

CHAPTER 11

RULES OF DEBATE

It is a fundamental principle of parliamentary procedure that debate is conducted in a free and civil manner. To ensure this, rules of debate and decorum have been developed which govern what members may say and do in the House. These rules are embodied in the standing orders, the practices developed in the House, and rulings of successive Presidents and Chairs of committee of the whole.

Members of Parliament are protected from legal liability for all statements they make during proceedings in Parliament (see Chapter 3 (Privilege)).

Except where the standing orders specifically preclude debate, all motions moved in the Council are debatable and all members are entitled to speak freely, subject only to the rules which the House itself has imposed. For example, the rules contained in standing order 91 preclude the use of offensive language, irreverent reference to the Queen or her representative, reflection upon votes of the House, and the imputation of improper motives and personal reflections on members of either House. In addition, a member's conduct both within and outside the House is subject to the House's powers to deal with contempt, such as its powers to impose sanctions where a member is adjudged guilty of 'conduct unworthy of a member' of the House.

The House has imposed rules to ensure that all members are entitled to speak and can expect a fair hearing whether or not their opinions concur with the majority. As the House of Commons Select Committee on Procedure reported in 1991:

[C]ourtesy and self-discipline are vital ingredients of parliamentary discourse ... it is no more than elementary good manners for those who have finished speaking to sit through the next speech ... It is only through such standards of behaviour, as enshrined in the conventions of the House, that the traditions of robust debate in a democratic assembly are accepted and upheld.¹

It is the role of the Chair to ensure that rules of order and decorum, adopted by the House, are upheld within the chamber, and that members' behaviour, both

1 Select Committee on Procedure, UK House of Commons, *Short speeches*, Fourth Report, 1990-1991, p xi.

towards other members and to the institution of Parliament itself, is acceptable to the House. The Chair's disciplinary powers ensure that debate is focused and relevant, and allow the Chair to remove any member who refuses to behave appropriately.

RIGHT TO SPEAK

Initiation of debate

A member initiates debate by the moving of a motion. In most cases the motion is moved according to notice given at a previous sitting, and the member who has given the notice is recognised first when the item is called on. When a motion is moved, the mover may speak to it, after which other members may seek the call to speak in the debate. On substantive motions the mover is entitled to speak in reply, and in doing so closes the debate prior to the question being put by the Chair.

Seeking the call

Standing order 85 states that to seek the call a member must rise in their place and address the President. In addressing the President the member uses the words 'Mr/Madam President'. Historically, the member first standing who 'catches the President's eye' is given the call, a tradition which developed in the House of Commons. Originally, when several members of the Commons stood up to speak, the House itself decided who it wanted to hear. However, in 1625 the Commons resolved that 'if two rise up at once, the Speaker does determine. He that his eye saw first, has the precedence given'.²

Under modern practice, the Chair recognises members according to an established precedence.³ In general, the following principles apply:

- members are usually called from each side of the chamber alternately, including members from the cross-benches;
- the Leader of the Government and the Leader of the Opposition are given the call before other members;
- a minister or member in charge of a bill or other matter before the House is usually given the call before other members;
- a member leading for the opposition in relation to a bill or other matter before the House is usually given the call before other members;
- leaders of other non-government parties are usually given the call before other members, subject to the practices listed above;

2 Wilding N and Laundry P, *An Encyclopaedia of Parliament*, Cassell & Company, London, 1958, p 57.

3 It is not uncommon for the President to announce at the beginning of a session the order in which members may be given the call for questions, notices and the adjournment debate. See, for example, *LC Minutes* (29/4/2003) 36.

- members who have a right to the call are discouraged from exercising their right if that would have the effect of closing the debate when other members wish to speak.

These principles are generally applied in the order indicated, so that each practice is subject to those which precede it, and so that they are consistent with each other.

For many debates an agreed speakers list is compiled by the whips and provided to the Chair, and members usually seek and receive the call in the order shown in the list. The list is unofficial, and does not prevent the President from recognising another member seeking the call.

Remarks to be addressed through the Chair

The standing orders require that members speaking on a motion must address their remarks through the Chair (SO 85(1)). This must be done not only at the commencement of a member's remarks but throughout their speech. It is improper to direct remarks directly to other members in the chamber. Remarks concerning other members of the House should be expressed in the third person. Members are referred to as 'The Honourable (name of member)' or by the office they hold, 'The Honourable the Minister for ...'; or 'The Honourable the Leader of the Opposition'. In some instances, members have requested that they not be referred to as 'the Honourable' in the chamber, in which case they should be referred to by their title.

To speak standing

Standing order 85 requires that members stand to speak in the chamber. However, the standing order provides an exception to this when a member is unable to stand because of sickness or infirmity, in which case the member is allowed to speak while seated (SO 85(2)).

There were two occasions in the 1990s where the House has allowed a member to speak while seated. The first was on 7 November 1993 when the Revd the Hon Fred Nile, a member of the cross-bench, came into the House from his hospital bed, where he had been confined following a fall down the stairs behind the chamber. The occasion drew considerable media attention, since the debate before the House, which took place in the early hours of the morning (from 12.27 am until 3.24 am), was on the Anti-Discrimination (Homosexual Vilification) Amendment Bill which Revd Nile strongly opposed. Revd Nile addressed the House from a wheelchair, while dressed in his pyjamas and dressing gown. As the President indicated to the House on that occasion:

Before giving the call to the Reverend the Hon FJ Nile, I would like to point out for the purpose of the record that he has been admitted to the floor of the House in a wheelchair, clothed as he is, this being the result of his hospitalisation due to an injury caused by accident. I understand that there is

precedent for this from the 1930s and 1940s and, therefore, Reverend Nile's circumstances so permit him to address the House from a seated position.⁴

The second occasion occurred in 1996. The President announced to the House that the Hon Elisabeth Kirkby had, in view of a temporary incapacity, the indulgence of the House to speak from a seated position.⁵

Use of the lectern

The Council chamber does not have designated seats for members. While sound recording equipment is installed in the chamber, the acoustics require that, other than when asking relatively short questions during Question Time, members move to one of the four amplified lecterns at the centre table when speaking. Ministers and government members speak from the two lecterns on the government side of the chamber while opposition members speak from the two lecterns on the opposite side of the chamber. Cross-bench members speak from either side of the chamber, using the two lecterns at the end of the table.

Pre-audience

Under standing order 82 a member who is in charge of a bill, that is the member who introduced the bill and has carriage of it through its various stages in the House, has pre-audience when the order of the day is read. This allows the mover to have priority when moving for the postponement of consideration of the bill, or to move that the order of the day be discharged.

A member on whose motion a debate is adjourned is entitled to speak first on the resumption of the debate. However, if a member chooses not to exercise that right, it does not preclude them from speaking at a later time, unless they had already commenced their speech in the debate, in which case they lose their right to speak further.

SPEAKING ONCE TO A MOTION

A member may only speak once on any question before the House or on an amendment (SO 87), other than in committee of the whole House. There are three exceptions to this rule.

First, a reply is allowed to a member who has moved a substantive motion or the second or third reading of a bill (SO 90(1)), but only at the conclusion of the debate. There is no right of reply on a non-debatable motion,⁶ nor on a procedural motion such as a motion to suspend standing orders.

4 *LC Debates* (17/11/1993) 5517.

5 *LC Debates* (19/11/1996) 6081. In an earlier case, in 1967, the Hon Edna Roper was permitted to speak while remaining seated owing to disability, *LC Debates* (28/9/1967) 1712.

6 Certain standing orders do not permit debate on a procedural motion, for example, the motion that a petition be received (SO 68(5)), and for the committal of a bill after the second reading has been agreed to (SO 141).

Secondly, standing order 89 allows a member to explain or reply to a matter on which the member has been misquoted or misunderstood. In doing so they may not interrupt the member speaking nor introduce new material into the debate.⁷

Thirdly, a member may speak a second time during the same debate when an amendment has been moved after the member has spoken, and the member wishes specifically to address the proposed amendment. This is because the amendment is seen as a separate question before the Chair, in addition to the question on the original motion. When an amendment is proposed to a motion, a member who has not yet spoken in the debate may speak to both the amendment and the main motion, while a member who has already spoken in the debate prior to the amendment being moved may speak again only to the amendment. In speaking a second time they may also propose an amendment to the amendment.

On occasion members have been granted leave to speak a second time on a particular matter when special circumstances have warranted it, but this is very much an exception to the practice of the House.⁸

Members may speak more than once in debate in committee of the whole House (SO 87(2), 173(5)).

INTERRUPTION OF THE SPEAKER

Standing order 95 states that a member may not interrupt another member speaking except to:

- call attention to a point of order, that is, that proceedings are not being conducted according to the rules and orders of the House;
- call attention to the lack of a quorum; or
- raise a matter of privilege.

When a point of order or a matter of privilege has been raised, the business then under consideration is suspended until the matter has been dealt with and any member speaking or called to order must resume their seat until the Chair makes a determination.

There is no concession granted to a member whose time for speaking, where time limits apply, is curtailed by the taking of a point of order, although debate on the point of order may go on past the time limit.⁹ While it has been the practice of the House that a second point of order cannot be raised while one is already before

7 Rulings: Burgmann, *LC Debates* (24/11/2000) 10826, (28/6/2001) 15633.

8 *LC Minutes* (5/9/1999) 60, (13/10/1999) 107, (20/6/2000) 522, (3/7/2001) 1105, (25/6/2003) 171, (26/5/2005) 1410.

9 Rulings: Burgmann, *LC Debates* (5/6/2001) 14279, (21/3/2002) 911. There is, however, a recent precedent where President Primrose ordered that the clock be stopped upon the taking of a point of order, *LC Debates* (30/5/2007) 413.

the House, the Chair has ruled that a member may interrupt another member speaking to a point of order to take a point of order on the member with the call.¹⁰

Interjections by members who do not have the call, other than to raise a point of order or privilege or to call attention to the lack of a quorum, are disorderly at all times. However, in practice interjections are tolerated if they are not too disruptive. Interjections which are responded to by the member with the call are usually recorded in Hansard.

CLOSURE OF DEBATE (GAG)

Standing order 99 allows a member who has the call to move, without notice, 'That the question be now put'. Such a motion can be moved during debate on a question, both in the House and in committee of the whole. A member, except a minister, who has spoken in the debate or who has previously moved that motion, may not move that the question be now put.

The closure motion itself must be put without debate. However, if resolved in the affirmative the original question must be put, without debate, except for the mover of the original motion who has 30 minutes to speak in reply before the original question is put.

This standing order has its origin in former standing order 102, which was adopted in 1895. The closure of debate was a method originally designed to counteract the use of ordinary forms of procedure to prolong debate and so obstruct the progress of business.¹¹ In order to ensure the measured use of the closure motion, before putting the question the Chair must advise the House to consider whether the motion, if agreed to, is an abuse of the rules or conventions of the House, would deny the rights of the minority or is an abuse of the standing orders (SO 99(4)). This latter provision was inserted in the new standing orders in 2004 and reflects a similar proviso contained in standing order 36(1) of the House of Commons' standing orders relative to public business.

Former standing order 102 was only used on eight occasions, the last time in 1906. It was carried five times, negatived once and withdrawn twice.¹² Standing order 99 has not been used to date. Despite occasions when there has been a strong

10 Ruling: Burgmann, *LC Debates* (3/12/2003) 5659.

11 McKay W (ed), *Erskine May's Treatise on The Law, Privileges, Proceedings and Usage of Parliament*, 23rd edn, LexisNexis, UK, 2004, p 456.

12 See the committee stages on the Australasian Federation Enabling Act Amendment Bill in 1897, *LC Minutes* (25/11/1897) 254(2), 255(2), 256, 257; the second reading of the Cobar to Wilcannia Railway Bill in 1900, *LC Minutes* (5/9/1900) 113; the third reading of the Women's Franchise Bill in 1901, *LC Minutes* (25/9/1901) 89; the committee stage of the Fisheries Bill in 1902, *LC Minutes* (16/12/1902) 239; a general business motion concerning the federal capital site and home rule in 1905, *LC Minutes* (9/11/1905) 133, *LC Debates* (9/11/1905) 3639; and the committee stage of the Railway Commissioners Appointment Bill in 1906, *LC Debates* (29/8/1906) 1549-1550.

temptation to use it, by convention the procedure has been avoided, in the fear that use of the procedure would open the floodgates to its use.

MEMBER TO 'BE HEARD' AND GAG OF AN INDIVIDUAL SPEAKER

Standing order 97 allows any member to move without notice that any other member who rises to address the House 'be now heard'. The question is put immediately, without amendment or debate.¹³

The standing orders also provide for the 'gag' to be applied to individual speakers. Standing order 98 provides that any member, except a member who has already spoken in the debate, may move without notice that a member who is speaking 'be no longer heard'. The motion may not be debated or amended. As with the closure motion, standing order 98 now requires that before putting the question the Chair is to advise the House to consider whether the member speaking has had ample opportunity to debate the question, whether the member is abusing the standing orders or conventions of the House, or is obstructing business, or whether the motion, if carried, would take away the rights of the minority.

The last attempt to gag a member occurred in 1995. On that occasion, the motion that the member 'be not further heard', the form required under the old standing order, was moved twice during the speech of the Revd the Hon Fred Nile and was negatived both times.¹⁴

REPLY

The member who moves a substantive motion, or the second or third reading of a bill, is entitled to speak in reply, thus closing off the debate (SO 90). There is no right of reply to non-substantive motions or an amendment. Non-substantive motions include procedural motions, the previous question and instructions to committees of the whole. The right of reply gives the mover of a substantive motion an opportunity to refute arguments against the motion which have been raised during the debate and to indicate their position in relation to any amendments.

Since the reply of the mover closes off further debate, the President will not call the member to speak in reply if there is any other member who has not spoken and who seeks the call to speak.

While the standing orders do not specifically preclude the introduction of new material during a speech in reply there are several rulings indicating that when

13 This procedure was used in 1978 when, during debate on a motion for a special adjournment, the House resolved that the Hon Edna Roper be now heard, *LC Minutes* (24/8/1978) 77.

14 *LC Minutes* (15/12/1995) 474.

speaking in reply members should relate their remarks as far as possible to the debate that has already taken place.¹⁵

A member who speaks in reply on behalf of another member does not close off the debate.¹⁶ However, a member who gave notice of a motion may reply and close off debate where another member has moved the motion on his or her behalf. Consequently, the speech of the minister in charge of a bill in reply to the second reading debate is regarded as closing the debate, even though another minister may have moved the motion for second reading on their behalf. When a minister speaks in reply on another minister's behalf the converse does not apply. There have been occasions where a member has sought to speak after a minister has spoken in reply.¹⁷

There is also a recent precedent where more than one minister spoke during debate on a Government bill, the Human Cloning and Other Prohibited Practices Amendment Bill 2007, on which there was a free vote or conscience vote. In this instance, ministers spoke in the debate, and the debate continued until the minister who had moved the second reading of the bill spoke in reply.¹⁸

TIME LIMITS ON DEBATES AND SPEECHES

Before 1986, there were only two matters in the Council where the standing orders provided for time limits on speeches:

- Under standing order 13 (now 201) dealing with the adjournment motion, on the question being put 'That this House do now adjourn', the speeches of the mover and minister first speaking were not to exceed 30 minutes each, while the speeches of any other members, including the mover in reply, could not exceed 15 minutes each.
- Under standing order 102 (now 99) dealing with closure of debate, on the motion 'That the question be now put', the mover of the matter then under discussion was allowed to speak for 30 minutes in reply before the question was put.

In 1986, provision was made in sessional orders for an adjournment debate of up to 15 minutes duration, effectively allowing three members to speak for up to five

15 Rulings: Johnson, *LC Debates* (25/3/1980) 5755, (17/9/1980) 1067, (25/3/1981) 5137, (22/11/1983) 6071, (22/5/1990) 4056, 4085; Willis, *LC Debates* (1/12/1994) 6071, (23/11/1995) 3887; Solomons (Deputy), *LC Debates* (2/8/1989) 8952; Bourke (Deputy), *LC Debates* (24/6/2003) 1873.

16 Ruling: Kelly (Deputy), *LC Debates* (1/3/2001) 12159.

17 On 31 August 2006 Ms Sylvia Hale by leave spoke to a motion for a special adjournment after the Parliamentary Secretary who had moved the motion had spoken in reply, *LC Minutes* (31/8/2006) 161.

18 *LC Debates* (19/6/2007) 1131-1134 per the Hon Ian Macdonald, (19/6/2007) 1166-1167 per the Hon Tony Kelly, (20/6/2007) 1335-1338 per the Hon John Della Bosca, (26/6/2007) 1680-1683 per the Hon Ian Macdonald in reply.

minutes duration on matters not relevant to the question before the House. This was extended to 30 minutes in 1996.¹⁹

In 1987 a sessional order imposing time limits on speeches on bills was introduced in the Council. The motion, introduced by the Leader of the Government, provided for time limits of 45 minutes on all speeches on bills, with provision for a 15-minute extension if agreed to by the House. An attempt by the cross-benches to refer the issue to the Standing Orders Committee was defeated on division, as was an amendment to allow unlimited time for a member who was not a member of the government or opposition.²⁰ The sessional order had effect for the remainder of the session, 18 sitting days, but was not reintroduced in the next session following a change in government.

At the time, the application of time limits to all speeches in the Council was considered undesirable. In its role as a House of review, it was thought that Council members should not be unduly constrained or restricted by limiting the time available to them in debate. Although there had been occasions when members had engaged in long speeches, with several exceeding three hours in length,²¹ it was considered that the absence of time limits on speeches had not led to unduly lengthy speeches, except on controversial matters, and that the general tendency in the House had been for short speeches.

The only other occasion that time limits have been imposed on government business in the Council occurred on 15 December 2005 when the House was recalled from the summer recess specifically to consider the Law Enforcement Legislation Amendment (Public Safety) Bill. The introduction of the bill followed several days of public disturbances. When the House met, it adopted a resolution that government business would take precedence of all other business for that day, including Question Time, and that time limits would apply to debate on the various stages of the bill. Under the resolution, during debate on the second reading a member could speak for no more than 20 minutes, in committee of the whole members could only speak for 10 minutes at a time on any question, and on the third reading, members could not speak for more than five minutes.²²

In 1988, provision was made in sessional order for debate on matters of public importance to be restricted, with the speech of the member proposing the matter and the minister or member first speaking in reply not to exceed 15 minutes each,

19 *LC Minutes* (19/3/1986) 89-91, (17/4/1996) 28.

20 *LC Minutes* (13/10/1987) 1112-1114.

21 The longest continuous speeches are: The Hon Mick Ibbett, 3 hrs 58 mins, *LC Debates* (20/3/1991) 1344-1382; The Hon Ian Macdonald, 3 hrs 39 mins, *LC Debates* (28/10/1993) 4684-4708; The Hon Peter Breen, 3 hrs 26 mins, *LC Debates* (5/5/2005) 15713-15753; and the Hon Fred Nile, 2 hrs 57 mins, *LC Debates* (17/11/1993) 5517-5541. The longest interrupted speeches are: The Hon Mick Ibbett, 4 hrs 43 mins, *LC Debates* (4/4/1990) 1636-1660, (1/5/1990) 1893-1904, 1917-1928; and the Hon John Jobling, 3 hrs 26 mins, *LC Debates* (8/10/1986) 5424-5440, 5441-5473.

22 *LC Minutes* (15/12/2005) 1819.

and the speech of any other member or proposer in reply not to exceed 10 minutes each.²³

Current practice in the Council provides that, in order to facilitate debate and to allow an opportunity for all members to bring matters before the House, time limits on certain types of debate and speeches are necessary. Time limits now apply to debate on adjournment motions (SO 31), urgency motions (SO 201), matters of public importance (SO 200), motions for the disallowance of statutory rules (SO 78), motions for the suspension of standing orders (SO 198) and to all private members' business (SO 186 and 187).

Under the rules relating to private members' business, on items other than bills the total debate time is limited to three hours, with 30 minutes debate time allowed for the mover, 20 minutes for any other member, and 10 minutes for the mover in reply (SO 186).

When a private member's bill is being considered the following time limits apply (SO 187):

- where there is debate on the question of leave to bring in the bill, there is a maximum of one hour debate, with the mover and any other member able to speak for up to 10 minutes and the mover in reply for not more than 10 minutes;
- if leave is granted to bring in the bill, there is no debate on the first reading and printing of the bill;
- where there is debate on the question of the second or third reading of a bill there is no time limit on the total debate time, but the mover may speak for 30 minutes, and any other member, and the mover in reply, may speak for 20 minutes.

There is no time limit applied to the consideration of private members' bills in committee of the whole. There is also no time limit applied to the consideration of government business. Details of time limits are provided in Appendix 11.

In the House of Commons the practice of limiting speeches is entirely at the discretion of the Speaker. If it is apparent that a large number of members wish to speak in a debate, the Speaker may, on specific days, call for members to make brief speeches not longer than 10 minutes in duration. This rule only applies to second reading of bills, allotted opposition days, motions in the name of a minister, and motions for an address in answer to the Queen's Speech.

Conversely, the House of Lords has set a time limit of up to 20 minutes duration on all speeches. Similarly, Senate practice is to limit all speeches in debate to 20 minutes, extended by order by not more than 10 minutes.²⁴

²³ *LC Minutes* (18/8/1988) 27-28.

²⁴ Senate standing order 189(1).

READING OF SPEECHES

Although the standing orders are silent on the reading of prepared speeches, points of order protesting against the practice have been taken in the past, usually based on the objection that the views of persons other than the member speaking are being presented or that a question is not being debated. The Chair has ruled that a member is not entitled to read a prepared speech, as this tends to reduce the cut and thrust of debate. However, the use of copious notes when making a speech has been permitted.²⁵

It is accepted that ministers and the Leader of the Opposition may read prepared speeches on bills and that the first speech by a new member may be read.²⁶

QUOTATION OF DOCUMENTS

Members are entitled to quote from documents during the course of debate, including reading articles from newspapers, books and other publications and documents. Under standing order 91 a member is limited to reading reasonable lengths of extracts from such documents, and it is up to the Chair to determine what constitutes a reasonable length. There have been numerous rulings concerning the quotation of documents, which have shaped the practice in the House. In general, members are encouraged to give the authorship and page reference of books and articles,²⁷ although they are not obliged to.²⁸ They are also encouraged to quote selectively rather than read large extracts onto the public record,²⁹ while quoting extensively from public documents which are readily accessible is actively discouraged.³⁰

The practice of some members to read out extensive lists of names of people who have written in opposition to a bill has led to claims that it was wasting the time of the House. Conflicting rulings, on the one hand curtailing the practice³¹ and on the other suggesting that it would be an undemocratic and dangerous precedent to rule out of order a member who seeks to read a list, even if it were a long list,³²

25 Rulings: Johnson, *LC Debates* (15/3/1981) 5256; Solomons (Deputy), *LC Debates* (27/2/1990) 163.

26 Second reading speeches delivered by ministers may be used by the courts in the interpretation of statute, adding additional importance to the second reading speech.

27 Rulings: Johnson, *LC Debates* (26/3/1980) 5924; Willis (Deputy), *LC Debates* (13/6/1990) 5530; Willis, *LC Debates* (24/3/1992) 1715, (25/3/1992) 1821, (22/9/1992) 6103, (18/6/1996) 3013.

28 Rulings: Johnson, *LC Debates* (26/5/1998) 692, (27/2/1990) 176.

29 Rulings: Willis (Deputy), *LC Debates* (13/6/1990) 5530, 5533; Willis, *LC Debates* (17/11/1993) 5506, 5539, (18/6/1996) 3013, (28/5/1997) 9356; Fazio (Deputy), *LC Debates* (15/11/2005) 19628.

30 Rulings: Johnson, *LC Debates* (10/8/1989) 9675; Johnson (Deputy), *LC Debates* (18/6/1996) 2990; Willis, *LC Debates* (17/11/1993) 5506.

31 Ruling: Gay (Deputy), *LC Debates* (23/10/1991) 3075.

32 Ruling: Tsang (Deputy), *LC Debates* (27/6/2002) 3970.

eventually led to the adoption of a sessional order regulating the practice,³³ and later, in 2004, to the adoption of standing order 91(5). Standing order 91(5) provides that when an objection is taken to the reading of a list of names of individuals or organisations who have made representations in relation to the matter the subject of the debate, without distinguishing the comments or views of those individuals or organisations, the member must confine their remarks to a statement of the comments or views of those individuals or organisations, and the number of individuals or organisations making similar representations.

The normal rules of debate apply when a member quotes from a document. For example, the quotation must be relevant to the matter then under discussion and the member is not permitted to reflect on members of either House, the Queen or the Queen's representative or to use offensive language. The latter was the subject of a question without notice put to the President in 1989, which sought clarification as to whether it was in order to quote an offensive expression, as had occurred earlier in Question Time that day. The President noted that in quoting the expression from an article in a newspaper, the member had given much pertinence to the question and elicited from the minister a succinct reply. The President ruled that the quotation of offensive words, if pertinent to a question, is in order subject to the enforcement of standards of good taste by the House.³⁴

When a document relating to public affairs is quoted by a minister, the document may be ordered, by motion without notice moved immediately on the conclusion of the minister's speech, to be laid upon the table (SO 56).³⁵ An exception to this applies where the minister states that the document is of a confidential nature or should be more properly obtained by order.

PERSONAL EXPLANATIONS AND EXPLANATION OF SPEECHES

A member may, by leave of the House, make a personal explanation when there is no question before the House (SO 88). A personal explanation cannot be made during the course of debate.

As determined by Presidents' rulings, a personal explanation allows a member to explain a matter reflecting on their honour, character or integrity, or to explain any matter which reflects on them in a personal way.³⁶ A personal explanation

33 *LC Minutes* (29/8/2002) 4331. In June 2002, before the adoption of the sessional order, during the second reading debate on the Game Bill, Ms Lee Rhiannon read the names of 400 people opposed to the bill, having unsuccessfully sought leave to have the list incorporated in Hansard both before and during the reading of the list. Although objection was also taken to the reading of the list, on the ground that it did not contribute to the cut and thrust of debate, and that it trivialised the matter under debate, the member was allowed to conclude. *LC Debates* (22/6/2002) 3967-3971.

34 Ruling: Johnson, *LC Debates* (24/10/1989) 11593-11594.

35 This procedure was first used on 7 September 2006 when the House ordered that a document quoted by the Minister for Roads be laid on the table of the House, *LC Minutes* (7/9/2006) 185-186.

36 Rulings: Johnson, *LC Debates* (27/2/1986) 521; Willis, *LC Debates* (18/11/1992) 9095-9097.

should not be used to explain matters on behalf of any other person.³⁷ The matter which is the subject of the personal explanation should not be amplified or debated, nor should provocative or disputative language be used.³⁸ Personal explanations should not be used to reply to or to explain a matter on which the member has been misquoted or misunderstood.³⁹

If a personal explanation goes beyond the limits for which leave has been given, and any member objects, the Chair usually calls the member to order. Leave may also be withdrawn after it has been given.⁴⁰

Under standing order 89 a member who has spoken on a question may only speak a second time to explain a matter on which the member has been misquoted or misunderstood. In doing so they may not interrupt the member speaking nor introduce new material into the debate.⁴¹

RULES REGARDING CONTENT OF SPEECHES

The rule of anticipation

The rule of anticipation precludes members from discussing a notice of motion or order of the day on the Notice Paper except an item of private members' business outside the order of precedence unless, in the opinion of the President, there is no likelihood of the motion or order of the day being called on within a reasonable time (SO 92). Further, under standing order 65(4), questions must not anticipate discussion on an order of the day or other matter on the Notice Paper, except an item of private members' business outside the order of precedence, or an order of the day relating to the budget estimates.

It is not anticipation to use a more effective form of procedure. For example, a bill is more effective than a motion, a substantive motion more effective than a motion for the adjournment of the House, and an adjournment motion more effective than a question.

In relation to questions to ministers, the practice has been to allow questions seeking information regarding matters on the Notice Paper but which do not necessarily amount to anticipating discussion. The same practice applies to questions regarding proceedings in committees which have not been reported to the House. However, it is not in order to canvass the findings of a committee which has not yet reported.⁴²

37 Rulings: Johnson, *LC Debates* (26/2/1986) 383; Solomons (Deputy), *LC Debates* (12/10/1988) 2057.

38 Rulings: Johnson, *LC Debates* (26/2/1986) 383; Willis, *LC Debates* (17/11/1994) 5188.

39 Ruling: Johnson, *LC Debates* (27/2/1986) 521.

40 Rulings: Johnson, *LC Debates* (21/9/1988) 1533, (15/11/1988) 3217. See also *LC Minutes* (13/11/2002) 476, (21/11/2002) 515.

41 Rulings: Burgmann, *LC Debates* (24/11/2000) 10826, (28/6/2001) 15633.

42 Ruling: Gay (Deputy), *LC Debates* (26/11/1992) 10059.

In 1907 the House of Commons Select Committee on Procedure (Anticipatory Motions) investigated the origins and development of the 'rule against anticipation'.⁴³ According to evidence given to the Committee by the Clerk of the House, the earliest reference to the practice appears to be in Charles Dickens' *Little Dorrit*, published in 1857, where Dickens remarks that the parliamentary members of the Barnacle family used to put dummy motions on the Paper in the way of other men's motions. Charles Dickens had experience in the reporters' gallery of the House of Commons.⁴⁴ There are also several rulings from Speaker Denison in the 1860s, but from notes in his diary it appears that the practice was already established.

The Committee concluded that the rule is of comparatively recent origin, and that it rests for its authority on usage and a body of decisions from the Chair. The original purpose of the rule was to prevent any member from unfairly forestalling the discussion of a matter which another member had already given notice of his intention to bring before the House by motion or bill. The Committee, however, noted that the practice had been developed in such a way as to have almost the opposite effect – that is, to enable a member, by giving notice, to prevent any effective discussion of the matter at all. In its conclusions, the Committee recommended that if the rule was to be kept, it should be brought back and confined to its original purpose, and that discussion on any matter should not be ruled out of order on the ground of anticipation unless there was, in the opinion of the Chair, a probability of the matter being brought before the House within a reasonable time.

Unparliamentary (offensive) language

In most Parliaments, the rules of order prohibit members from using offensive, or unparliamentary language.

Historically in the House of Commons, offensive words spoken against the House or individuals were punished in an extreme manner, sometimes leading to imprisonment.⁴⁵ This power was used to protect the House from disorderly conduct and debate which could arise by the use of offensive expressions.

In the Council offensive language is governed by standing order 91(3) which provides that a member may not use offensive words against either House of the legislature, or any member of any House. The practice today usually calls for a withdrawal of the remark or an apology from the member.

Exactly what constitutes an offensive remark is left to the determination of the Chair. However, offensive language usually includes:

43 Select Committee on Procedure (Anticipatory Motions), UK House of Commons, 23 July 1907.

44 *Ibid*, p iii.

45 *Erskine May*, 23rd edn, p 96.

- imputation of false or unavowed motives;
- misrepresentation of the language of another and the accusation of misrepresentation;
- charges of uttering a deliberate falsehood;
- abusive and insulting language of a nature likely to create disorder.⁴⁶

When an instance of this type of disorder arises in debate, the practice for the Chair is to intervene in the debate and call for the offensive remark to be withdrawn. In 1987 President Johnson ruled:

If the Chair is of the opinion that words complained of are offensive or disorderly, the member concerned will be called upon to conform to the rules of the House and retract the offensive expression and, in a serious case, make an apology to the House if required by the Chair.⁴⁷

When judging what constitutes an offensive remark, President Johnson ruled that the offence must be personal rather than political:

I consider that the following should be a useful guide. Offensive words must be offensive in the generally accepted meaning of that word. When a person is in political life it is not offensive that things are said about him or her politically. Offensive means offensive in some personal way. The same view should be applied to the meaning of 'improper motives' and 'personal reflections' as used in the standing order ... There may be occasions in which remarks offensive to an identifiable member may not be regarded as unparliamentary when applied to a group where members cannot be identified.⁴⁸

President Willis also adopted the principle in ruling under former standing order 80 (now standing order 91(3)) that offensive words should refer to the specific rather than the general. For instance, he ruled 'the expression "mafia" is not unparliamentary because it refers to the general and not the particular, which is the basis upon which members may take objection'.⁴⁹ As well, various rulings in the Council support the view that the context of a specific debate is important in determining what is offensive and that the Chair must take this into account when deciding that a particular word or expression is offensive.

Objection to any words used in debate must be made when spoken, that is at once, and not some time afterwards. If a member states that they did not say what is alleged the member's word must be accepted.

Words taken down

Before 2004, standing order 91 provided that when a member objected to words used in debate, and requested that they be taken down, the President would direct

46 *Ibid*, pp 386-387.

47 *LC Debates* (31/3/1987) 9586-9587.

48 *LC Debates* (31/3/1987) 9586.

49 *LC Debates* (12/4/1994) 1022.

the Clerk to take them down. The objection had to be taken at once, and the words were recorded in the Minutes of Proceedings. The same practice was provided for in committee of the whole under standing order 92.

There was one instance, in 1991, where a member objected to words and requested that they be taken down.⁵⁰ On that occasion the President left the Chair until the ringing of a long bell while the Hansard record was checked to determine exactly what the words were to which objection had been taken.

The difficulty with this procedure was that, in having the words taken down in the Minutes, they were given much greater prominence than if they had not been taken down. This may account for the fact that there is only once instance recorded in the Council where this has occurred. When members object to words, either because they are offensive or because they cast reflections, the practice has been to request that they be withdrawn rather than taken down.

In 1957 the President of the Senate ruled that the purpose of the relevant Senate standing order relating to words taken down was to protect senators from objectionable, offensive and disorderly expressions, and that the reading of such words must be followed by an explanation, withdrawal or apology by the senator deemed to have offended against the standing orders. He continued:

Taking down words is an ancient practice of the House of Commons, now in disuse, for considering disorderly words used by a member in debate. The modern practice is for a member, at the moment it occurs, to make application to the Chair for the withdrawal of an expression objected to. It is then within the discretion of the Chair to decide whether the expression should be withdrawn.⁵¹

The standing orders adopted by the Council in 2004 no longer provide for the words to be taken down.

Reflections on the House, the Assembly, members and officers

The standing orders are specific in relation to reflections on the House, the Assembly, members and officers. Standing order 91(3) prohibits the use of offensive words against either House or any member of either House, and any imputations of improper motives or personal reflections on members.

The conduct of a member of Parliament can only be debated on a substantive motion moved for that purpose and which allows a distinct decision of the House. The same is true of charges of a personal character, which must also be raised on direct and substantive motions. For this reason it is not possible to make accusations or raise allegations by way of amendment or on an adjournment motion.

50 *LC Minutes* (19/3/1991) 84.

51 *Senate Journals* (1/11/1957) 135.

Nor is it possible to include such an allegation within the context of a broader motion, or to raise it in reply to a question.⁵²

In 1889 President Hay ruled that a charge against any member of the House could not be brought on a motion for the adjournment of the House. He further ruled that a question as to the conduct of a member could not be dealt with except by notice and in a formal manner.⁵³

In a ruling given by President Johnson in 1987 concerning offensive words he reminded members that allegations against members can only be made on a direct and substantive motion.⁵⁴

A similar ruling was made by President Willis in 1995 when he ruled against a member for reading from a document which contained allegations against a member. He suggested that if the member wished to proceed with the matter they should do so by way of a substantive motion.⁵⁵ Similar rulings have also been made by other Presidents.⁵⁶

In some cases, the making of seriously damaging and unfounded allegations by members against other members, or strangers, may amount to a contempt,⁵⁷ or to conduct which falls below the standards the House is entitled to expect from its

52 *Erskine May*, 23rd edn, pp 386-387.

53 Ruling: Hay: '[T]hat a charge against any member of this House cannot be brought on a motion of this kind. It cannot be brought forward except in such manner that it can be dealt with by the House in a more formal manner than it can possibly be dealt with on a mere motion for adjournment. A question as to the conduct of a member of this House is a question requiring grave consideration of this House; therefore it cannot be dealt with unless the honourable member gives notice, and puts his charges against that member in a formal manner. I cannot allow the honourable member to go into the conduct of any other honourable member especially implying malice in connection with the business of this House - upon a motion for adjournment', *LC Debates* (8/5/1889) 1105.

54 Ruling: Johnson: 'I remind Honourable members that all allegations of a personal nature against members can only be made upon a direct and substantive motion. I urge Honourable members to exercise their privilege of free speech with good sense and good taste, so as to maintain courtesy of language towards other members in debate. Personal references not only reduce the standard of debate, provoke retaliation and lead to disorder in the House, but degrade the Parliament in the estimation of the people', *LC Debates* (31/3/1987) 9586-9587.

55 Ruling: Willis: 'The requirement is that a member who wishes to make allegations against a member of this House or member of the other House should proceed by way of substantive motion. Effectively the Honourable member is making allegations by reading a document which makes allegations. Therefore I rule the member out of order and suggest that if she wishes to proceed with the matter, she should do so by way of substantive motion', *LC Debates* (1/6/1995) 554-555.

56 Rulings: Saffin (Deputy), *LC Debates* (8/5/2002) 1730; Burgmann, *LC Debates* (5/6/2002) 2585.

57 For example, in 1967 the House of Commons Select Committee on Parliamentary Privilege cited as an example of contempt 'a gross abuse by a member of his rights and privileges, for example by maliciously making under cover of absolute privilege afforded by the Bill of Rights a gross defamatory attack upon a stranger or upon another member of the House': Report, December 1967, para 60.

members and brings the House into disrepute.⁵⁸ There have been three instances in recent years where a member has been removed from the House after refusing to withdraw offensive words directed to another member.⁵⁹ Furthermore, in 1998 the Hon Franca Arena was required to make a statement of regret to the House for remarks made in debate reflecting on members of the Assembly and others. This is discussed further below.

It has also been ruled that imputations against officers of the House are improper and should be withdrawn.⁶⁰

References to the Queen or Governor

Members are prohibited from referring to the Queen or the Governor disrespectfully in debate, or for the purposes of influencing the House in its deliberations (SO 91(2)). Reference to the Governor has been held to include ‘the Governor-General’ and a member has been ruled out of order for making a statement casting reflections on the Governor-General.⁶¹

In the Senate, standing order 193 precludes reference to the Queen, Governor-General or the Governor of any State ‘disrespectfully in debate, or for the purpose of influencing the Senate in its deliberations’. According to *Odgers*:

This rule is founded upon the need for mutual respect between the branches of government and between the Commonwealth and state governments, and on the requirement that the holders of these offices remain above political disputation.⁶²

In the House of Representatives, Speaker Snedden in 1976 prohibited reference casting reflection on the Governor-General ‘unless discussion was based upon a substantive motion drawn in proper terms’. The Speaker ruled that it would be in order to make a statement about a decision of the Governor-General including giving reasons ‘in a dispassionate way’ but that reflecting personally on the Governor-General or imputing improper motives would not be in order.⁶³

Erskine May states that the conduct of the sovereign and of the Governor-General of an independent territory, amongst others, cannot be debated except on substantive motion which allows a distinct decision of the House. Nor can a charge of

58 See Standing Committee on Parliamentary Privilege and Ethics, *Report on inquiry into the conduct of the Honourable Franca Arena MLC*, Report No 6, June 1998; see also *LC Minutes* (1/7/1998) 663-665, (16/9/1998) 694-696.

59 *LC Minutes* (18/10/1989) 976-978 per the Hon Marie Bignold; (14/11/1991) 268-269 per the Hon Elisabeth Kirkby; (21/6/2007) 145 per the Hon Michael Costa.

60 Ruling: Johnson, *LC Debates* (30/5/1990) 4715.

61 Ruling: Budd, *LC Debates* (12/11/1975) 2514, 2517.

62 Evans H (ed), *Odgers’ Australian Senate Practice*, 11th edn, Department of the Senate, Canberra, 2004, p 205.

63 Harris IC (ed), *House of Representatives Practice*, 5th edn, Department of the House of Representatives, Canberra, 2005, p 503.

a personal character be made against them except on a direct and substantive motion. Such statements cannot be incorporated in a broader motion nor, for example, included in a reply to a question.⁶⁴

It is in order to ask a question relating to the Queen, Governor or Governor-General, provided they do not cast reflections on their conduct. However, treasonable or seditious language or a disrespectful use of Her Majesty's name is not permitted. In the House of Commons, members have not only been called to order for such offences, but have been reprimanded, committed to the custody of the Serjeant, and even sent to the Tower.⁶⁵

Although there has been a number of occasions on which the President has called members to order for reflections on the Crown, there have been few instances where the President has ruled that an imputation has been made. In 1980 President Johnson ruled that to suggest that His Excellency was placed in an embarrassing situation by being required to make untrue comments in his Opening Speech to Parliament was a personal reflection on the Governor and must be withdrawn.⁶⁶

References to judges

Members may not adversely reflect in debate on the conduct of judicial office-holders, except by substantive motion.

According to *Odgers*, the rationale for the parliamentary practice of protecting judicial office-holders 'is based on the need for comity and mutual respect between the legislature and the judiciary, and the requirement that judicial officers be protected from remarks which might needlessly undermine public respect for the judiciary'.⁶⁷

In the House of Commons, criticism of judges, as opposed to criticism of judgments made by judges, can only be made on a substantive motion.⁶⁸

In the Council, there is no standing order dealing specifically with reflections on the conduct of judges in debate.⁶⁹ The decision as to whether the words used by members in debate are offensive or cast a reflection on the judiciary rests with the Chair, and successive rulings have upheld the principles established in the House of Commons. Reflections on a member of the judiciary or any other decision of a court cannot be debated unless raised by way of a substantive motion.⁷⁰ This

64 *Erskine May*, 23rd edn, pp 386-387.

65 *Ibid*, p 435.

66 Ruling: Johnson, *LC Debates* (17/9/1980) 1040.

67 *Odgers*, 11th edn, p 205.

68 *Erskine May*, 23rd edn, pp 386-387.

69 The standing orders of both the Senate (SO 193) and the Legislative Assembly (SO 72) specifically provide protection to judicial officers against offensive words and personal reflections.

70 Ruling: Willis, *LC Debates* (23/9/1997) 303; Farrar, *LC Debates* (14/9/1949) 3400-3401; Chadwick, *LC Debates* (24/9/1998) 7965.

includes implying that there is any political motive or a connotation of interference in the actions of the judge.⁷¹ Furthermore, while members may comment in debate on the law itself, and its operation, they may not comment on judges in respect of motives, capacity or character.⁷²

It was the view of President Willis that some of the rulings by past Presidents of the Council had been restrictive with respect to comments on decisions made by judges as distinct from comments on judges themselves.⁷³ It has been the practice in recent years to permit more latitude in debate and not automatically exclude discussion in the House on matters which are already being freely ventilated in the media.

The New Zealand Parliament also draws a distinction between disagreement with, and criticism of, a judgment delivered by a court, and allegations directed at the judge of being consciously unfair or unjust. The House is considered the proper forum to debate the implications of a legal decision, while it is the duty of members to criticise the effects of findings and advocate changes to the judicial system if it is in the public interest. However, it is incumbent on the Presiding Officer and members to uphold the dignity of the judiciary and not to attack judges themselves.⁷⁴

In 1998, the conduct of a judge was debated on a substantive motion in the form of an address to the Governor seeking the removal from office of the Hon Justice Vince Bruce, in accordance with section 53 of the *Constitution Act 1902*.⁷⁵

Reference to members of the public

There are no standing orders which govern reference in debate to members of the public. Under the protection offered by the doctrine of freedom of speech, members are able to debate matters in the House which might otherwise attract action under the laws of defamation.

Nonetheless, the House expects that members will exercise their freedom of speech responsibly and with due care. A person's reputation may be seriously affected by matters raised in Parliament, with sometimes devastating effects for the person concerned. For this reason, the Council has adopted a procedure which permits a citizen to request a citizen's right of reply to statements made in the Council by members (SO 202 and 203).

The House has also on rare occasions taken action against a member for comments in debate which have been deemed an abuse of the privilege of freedom of speech.

71 Ruling: Tsang (Deputy), *LC Debates* (21/6/2001) 15016; Farrar (Deputy), *LC Debates* (25/2/1941) 1500-1501.

72 Ruling: Hay, *LC Debates* (4/5/1880) 2136.

73 President Willis in a letter of advice to the Hon Justice AM Gleeson AC, 8 March 1996.

74 McGee D, *Parliamentary Practice in New Zealand*, 3rd edn, Dunmore Publishing, Wellington, 2005, p 191.

75 *LC Debates* (25/6/1998) 6524-6587.

This is because such conduct may bring the House into disrepute and therefore obstruct or impede the House in the performance of its duties. As the House of Commons Select Committee on Parliamentary Privilege found in 1967:

[C]ontempt may (and has been held to) include the conduct of a Member or Officer, whether within or outside the Chamber or the precincts, which is so improper or disorderly as to amount to an abuse of a Member's or Officer's position. An example of such misconduct would be gross abuse by a Member of his rights and immunities, for example by maliciously making under cover of the absolute privilege afforded by the Bill of Rights a gross defamatory attack upon a stranger or another Member of the House.⁷⁶

There have been two cases in New South Wales where action has been taken by a House against one of its members in respect of statements made under parliamentary privilege. In both cases the action taken by the House followed findings by an external inquiry that the member's statements were unfounded.⁷⁷ The first case arose in the Assembly in 1917 when a member was expelled under the Assembly's standing order 391 for 'conduct unworthy of a Member of Parliament and seriously reflecting upon the dignity of this House'.⁷⁸ The second case arose in the Council in 1998, when the House resolved that the Hon Franca Arena's conduct in making statements concerning the Premier, Leader of the Opposition and various members of the public fell below the standard the House is entitled to expect of a member and brought the House into disrepute. The House initially required Mrs Arena to submit an apology in respect of the statements and, had she failed to do this, would have suspended her from the service of the House.⁷⁹ The House subsequently agreed to accept a statement of regret from Mrs Arena.⁸⁰ This case is discussed in more detail in Chapter 3 (Privilege).

Quoting previous debates and proceedings

Under the previous standing order 76, in force before 2004, members were prohibited from quoting any debate in either House of the same session on a question or bill not then under discussion, except by the indulgence of the House for a personal explanation. The principle behind the restriction was that it could lead to the re-opening or the re-arguing of a matter which had already been determined. It also prevented fruitless arguments between members of two distinct bodies who are unable to reply to each other, and guarded against recrimination and offensive language in the absence of the party assailed.⁸¹

76 Select Committee on Parliamentary Privilege, UK House of Commons, Report, December 1967, para 60.

77 A royal commission in the first case and a special commission of inquiry in the second.

78 *LA Debates* (17/10/1917) 1785. Although there is no equivalent standing order in the Council, the right of the House in appropriate circumstances to expel a member for conduct judged unworthy was recognised and upheld in *Armstrong v Budd* (1969) 71 SR (NSW) 386 (as discussed in Chapter 3).

79 *LC Minutes* (1/7/1988) 633-635.

80 *LC Minutes* (16/9/1998) 693-696.

81 *Erskine May*, 22nd edn, p 381.

In line with modern practice, the standing orders adopted by the Council in 2004 no longer prevent debates and proceedings being quoted.

Reference in debate to committees

The evidence taken by a committee and documents presented to it, which have not been reported to the House, may not, unless authorised by the House or committee, be disclosed to any person other than a member or officer of the committee (SO 224).⁸² In addition, members must not disclose the contents of draft reports of committees.⁸³ However, members are not precluded from referring to matters that are in the public arena, or to evidence given in public to a committee.⁸⁴

The fact that a matter is the subject of a committee inquiry does not preclude the House from considering the same matter.⁸⁵ Although it is not in order to discuss or reveal the deliberations of a committee, or to canvass the findings of a committee before the committee has reported to the House, there is nothing to prevent a member from raising the same matter in the House. Provided debate does not refer to the committee inquiry it does not contravene the standing orders. Further, it does not offend the rule of anticipation, since the committee reference is no longer before the House. If a matter could no longer be debated in the House merely because it was the subject of a committee inquiry, the House's right to debate matters would be unduly restricted. At worst, such a practice would allow the government to suppress debate in the House by the technicality of ministers referring sensitive matters to committees.

Speakers of the House of Commons have commented that it is not an easy matter to determine when a reference to proceedings within, and matters the subject of inquiry by, a committee is appropriate.⁸⁶ The principal purpose of the rule prohibiting reference in debate to proceedings of a committee is to 'prevent Members in the House seeking to interfere with and prejudice the proceedings of the Committee'.⁸⁷

It is also not in order when asking questions to refer to proceedings in committee which have not yet reported to the House when asking questions, subject to the qualifications outlined above (SO 65(3)(b)).⁸⁸ However, standing order 63(4) allows questions to be put to a chair of a committee relating to the activities of that

82 Rulings: Johnson, *LC Debates* (20/10/1988) 2677; Burgmann, *LC Debates* (7/3/2001) 12282, 12286, 12301, (22/9/2004) 11229, (26/9/2004) 5487, (24/5/2005) 15910; Johnson (Deputy), *LC Debates* (31/4/2001) 12993; Forsythe (Deputy), *LC Debates* (22/9/2004) 11248.

83 *Parliamentary Debates* (Senate) (27/10/1997) 8064.

84 Rulings: Burgmann, *LC Debates* (7/3/2001) 12286, (22/9/2004) 11229; Forsythe (Deputy), *LC Debates* (1/9/2004) 10599, (22/9/2004) 11248.

85 Ruling: Willis, *LC Debates* (2/5/1996) 708.

86 *Parliamentary Debates* (UK House of Commons) (1974-75) 890, p 444.

87 *Ibid*, referring to *Parliamentary Debates* (UK House of Commons) (1947) 434, pp 1145-1146.

88 Rulings: Willis, *LC Debates* (30/5/1996) 1776; Burgmann, *LC Debates* (20/9/2001) 16922, (27/9/2001) 17226.

committee, provided the question does not attempt to interfere with the committee's work or anticipate its report.⁸⁹

Reflections on votes

A member shall not reflect on any resolution or vote of the House, unless moving for its rescission (SO 91(1)).⁹⁰ President Burgmann ruled in 2003 that the word 'reflect' in standing order 91(1) means reflect in a poor way, rather than simply making a reference.⁹¹

Repetition and relevance in debate

Standing order 92 states that members may not digress from the subject matter of any question under discussion. The precise relevancy of remarks and their connection to the question before the House are not always apparent. The President will often call a member to order and remind them that their remarks must adhere as closely as possible to the question.

The rule of relevance also insists that amendments be relevant to the main motion and applies to the various stages in the passage of bills. At the second reading stage, debate is limited to the principle of the bill and debate on individual clauses is out of order. At the third reading stage, although debate is rare, debate must be confined to the question that the bill be read a third time and not a general discussion of the content of the bill. Wider latitude is allowed on certain debates such as the debate on the Address-in-Reply and debate on the budget estimates and related papers.

THE SUB JUDICE CONVENTION

Although the Parliament has a right to legislate on any matter within its legislative power, a convention has developed that members refrain from making reference in debate, motions, questions or committee proceedings, to matters before the courts where this could prejudice proceedings. This is known as the *sub judice* convention, 'sub judice' meaning before a judge or court of law. The convention is a restriction which a House of Parliament voluntarily imposes through practice and rulings of the Chair, rather than a specific standing order which must be followed. The practice is designed to avoid prejudice to pending court proceedings or harm to specific individuals through public discussion in the House. As stated in *King v Parke*: 'It is possible very effectually (by allowing such discussion) to poison the fountain of justice before it begins to flow'.⁹²

89 Rulings: Willis, *LC Debates* (30/5/1996) 1776; Burgmann, *LC Debates* (28/6/2001) 15625.

90 The predecessor to standing order 91(1) was standing order 78.

91 Rulings: Burgmann, *LC Debates* (5/12/2003) 6029.

92 [1903] 2 KB 438.

In practice, in criminal cases the convention applies from the moment a charge is made until the announcement of the verdict and sentence. It becomes relevant again from the time a notice of appeal is lodged until the appeal is decided.

In civil matters the convention applies when proceedings are set down for trial or otherwise brought before the courts until judgment is entered. However, regard is had to the likelihood of the matter coming before the courts in the reasonably foreseeable future. The mere issue of a writ does not amount to the automatic invoking of the convention and the curtailing of debate on a particular issue.

The convention is applied strictly only to prevent discussion of the precise issue before the courts, and not to prevent general discussion of collateral or related matters, particularly when issues are being canvassed in the media.

Council practice

The President is the final arbiter in *sub judice* issues and has absolute discretion in making a ruling to prevent or allow discussion. The Chair may intervene on their own volition or may be called on to decide on a point of order. The issue the Chair must decide is whether a motion, debate or question might prejudice proceedings before a court. In determining that issue, the Chair rules on the side of further discussion unless it is clear that to do otherwise could create prejudice. Even then the Chair may determine that the public interest in the matter outweighs possible prejudice.

The issue of *sub judice* came before the House in 1990 following a notice of motion for the appointment of a select committee on power lines. When a point of order was taken that certain paragraphs of the notice were *sub judice*, in that there were proceedings in the Land and Environment Court concerning issues raised in the notice, President Johnston ruled various paragraphs of the notice out of order.⁹³ In doing so, President Johnston outlined the following guidelines to be followed when considering whether a matter is *sub judice*:⁹⁴

- The convention is much stricter in relation to criminal matters, possibly having to be applied from the moment a charge is made, than in civil cases, possibly having to be applied from the time the case has been set down for trial or otherwise brought before the court.⁹⁵
- In recognition of the fact that some time may elapse before a civil matter comes before a court, the additional test of ‘real and substantial danger of prejudice to the trial of the case’ may be used by the Chair.⁹⁶
- Once a matter is before a civil court or a charge has been laid in a criminal matter the Chair, in exercising discretion in applying the *sub judice*

93 *LC Minutes* (16/5/1990) 164-165.

94 Ruling: Johnston, *LC Debates* (16/5/1990) 3364-3369.

95 Ruling: Johnston, *LC Debates* (16/5/1990) 3365.

96 *Ibid.*

convention, must weigh two competing interests. While the House should never be inhibited from discussing matters of public interest, unless there are strong overriding reasons, there is the need to ensure that proceedings in the courts and the integrity of the judicial process are not prejudiced by debate in the House.⁹⁷

- The Chair should be guided in the first instance by a presumption for discussion rather than against it. If the Chair feels that the interests of individuals who are to appear before the court may be prejudiced, the Chair should intervene and warn the member speaking to temper their remarks.⁹⁸
- The House should not act as an alternative forum, especially where the Parliament has handed to a body certain powers and functions. To canvass issues which at the same time are being tried in a court may have the effect of interfering with the course of justice and prejudicing proceedings.⁹⁹
- The convention applies equally with regard to select committee proceedings.¹⁰⁰
- Because a matter is before a court it does not follow that every aspect of it must be *sub judice* and beyond the limits of permissible debate – this would be too restrictive of the rights of members.¹⁰¹
- The Chair should take a realistic attitude towards *sub judice* by not automatically excluding discussion in the House on matters of public interest which are already being freely ventilated in the media.¹⁰²
- The Chair should take into account that there are limits to which debate in the House can be seen as affecting the proceedings in a court. In the words of Speaker Snedden in the House of Representatives:

[T]here is a long line of authority from the courts which indicates that the courts and judges of the courts do not regard themselves as such delicate flowers that they are likely to be prejudiced in their decisions by a debate that goes on in this House.¹⁰³

The decision of Jordan CJ in *Ex parte Bread Manufacturers Ltd; Re Truth and Sportsman Ltd*,¹⁰⁴ which concerned the law of contempt of court, by analogy highlights the limits to which the public interest in the administration of justice should be seen as prevailing over the right to debate in the House in the context of *sub judice*. In that decision his Honour stated:

97 *Ibid*, 3365-3366.

98 *Ibid*, 3368.

99 *Ibid*.

100 *Ibid*.

101 *Ibid*.

102 *Ibid*, 3367.

103 *Ibid*, 3368. See *House of Representatives Practice*, 5th edn, p 507.

104 (1937) 37 SR (NSW) 242.

[I]f in the course of the ventilation of a question of public concern matter is published which might prejudice a party in the conduct of a law suit, it does not follow that a contempt has been committed. The case may be one in which as between competing matters of public interest the possibility of prejudice to a litigant may be required to yield to other and superior considerations. The discussion of public affairs and the denunciation of public abuses, actual or supposed, cannot be required to be suspended merely because the discussion or the denunciation may, as an incidental but not intended by-product, cause some likelihood of prejudice to a person who happens at the time to be a litigant. It is well settled that a person cannot be prevented by process of contempt from continuing to discuss publicly a matter which may fairly be regarded as one of public interest, by reason merely of the fact that the matter in question has become the subject of litigation, or that a person whose conduct is being publicly criticised has become a party to litigation either as plaintiff or defendant, and whether in relation to the matter which is under discussion or with respect to some other matter.¹⁰⁵

However, the rule is not always confined to those limits.

As to what constitutes 'prejudice to proceedings', the House of Commons Select Committee on Procedure in 1962-1963 said:

In using the word 'prejudice' Your Committee intend the word to cover the possible effect on the members of the Court, the jury, the witnesses and the parties to any action. The minds of magistrates, assessors, members of a jury and of witnesses might be influenced by reading in the newspaper comment made in the House prejudicial to the accused in a criminal case or to any of the parties in a civil action.¹⁰⁶

Further, the Committee's report included a memorandum from the Clerk of the House which outlined the main difficulty faced by the Chair when determining whether prejudice to court proceedings is likely to result:

[W]hile a case is under trial or awaiting trial, a motion or question which canvasses the actual issue to be tried would properly be held to prejudice the case. It is however rare for such a notice to be offered. The more usual problem lies in a notice which raises cognate issues or circumstances attendant on the case. In civil cases a current action may be cited as an example of the need for amendment of the law, or it may be used to illustrate some aspect of government policy. In criminal cases the occasion of the arrest of the person charged will often be the theme. It is these cognate or circumstantial issues which provide the main difficulties for the Chair, for it is seldom easy to know without full access to all the facts whether an apparently irrelevant issue may not in fact turn out to be relevant to a trial.¹⁰⁷

105 *Ibid* at 249-250.

106 Select Committee on Procedure, UK House of Commons, *The Rule Relating to Reference in the House of Commons to Matters Considered as Sub Judice*, First Report, 1962-1963, p v, paragraph 11.

107 *Ibid*, p 45.

In 1972, the House of Commons Select Committee on Procedure recommended that ‘questions, motions and debate should be permitted on the general background ... but that comment on the precise issues on which the court has to decide should not be permitted’.¹⁰⁸

The difficulty of determining what matters are relevant when applying the *sub judice* convention was also discussed by the Hon Sir Kevin Ellis, a former Speaker of the Legislative Assembly,¹⁰⁹ in 1968:

[T]he great difficulty is to determine the real matter that is before the court and to find out what matters are material or relevant to the issue before the court. To ... say that simply because a matter is before a court it may not be mentioned in Parliament ... is far too restrictive. ... [T]he Chair ought to endeavour to apply a more flexible ruling so as to allow the maximum measure of debate, stopping only at the point at which it appears that there is a real possibility of prejudicing the interests of parties before the courts or in some way embarrassing or influencing the court itself ... [W]e ought not ... believe that the courts would be too ready to be influenced by what we might say about the ordinary matters that are likely to arise in the courts and in the Parliament. I allow debate in a broad and general sort of way up to the point at which it becomes clear to the Chair, either on its own information or on the submission of a member, that someone is seeking to debate or discuss the specific matter before the court or an aspect of that matter that must necessarily be examined by the court in coming to a decision on the issue before it.¹¹⁰

Also on this point, in an article published in 1978, Mr RD Meagher QC said:

It is of critical importance to appreciate that the rule is limited in its operation. It does not apply unless the necessity of its operation has become quite clear. Any person objecting to the continuation by discussion on the basis of the rule has clearly to justify his objection. It is to be applied prudently, and is not applied strictly. It applies, when it does, only to prevent discussion of the precise issue before the House, not to prevent general discussion of collateral or related matters.¹¹¹

***Sub judice* and royal commissions and other similar bodies**

There is conflicting authority on the application of the *sub judice* convention to royal commissions, special commissions of inquiry, the Independent Commission Against Corruption and similar bodies.

108 Select Committee on Procedure, UK House of Commons, *Matters Sub Judice*, June 1972, p xiii.

109 Speaker from 26 May 1965 to 3 December 1973.

110 First Conference of Presiding Officers and Clerks (1968), transcript of proceedings, pp 35-36.

111 Meagher RD, ‘The Parliamentary Sub Judice Rule in New South Wales’, *Justice*, No 7, November 1978, pp 36-37.

The position in the House of Commons is that the convention applies in the case of a judicial body or tribunal to which the House has expressly referred a specific matter for decision and report:

Subject to the discretion of the Chair and to the right of the House to legislate on any matter or to discuss any matters of delegated legislation, matters awaiting the adjudication of a court of law should not be brought forward in debate ...

The restriction on reference in debate in the case of any judicial body to which the House has expressly referred a specific matter for decision and report applies to tribunals established under the *Tribunals of Inquiry (Evidence) Act 1921*.¹¹²

The Senate holds that the *sub judice* convention does not have any application to royal commissions:

The *sub judice* convention does not have application to matters before royal commissions and other commissions of inquiry. In the past rulings were made to the effect that matters before royal commissions should not be canvassed, but these rulings are not consistent with the subsequent emphasis on the danger of prejudice to court proceedings. A royal commission is not a court, its proceedings are not judicial proceedings, it does not try cases and it is unlikely that a royal commissioner would be influenced by parliamentary debate. Criminal prosecutions may arise from evidence taken before royal commissions, but the *sub judice* convention should not be invoked until such time as such prosecutions are before the courts. Thus it has been ruled that the *sub judice* convention does not arise in relation to inquiries by a state commission.¹¹³

The House of Representatives, however, considers that in some circumstances the *sub judice* convention should be applied to royal commissions:

Although it is clear that royal commissions do not exercise judicial authority, and that persons involved in royal commissions are not on trial in a legal sense, the proceedings have a quasi-judicial character. The findings of a royal commission can have very great significance for individuals, and the view has been taken that in some circumstances the *sub judice* convention should be applied to royal commissions ...

The contemporary view is that a general prohibition of discussion of the proceedings of a royal commission is too broad and restricts the House unduly. It is necessary for the Chair to consider the nature of the inquiry. Where the proceedings are concerned with issues of fact or findings relating to the propriety of the actions of specific persons the House should be restrained in its references.¹¹⁴

In light of these authorities, it can be concluded that, despite some precedent to the contrary, as a general rule the *sub judice* convention does not apply to inquiries

112 *Erskine May*, 23rd edn, pp 436-438.

113 *Odgers*, 11th edn, p 203.

114 *House of Representatives Practice*, 5th edn, p 509.

by executive appointed bodies. However, as noted, in the House of Commons, the convention does apply to tribunals established under the *Tribunals of Inquiry (Evidence) Act 1921*,¹¹⁵ which are akin to royal commissions and other ad hoc and standing commissions of inquiry in Australia. On that basis it is reasonable to assume that the convention applies in those cases where the Parliament has established a royal commission or commission of inquiry, or where the Parliament has expressly referred a specific matter to an existing royal commission or standing commission of inquiry such as the Independent Commission Against Corruption (ICAC).

There has been one ruling in the Council dealing with the question of the application of the *sub judice* convention to the ICAC. This was a ruling of the Deputy President Sir Adrian Solomons on 28 March 1990, concerning debate on north coast land development at the time the ICAC was conducting an inquiry into the same subject matter. The Deputy President referred to the position in the House of Commons that:

The restriction on reference in debate also applies in the case of any judicial body to which the House has expressly referred a specific matter for decision and report, from the time when the resolution of the house is passed, but ceases to have effect as soon as the report is laid before the House.¹¹⁶

The Deputy President then applied this statement to the ICAC as, in his view, it was a 'judicial body' to which a specific reference had been made by the House. Accordingly, he ruled that discussion of the particular matters which were the subject of the inquiry being undertaken by the ICAC was out of order.¹¹⁷

Applying the House of Commons position, as applied by the Deputy President in March 1990, the key question is whether or not the matter being investigated by the ICAC has been referred to the ICAC by the Parliament under section 73 of the *Independent Commission Against Corruption Act 1988*. In the case of the north coast land development, the matter had not in fact been referred to the ICAC by the Parliament, and in this context the ruling of the Deputy President was contrary to practice.

In considering the application of the *sub judice* convention to the ICAC, regard should also be had to section 122 of the *Independent Commission Against Corruption Act 1988*, which provides that nothing in the Act is taken to affect the rights and privileges of Parliament in relation to freedom of speech, and debates and proceedings, in Parliament.

115 *Erskine May*, 23rd edn, p 438.

116 *LC Debates* (28/3/1990) 1126.

117 *Ibid.*

CONDUCT OF MEMBERS

As well as rules which must be observed by members when speaking, there are also established rules and practice relating to the conduct of members and decorum in the chamber. Some of these rules are contained in standing orders, while others rely on rulings of the President and the good sense and common courtesy of members.

Members must remove their head covering when entering or leaving the chamber or moving to any part of the chamber during debate. When entering or leaving the chamber members bow their head to the Chair as a gesture of respect to the Chair (SO 84(1)). Members are not permitted to pass between the Chair and a member who is speaking, or between the Chair and the Table of the House (SO 84(2)).

At the beginning of each sitting day, members stand when the Usher of the Black Rod announces the President, and remain standing until after the prayers have been read (SO 28).

It is discourteous for a member to leave the chamber immediately after finishing a speech. In the ‘cut and thrust’ of debate, it is usual for the next speaker to comment on the speech of the preceding member, and for that reason it is traditional for the member who has just spoken to remain in the chamber for a reasonable time.

When not speaking, members are required to sit quietly and listen to the debate. Members not addressing the House may not converse aloud or make any noise or disturbance during debate (SO 84(3)), although in practice quiet conversations are tolerated, provided they do not disturb the member speaking. While interjections are disorderly at all times, they are also tolerated provided they do not interfere with the flow of the debate.

The Chair has made a number of rulings regarding acceptable behaviour in the chamber. Betting between members has been ruled disorderly,¹¹⁸ while members have been called to order for conversing with people in the public gallery¹¹⁹ and for attempting to contribute to debate from the gallery areas of the chamber.¹²⁰ Members may not use mobile phones¹²¹ or chew gum,¹²² and the reading of newspapers and magazines in the chamber is deemed unacceptable and disorderly.¹²³

118 Rulings: Johnson, *LC Debates* (7/11/1979) 2605, 2620, (3/11/1982) 2125.

119 Rulings: Willis, *LC Debates* (12/9/1996) 4071, (20/5/1997) 8777; Gay (Deputy), *LC Debates* (18/5/1993) 2155, (21/10/1998) 8709.

120 Ruling: Gay (Acting), *LC Debates* (15/12/1995) 5078.

121 Rulings: Gay (Deputy), *LC Debates* (14/9/1994) 2912; Johnson (Deputy), *LC Debates* (12/12/1995) 4658; Sham-Ho (Deputy), *LC Debates* (27/6/1997) 11316; Willis, *LC Debates* (26/5/1998) 5089; Fazio (Deputy), *LC Debates* (1/7/2003) 2398, (24/2/2005) 14191.

122 Ruling: Evans (Deputy), *LC Debates* (11/5/1994) 2227.

123 Rulings: Willis, *LC Debates* (15/9/1994) 3014, (8/6/1995) 899; Kirkby (Deputy), *LC Debates* (22/11/1995) 3693; Sham-Ho (Deputy), *LC Debates* (17/6/1997) 10351; Gay (Deputy), *LC Debates* (19/6/1997) 10674, (17/6/1998) 5912; Goldsmith (Deputy), *LC Debates* (26/6/1997) 11197, (4/6/1998) 5737; Chadwick, *LC Debates* (21/5/1998) 4990; Fazio (Deputy), *LC Debates* (20/10/2004) 11650; Burgmann, *LC Debates* (7/6/2006) 683, (31/8/2006) 1221.

POINTS OF ORDER

Raising a point of order

Standing order 95 gives a member the right to interrupt debate and draw the attention of the Chair to what the member believes is a breach of order. The standing order states that a member may rise to speak on a matter of privilege suddenly arising, to the lack of a quorum or to a point of order. Points of order are used by members at any time during debate to call attention to departures from either the standing orders or other practices of the House.

The Chair may also intervene at any time when they consider that the speaker is in contravention of the rules and orders of the House.

The attention of the Chair must be directed to a breach of order the moment it occurs. When a question of order is raised the member speaking should immediately resume their seat. A member raising a point of order should state which standing order or practice has been breached. Any question then under consideration is suspended until the point of order is decided by the Chair. There is no limit on the number of members who may speak or how many times they may speak to a point of order.

The Chair may hear arguments on a point of order if they wish, and may decide on the question of order immediately or at a later time. The Chair can also intervene at any time during debate on a point of order to determine the matter.

The decision of the Chair can be appealed to the House under standing order 96, by a motion of dissent from the ruling.

A point of order cannot be raised when the President is addressing the House and hypothetical questions on procedure may not be addressed to the President. Further, members may not request the President to rule on constitutional questions or to decide on a question of law.¹²⁴

It has been the practice of the House that a second point of order cannot be raised while one is already before the House, although recently the Chair has allowed points of order to be taken on a member who is speaking to a point of order.¹²⁵ It is an abuse of the forms of the House to take a point of order to merely contradict a statement made in debate¹²⁶ or to make a personal explanation.¹²⁷

Rulings

It is the role of the President to maintain order in the House and similarly for the Chair of Committees to maintain order in committee of the whole House. When

124 Ruling: Steele (Deputy), *LC Debates* (4/12/1951) 4796.

125 Ruling: Burgmann, *LC Debates* (3/12/2003) 5659.

126 Ruling: Burgmann, *LC Debates* (2/3/2006) 20919.

127 Ruling: Burgmann, *LC Debates* (1/12/2005) 20420.

points of order are taken, the President is the sole arbiter, although any member is entitled to dissent from a ruling of the President. The President, Deputy President, Assistant President or Temporary Chair may give a ruling on any question of order, whether or not a point of order has been raised by a member, and may intervene at any time when, in their opinion, the member speaking is contravening the rules and orders of the House.

The President may hear argument on a point of order before making a ruling. However, there is no requirement to hear argument and it is at the Chair's discretion at what point to intervene and give a ruling, even if further members wish to speak to the point of order.

The President may determine a point of order immediately or, at their discretion, they may reserve their ruling until a later time.¹²⁸

When a member dissents from a ruling of the President, they must do so by motion moved immediately after the ruling 'That the House dissent from the ruling of the President'. The motion may be debated, and may be adjourned, without amendment, until a later hour of the sitting or to the next sitting day (SO 96(2)).

Although there have been motions of dissent moved against rulings by various Presidents, they are not common. The first motion of dissent was moved in 1858 by the Solicitor General, when the President ruled that the Solicitor General's statement regarding the propriety of judges holding seats in the Council was not in order. The motion was negated on division.¹²⁹

In general, dissent motions against rulings of the President have been negated on division. However, there have been some exceptions. In 1862, during debate on the Clergy Returns Transfer Bill, a money bill, the President upheld a point of order that the Council did not have power to amend money bills. However, the dissent motion 'That the House does not concur in the opinion given by the President touching the powers of the Legislative Council to amend money bills' was carried on division, 16 votes to three.¹³⁰

In 1865 during the second reading debate on the 'Session' Definition Bill a point of order arose as to whether it was in order to proceed with the bill before determining the question of a vacancy in the seat of three members which was currently before the House. The President ruled that it would be irregular to proceed with the bill at present inasmuch as if any judgement were given upon the bill, the question of vacancy, involving also the definition of the word 'session', which had already been part debated and ordered by the House for further consideration on a future day, would be anticipated and prejudiced. A motion of dissent was then moved against the President's ruling and the debate

128 Rulings: Burgmann, *LC Debates* (19/3/2002) 69; Johnson, *LC Debates* (10/5/1990) 146.

129 *LC Minutes* (5/10/1858) 83. In another early case, a motion to dissent from a ruling of the President was by leave withdrawn, *LC Minutes* (28/8/1889) 190.

130 *LC Minutes* (23/10/1862) 121, (28/10/1862) 125.

was adjourned.¹³¹ When debate on the dissent motion resumed, the Hon Sir William Manning moved an amendment to the effect that the Council reserved the consideration of the principle involved in the ruling of the President, to which the House agreed.¹³²

In 1960, the House received a message from the Governor convening a joint sitting under section 5B of the *Constitution Act 1902* to consider the Constitution Amendment (Legislative Council Abolition) Bill. A point of order was taken that section 5B prevented the House from considering the message, which the President upheld. The House subsequently dissented from the President's ruling, upholding the point of order and proceeding to debate the message.¹³³

The last time a ruling was overturned by a vote of the House was in 1991, when the acting Deputy President, the Hon Dr Marlene Goldsmith, upheld a point of order that it was irregular for a member to read lengthy excerpts from a court judgment which is a public document. In her ruling the acting Deputy President directed the member to come to the point and summarise the judgment rather than read extensively from a written public document. The dissent motion was carried 19 votes to 16 votes.¹³⁴

The fact that a particular ruling by the Chair is dissented from by the House has no material effect on the authority of the Chair. However, although dissent motions are usually decided along party lines, an increase in the number of motions carried could reflect a loss of confidence in the Chair and may result in the President's removal from office by a vote of the House.

MAINTAINING ORDER

Power of the Chair to enforce order

The President and the Chair of Committees are responsible for ensuring that business is conducted in an orderly fashion in accordance with the standing rules and orders and principles of parliamentary practice (SO 83). Questions of order may be raised by members as points of order. As already noted, under standing order 95, when a member takes a point of order the Chair interrupts proceedings to hear the argument and then rules on the point of order, immediately or at a later time, at their discretion. The Chair may also intervene on a question of order and rule on it without waiting for a point of order from a member (SO 95). The Chair exercises discretion in intervening in debate and will normally only intervene if a member's right to speak or be heard is being infringed, if a breach of order has been committed or if a point of order is taken.

131 *LC Minutes* (25/5/1865) 89.

132 *LC Minutes* (31/5/1865) 97.

133 *LC Minutes* (13/4/1960) 230-233, *LC Debates* (13/4/1960) 4005.

134 *LC Minutes* (2/5/1991) 186-188.

Whenever the President rises during a debate all members must resume their seats, including the member with the call, and the House must be silent while the President speaks.

In cases of serious disorder in the House or in committee of the whole House, the President may suspend the sitting of the House for a time to be stated or adjourn the House until the next sitting day without any motion (SO 193).¹³⁵

Naming and removal of a member by the Chair

Disorderly conduct by members is dealt with in different ways, depending on the severity of the offence. Under the standing orders, the President has the authority to deal with disorderly behaviour and to remove a member who continues to behave in a disorderly manner. However, for more serious offences it is up to the House to determine the sanctions.

A member who is called to order three times in any one sitting, or who conducts themselves in a grossly disorderly manner may, by order of the President, be removed from the chamber by the Usher of the Black Rod for a period of time as the President determines. In committee of the whole the Chair of Committees has the same authority to remove a member. The period of suspension imposed by order of the President or the Chair of Committees may be for the remainder of the debate then before the House or such other time as determined, but may not extend beyond the termination of the sitting (SO 192).

Although it is not uncommon for a number of members to be called to order for disorderly conduct once or twice during Question Time, only one member has been removed under standing order 192.¹³⁶

The predecessor to standing order 192 was standing order 261.¹³⁷ During the period 1916-1922, a member of the House, the Hon James Wilson, was removed from the chamber under the provisions of this former standing order on five occasions.¹³⁸ On the first occasion, after the member had been removed from the

135 On 2 May 1996, the Treasurer was adjudged guilty of contempt for his failure to comply with an order of the House and was suspended from the service of the House for the remainder of the sitting. Following the member's refusal to leave the chamber, the President left the Chair at 4.06 pm due to disorder arising from the member's actions. The House resumed at 4.40 pm. *LC Minutes* (2/5/1996) 118.

136 On 21 June 2007, the Treasurer, the Hon Michael Costa, was removed under the standing order until the end of Question Time, for gross disorder, *LC Minutes* (21/6/2007) 145.

137 Standing order 261 provided: 'A Member who shall so conduct himself as to make it necessary for the President or Chairman of Committees to call him to order three times in the course of any one sitting for any breach of the Rules or Orders may, by the order of the President or Chairman of Committees, be removed by the Usher of the Black Rod from the chamber until the termination of the sitting'.

138 *LC Minutes* (23/3/1916) 276, *LC Debates* (23/3/1916) 5674-5682, *LC Minutes* (21/9/1916) 113, *LC Debates* (21/9/1916) 1978-1979, *LC Minutes* (21/10/1920) 74, *LC Debates* (21/10/1920) 1751, *LC Minutes* (24/8/1922) 56, *LC Debates* (24/8/1922) 1300, *LC Minutes* (12/10/1922) 102, *LC Debates* (12/10/1922) 2507-2508.

chamber, and another member had intimated that Mr Wilson was desirous of apologising to the House for his conduct, the Deputy President informed the House that he had no desire, under the circumstances, to exclude Mr Wilson from the chamber. The Deputy President directed the Usher of the Black Rod to conduct Mr Wilson to his seat in the chamber, whereupon Mr Wilson apologised for his conduct.¹³⁹

Following the last occasion of Mr Wilson's removal from the chamber, the President reported the conduct of the member to the Acting Representative of the Government, with a view to having steps taken to protect the dignity of the chamber. The Acting Representative of the Government then activated the provisions of former standing order 260 (now standing order 191). Mr Wilson was adjudged guilty of contempt and was suspended from the service of the House for the remainder of the session, a total of 15 sitting days.¹⁴⁰

Naming and removal of a member by the House

A member who continues after warning to obstruct the business of the House or to abuse the rules of the House, or who refuses to comply with an order of the Chair, may be reported to the House by the President. Once reported, the member is given an opportunity to make an explanation or apology to the House and then, if required by the President, must withdraw from the chamber while the House considers the matter. If it is considered necessary, a motion may be moved without notice that the member be suspended from the House. The motion for suspension cannot be debated or amended. The term of suspension is determined by the House, and may be until the House terminates the suspension, until the submission of an apology by the offending member, or both of the above (SO 190 and 191).

If the offence is committed in committee of the whole House, the Chair suspends proceedings and reports the offence to the President.

The power to suspend or expel has been exercised infrequently. Other than the case of Mr Wilson in 1922 discussed above, members have been suspended under the predecessors to standing orders 190¹⁴¹ and 191¹⁴² on only two occasions, in

139 *LC Minutes* (23/3/1916) 276, *LC Debates* (23/3/1916) 5674-5682.

140 *LC Minutes* (12/10/1922) 102, *LC Debates* (12/10/1922) 2507-2508.

141 The predecessor to standing order 190, standing order 259, provided: 'A member named by the President or reported by the Chairman as having been named by him in Committee of the Whole House as guilty of a wilful or vexatious breach of any of the standing rules and orders, or as interrupting the orderly conduct of the business of the House, may be adjudged by the House on motion, without notice, guilty of contempt, no debate being allowed on such motion except an explanation by the member named'.

142 The predecessor to standing order 191, standing order 260, provided: 'A member adjudged by the House, for any of the causes hereinbefore mentioned, guilty of contempt, may be suspended from the service of the House for such time as the House shall by resolution declare'.

1989¹⁴³ and 1991.¹⁴⁴ In both instances, a point of order was raised that a member had used offensive words. The President upheld the point of order and called on the member who had used the words in question to withdraw the remarks. Having refused to comply with the President's order, the member was named by the President under standing order 259. The Leader of the Government then moved that, according to standing order 259, the member was guilty of contempt. The question was put and passed. The Leader of the Government then moved that the member be suspended from the service of the House, in one case for 24 hours, in the other for the remainder of the sitting.¹⁴⁵

In both instances, the member concerned was given an opportunity to reconsider their position so as to be able to obey the direction of the Chair and obviate the need for the member to be named.

Standing order 192 now allows the President, without any resolution of the House, to remove a member who conducts themselves in a gross disorderly manner.

There has been a small number of other instances of a member being suspended from the service of the House, not directly related to the enforcement of order in debate. In particular, the suspension of the Hon Michael Egan for his failure to table State papers is discussed in Chapter 3 (Privilege) and Chapter 17 (Documents).

The effect of suspension is discussed below.

Naming of members in committee of the whole House

With certain exceptions, the same rules as to the conduct of members and of debate, procedure and the general conduct of business are observed in committee as in the House. The Chair is vested with the same authority as the President for the preservation of order (SO 173(7)).

Disorder in committee, however, can only be censured by the House, on receiving a report. If any member offends in committee, the offending member may be named by the Chair, who suspends the proceedings of the committee and leaves the Chair to report to the President who resumes the Chair of the House (SO 175 and SO 190(2)).

In 1915 a member was named in committee and dealt with by the House in accordance with the procedures set out above. The member was both warned by

143 The Hon Marie Bignold, *LC Minutes* (18/10/1989) 976-978, *LC Debates* (18/10/1989) 11370-11374, 11379-11381.

144 The Hon Elisabeth Kirkby, *LC Minutes* (14/11/1991) 268-269, *LC Debates* (14/11/1991) 4572-4574.

145 In the 1989 case, the motion was moved 'pursuant to standing order 260', *LC Minutes* (18/10/1989) 977. In the 1991 case, the Leader of the Government indicated that the effect of the suspension would be for one minute as he was about to move the adjournment of the House, *LC Debates* (14/11/1991) 4574.

the Chair in Committee, and given an opportunity to make an explanation in the House, before being dealt with and suspended from the House.¹⁴⁶

Effect of suspension

A member suspended from the House is excluded from the chamber and galleries, and may not serve on or attend any proceedings of a committee during the period of suspension (SO 191). In addition, notices of motions and questions on notice are not accepted from the member during the period of suspension.

The effect of suspension differs slightly in other jurisdictions. In the House of Commons, suspension does not prevent a member attending or serving on a committee. No motion can be made that a suspended member be heard at the Bar of the House.¹⁴⁷

Similarly in the Senate, the suspension of a senator does not prevent the senator attending a meeting of a Senate committee, and does not affect any of the senator's other entitlements.¹⁴⁸

In the House of Representatives, a suspended member is excluded from the chamber, its galleries and the Main Committee room, and they may not participate in chamber-related activities. Thus, petitions, notices of motion and matters of public importance are not accepted from a member under suspension.¹⁴⁹

FIRST (MAIDEN) SPEECH

It has been the custom of the House to extend certain courtesies to new members making their first speech in the House. These courtesies include the practice of being heard in silence without interjection or interruption,¹⁵⁰ and a wider than usual latitude in debate. In addition it has been customary for the chamber to be well attended. The member's family and friends usually attend in the galleries.

The practice of hearing a member's inaugural speech in silence has a long history in Westminster Parliaments. However, the corollary to this practice is that a member should avoid making comments which are critical of or offensive to other members or which in some other way provoke criticism or points of order. When the first speech of a new member raises matters which provoke response, it is usually with great reluctance that a point of order is taken against them.¹⁵¹ Even

146 *LC Minutes* (15/12/1915) 226, *LC Debates* (15/12/1915) 4748-4750.

147 *Erskine May*, 23rd edn, p 455.

148 *Odgers*, 11th edn, p 213.

149 *House of Representatives Practice*, 5th edn, p 523.

150 Rulings: Johnson, *LC Debates* (23/11/1982) 2731; Gay (Deputy), *LC Debates* (25/10/1995) 2272; Burgmann, *LC Debates* (19/11/2001) 16801.

151 UK House of Commons, *Parliamentary Debates* (1987-1988), c 236. The Deputy Speaker (Mr Harold Walker) did not uphold the point of order and drew attention to the custom that members making their first speech in the House are usually heard without interruption.

interjecting in support of the remarks of a new member during their first speech has led to the Chair upholding the custom of hearing the speech without interruption.¹⁵²

As a member's speech is required to be relevant to the subject matter before the House (SO 92), members have often chosen to give their first speech during debate on the Address-in-Reply or the budget debate as these debates are typically wide-ranging and the issue of relevancy does not arise. However, where this is not practical, members have given their first speech during debate on other matters, most often during the second reading debate on government bills. In these cases, the Chair has allowed wide latitude of debate. In one case, a member even chose to give his first speech on the adjournment debate, where relevancy is of no consequence, but a five-minute time limit is applied.¹⁵³ More recently members have spoken at the end of the adjournment debate and the clock has been turned off so that they could continue speaking beyond the five-minute limit.¹⁵⁴

The practice has also developed since 1984 where the political colleagues of a new member move to the opposite side of the chamber to where they would normally sit, so that their new colleague is not only facing their political opponents for their first speech.¹⁵⁵ At the conclusion of the speech it is the practice for members from all parties to acknowledge the member by calling out 'hear, hear', while speakers who follow congratulate the new member on their speech.

The President has ruled that the asking of questions and making of a personal explanation does not preclude a new member from making a first speech at some later time, while members who re-enter the Council and have during their previous service made a first speech, are not accorded the courtesies of an inaugural speech a second time.¹⁵⁶

Most members make their first speech within a few weeks of becoming a member, although it can sometimes be longer when a significant number of new members are elected at the same time. In one instance a member made their first speech in the House some 15 years after being elected. The occasion was notable because the member, in her state of anticipation, rose to address the House on the wrong bill. However, in keeping with tradition, no point of order or interjection was made, and the speech was heard in silence. Consequently, the member's speech on amendments to the *Public Hospitals Act* is recorded for posterity in the debate on the Health Commission Bill.¹⁵⁷

152 Ruling: McKay (Deputy): *LC Debates* (17/10/1973) 2136.

153 *LC Debates* (31/5/1995) 443 per the Hon Alan Corbett.

154 See, for example, *LC Minutes* (5/6/2007) 104.

155 This practice was instituted at the suggestion of President Johnson, *LC Debates* (23/5/1984) 1404.

156 Ruling: Johnson, *LC Debates* (27/2/1986) 521, *LC Minutes* (27/2/1986) 52.

157 The member was the Hon Amelia Rygate. The bill to which her speech referred was still before the Assembly, although the bill to which she actually spoke was on a related topic, *LC Debates* (17/11/1976) 3038.

A member makes a first speech to the Council even if they have previously served as a member of the Assembly.¹⁵⁸

INCORPORATION OF MATERIAL IN HANSARD

The incorporation of material in Hansard has occurred for many years, although it is not provided for in the standing orders. Material can only be incorporated by leave, and one objection is sufficient to prevent the incorporation.

The principal reason for incorporating items is to save time. For example, leave is often granted for incorporation of ministers' second reading speeches on bills forwarded for concurrence from the Assembly since members have already had time to peruse the contents of the speech when the bill was introduced into the Assembly. Other types of material that have been incorporated include graphs, maps, tables, newspaper extracts, extracts from reports, letters, diagrams, schedules, answers to some questions without notice and on one occasion a photograph.

Another reason for incorporating items is that material such as columns of figures, graphs and charts are more easily comprehended visually rather than orally.

However, the notion of saving time must also be balanced against the underlying principle that the Hansard record is a true record of what was said in the House. The inclusion of unread matter in Hansard is a distinct departure from this principle. Objections to the practice are based on a number of grounds, including that:

- a speech may be lengthened beyond the member's entitlement under the standing orders, such as on the adjournment debate;
- incorporated material may contain irrelevant or defamatory matter, or unparliamentary language;
- other members will not be aware of the contents of the material until production of the daily Hansard next morning and therefore not have an opportunity to rebut or answer claims made;
- following speakers may appear to be less relevant and informed than if they had been aware of the unspoken material before speaking.¹⁵⁹

Objection to the incorporation of material has been taken in the Council on the grounds that material should be read or spoken in the House, thus enabling members to debate the matters fully;¹⁶⁰ the material was not voluminous and could easily be read to the House;¹⁶¹ and that leave should only be granted on the basis that the material is lengthy and technical in nature.¹⁶²

158 See, for example, the first speeches of the Hon Michael Egan at *LC Debates* (30/9/1986) 4110-4114 and the Hon Marie Ficarra at *LC Debates* (5/6/2007) 723-727, both of whom were previously members of the Assembly.

159 *House of Representatives Practice*, 5th edn, p 491.

160 *LC Debates* (5/11/1975) 2273-2274.

161 *LC Debates* (24/3/1977) 5643.

162 *Ibid.*

Various rulings of the President have determined the parameters within which material can be incorporated. While any member may seek leave to incorporate material, the House is the final arbiter of what will be incorporated, subject to the technical capacity of Hansard to reproduce the material. In objecting to incorporation, a member may not give reasons for the objection,¹⁶³ and where leave has been denied it is within the prerogative of the member, subject to the standing orders, to read an entire document onto the record.¹⁶⁴

As the practice of incorporating material in Hansard has increased, rulings of the Chair have also focused on the impact which incorporation of material has on the flow and quality of debate in the chamber, and have urged members to ensure that the courtesy extended to members in this regard is not abused.¹⁶⁵ In particular the Chair has cautioned against seeking to incorporate material which is readily available elsewhere.¹⁶⁶

In 1984 the Senate's Standing Orders Committee investigated the issue of incorporation of material in Hansard. In its report the Committee recommended that the Senate deal more circumspectly with requests for the incorporation of material, and suggested the Senate adopt and adhere to guidelines to govern the practice.¹⁶⁷

Displays, exhibits and props

There have been instances in the Council where members have brought articles into the chamber to emphasise a point during debate. Members have displayed a bottle of discoloured water, pornographic publications, a set of dentures, maps and charts, and a lady's scarf.

The degree to which aids and devices may be used in debate rests with the common sense and will of the House.

DRESS

The Council has not laid down rules concerning members' dress. Rather, dress is left to the good sense and judgment of members, subject to any rulings by the President.

Standards of dress in the chamber arose in 2001, when acting Deputy President Nile upheld a point of order that not wearing a jacket was against the standing orders, and refused to let a member, Mr Ian Cohen, continue his speech. Mr Cohen

163 Ruling: Johnson, *LC Debates* (27/11/1979) 3869.

164 Ruling: Johnson, *LC Debates* (25/11/1980) 3368.

165 Rulings: Johnson, *LC Debates* (15/8/1979) 150-151; Healy (Deputy), *LC Debates* (24/8/1983) 403.

166 Rulings: Johnson, *LC Debates* (18/2/1982) 2157, (7/4/1982) 3581, (5/3/1984) 4087, (15/6/1988) 2003-2004; Healey (Deputy), *LC Debates* (24/8/1982) 342; Solomons (Deputy), *LC Debates* (14/4/1989) 6374; Gay (Deputy), *LC Debates* (17/11/1983) 5572.

167 Senate Standing Orders Committee, Third Report for the Sixty-first Session, June 1984.

defended himself on the grounds that women members did not have to wear a jacket and tie, and protested that he was unable to get his jacket as it was in his office. Although a female member removed her jacket and offered it to him so that he might continue his speech, he declined.¹⁶⁸

The following week Mr Cohen came into the chamber wearing a deep purple long-sleeved shirt and jeans. Again a point of order was taken, on the basis that he was not upholding the standards of proper dress and conduct in the chamber. The President did not uphold the point of order and, in ruling that members should use their own discretion as to the way they dress, commented that it was clear that Presiding Officers had moved with the times.¹⁶⁹

Following these incidents, the President made the following statement to the House, establishing the current practice regarding members' dress in the chamber:

The standing orders of the Legislative Council do not refer to members' dress, and the House has not laid down any rules on this issue.

In both the Australian Senate and the House of Representatives, the standard of dress is left to the individual judgment of members. No rules have been set down by either House and in 1971 the Senate's House Committee reported that rules for dress should not be necessary. I quote, 'The Committee believes that rules relating to dress in the Chamber should not be necessary and that the choice of appropriate clothing should be left to the Senators' discretion'.

I expect the attire of members in the Chamber to conform to the standards of neatness, cleanliness and decency required by Speaker Jenkins (House of Representatives) in 1983 and that members will respect the dignity of the House and the institution of Parliament. While these standards are observed I feel I cannot deny the call to a member merely because he or she is dressed in a manner that departs from tradition in some way. To prevent a member from speaking or voting would be to interfere unnecessarily with the right of a member to represent his or her constituents.¹⁷⁰

Another issue which has caused some concern in the chamber is the wearing of badges. In 1996, a point of order was taken concerning the wearing by members in the House of badges displaying political slogans. In ruling on the issue, the Chair of Committees referred to practice in the House of Commons, where members are not permitted to wear decorations in the House, and the wearing of military insignia is against established custom. He also referred to a ruling by President Johnson in the Council in 1980 that political slogans should not be posted in the parliamentary precincts.¹⁷¹ In light of those precedents, the Chair ruled that it is inappropriate for members to attend the chamber wearing articles of clothing or items of decoration which reflect political views, commercial interests or similar

168 Ruling: Nile (Deputy), *LC Debates* (27/3/2001) 12569-12570.

169 Ruling: Burgmann, *LC Debates* (5/4/2001) 13299.

170 *LC Debates* (10/4/2001) 13377.

171 *LC Debates* (3/12/1996) 6865.

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things, and that only lapel badges the size of, or smaller than, the members' badges may be worn in the chamber.¹⁷²

This issue was revisited in 2006 when a point of order was taken concerning a member, about to table a report, wearing a Tee-shirt displaying a political slogan. The President upheld the earlier 1996 ruling that badges, signs or displays worn by members must not be larger than their Council badges. Although there was no authority, the member was requested to leave the chamber until she could comply with the ruling. The member returned later in the sitting and tabled the report.¹⁷³

In the past, Presidents of the Council wore a traditional formal dress, including wig and gown, when presiding in the House. In recent years, some Presidents have chosen not to wear traditional formal dress, although it is possible a future President may revive the practice. The Clerks at the Table also formerly wore traditional dress but since 1998 have worn standard business attire.

¹⁷² *LC Debates* (3/12/1996) 6873.

¹⁷³ *LC Debates* (6/4/2006) 22193.