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**WORKSHOP 1A: IDENTIFYING BEST PRACTICE WITHIN PARLIAMENTARY
PROCEDURE**

This paper looks at three key aspects of best practice within parliamentary procedure – the principles of parliamentary procedure; interpretation of the standing orders in accordance with the principles and precedent; and communication of technical details to members, in context.

This paper relies heavily on three papers given at previous ANZACATT seminars, by Les Gonye, Acting Deputy Clerk, New South Wales, Legislative Assembly,¹ Peter McHugh, former Clerk of the WA Legislative Assembly,² and David Blunt, Clerk of the Parliaments, NSW Legislative Council.³

I recall, while in the Deputy Clerk chair some years ago, being asked by a senior Opposition member whether he could amend his motion when speaking in reply. Clearly some negations had occurred and without an amendment, he was about to lose the vote, but to this I was unaware. As he was about to commence his speech in reply, I advised, perhaps somewhat hesitantly, that to seek to amend his motion would be out of order. I was right, and there are precedents to back me up, but he would have detected that I was not confident in my knowledge of the principles of parliamentary procedure or the rules of the House. Not only that, I was ignorant of the context in which he was operating and I neglected to give reasons for advising the way I did or to suggest some alternative action. The member was not happy and the look on

¹ Les Gonye, NSW Legislative Council, *“Dealing with Members’ Expectations”*, ANZACATT Professional Development Seminar, Darwin, 2014

² Peter McHugh, Clerk of the Legislative Assembly, Western Australia, *“Interpretation of Standing Orders”* ANZACATT Professional Development Seminar, Sydney, 2004.

³ David Blunt, Clerk of the Parliaments, Parliament of New South Wales, *“Parliamentary traditions, innovation and the great principles of English parliamentary law”*, ANZACATT, Canberra, 2012

his face has stayed with me as a reminder of the essential components of bad parliamentary procedure.

The principles of parliamentary practice

The first aspect of best practice within parliament procedure are the “*great principles that lie at the basis of English parliamentary law*”.

The Canadian House of Commons Procedure and Practice quotes John George Bourinot, an authority on parliamentary procedure and Clerk of the Canadian House of Commons from 1880 to 1902 as saying:

The great principles that lie at the basis of English parliamentary law have ... been always kept steadily in view by the Canadian legislatures; these are: To protect the minority and restrain the improvidence and tyranny of the majority, to secure the transaction of public business in a decent and orderly manner, to enable every member to express his opinions within those limits necessary to preserve decorum and prevent an unnecessary waste of time, to give full opportunity for the consideration of every measure, and to prevent any legislative action being taken heedlessly and upon sudden impulse.⁴

The principles aren't just ideals, they have a practical application and are fundamental to our thinking about parliamentary procedure. For example, in his paper⁵ regarding the “great principles” David suggests that principles can be turned into questions which can be considered when reviewing the ongoing relevance of parliamentary traditions and the appropriateness of proposed innovation. For example, if the answer to a question such as “does it assist in the orderly conduct of business?”, is “no” then that procedure is probably not in the interests of parliamentary democracy.

A quote in Peter McHugh's 2004 paper from *Mason's Manual of Legislative Procedure*, *Mason's Manual of Legislative Procedure*, also highlights the application of the principles:

⁴ Audrey O'Brien and Marc Bosc Eds, *House of Commons Procedure and Practice*, 2nd Ed, 2009, Ch 5, Parliamentary Procedure

⁵ Blunt, 2012

*Parliamentary law is a system of principles, based on reason and developed over a long time as individual questions were determined on the best reasoning of legislative bodies, their presiding officers (and of the courts). Individual rules are to be interpreted in light of the principles. “Ordinarily, from a knowledge of the principles, the rules become evident. In any event the correctness of any rules should be checked against the principles, and if there is no conflict, the rule cannot be far wrong”.*⁶

It is probably fairly rare that on any given sitting day the participants in parliamentary procedure, Chairs, members, and clerks, consciously consider the principles, but when members question a seemingly ambiguous rule, or there appears to be a contradiction or conflict between rules, or the Presiding Officer is called on to make a difficult ruling, understanding that rules should be interpreted in light of the principles is central to determining best practice.

Interpretation of the standing orders in accordance with the principles and precedent

The interpretation of standing orders has been the basis of a major project over a number of years conducted by myself, Jenelle Moore and other Legislative Council staff.⁷ The project is near completion and by the time I present this paper at ANZACATT it will be with the publishers.

In essence, the project is intended to identify the purpose of each current standing order of the New South Wales Legislative Council, to describe the operation of the standing order in practice, and to chart the development of the standing orders since 1856. The commentaries on the standing orders are intended to be practical, clarifying, for example, how a President’s ruling or precedent under a previous standing order continues to apply today, or is no longer relevant. The commentaries are intended to answer as many potential questions about each rule as possible by providing examples of its use in practice, debates concerning its adoption, amendment, ongoing relevance, and President’s rulings.

In order to define the purpose or intent of each current standing order, how it operates in practice and how it has developed, the various resources available have been used: minutes of proceedings of the Council since 1856, Hansard since 1874, procedural resources such as

⁶ McHugh, 2004, quoting *Mason’s Manual of Legislative Procedure: Mason’s Manual of Legislative Procedure, 2000 Edition, NCSL, Sec. 45, p41.*

⁷ The *Annotated Standing Orders* are intended to complement the Council’s publication “New South Wales Legislative Council Practice”, the 2nd edition of which is currently being drafted.

consolidated indexes of minutes and bills registers, the Standing Orders Committee reports produced since 1856, various hand written notes of the Clerks and lovely old minutes and records of the Standing Orders Committee upon which unidentified members and clerks have annotated and marked. Frustratingly, there are significant gaps in the records of procedural developments over time. In a large number of cases, the reasons for change were not debated in the House, and even if they were, prior to 1874, the only record of the debates were the minimal reports in the Sydney Morning Herald. The obvious resources (Erskine May, Odgers Senate Practice and New Zealand Practice), were also referred to, particularly when seldom used or obscure rules were examined.

Other factors taken into consideration when interpreting the rules was context, such as the political environment at the time, the constitution and membership of the House and so on; as well as the interaction between standing orders. And of course there were many occasions on which the fundamental principles of parliamentary procedure were critical in identifying purpose and intent of standing orders. John Evans quotes Speaker Fraser of the Canadian House of Commons as saying that “when interpreting the rules of procedure, the Speaker must take account not only of their letter but of their spirit and be guided by the most basic rule of all, that of common sense”. We would like to think that at all times common sense also factored into our interpretation of the standing orders.

There were a number of interesting discoveries made during this project. Recently devised creative and innovative use of the standing orders seem to have also been devised and used many decades ago, and standing orders seldom used today were used regularly and to great effect in the past, begging the question as to why such procedures fall into disuse.

But despite the research and the resources, there were occasions when the reasons for adopting some rules were not revealed, and although the reasons could be presumed, the evidence was lacking. As Rosemary Laing advised us, “you can't go down every rabbit whole”. Perhaps once the standing orders are published, others will be able to close these gaps for us.

One of the most fascinating discoveries has been, despite all the changes to procedure since 1856 and the reviews conducted in 1870, 1895 and prior to 2004, the extent to which the rules first adopted in 1856 remain in place and remain relevant today – a testament to the application of the fundamental principles of parliamentary procedure in the Legislative Council over time.

But there have of also been numerous changes to the standing orders over the past 160 years: resolutions have sought to improve the operations of the House, President's rulings have varied practice, major innovations have been adopted, and inappropriate or irrelevant rules have been repealed. The following section outlines some of these developments:

Rules for debate adopted in 1856 were rudimentary in comparison to the current rules. Members were restricted to speaking only once to a question unless speaking in explanation, except for members speaking in reply; members were not to digress from the question before the Council; and imputations of improper motives and personal reflections were considered disorderly. Over time a number of additional a rules have been adopted, either by way of President's ruling, or resolution. The current rule that a member may not reflect on any resolution or vote of the House, unless moving for its rescission, was first adopted as a standing order in 1895, but had been the subject of a President's Rulings in 1891;⁸ in 1895 a rule was adopted regarding the appropriate use of the Queen's or Governor's name, a matter which had first been debated in 1844; the rule all imputations of improper motions and all personal reflections on Members being disorderly was first adopted in the Legislative Council in 1843; Presidents' rulings established from 1883 that it was not in order to say anything that may be offensive to the other House or to any member thereof and that members should be referred to with due respect and not in a derogatory manner⁹; the first standing order to restrict the extent to which members could speak to notes or from publications was adopted in 1858 in relation to newspapers, based on House of Commons practice, and was extended to reading extracts from books and other publications or documents in 1895 and to reading of lists of names in 2002.

As rules have been challenged and Presidents' have sought to clarify the rules, they have conversely become more detailed and complex. The 154 relatively simple rules adopted in 1856 have expanded to 230 standing orders, many of which include multiple paragraphs. The complexity of the rules has in a small number of cases, led to apparent contradictions. For example, there is an apparent contradiction between SO 137 and SO 90 in that SO 137 prohibits debate on the first reading of a bill, while SO 90 provides that the mover of the first reading of a bill is allowed to speak in reply:

⁸ See for example *Hansard*, NSW Legislative Council, 10 July 1890, p 1996; 19 May 1891, p 8.

⁹ See for example *Hansard* NSW Legislative Council, 31 January 1883, p 172; 22 February 1888, p 2718; 19 April 1893, p 6194.

90. Reply

- (1) A reply is allowed to a member who has moved a substantive motion or *moved the first*, second or third reading *of a bill*. A reply is not allowed to a member who has moved an amendment.
- (2) The reply of the mover of the original question closes any debate.

137. First Reading

- (1) The question on the first reading and printing will be taken together as one motion, be put by the President immediately after the bill has been received, and be determined *without amendment or debate*.
- (2) On every order for the reading of a bill the short title only will be read.
- (3) After the first reading, on any bill other than a bill received from the Legislative Assembly, the second reading may be moved immediately or made an order of the day for a later hour or for a future day. Immediately following the second reading speech by the mover, debate is to be adjourned until a future day which must be at least five calendar days ahead.

However, applying the considerations above when interpreting standing order 137 and standing order 90 reveals that the standing orders are complementary rather than contradictory. Earlier rules for the first reading in operation prior to 1895 were silent on the ability to debate or amend the motion, but motions were, on occasion, debated¹⁰ and amendments moved to have the first reading of a bill read ‘this day three month’¹¹ or ‘this day six months’.¹² “Reasoned amendments”, were also moved to the motion for the first reading.¹³ In 1895, while the terms of new SO 165 and 166 again made no provision for debate on the motion for the first reading, there are examples where debate occurred.¹⁴ In 1899 the President ruled that as the first reading of a bill from the Assembly was moved without notice, it should be determined without debate and as the bill in question had been introduced in the Parliament some time previously, there was no

¹⁰ See for example *Minutes*, NSW Legislative Council, 29 October 1856, p 19 (Sillitoe’s Trust Estate Bill); 12 October 1859, p 25 (Church of England Synods Bill); 21 December 1876, p 12 (Criminal Law Amendment Bill); 9 September 1885, p 9 (Public Health Bill).

¹¹ *Minutes*, NSW Legislative Council, 11 February 1857, p 62 (Remedies on Bills of Exchange and Promissory Notes Facilitation Bill (No. 2)).

¹² *Minutes*, NSW Legislative Council, 12 April 1861, p 113 (Church and School Lands Bill).

¹³ *Minutes*, NSW Legislative Council, 2 April 1873, pp 110-111; see also 22 November 1894 p 87 (Labour Settlements Acts Further Amendment Bill (No. 2)); 16 September 1993, pp 244-245, 9 November 1993, pp 360-361 (Government Cleaning Service Retention Bill).

¹⁴ *Minutes*, NSW Legislative Council, 16 August, 1922, p 46; *Hansard*, NSW Legislative Council, 16 August 1922, pp 1038-1044 (Eight Hours Amendment Bill).

requirement for an explanation of the bill on the first reading. But the rule was different for a bill originating in the Council.¹⁵ In 1922 a point of order was taken that based on practice in the Imperial Parliament, the first reading of a bill is a mere formality and is not open to debate. However, the President ruled that with no real guidance in Erskine May and as it was not for him to restrict the right to debate, it was permissible to debate a bill on its first reading.¹⁶

Accordingly, based on precedent and practice, the first reading of an Assembly bill cannot be debated, but the first reading of a Council bill can be, and the mover can speak in reply.

The *Annotated Standing Orders* project has also revealed cases of standing orders being repealed shortly after their adoption. For example, standing orders were adopted in 1849 and again when the Legislative Council was established in the bicameral parliament in 1856¹⁷ to provide that members could be adjudged guilty of contempt for absenting “himself” for more than three consecutive weeks without leave of the House, or for wilfully disobeying any order of the Council or vexatiously interrupting the orderly conduct of business could be fined for not more than £20 and if that sum was not paid immediately, the member could be committed to the custody of the Usher of the Black Rod for a period not exceeding fourteen days. Concern about the power of the Council to impose such penalties were raised when the rules were first adopted in 1849.¹⁸ Perhaps such concern was the reason the provisions were omitted from the new standing orders in 1895.

Standing order 210 adopted in July 1895 was repealed only months later. The standing order conceded power to the Assembly to lay aside a bill amended by the Council if, in the Assembly’s view, the Council did not have the power to make the amendments. The Council could not consider or introduce a similar bill in the same session, notwithstanding that the President or the Council by resolution was of the view that the Council did have the power to make the amendments. As the Attorney General explained at the time, to enable such a the bill to pass, the Council would be placed in the position of having to acquiesce in the Assembly’s assertion that the Council had exceeded its rights and privileges and erred in making the original amendments to the bill, making “a ridicule of the House’s work in the consideration and amendment of the

¹⁵ *Hansard* NSW Legislative Council, 26 September 1889, p 5467.

¹⁶ *Minutes*, NSW Legislative Council, 16 August, 1922, p 46; *Hansard*, NSW Legislative Council, 16 August 1922, pp 1038-1044 (Eight Hours Amendment Bill).

¹⁷ In standing orders of the Colonial Council adopted in 1849

¹⁸ *Sydney Morning Herald*, 2 June 1849, p 2; *Votes and Proceedings of the Legislative Council*, 1 June 1849, p 35.

bill with a view to it passing”.¹⁹ The matter was referred to the Standing Orders Committee, and standing order 210 was subsequently repealed on recommendation of the committee.

There have been other cases where members have objected to proposed rules on the basis that it conceded Legislative Council powers. In 1843 the governor requested that the House reconsider standing order 140, recently adopted by the House, which provided for the repeal of a standing order by a simple vote of the Council, and not on the approval of the Governor.²⁰ The House ultimately agreed to the Governor’s request and repealed the rule, but not without some dissent. A ‘this day six months’ amendment moved to the motion that the House resolve into committee of the whole to consider the Governor’s message was negatived on division and a motion that the message be considered early in the next session was also negatived on division.²¹ As noted above, standing order 210 adopted in 1895 conceded power to the Assembly to lay aside a bill amended by the Council if, in the Assembly’s view, the Council did not have the power to make the amendments and was subsequently repealed.

There have also been rules which have been the subject of ongoing contention since 1856. For example, rules for prayers were first proposed in 1856 but were not adopted until 1934, and recently have been the subject of unsuccessful proposals that they be replaced by a period of contemplative silence.

While an important principle of best practice in parliamentary procedure is consistency and precedent, this does not prevent the House from expressly changing practice and there have been a number of significant changes in practice adopted in the Legislative Council in recent years, particularly following the period of non-government majorities in the Legislative Council which started in 1988.

A number of rules which would allow greater scrutiny of the executive government were adopted or amended including procedures for motions for the disallowance of statutory rules;²² for bills introduced in the Council to be adjourned for five calendar days after the second reading speech;²³ and for the precedence of matters of public importance.²⁴ Most significantly, the

¹⁹ *Hansard*, NSW Legislative Council, 6 November 1895, p 2321.

²⁰ *Votes and Proceedings of the Legislative Council*, 22 November 1843

²¹ *Votes and Proceedings of the Legislative Council*, 30 November 1843, pp 213-214

²² *Minutes*, NSW Legislative Council, 28 April 1988, p 26.

²³ *Minutes*, NSW Legislative Council, 24 May 1988, p 54.

²⁴ *Minutes*, NSW Legislative Council, 25 May 1988, p 64.

appointment of standing committees in 1988 marked the commencement of a committee structure which would become a cornerstone of the Council's ability to fulfil its role as a House of Review and of scrutinising government legislative proposals, decisions, actions and administration. Disputes in the late 1990's between the executive and the Legislative Council regarding the Council's power to order the production of State papers led to the adoption by the House of a unique mechanism for the evaluation of disputed claims of privilege by the Executive on documents returned to the House.

In 1999 the House adopted by sessional order a new system for the consideration of private members' business. The adoption of the rules followed the Leader of the Government in the Legislative Council requesting the Clerk, John Evans, to devise new procedures, which resulted in a briefing paper outlining the problems with the existing system and proposing a new system adapted from the Canadian House of Commons.²⁵ The new system established an 'order of precedence' of items of private members' business selected in a draw conducted by the Clerk.²⁶ The system, adopted as standing orders in 2004, was intended to be more efficient in the use of the time of the House and provide some certainty to members regarding the items to be considered on private members' days. However, the rules have not been without problem and in recent years have been varied by a number of sessional orders.

Best practice – communicating with members

The third aspect of best practice within parliamentary procedure to be considered in this paper is communication to members of the technical aspects of parliamentary procedure, and consideration of the context and circumstances of the moment.

As described above, in parliamentary procedure, best practice relies on the principles of parliamentary procedure being applied, but best practice also requires members' expectations to be met and this responsibility rests largely with the clerks.

In his paper of 2014 Les Gonye reports a member as saying that it was important for clerks to be able to explain technical matters using plain language.²⁷ In order to do this Les proposed that clerks should elicit all the information and background possible from a member so as to be

²⁵ Briefing Paper, *Private Members' Business*, John Evans, Clerk of the Parliaments, 27 May 1991.

²⁶ *Minutes*, NSW Legislative Council, 12 May 1999, pp 50-51.

²⁷ Gonye, p 11

better informed when providing advice to that member. An awareness of the expectations and requirements of the member assists in understanding the context within which advice is sought. An ability to explain sometimes very technical and detailed matters in plain language is also key when advising a member that they should not proceed to take some action. As Les notes, members have a preference for frank advice.

Technical detail should not only be delivered in plain language but should also be succinct and direct. Detailed briefing notes, for example, can risk providing too much erroneous information thereby burying the key points being made. Consequently creative approaches to providing detailed information to members, particularly when members have little time to absorb the detail can be beneficial. For example, during a recent high profile Legislative Council committee inquiry, rather than provide a detailed briefing note on privilege matters which were expected to arise during the inquiry, the Clerk prepared a flow chart of issues, the steps and action that could be taken and the consequences of each. This strategy was derived from an approach taken in Westminster by the committee secretariat during the House of Commons select committee inquiry into News International and phone-hacking, in acknowledgement that lengthy briefing notes on the intricacies of parliamentary privilege in the circumstances would not be helpful to committee members.

Being perceptive to the response when giving advice is also important. I facilitated a workshop for the Speaker, the Deputy Speaker and Procedure staff of the National Parliament of Solomon Island on the interpretation of standing orders and practices. Initially I could not engage the participants in my structured powerpoint presentation, which used Legislative Council precedents as examples. The participants just could not envisage the sorts of scenarios I was referring to ever occurring in their House, their members being somewhat more polite and quietly spoken than the Council members. So I abandoned the powerpoints and we started discussing using the standing orders for bills as a mechanism for talking through not only those rules but a range of procedural rules that might be invoked when considering a bill – rules of debate, rules for points of order, rules for the conduct of members and so on. A more informal and discursive approach was significantly more successful.

Les also advocates in his paper for discussing proposed advice with colleagues to ensure consistency in advice given. A former Clerk in the Legislative Council would also test the justifiability of advice with other officers before giving it. If, having verbalised the advice, she

felt that she could justify it to an opposing member, she had confidence that the advice was probably sound.

Members' "buy-in" is important when changes to standing orders are proposed, after all, the standing orders belong to the members, not to the clerks. An excellent example of successfully communicating technical matters is taken from work in the House of Representatives in the Autonomous Region of Bougainville, a twinning partner of the New South Wales Parliament. Peter Topura, a procedure officer in the House of Representatives, commenced a project of redrafting the standing orders which were based on the New Zealand rules of procedure. Although the existing rules were sound and consistent with parliamentary law and practice, they did not, in some respects, suit the culture and characteristics of the House of Representatives and its members. As a result, consistency in parliamentary procedure tended to be in the breach of the rules, rather than in compliance with them. For example, rules of debate were regularly ignored with members speaking more than once on a question or speaking when there was no question before the House, and members put questions without notice to Ministers without any provision to do so. The purpose of redrafting the rules was to devise rules which better suited that House, and to which members would be able to comply, while maintaining the traditions of a Westminster style parliament. With the Speaker, Peter, prepared a schedule within which briefings on the proposed new rules would be conducted for members, and opportunities would be provided for members to have input into the proposed rules. Once the Standing Orders Committee had finally approved the new rules, a schedule of adoption by the House was devised, so that members would be aware of when certain new rules would come into effect.

Conclusion

In conclusion I reiterate that best practice in parliamentary procedure relies on the application of the principles of parliamentary procedure, the interpretation of the rules and standing orders in accordance with the principles and precedent, and good communication of the technical details of parliamentary procedure with members within the context of the moment.

APPENDIX A: EXAMPLE OF AN ANNOTATED STANDING ORDERS PROJECT

140. Second reading

- (1) On the order of the day being read for the second reading of a bill, the question will be proposed:
 - (a) “That this bill be now read a second time”, or
 - (b) “That the order be postponed or discharged”.
- (2) An amendment may be moved to the question for second reading:
 - (a) by leaving out “now” and inserting “this day 6 months”, which if carried will finally dispose of the bill,
 - (b) by referring the bill to a standing or select committee, or
 - (c) by moving the previous question.
- (3) A bill which has been ordered to be read "this day 6 months" may not be considered again in the same session.
- (4) When a standing or select committee has reported on a bill, a future day may be fixed for the second reading.

Development summary

1856	Standing order 113	Second reading
	Standing order 114	Going into committee
1870	Sessional order 125	Second reading
	Standing order 127	Going into committee
1895	Standing order 167	Motion for second reading
	Standing order 168	Amendments
	Standing order 169	When reported on by Select Committee
1982	Standing order 168	Amendments
	Standing order 169	When reported on by Select Committee
2003	Sessional order 140	Second reading
2004	Standing order 140	Second reading

Standing order 140 regulates the moving and disposal of a motion for the second reading of a bill. Standing order 140 is an amalgamation of former standing orders 167, 168 and 169 and continues to reflect the standard Westminster procedures for the second reading of a bill.

Operation

SO 140 provides for the motion for the second reading of a bill, for its postponement or discharge, for its amendment and disposal and for its referral to a select or standing committee.

SO 140(1) provides that on the order of the day being read for the second reading of a bill, the question will be proposed “That this bill be now read a second time”, or a motion moved for the order to be postponed or discharged.

Agreeing to the motion that a bill be read a second time progresses the bill to the next stage, either to committee of the whole if amendments are proposed, or to the third reading. Standing order 140 provides a number of alternative scenarios.

If the majority of members oppose a bill, the most common practice to dispose of the bill is to vote against the question “That this bill be now read a second time”

However, defeating the motion for the second reading is not fatal to the bill. When the question for second reading is negatived, the House has decided only that the bill should not *then* be read a second time and the question of the second reading of the bill remains undecided. It is open for the member in charge of a bill to have the bill restored to the notice paper by motion on notice and for the second reading to be set down for some future date.

There are many examples during the 1920s and 1930s of bills being negatived then restored in the Council²⁸ but the last occasion on which such a bill was restored was in 1936.²⁹ The procedure also became less common in the House of Commons upon which the practice is based. In that House, restoration became so rare that current practice now sees defeat of the second or third reading as fatal to a bill and no fresh bill in substantially the same terms can be introduced in the same session.³⁰

To dispose of a bill in order that it not be considered again in the same session, an amendment must be carried that the bill be read “this day six months” under SO 140(2).

Alternatively, when the order of the day for the second reading is called on, or when a motion for the second reading of a bill has been negatived, a motion that the order of the day for the second reading be discharged, if agreed to, will ensure the bill is not considered again in the same session.³¹

Postpone or discharge

Standing order 140(1) allows the member with carriage of a bill, to proceed with the second reading of the bill on the order of the day being read, or to move that the order of the day be postponed until a later time, or discharged.

The postponement of an order of the day for the second reading of a bill has no impact on the progress of the bill itself, and only delays its consideration.³² Under standing order 45, the question on postponement must be put without amendment or debate.

The consequence of a motion to discharge the order of the day for the second (or third) reading of a bill, if carried, is to remove the bill from the notice paper and from any further consideration by the House. If the bill is an Assembly bill, a message is forwarded to the Assembly advising of the action taken by the Council.³³ If the bill is a Council bill, once an order of the day has been discharged the bill can be withdrawn to allow a second bill to be introduced under the original order of leave.

²⁸ See for example: *Minutes*, NSW Legislative Council, 5 November 1925, p 64, 22 December 1925, p 134 (Constitution (Amendment) Bill); 18 November 1925, p 69, 22 December 1925, p 134 (Government Railways (Amendment) Bill); 17 December 1925, p 122, 14 January 1926, p 150 on division (Sydney Corporation Amendment (Municipality of Waterloo) Bill); 1 December 1931, pp 392-393, 22 December 1931, p 414 (Local Government (Elections) Bill).

²⁹ *Minutes*, NSW Legislative Council, 25 June 1936, p 189 (Local Government (Amendment) Bill).

³⁰ Erskine May 24th Ed p 548.

³¹ See for example *Minutes*, NSW Legislative Council, 16 June 1943, pp 185-186 (Settlement Promotion Tax Management Bill); See also President’s Ruling *Hansard*, NSW Legislative Council, 11 December 1924 p 4459 on Local Government (Amendment) Bill.

³² Under SO 188 an item of private members’ business in the order of precedence can only be postponed three times before it loses its position in the order of precedence. Under sessional order adopted in 2011 and again in 2015 SO 188 was varied to remove the limit on the number of times a private members’ bill in the order of precedence can be postponed.

³³ See for example *Minutes*, NSW Legislative Council, 1 June 1999, p 114, p 116; *Hansard*, NSW Legislative Council, 1 June 1999, pp 671-673 (Public Finance and Audit Amendment Bill and cognate bills).

Amendments to the second reading

Standing order 140 specifically provides for the question for the second reading to be amended by omitting “now” and inserting instead “this day 6 months”, which if carried will finally dispose of the bill, or by referring the bill to a standing or select committee. The standing order also provides for the previous question to be moved on the second reading.

This day six months

The motion that a bill be read “this day six months” was originally used because it would result in the order of the day lapsing on prorogation of the House at the conclusion of the session. The practice of ordering that a bill be read a second time this day six months became tantamount to the rejection of the bill, even if the session extended beyond the six month period.

In the standing order adopted in 2004 the situation has been clarified. On such a motion being agreed to the bill is finally disposed of.

However, there are precedents to the contrary. Following a this day six month amendment agreed to on 8 December 1875, the order of the day for the second reading of the Matrimonial Causes Act Amendment Bill appeared on the notice paper for 25 May 1876, the second reading moved that day and a this day six months amendment again agreed to.³⁴

Between 1858 and 1981 there are numerous examples of this day six months amendments being negatived³⁵ and agreed to.³⁶ The procedure has been used infrequently in recent years. The last time the amendment was agreed to was on the second reading of the Sydney Heliport Bill on 8 March 1994.³⁷ The amendment was negatived in 2005 and twice in 2016.³⁸

In 1998, the Opposition Whip, the Hon John Jobling, requested that the second reading of the Fair Trading Amendment Bill and the six cognates bills be put seriatim and moved that the question on two of the bills, the Landlord and Tenant (Rental Bonds) Amendment (Penalty Notices) Bill and the Property, Stock and Business Agents Amendment (Penalty Notices) Bill be amended by omitting the word “now” and adding at the end “this day six months”.³⁹ The question on the amendment of the Landlord and Tenant (Rental Bonds) Amendment was negatived on 16 June 1998 before business was interrupted for questions.⁴⁰

The minutes of proceedings of 17 June 1998 record the order of the day being read as follows:

³⁴ *Minutes*, NSW Legislative Council, 8 December 1875, p 22; 11 May 1876, p 154; 25 May 1876, p 160.

³⁵ See for example: *Minutes*, NSW Legislative Council, 28 July 1858, pp 56-57 (Chinese Immigration Bill); 26 and 27 October 1955 am, p 52 (Industrial Arbitration (Basic Wage) Amendment) Bill; 24 and 25 March 1970 am, p 287 (Crown Lands and Other Acts (Amendment) Bill) 24 March 1970 p 285-286 (Dairy Industry Authority) Bill; 28 and 29 April 1971 am, p 31 (Land Aggregation Tax Management) Bill 11 and 12 April 1973 am, p 343 (Aborigines (Amendment) Bill).

³⁶ See for example: *Minutes*, NSW Legislative Council, 14 December 1943, pp 77-78 (Constitution (Legislative Council Reform Bill)); *Minutes*, NSW Legislative Council, 27 October 1965, pp 105-107 (Local Government (Elections) Amendment Bill); 1 December 1965, pp 150-151; (Gas and Electricity (Sydney County Council) Amendment Bill).

³⁷ *Minutes*, NSW Legislative Council, 8 March 1994, p 51.

³⁸ *Minutes*, NSW Legislative Council, 30 November and 1 December 2005 am, p 1798; 10 August 2016, pp 1035-1036; 16 November 2016, p 1338.

³⁹ *Minutes*, NSW Legislative Council, 3 June 1998, p 534.

⁴⁰ *Minutes*, NSW Legislative Council, 16 June 1998, pp557-558.

“Order of Day read for resumption of putting of the question in seriatim: That these Bills be now read a second time.

Upon which Mr Jobling has moved:

1. That the question on the second reading of the Landlord and Tenant (Rental Bonds) Amendment (Penalty Notices) Bill be amended by omitting “now” and adding at the end the words “this day six months”. (Amendment already disposed of 16 June 1998.)
2. That the question on the second reading of the Property, Stock and Business Agents Amendment (Penalty Notices) Bill be amended by omitting “now” and adding at the end the words “this day six months”.

A note was also recorded in the minutes that the second reading of the Fair Trading Amendment Bill, Home Building Amendment Bill and Landlord and Tenant (Rental Bonds) Amendment (Penalty Notices) Bill agreed to 16 June 1998.]

The question on the amendment to the Property, Stock and Business Agents Bill be amended by omitting “now” and adding at the end the words “this day six months” was negatived on division and the question on the second reading on the remaining cognate bills put and passed.

There have been variations to the six month amendment considered by the House with differing consequences and success. In June 1877, a this day six month amendment to the second reading of the Duty on Gold Abolition Bill was negatived on division. The committee of the whole on the bill later reported progress and obtained leave to sit again this day six months. Further consideration of the bill in committee of the whole was not set down as an order of the day on the notice paper.⁴¹

An amendment to the motion for the second reading agreed to in 1994 that the bill be read “this day twelve months” was deemed to have the same consequence as a “this day six months” amendment and was removed from the Notice Paper.⁴²

In 1904, an amendment that a bill be read this day three months was ruled to “put the bill off the business-paper exactly the same as if he made it six months.” The amendment was put to the House by the President as a “this day six months” amendment.⁴³ The amendment was negatived and the bill read a second time.

An amendment that cognate bills be read this day four months was moved after a member had mistakenly moved that the debate be adjourned until this day four months. On it becoming clear during debate on the motion for adjournment that the intention had not been to cut short debate on the second reading, the member withdrew his motion, by leave, and instead moved “That the question be amended by the omission of the word ‘now’ with a view to inserting at the end ‘this day four months’”. The amendment was put and negatived at the conclusion of the second reading debate.⁴⁴

⁴¹ *Minutes*, NSW Legislative Council, 6 June 1877, pp 100-101 (Duty on Gold Abolition Bill).

⁴² *Minutes*, NSW Legislative Council, 12 May 1994, p 202 (Homefund Legislation (Amendment) Bill).

⁴³ *Minutes*, NSW Legislative Council, 19 December 1904, p 118; *Hansard*, NSW Legislative Council, 19 December 1904, p 2726 (Closer Settlement Bill).

⁴⁴ *Minutes*, NSW Legislative Council, 9 May 1990, pp 133-134, *Hansard*, NSW Legislative Council, 9 May 1990, p 2660.

Reasoned amendments

A member who wants to place on record any specific reasons for not agreeing to a second reading of a bill may move a "reasoned amendment". The standing orders do not provide for the moving of a reasoned amendment, though there are numerous examples of the House amending the second reading to reject the bill and to provide reasons for doing so.⁴⁵

The rules for the practice, based on procedures of the Westminster Parliament, and the content of 'reasoned amendments' are as follows:

1. The amendment must be relevant, and must not include in its scope other bills then before the House.
2. The amendment must not be concerned with the provisions of the bill upon which it is moved, nor anticipate amendments to be moved in Committee.
3. The amendment should not be a direct negation of the principle of the bill.

In the Westminster Parliament, former practice held that a reasoned amendment was considered to be a motion to supersede the question to "now" read the bill a second time and would leave the bill in the same position as if the bill had been negatived.⁴⁶ However in modern practice, a reasoned amendment is considered fatal to the bill. As the original motion was agreed to as amended there is no longer an order of the day for the second (or third) reading of the bill to be restored.⁴⁷

In contrast, Legislative Council practice views a bill rejected by a reasoned amendment as still being before the House and able to be restored to the business paper. For example, in 2001 the Workers Compensation Legislation Amendment Bill (No 2) 2001 was restored to the notice paper after a reasoned amendment was agreed to which provided that the House decline to give the bill a second reading until such time as the House had an opportunity to consider a motion for the appointment of a committee to review the bill. Immediately following, the House agreed to a motion to refer certain matters relating to the bill to a committee for inquiry and report. The President then made a statement that as the House had considered a motion to refer the matter to a committee, it was therefore in order for a motion for the restoration of the bill to be moved. The bill was restored to the business paper, on motion, without notice.⁴⁸

The most common form of a reasoned amendment is to move that the question be amended by omitting all words after "That" and inserting instead "this House declines to give the bill a second reading for the following reasons...". In 1998 a reasoned amendment varied the form of words to omit all words after "That" and insert instead words to call on a named QC to consider the bill and for the bill to be read a second time on stated day or after the report of the QC is tabled whichever was the later.⁴⁹ The amendment was negatived.

In January 1978 a reasoned amendment to the second reading of the Constitution and Parliamentary Electorates and Elections (Amendment) Bill, which had been received from the Assembly a second time under section 5B of the Constitution Act 1902, was agreed to and the

⁴⁵ See for example *Minutes*, NSW Legislative Council, 6 August 1902, p 88 (Women's Franchise Bill).

⁴⁶ Erskine May 17th Ed p 528

⁴⁷ Erskine May 24th Ed p 550

⁴⁸ *Minutes*, NSW Legislative Council, 28 June 2001, pp 1073-74, pp 1075-1077, pp 1077-1078.

⁴⁹ *Minutes*, NSW Legislative Council, 2 December 1998, pp 1001-1002 (Sydney Water Catchment Management Bill 1998).

bill again returned to the Legislative Assembly. The amendment outlined reasons for again rejecting the bill and requested that the Parliament adopt the recommendation of the Select Committee to convene a State Constitutional Convention to review the method of election, the functions and powers of the Legislative Council.⁵⁰ The Assembly requested a free conference on the bill which occurred and the bill was ultimately agreed to at a referendum.

The previous question

Under SO 141(2)(c) the previous question may be moved on the motion for the second reading.

The previous question is a dilatory motion which can be moved at any time during debate by a member with the call. The objective is to force the House to decide whether to have the original question put.

Under standing order 107 adopted in 2004 the form of the previous question is “That the question be **not** now put.” Under standing order 108 if the previous question is agreed to, the original question, and any amendment moved to it, are disposed of and House proceeds immediately to the next item of business. If negatived, the original question and any amendment before the House must be put immediately without amendment or debate. Under SO 107, the previous question may not be moved to an amendment, nor in committee of the whole; the motion may not be amended; and, in debating the previous question, the original question and any amendment may be debated. The previous question can be moved on the third reading. See standing order 107 for further information on the previous question and earlier forms of the question.

Although standing order 140 suggests that the previous question is moved as an amendment to the second reading, in practice it is a separate motion moved as a dilatory motion.

The consequence of the previous question being carried, is that the question on the second reading lapses with the same effect as the House negating the second reading. The order for the second reading can be restored by motion on notice. If the previous question is negatived, the Chair must immediately put the question on the second reading, together with any amendments that had been moved to it (SO 108 (2)). The effect of the vote is that in disagreeing that the question be *not* now put, the House has agreed that the question *be* now put.⁵¹

Although prior to 1895 the standing orders did not specifically provide for the previous question to be moved to the second reading, there are examples of its occurrence.⁵²

The previous question has not been moved since the adoption of the new standing orders in 2003.

Bills referred to a committee for inquiry and report

Under SO 140 (2)(b) an amendment may be moved to the second reading to refer the bill to a standing or select committee. Such amendments have sought to:

⁵⁰ *Minutes*, NSW Legislative Council, 11 January 1978, pp 740-743.

⁵¹ Erskine May 24th edn. pp 404-405.

⁵² *Minutes*, NSW Legislative Council, 27 June 1860, p 113 (Appropriation Bill for 1859-60); 26 March 1879, p153 (Supreme Court (Additional Judge) Bill); 3 April 1883, p 73 (Judges Salaries and Pensions Bill); 30 July 1884, p 225 (Pastoral Dams Bill); Examples post 1895 include: *Minutes*, NSW Legislative Council, 10 June 1896, p 26 (Conditional Purchasers' Relief Bill).

- refer a whole bill to a committee for inquiry and report⁵³
- refer a whole bill and to give an instruction to a committee that it consider a specific matter relating to the bill⁵⁴
- refer the provisions of a bill to a committee for inquiry while the bill itself proceeded through all stages⁵⁵
- refer cognate bills to a committee while allowing the principle and other bills to continue⁵⁶

Although the procedure is intended to provide for a committee to examine a bill in greater detail than would be possible by the House there are relatively few examples of a bill being referred to a committee, the committee reporting to the House and the bill then proceeding through all its stages.⁵⁷

On a bill being referred to a committee, it is no longer before the House, but is recorded in the Notice Paper as having been referred to a committee. Standing order 140(4) provides that, following the report of a committee a future day may be fixed for the second reading. The standing order is the same in substance as its predecessor, standing order 169. On a committee reporting to the House a motion is moved without notice that the second reading (or third reading⁵⁸) stand an order of the day for a subsequent day.⁵⁹

Background and development

Standing order 140 (1) applies to any bill, Council or Assembly, which has been read a first time and printed and on which the second reading has previously been set down as an order of the day. Its predecessors of 1856 and 1870 did not expressly refer to the motion for the second reading. Standing order 167 adopted in 1895 provided that on the order of the day being read a motion could be moved that the bill be read a second time or that the order be postponed or discharged.

Standing order 140 (2) provides for amendments to the motion for the second reading, specifically, a “this day six months” amendment, or an amendment to refer the bill to a standing or select committee, or to move the previous question. Standing order 114 of 1856 and standing order 127 of 1870 provided for referral to a select committee, but neither provided for the motion to be moved as an amendment to the second reading, or for any other amendments to the second reading. Nonetheless, there are numerous examples of motions for the second reading being amended to refer a bill to a select committee⁶⁰, for a reasoned amendment, and to

⁵³ *Minutes*, NSW Legislative Council, 11 November 2011, p 585 (Education Amendment (Ethics Classes Repeal) Bill 2011).

⁵⁴ *Minutes*, NSW Legislative Council, 7 March 1961, pp 148-149 (Public Hospitals (Amendment) Bill).

⁵⁵ *Minutes*, NSW Legislative Council, 1 June 1999, pp 114-116 (Appropriation (1998-99 Budget Variations) Bill).

⁵⁶ *Minutes*, NSW Legislative Council, 17 June 1997, pp 803-806, (Appropriation Bill and cognate bills).

⁵⁷ See for example *Minutes*, NSW Legislative Council, 24 September 1963, p 268 (reported); 25 September 1963, p 272 (bill read a third time) (Optometrists (Amendment) Bill); 28 April 1964, p 463 (reported with a copy of the bill as amended by the committee), 30 April 1964, p 480 (bill read a third time and returned to Assembly with an amendment) (Dentists Amendment Bill).

⁵⁸ See SO 148.

⁵⁹ See for example: *Minutes* NSW Legislative Council, 11 March 1927, p 149 (Family Endowment Bill); 24 September 1963, p 268 (Optometrists (Amendment) Bill); 30 June 1992, p 201 (Financial Institutions (New South Wales) Bill and cognate bill).

⁶⁰ *Minutes*, NSW Legislative Council, 25 August 1858, p 68.

have the bill read a second time “this day three months”, “this day six months” or other length of time, as noted above.

Standing order 168 adopted in 1895 introduced the provisions for amending the second reading by omitting “now” and inserting instead “this day six months”, by moving that the bill be referred to a select committee, or standing committee on the adoption of standing order 257A-C in 1982, and providing for the previous question to be moved. Current standing order 140(3), like its predecessor specifically provides that a bill ordered to be read “this day 6 months” may not be considered again in the same session. Like the 1856 and 1870 standing orders, it was not made clear in the 1895 standing orders that a referral to a committee was by way of an amendment to the second reading. However, the practice of amending the second reading to refer bills to committees continued under SO 168.⁶¹

Standing order 140(4), like its predecessor SO 169, provides that when the committee reports, a future day may be fixed for the second reading.

The form of moving the previous question has changed a number of times since 1856. In 1856, the previous question was in the form - “Shall the Question be now entertained?”; in 1895 under standing order 108 the previous question was put in the form “That the question be now put”. The form of words was changed again in 2004 to distinguish the question from the closure motion which, under standing order 99 is in the form “that the question be now put”. Under standing order 107, the form of the previous question is “That the question be not now put”. (See standing order 107 for more detail on the previous question).

Bills referred to and amended by select committee

Between 1856 and the 1940s it was not uncommon for the House to *commit* a bill to a select committee where it would be considered in detail and could be amended, although the standing orders did not provide for the committal of a bill to a select committee. The practice is likely based on the practice in the Imperial Parliament at the time for the committal of a bill to a select committee, and then recommittal to a committee of the whole house.

In 1925, the motion for the second reading of the Juvenile Migrants Apprenticeship (Repeal) Bill was amended to refer the bill to a select committee. The report of the select committee was tabled on 3 December 1925, together with the minutes of proceedings and transcripts of evidence, and a copy of the bill as amended and agreed to by the committee. On 9 December 1925, the motion for the second reading was again moved, the Minister advising that the committee had prepared a new bill, which included new clauses and a schedule, for consideration. The committee of the whole agreed to an amendment to one of the clauses inserted by the select committee and the new bill was reported to the House with an amendment. The bill was returned to the Assembly with the schedule of amendments agreed to.⁶²

The subsequent procedures in the House depended on the stage at which the bill was referred. There are precedents for motions for a bill to be referred to a committee for consideration in detail:

⁶¹ See for examples: *Minutes*, NSW Legislative Council, 23 August 1916, pp 46-47 (Grain Elevator Bill); 29 August 1963, p 246 (Optometrists (Amendment) Bill); 7 and 8 May 1992 am, pp 189-191 (Financial Institutions (New South Wales) Bill and cognate bill).

⁶² *Minutes*, NSW Legislative Council, 7 October 1925, p 38; 3 December 1925, p 93; 9 December 1925, p 100; See also 28 April 1964, p 463; 30 April 1964, p 479 (Dentists Amendment Bill).

- as an amendment to the motion for the second reading⁶³
- as an amendment to the motion that the House adopt the report from committee of the whole⁶⁴
- by amendment to the motion that the bill be considered in committee of the whole.⁶⁵

Counsel heard at the bar of the House

The second reading is also the stage at which counsel have most often been heard on a bill at the bar of the House. There is no provision in the standing orders for Counsel to be heard at the bar of the House but there are a number of examples of contingent notices for motions for companies or individuals to be heard by Counsel at the bar of the House.⁶⁶

For example, In 1915, three contingent notices were moved separately and put as one question for a number of petitioners to be heard by Counsel at the bar of the House.⁶⁷ In November 1952 a petition was presented from the Taxpayer's Association of NSW in reference to the Stamp Duties (Amendment) Bill) praying to be heard by Counsel at the Bar of the House. Standing orders were suspended to allow consideration of the petition and a motion was then agreed to that on the order of the day for the second reading being read the House should forthwith hear the Counsel's submission. On the order of the day for the second reading being read the House agreed to motions that Counsel for the petitioners be heard, that Counsel be called in and that Counsel be permitted to address the House from the bar. The President informed the House that he had adopted a ruling from a former President, that the Counsel could show how his clients would be affected by the bill but not comment on questions of public policy more generally. Having been heard, the Counsel withdrew and consideration of the bill proceeded.⁶⁸

⁶³ *Minutes*, NSW Legislative Council, 25 August 1915, p 57 (Military and Naval Hospital Home Bill); 18 November 1947, p 40-41 (Local Government (Areas) Bill).

⁶⁴ *Minutes*, NSW Legislative Council, 8 November 1923, p 84 (Bread Amendment Bill).

⁶⁵ *Minutes*, NSW Legislative Council, 3 December 1856, p 30 (Common Law (Proceedings) Bill).

⁶⁶ See for example *Minutes*, NSW Legislative Council, 11 June 1862, p 13 (Municipalities Indemnity Bill); 19 February 1873, p 67 (Loder's Estate Bill); 2 April 1879, p 160 (Chinese Immigration Regulation Bill); 12 May 1880, p 162 (Church and School Lands Dedication Bill); 8 December 1938, p 136 (Theatres, Public Halls and Cinematograph Films (Amendment) Bill); 21 October 1941, p 89 (Income Tax Management Bill); Mental Institution Benefits Agreement Bill, 2 November 1949, p 216; 1 December 1953, pp 106-107 (Industrial Arbitration (Amendment) Bill).

⁶⁷ *Minutes*, NSW Legislative Council, 24 November 1915, p 173 (Eight Hours Bill).

⁶⁸ *Minutes*, NSW Legislative Council, 5 November 1952, pp 115-117, 6 November 1952, pp 120-121; *Hansard*, NSW Legislative Council, 5 November 1952, pp 1837-1869; 6 November 1952, pp 1928-1944.