fill in the gaps between the Standing Orders. Much of this simply comes down to the way things are done: the Final Order Paper is circulated at particular times, the Leader of the House signals to the House Office when a bill is to be introduced, a Simultaneous Interpretation service is provided, members can get their select committee documents through the eCommittee system—or they can ask for them to be printed and sent as paper copies.

All of these myriad ways of doing things are described collectively as the “practice” of the House. Whenever a dispute or uncertainty arises about how the Standing Orders should be interpreted or applied, or what the appropriate practice should be, it is up to the Speaker to decide.<sup>21</sup> The Clerk keeps track of things, and assists members, staff, Government officials and the public with advice about relevant rules and practices when they want to transact parliamentary business.

## Review of Standing Orders—process

The Standing Orders Committee is a select committee that is empowered to review the Standing Orders, procedures and practices of the House.<sup>22</sup> The committee has cross-party representation and is chaired by the Speaker. Usually the Leader of the House and Shadow Leader of the House are members, along with the senior whips or spokespeople of other parties. The committee member with the longest continuous service in the House is traditionally appointed as the Deputy Chairperson, but rarely presides as it would be unusual for the committee to meet when the Speaker is unable to attend.

While strictly speaking the committee has discretion about whether to conduct a review, the practice is for a review to be conducted during each term of Parliament.<sup>23</sup> The Standing Orders Committee also can consider separate matters of procedure and practice as they arise, without needing to commence a review. Similar to other select committees, items of business can be referred or allocated to the Standing Orders Committee for consideration.<sup>24</sup>

The typical process of a review of Standing Orders resembles that for a select committee inquiry. The committee initiates the review and determines its own approach, which tends to involve an open call for public submissions with suggestions for any changes to the Standing Orders, procedures and practices of the House. Generally no limit to the scope of the review is prescribed. Submissions are received, usually including

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<sup>21</sup> SO 2.

<sup>22</sup> SO 7.

<sup>23</sup> Standing Orders Committee *Review of Standing Orders* (21 July 2014) [2011–2014] AJHR I.18A at 4. A review commenced during the 46th Parliament but was not completed before the Parliament was dissolved early for the snap election in 2002. That review was resumed in the next term and concluded in 2003.

<sup>24</sup> Since 2002, the committee has considered three bills and three petitions, and one matter referred by the House (a review of Standing Orders relating to pecuniary interests). The committee has also self-initiated consideration of separate matters of procedure and practice relating to: publishing of *Hansard* and other parliamentary publications; television coverage of the House; pecuniary interests; captioning of proceedings and webcasting of select committee hearings; and members’ attendance, absence and suspension.

submissions from select committee chairpersons and other members, and from the Clerk of the House. Some enthusiasts and activists feed into the process, but on the whole submissions have been relatively few. Hearings are held in public. The Clerk then analyses the submissions and makes recommendations, similar to the provision of advice by departmental advisers on bills (as for other committee business, the Clerk's advice is published on the Parliament website after the committee reports).

The committee works through the recommendations, in the process developing proposals further until the committee is ready to instruct the Clerk about the drafting of the amendments. A narrative report is prepared to explain the committee's main recommendations and the draft amendments are attached to it once they are adopted.

The House considers the committee's report on a notice of motion, moved by the Leader of the House, for the appended amendments to be adopted by the House. Once the House has agreed to the amendments, the Clerk arranges for a new edition of the Standing Orders to be published, usually during the election period.

### **Seeking a good balance**

Members of Parliament are conscious that the Standing Orders are part of New Zealand's constitutional landscape; hence the Standing Orders Committee has a convention of requiring consensus or overwhelming support if proposed amendments are to be effected. In 2003, the committee explained its decision-making process:

As the body that considers changes to the rules of the House, the Standing Orders Committee includes representatives from each recognised party, and generally operates on a consensual basis. By convention, we do not divide on Standing Orders matters: we ascertain whether the overall package of amendments to be recommended has the support of members who represent an overwhelming majority of the House. This approach does not mean that all of us support every measure, but on the other hand a number of significant proposals that might have obtained majority support have not been adopted. In our collective view, a good balance has been achieved.<sup>25</sup>

This approach has been reiterated in recent reports of the committee.<sup>26</sup> The aim is to find a balance which recognises the different parliamentary perspectives that should be considered.<sup>27</sup>

### **Principle, pragmatism and freeze-dried Parliament**

A convention preventing change without overwhelming support might seem to entrench the status quo. It has been suggested to the Standing Orders Committee that an "unattainably high" threshold of consensus results in "unworkable" legislative procedures being anchored in place, with worthwhile changes to these procedures being blocked.<sup>28</sup> In response, the Standing Orders Committee observed that the alternative—a majoritarian approach—would "undermine respect for the Standing Orders and thus their standing as part of New Zealand's constitutional framework".<sup>29</sup>

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<sup>25</sup> Standing Orders Committee *Review of Standing Orders* (11 December 2003) [2002–2005] AJHR I.18B at 5.

<sup>26</sup> Standing Orders Committee *Review of Standing Orders* (21 July 2014) [2011–2014] AJHR I.18A at 4; (27 September 2011) [2008–2011] AJHR I.18B at 7; (27 August 2008) [2005–2008] AJHR I.18B at 6.

<sup>27</sup> Mary Harris, Deputy Clerk of the House, memorandum to Standing Orders Committee (5 December 2006) at [49–51].

<sup>28</sup> Legislation Advisory Committee, submission to Standing Orders Committee (October 2006) at [82–83].

<sup>29</sup> Standing Orders Committee *Review of Standing Orders* (27 August 2008) [2005–2008] AJHR I.18B at 6.

The seeking of overwhelming support for amendments to the Standing Orders is an important convention from a constitutional perspective. Less lofty, but not insignificant in the hard-headed world of politics, is the realisation by members that the position of Government and Opposition may be reversed after the next election. What goes around comes around. Members may be reluctant to equip one side of the House with weapons that could, in turn, be brought to bear on them when political fortunes change. After all, the Standing Orders Committee usually is more active towards the end of the parliamentary term. Moreover, the parties would be mindful that a rule change which significantly shifted the balance of power could be difficult to unwind.

With principled and pragmatic drivers such as these, it would not be surprising if the House conducted a self-review process that was inherently change averse, resulting in a sort of freeze-dried Parliament. However, this proposition is not borne out by actual experience in New Zealand.

### **Regular cycle of review**

The conservatism that could ensue from the pursuit of overwhelming support is mitigated by the fact that reviews occur regularly, as part of the relatively short three-year parliamentary cycle. Ideas that seem novel and uncomfortable at first can, with time, become more acceptable. The cycle of regular reviews means that the House can incrementally update its way of operating, and over time these increments can result in major shifts in procedure.

Regular reviews have not always been a given, though: for much of the 20th Century reviews were relatively few and far between.<sup>30</sup> In the last three decades, however, the Standing Orders Committee has been active on a more frequent basis, in some cases being appointed to respond to particular legislative developments (such as the passing of the Public Finance Act 1989 and the switch to the MMP electoral system), and in others being established on an ad-hoc basis to consider reforms (such as in 1985). It was not until 2003 that the Standing Orders Committee was itself referred to in the Standing Orders, as one of the select committees established automatically in each term of Parliament.<sup>31</sup>

An important step towards “modernising” Parliament, then, is to recognise that it cannot be done all at once. A regular cycle of review is essential if Parliament is to keep up to date.

### **Achieving reform by give and take**

Having said this, the Standing Orders Committee’s self-imposed regimen for seeking cross-party support has not necessarily prevented significant change from occurring in a single move. Rather than seeking consensus on everything, the committee sees the

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<sup>30</sup> The inquiry into the Standing Orders in 1962 was the first to take place since 1951, though no significant revision had taken place since 1929 (Standing Orders Committee report [1962] AJHR 1.17 at 5). The Standing Orders Committee was not active during the years of the Reform Government from 1912 to 1928 (John E Martin “From legislative machine to representative forum? Procedural change in the New Zealand parliament in the twentieth century” (2011) 26(2) *APR* 35–52 at 37).

<sup>31</sup> SOs 7 and 184(1)(b); Standing Orders Committee *Review of Standing Orders* (11 December 2003) [2002–2005] AJHR I.18B at 29–30.

review as a process of arriving at an overall package. This involves “give and take” by members on all sides to find a balanced set of proposals.<sup>32</sup>

One of the key reforms in recent decades took place in 1985, most importantly to reorganise the select committee system, but also with a number of other notable changes.<sup>33</sup> The normal days of sitting found their current Tuesday, Wednesday, Thursday pattern, with regular Friday sittings being abolished to allow members to attend to constituents—this compensated for the expectation that the House would now meet throughout the year (instead of intense blocks of sittings clustered around the autumn and winter months). Extraordinary urgency was introduced as a mechanism for the Government to pass legislation very quickly when required; while on the face of it this would seem to have been a backward step, it was in fact a move to prevent sittings from extending after midnight unless absolutely necessary.<sup>34</sup> The Regulations Review Committee was established to keep an eye on the Government’s use of delegated powers to legislate.

These initiatives to modernise Parliament took place in the midst of a wider context of major constitutional reform that resulted in such landmark statutes as the Constitution Act 1986, State Sector Act 1988, Reserve Bank of New Zealand Act 1989, Public Finance Act 1989 and New Zealand Bill of Rights Act 1990. A Royal Commission was set up to look at overhauling the electoral system, laying the groundwork for the shift to MMP. This reform programme patently sought to rectify systemic and constitutional shortcomings that had permitted the dominant style of Government led by Rt Hon Sir Robert Muldoon until 1984. However, the work of the Standing Orders Committee was bipartisan and pragmatic, and focused on a balanced set of proposals. Hon Geoffrey Palmer, Leader of the House, paid special tribute to “the only member of the Opposition who was present at every meeting”, and whose “contribution was outstanding”.<sup>35</sup> He was referring to none other than Mr Muldoon himself, who in turn spoke glowingly about the process:

The work of the committee has been done in a thoroughly co-operative manner. There was no degree of dissent. When the various proposals were referred back to the party caucuses it was found that a spirit of compromise prevailed. We came together to reach agreement, rather than sticking to the original point on every side. As a result, we have something that I hope the House will accept in due time. Let us try it. Let us try to make it work.<sup>36</sup>

Another fundamental reform of parliamentary procedure was carried out—by consensus—when the Standing Orders were almost completely rewritten in 1995 in anticipation of the first MMP-elected Parliament.<sup>37</sup> As always, this included some give-and-take. The omnibus bill rule was introduced to curb the Government’s ability to combine disparate legislative proposals in a single bill. This move had been prompted by abuses to the legislative process in previous terms of Parliament.<sup>38</sup> The change

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<sup>32</sup> Standing Orders Committee *Review of Standing Orders* (21 July 2014) [2011–2014] AJHR I.18A at 4.

<sup>33</sup> Standing Orders Committee *First Report* (16 July 1985) [1984–1985] AJHR I.14.

<sup>34</sup> This change was successful: extraordinary urgency has been accorded only 10 times in the 30 years since its inception, in each case for the passage of taxation or excise bills.

<sup>35</sup> (16 July 1985) 464 NZPD 5600.

<sup>36</sup> (16 July 1985) 464 NZPD 5602.

<sup>37</sup> Standing Orders Committee *Review of Standing Orders* (13 December 1995) [1993–1996] AJHR I.18A at 11.

<sup>38</sup> *Ibid* at 49–51.

effectively shifted the decision-making about the acceptable bounds of legislative proposals from the Executive to the legislature. While this change was, on the face of it, a limitation on the Government's capacity to initiate broad legislative reforms, it was balanced by a rule change to allow divided bills to be taken together for debate at the third reading, a considerable time saving.<sup>39</sup> The Government also benefited from the introduction of party voting,<sup>40</sup> which cumulatively over the thousands of votes during each term of Parliament has amounted to a massive streamlining of House procedure.

In another balancing act, sitting hours were reduced in 1986 following complaints that 11 pm was too late to conclude each day, with the proviso that Members' business be given preference each second Wednesday that the House sat, rather than on every Wednesday sitting, as was previously the case.<sup>41</sup>

More recently, in 2011 the Standing Orders Committee instituted procedures for extended sittings, and for the grouping and selection of amendments. These changes palpably improved the legislative process,<sup>42</sup> but also were to the advantage of the Government. In return, the Standing Orders Committee recommended that instructions to select committees be made debatable, as a deterrent to the Government moving motions to truncate committee consideration of bills.<sup>43</sup>

### **Entrenchment and struggle**

The current balanced approach to reviewing the Standing Orders was not always present. It has evolved as part of New Zealand's constitutional development from a raw colony to a modern democracy. For many years following the establishment of the Parliament, the Standing Orders were indeed effectively entrenched. A provision adopted in 1856 prevented any proposal for "altering or annulling" a Standing Order from being dealt with unless at least two-thirds of all members were present and four days' notice had been given.<sup>44</sup> The development of procedures relied heavily on received practice from the House of Commons in London.<sup>45</sup> The rights of individual members to speak were uppermost, against a backdrop of shifting factions and parochialism. There was frequent obstruction through filibustering speeches and other procedural tactics, and constant angst about the procedures for private bills and the influence of the Legislative Council.<sup>46</sup>

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<sup>39</sup> Standing Orders Committee *Review of Standing Orders* (December 2003) [2002–2005] AJHR I.18B at 52.

<sup>40</sup> Party votes are conducted by the Clerk at the Table calling the name of each party in order of the size of their parliamentary membership, with the whip or another member of the party casting its votes en bloc. This procedure takes about 40 seconds per vote, considerably less than the time taken for personal votes (divisions), which involve ringing the bells for 7 minutes in the first instance, followed by the time taken for the counting, checking and reporting of votes. For a second or subsequent personal vote, the bell is rung for only 1 minute.

<sup>41</sup> Standing Orders Committee *Second Report* (November 1986) [1986–1987] 11 AJHR I.18A at [2].

<sup>42</sup> Mary Harris, Clerk of the House, submission to Standing Orders Committee (November 2013) at 9–11.

<sup>43</sup> Standing Orders Committee *Review of Standing Orders* (21 July 2014) [2011–2014] AJHR I.18A at 41.

<sup>44</sup> SO [1856] 148.

<sup>45</sup> The development of procedure in New Zealand's House of Representatives has been detailed by Dr John Martin, former Parliamentary Historian, in a series of articles published in *Australasian Parliamentary Review*. See John E Martin "From talking shop to party government: procedural change in the New Zealand Parliament, 1854–1894" (2011) 26(1) *APR* 64–81 and "From legislative machine to representative forum? Procedural change in the New Zealand parliament in the twentieth century" (2011) 26(2) *APR* 35–52. These articles are available online at <http://www.parliament.nz/en-nz/about-parliament/how-parliament-works/fact-sheets>.

<sup>46</sup> The upper house, which eventually was abolished in 1950.



Unsurprisingly, the legislative output of the General Assembly was not high. Attempts to adjust the rules came unstuck on several occasions, with the threshold for a successful amendment to the Standing Orders being too high for the most part. With attendance at the House by its far-flung members poor anyhow, it was easy to prevent change by simply walking out.<sup>47</sup>

With the abolition of the provinces in 1876 and, especially, the establishment of parties and the ascendancy of the Liberals from 1891, the Government became more determined and organised in its efforts to reform the House. Richard Seddon, who to this day remains New Zealand's longest serving Prime Minister,<sup>48</sup> took a bullish approach, obtaining a resolution for the Standing Orders to expire in the following year, 1894. Seddon justified his actions on the grounds that the "license of prolix speech" enabled a minority to enslave the majority and interfere with House business.<sup>49</sup>

Seddon tabled a replacement set of Standing Orders that reduced the ability for members to filibuster, including provision for speech time-limits. The quorum requirement for amending the Standing Orders was reduced from two-thirds of the membership to a simple majority.<sup>50</sup> Seddon later also strong-armed the adoption of a procedure for urgency in 1903.<sup>51</sup> It is somewhat ironic that the larger-than-life statue on the plinth in front of Parliament House commemorates the politician who—despite being an accomplished stonewaller in his own right earlier in his career—was arguably the leader most responsible for the truncation of parliamentary debate in this country. On the other hand, given the extreme lengths (literally) that members could go to in obstructing proceedings, perhaps this was just as well. Under Seddon, the success rate for the passage of Government bills increased hugely. During his time in charge of the country, Seddon took full control over legislative expenditure and established a period of Executive dominance of the House.<sup>52</sup> This dominance continued, largely without interruption, for the next century.

Over time, the rule requiring an extended, four-day period of notice for motions to alter the Standing Orders was also "thrown to the winds", as the House customarily suspended it whenever amendments were mooted.<sup>53</sup> The provision was finally revoked in 1929,<sup>54</sup> when the current method of amending the Standing Orders by notice of motion was instigated.

### **When consensus went AWOL—the arrival of closure motions**

Seddon had managed to shorten speeches and introduce urgency, but he failed in his attempts to bring in closure motions, which are a procedure to move summarily for the termination of a debate. Even members of his own party recoiled at the idea.<sup>55</sup> It was not until the early 1930s that a Government finally forced the procedure into the

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<sup>47</sup> Martin (2011) 26(1) *APR* 64–81 at 66–67.

<sup>48</sup> From 1893 (when the office was known as Premier) to his death in 1906.

<sup>49</sup> (1894) 83 NZPD 9 (Speech from the Throne), quoted by Martin (2011) 26(1) *APR* 64–81 at 76.

<sup>50</sup> Martin (2011) 26(1) *APR* 64–81 at 76–77.

<sup>51</sup> (1901) 119 NZPD 602; John E Martin "A shifting balance: Parliament, the executive and the evolution of politics in New Zealand" (2006) 21(2) *APR*.

<sup>52</sup> Martin (2006) 21(2) *APR*.

<sup>53</sup> (28 March 1931) 227 NZPD 544 (Speaker Statham).

<sup>54</sup> Prior to its revocation in 1929, this was numbered as Standing Order 448.

<sup>55</sup> Martin (2011) 26(2) *APR* 35–52 at 36–37.

Standing Orders. This unusual exercise of a majority to change the House's rules was an exception to prove the rule: it was resorted to after an accord reached at the Standing Orders Committee was deemed to have fallen over.

In 1929 the Standing Orders Committee had taken a bipartisan approach to the revision of the Standing Orders, the first major review in many years. It was led by the tireless drive and learned diligence of Speaker Statham, with an overall spirit of improving the way the House conducted its business, particularly by sitting more reasonable hours.<sup>56</sup> The most contentious part of the Committee's consideration appears to have been a proposal to curtail the circulation of newspapers by messengers in the House, and even this proposal was eventually struck out in the committee of the whole House to ensure unanimity.<sup>57</sup> Most notably, the 1929 revision included new limits on speeches and sitting hours for the House.

In making these recommendations, the committee noted that it was hoping to avoid a provision for closure as had been installed in other Parliaments.<sup>58</sup> The committee had considered a closure procedure but in the end had "almost unanimously" agreed that its adoption would not be advisable.<sup>59</sup> The decision to start sittings in the middle of the afternoon (then 2.30 pm) was unanimous, after a compromise by members who preferred "daylight sittings" to reduce the prospect of sittings proceeding into the "unthinkable hours" of previous years.<sup>60</sup>

Speaker Statham acknowledged that views on some matters were not unanimous, "but the Committee had worked well together, and, although there had been individual differences of opinion, there had never been an actual division. If one or two members did not agree with a proposal, they were willing that the general wish of the Committee should be submitted to the House".<sup>61</sup> The new approach to the House's sitting hours was regarded as "honourable" and "experimental", and members hoped it would stand the test of time.<sup>62</sup>

Within two years the House had changed its mind.

George Forbes was a United Party member on the Standing Orders Committee in 1929, when the committee had worked earnestly to avoid the introduction of the closure procedure. However, by 1931, Forbes, who by now had been elevated to Prime Minister, considered that the spirit of the committee's agreed package of amendments had not been observed by the Labour Opposition. He was angered by the stalling of legislation, particularly a bill to cut wages and salaries, which was introduced in response to the growing Depression.<sup>63</sup>

Forbes argued that the Opposition's attitude, combined with the shortening of sitting hours under the 1929 revision, made it impossible to transact the House's business. On this basis, he made good his threat by moving new "Standing Order 205A" to

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<sup>56</sup> (2 August 1929) 221 NZPD 881-882.

<sup>57</sup> (2 August 1929) 221 NZPD 893.

<sup>58</sup> Standing Orders Committee, report on revision of Standing Orders (11 July 1929) [1929] 3 AJHR I.18 at [4].

<sup>59</sup> (2 August 1929) 221 NZPD 878.

<sup>60</sup> *Ibid.*

<sup>61</sup> (2 August 1929) 221 NZPD 886.

<sup>62</sup> (2 August 1929) 221 NZPD 885.

<sup>63</sup> Martin (2011) 26(2) *APR* 35-52 at 38.

implement the closure procedure.<sup>64</sup> Statham, who to this day is well regarded as an independent-minded and scholarly Speaker, was inclined towards Forbes' view.<sup>65</sup> The ensuing fierce struggle dragged on for several days, ending at 2.22 am on a Tuesday morning.<sup>66</sup> While the closure rule was initially included in the Standing Orders on a temporary basis, it was soon made permanent and was used—with enthusiasm—by Labour when in Government from 1935.<sup>67</sup>

### **Dissent and “least-bad” solutions**

Fortunately, there have been no recent instances when the Standing Orders have been amended by exercise of a majority. However, while a unanimous voice is sought in Standing Orders Committee reports, this does not prevent disagreement being aired.

Declarations of members' pecuniary interests have been an area where members have voiced strong concerns but then, ultimately, avoided voting in dissent. The creation of a register of members' financial interests for public inspection was made as long ago as 1986, when a detailed proposal was put forward by the then Leader of the House, Hon Geoffrey Palmer. However, he opted not to proceed with the proposal “in light of the fact that there was not unanimity among committee members”.<sup>68</sup>

An initiative to create a register surfaced again in 2005. The Government first approached the Standing Orders Committee but, when agreement could not be reached, resorted to introducing a Government bill for a statutory regime. At this point, members opposed to the concept accepted that providing for the register in the House's rules was, at least, preferable to a law being passed. The Standing Orders Committee recommended that the bill not proceed but that the provisions for a Register of Pecuniary Interests of Members of Parliament be incorporated in the Standing Orders.<sup>69</sup> The committee recounted these ruminations in its commentary on the bill and observed that:

There is no presumption that every party in the House will agree with every recommendation made by the committee. For example, in 1995 there was considerable disagreement with the Standing Orders Committee's decision to include the position of Leader of the Opposition in the Standing Orders. Consequently, agreement to Standing Orders Committee reports means that particular parties must sometimes accept what they perceive to be the least-bad solution.<sup>70</sup>

In 2011, Government members found themselves in the minority when the committee discussed the swearing-in of members. The committee had unanimously agreed to bring in explicit requirements for members to observe the words of the oath or affirmation as required by law or risk being required to withdraw from the House. A majority of members thought the wording of the oath and affirmation should itself be reviewed, though a change would require a law-change and so could not be effected through the Standing Orders.<sup>71</sup> Members from the National Party and ACT New Zealand disagreed with this idea and, while those members were in the minority, the committee

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<sup>64</sup> (28 March 1931) 227 NZPD 546—547.

<sup>65</sup> (28 March 1931) 227 NZPD 543.

<sup>66</sup> *Ibid* at 668.

<sup>67</sup> Martin (2011) 26(2) *APR* 35–52 at 38.

<sup>68</sup> Standing Orders Committee *Second Report* (November 1986) [1986–1987] 11 AJHR I.18A at [5.1].

<sup>69</sup> As Appendix B to the Standing Orders.

<sup>70</sup> Members of Parliament (Pecuniary Interests) Bill (81–2) (commentary, 23 June 2005) at 4.

<sup>71</sup> Standing Orders Committee *Review of Standing Orders* (27 September 2011) [2008–2011] AJHR I.18B at 11.

refrained from expressing this suggestion as a formal recommendation to the Government.

At points in the 2011 report, the Green Party expressed concerns about the position reached by the committee.<sup>72</sup> However, the Green Party refrained from entering a separate minority report on the basis that its views were reflected in the report's main text. This accords with the Standing Orders Committee's preferred way of operating.

### **Trials of new procedures**

It is not unusual for significant new procedures to undergo a trial period before being made permanent in the Standing Orders. The two most significant reviews in recent times were implemented on the understanding that they would be followed up by further reviews after a year or so. The major reforms of 1985 were under probation until largely confirmed through a second report in 1986. Don McKinnon, the National Party's Senior Whip was, unlike Muldoon, relatively circumspect about the 1985 changes, and stated that his agreement was contingent on there being an opportunity to revisit them after a year.<sup>73</sup>

The rewritten Standing Orders adopted in anticipation of MMP actually came into force at the beginning of 1996, thus permitting several months of experimentation with the MMP-based procedures while the House was still populated with the members elected under the final FPP plebiscite. A further review was conducted just before the election, with the amended Standing Orders coming into operation in September 1996 when the Parliament opened in the new era of proportionality. Another health-check of the operation of the new Standing Orders was carried out in 1999.

A new procedure can also be trialled through the passing of a sessional order, which is a resolution of the House about its procedures that has lasting effect but lapses at the end of the term of Parliament (or sooner if the House decides this). This mechanism is useful when members are uncertain about how particular new procedures might work in practice, and wish to give them a go without making a permanent commitment. Major new initiatives tested in this way included the 1991 sessional order setting out the financial procedures following their revamp to implement the Public Finance Act 1989 and to introduce financial reviews; the introduction of international treaty examinations in 1998; and the re-establishment of a record of the attendance and absence of members in 2014 in association with a statutory provision for docking the pay of members who persistently are absent without permission.

### **Factors driving change**

Different factors can drive changes to Parliament's rules: changes in law, shifting social expectations, new technology, evolving practice, or political adjustments. Many of these stimuli will have been canvassed by other presentations at this conference.

The Clerk's submission will usually draw the Standing Orders Committee's attention to legislative changes that require incorporation. Aside from the implementation of proportionality and other changes associated with MMP, the 1995 review took a close look at the implementation of natural justice procedures in the House and select

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<sup>72</sup> Ibid at 16 and 38. Green Party proposals were noted in several other places without an expression of divergence from the committee's position.

<sup>73</sup> (16 July 1985) 464 NZPD 5598–5599.

committees in light of early experiences under the New Zealand Bill of Rights Act 1990.<sup>74</sup> The 2005 review largely focused on changes to financial procedures consequent to the passage of the Crown Entities Act 2004 and Public Finance Amendment Act 2004.<sup>75</sup> The Clerk also will counsel the committee about practices that have evolved so they are no longer suitably reflected in the Standing Orders, or that no longer seem to offer much value to the House.

Members themselves have a high awareness about social attitudes and expectations for Parliament, and about the opportunities that new technologies provide, and fresh ideas and perspectives are supplied through public submissions. Not all members are early adopters of technology, nor is the House. A number of ideas were floated during the 2014 review; the committee did not reach agreement on progressing particular new technology-based engagement initiatives, but made cogent observations about some of the possibilities on offer:

Public engagement is crucial to keeping Parliament relevant. We acknowledge that tensions between representative democracy and direct democracy have emerged, particularly regarding the considerable potential offered by technology and social media to harness direct popular engagement in public policy. ...

We envisage that in the future the public could be able to engage with their representatives via electronic channels, with controls in place to ensure systems were not open to manipulation. An online petition process might support the introduction of a bill, or the holding of a debate on a particular matter sponsored by a member.<sup>76</sup>

Members also have a sense of procedures that are not working well, and will feed these thoughts into the committee's consideration. Sometimes these observations are not tendered formally through submissions but arise during the hearing of evidence or other conversations and seem to strike a chord. Changes are occasionally proposed to deal with concerns that members have about procedural tactics in the House, if they consider that those tactics have crossed a line into new territory. The power for a Chairperson to group or select amendments in a committee of the whole House,<sup>77</sup> a significant development, followed determined filibustering of controversial bills in the 49th Parliament through the lodging of amendments by the hundred.

In any select committee, the making of submissions can have a considerable impact on members and can influence their findings and recommendations. This is also the case for the Standing Orders Committee. In its 2011 report, which made a suite of recommendations to improve the arrangement of the House's time, the committee made special mention of a submission by the Urgency Project, which provided an abundance of detailed research and in-principle discussion about the use of urgency in the House. It is fair to say that, while a number of proposals were already on the committee table, including the establishment of extended sittings, the Urgency Project submission helped to propel the overall package of proposals over the line.<sup>78</sup>

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<sup>74</sup> Standing Orders Committee *Review of Standing Orders* (13 December 1995) [1993–1996] AJHR I.18A. See in particular the report by Philip Joseph on natural justice (Appendix F, 204–246).

<sup>75</sup> Standing Orders Committee *Review of Standing Orders* (23 June 2005) [2002–2005] AJHR I.18C.

<sup>76</sup> Standing Orders Committee *Review of Standing Orders* (21 July 2014) [2011–2014] AJHR I.18A at 30–31.

<sup>77</sup> Standing Orders Committee *Review of Standing Orders* (27 September 2011) [2008–2011] AJHR I.18B at 45–46;

<sup>78</sup> *Ibid* at 14–15. The Urgency Project was a research project under the auspices of the New Zealand Centre for Public Law and the New Zealand Law Society. The research team, Claudia Geiringer, Polly Higbee and Elizabeth

## **Engagement of members**

Like many aspects of parliamentary procedure, the success of the process hinges on the engagement of the participants. This applies especially in relation to members, who as well as developing their own views about proposals are then required to inform their caucus colleagues and articulate the caucus position. In the Standing Orders Committee, where cross-party support is needed for procedural innovations, the buy-in of all committee members is crucial. Prospects of success are not assisted when members are placed under pressure to get caucus agreement quickly—the most likely answer in these circumstances will be “no”.

The ideal is for members to be able to gauge the responses of their caucus colleagues, obtain an understanding of any concerns underlying them, and bring those concerns back to the committee room with time to problem-solve. The Speaker, as Chairperson, has a leading role in facilitating the discussion so that members can find a good compromise in the interests of Parliament.

Through interactions like these a balanced package of proposals, with overwhelming support, can emerge.

## **Parliamentary effectiveness**

A necessary part of any review is scrutiny of how well procedures are working. But this is more than a textual revision—for the process to be meaningful, it involves asking the question: “How can Parliament be more effective?”. Effectiveness is a highly subjective yardstick. There has been an attempt to express generic parliamentary benchmarks<sup>79</sup> but, while these provide a useful baseline for democratic legislatures, they do not provide a high level of aspiration in the New Zealand context.

Parliamentary effectiveness can be gauged with reference to the various functions of the House. For example, in relation to the legislative function, the House is effective when it enables a Government to implement its mandated policy programme, encourages the public to have a say, and empowers members to be good legislators, considering, testing and improving proposed laws. The job of the Standing Orders Committee is to balance these needs in the best way possible. In the political environment, this means gaining cross-party support for improvements that are aimed at enhancing the institution of Parliament.

## **Nerve-centre of parliamentary innovation**

The 2011 review of Standing Orders clearly achieved this aim, providing a coherent package of amendments with a theme of encouraging constructive negotiations about the arrangement of House business. These amendments centred around the powers of the Business Committee to determine how business is to be dealt with. The Business Committee is a group of senior members representing parties across the House, which is chaired by the Speaker and discusses pending business with a view to arranging it through decisions that are unanimous or nearly unanimous.

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McLeay, later published the work as *What's the Hurry: Urgency in the New Zealand Legislative Process 1987–2010* (2011, Victoria University Press, Wellington).

<sup>79</sup> Commonwealth Parliamentary Association and World Bank Institute *Recommended Benchmarks for Democratic Legislatures* (December 2006, CPA Secretariat, London).

With the additional powers conferred on it in 2011, the Business Committee was cemented as the true nerve-centre of parliamentary innovation in New Zealand. The Business Committee meets every sitting week. It arranges debates, allocates speaking times to parties, extends sittings, and finds ways to facilitate business in the public interest. In particular, the committee has arranged extended sittings to enable several Treaty of Waitangi claims settlement bills to be passed, providing redress to Māori iwi for Crown breaches of the Treaty. Some of these bills would not realistically have been dealt with if they had been in direct competition with other Government bills for a place in the legislative programme. The Business Committee has also arranged for debates to be held on significant select committee inquiry reports that otherwise would have disappeared without discussion in the Chamber, and for a special debate on Pacific issues to be held at the same time as the hosting of a conference of Pacific members of Parliament.

Notably, the Business Committee has successfully reconfigured the debates for the scrutiny of the Estimates and annual reviews of government agencies. The Standing Orders Committee had considered but not reached agreement on the adoption of similar procedures. The Business Committee has simply made the arrangements, with members having the comfort of knowing that the new debate formats can be trialled without necessarily committing to a permanent rule change.

There is much more that the Business Committee could do. Controversial bills could be given time-limited debates in the committee of the whole House in return for longer second reading debates (during normal hours or even during extended sittings). Committee stages of bills could be arranged (say, by the grouping of parts for debate) before they are introduced, reducing the tendency to structure bills in a way that minimises debate. State occasions could be arranged; while they are primarily intended to allow for speeches by foreign leaders, there are other possibilities.<sup>80</sup> State occasions are as yet a blank canvas to allow the Business Committee to associate Parliament with events of national significance. The Standing Orders Committee has given these and many other powers to the Business Committee to encourage cross-party innovation in Parliament's interests.

### **Finding new ways to work and engage**

Opportunities for innovation don't end there. New practices are found all the time as presiding officers, members and staff look for better ways to do things. This approach is not just to be encouraged—it is essential. Recently the Local Government and Environment Committee set up its own Facebook page and has been using it actively to promote its business and engage with the interested public.<sup>81</sup> The experience from this trailblazing committee will inform what will surely be an ever-increasing trend for committees to interact with the public through social media. Significant improvements to the Parliament website are expected in the next year, presenting a better interactive experience for people wanting to access parliamentary information and have their say.

Members of Parliament and parties have their own ways of connecting with the public, and many have jumped enthusiastically into diverse social media channels, while retaining more traditional ways to stay in touch with constituents. Their expectations for how Parliament should operate will develop in light of this.

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<sup>80</sup> SO 82; Standing Orders Committee *Review of Standing Orders* (21 July 2014) [2011–2014] AJHR I.18A at 6–7.

<sup>81</sup> <https://www.facebook.com/localgovtenvironment>.

## **Conclusion—providing the impetus**

I began this paper by asserting that only Parliament can modernise Parliament. Technically, this is true. But Parliament does not exist in a vacuum. It can remain relevant only if it stays in touch with the public and is responsive. After all, the House is inhabited by politicians, who as a group are highly motivated towards gleaning the public mood.

Finding common ground and co-operating are like bread and butter for the Standing Orders Committee: working together to understand the issues and figure out what is in the interests of Parliament. Sometimes proposals that members considered had merit did not get implemented because the practical details were difficult, or there was concern about unintended consequences or unforeseen interpretations of suggested new procedures. The secret of success is to give members the opportunity to engage with each other and their caucuses, and to problem-solve. It has happened before. Reform is possible.

When it establishes its next review, then, the Standing Orders Committee will need to consider how to connect the House with this rapidly changing world. On the other hand, the challenge for all those who have ideas and dreams for Parliament is to convey them when the call goes out, to provide the impetus to modernise.