NEW SOUTH WALES LEGISLATIVE COUNCIL PRACTICE

Second Edition

THE FEDERATION PRESS

New South Wales
Legislative Council Practice

New South Wales
Legislative Council Practice

SECOND EDITION

First edition, 2008

Lynn Lovelock

John Evans

Second edition, 2021

Stephen Frappell

David Blunt

(editors)

THE FEDERATION PRESS

2021

Published in Sydney by

The Federation Press
PO Box 6178, Alexandria, NSW, 2015.
8 Birmingham Street, Alexandria, NSW, 2015.
Ph (02) 9552 2200. Fax (02) 9552 1681.
Email: info@federationpress.com.au
Website: http://www.federationpress.com.au

First edition 2008
Second edition 2021

National Library of Australia Cataloguing in Publication Data

A catalogue record for this
book is available from the
National Library of Australia

ISBN 978 1 76002 237 2 (hbk)
ISBN 978 1 76002 309 6 (ePDF)

Printed by OPUS Group in Australia.

PREFACE

The publication of the first edition of *New South Wales Legislative Council Practice* by **Lynn Lovelock** and **John Evans** in 2008 was a watershed moment in the history of the Legislative Council, bringing together for the first time an authoritative account of the practices and procedures of the oldest legislative body in Australia.

The first edition detailed the history of the Legislative Council as an often contested institution, from its colonial origins, through three significant reconstitutions and multiple failed abolition attempts. It described a parliamentary chamber that had evolved into a strong and effective 'House of Review', and outlined all of the practices and procedures developed over 184 years to enable it to assert its powers and to scrutinise the executive government.

The 10 years following publication of the first edition from 2008 to 2018 witnessed some of the most rapid evolution of the Council's role in its long history. That decade saw:

- resistance by the Legislative Council to an attempt to close down an important committee inquiry by means of prorogation of the Parliament;
- the introduction of time limited speeches in debate on government legislation;
- resolution of what had been a long-standing dispute with the executive government concerning statutory secrecy provisions and parliamentary privilege, followed by other breakthroughs in recognition of the powers of Legislative Council committees;
- the establishment of new committees to enhance scrutiny of legislation and the executive government; and
- assertion by the Legislative Council of its power to require the production of some categories of documents regarded by the executive government as 'cabinet information'.

Then, following the March 2019 periodic Council election, the non-Government majority in the Legislative Council moved, and the House agreed almost without demur, the adoption of 20 new sessional orders. The more notable of these new procedures:

- reinvigorated private members' business with up to 20 items now disposed of each Wednesday;
- introduced new rules for Questions and Answers incorporating some of the best procedural practices from across Australian and New Zealand parliaments;

- extended the annual budget estimates inquiry from seven hearing days to 29 hearing days per year; and
- put an end to all-night sittings through the introduction of a midnight 'hard adjournment.'

All of these developments are detailed in this second edition.

The text of this edition inherits and builds upon the scholarship of the first edition published by Lynn and John in 2008. That work captured the procedural research of many decades, including notably the *Consolidated Indexes to the Journals of the Legislative Council*, initiated by Major-General John Rowlestone Stevenson, Clerk of the Legislative Council and Clerk of the Parliaments from 1954 to 1971, and completed by Mr Leslie Jeckeln, Clerk from 1977 to 1989.

This second edition also makes extensive reference to the *Annotated Standing Orders of the New South Wales Legislative Council*, published in 2018 by Susan Want, Jenelle Moore and myself. This hugely significant work set a benchmark for forensic examination of the standing orders of the House and brought to light a vast array of fascinating procedural precedents.

Whilst standing on the shoulders of past scholarship, inevitably the bringing of this edition to publication has required concerted and concentrated research over many years. I wish in particular to pay tribute to the work of my co-editor, **Stephen Frappell**, currently the Clerk Assistant – Committees and prior to 2018 the Clerk Assistant – Procedure in the Legislative Council. Stephen has worked on this volume since the publication of the first edition in 2008. In 2018, he took time out from his usual role to work on major revisions to the text in relation to various topics such as parliamentary privilege in New South Wales, the powers of the Legislative Council in relation to money bills, the legislative process and relations between the Legislative Council and the Legislative Assembly. Stephen's almost limitless enthusiasm, capacity for hard grinding work and thoughtful scholarship were a significant contribution to the publication of the first edition – they have been absolutely essential to the publication of this second edition.

Whilst this edition is primarily the work of Stephen, thanks are due also to a number of other contributors. **Gareth Griffith**, formerly the Senior Research Officer in the New South Wales Parliamentary Library, brought together much of the material on parliamentary privilege published in the first edition. His work continues to echo loudly throughout the discussion of parliamentary privilege in this edition. **Velia Mignacca** made a significant contribution to large sections of the first edition and has again contributed extensively to this second edition, in particular in relation to the operations of the Privileges Committee and members' conduct. Other staff and former staff of the Council also deserve particular acknowledgement and thanks including **Annie Watts**, **John Young**, **Susan Want**, **Jenelle Moore**, **Merrin Thompson, Beverly Duffy, Sarah Dunn, Teresa McMichael** and **Rebecca Main**. Ultimately, however, it is impossible to acknowledge individually all the officers and former officers of the Council who have contributed to this volume, and I apologise if I have omitted to mention you by name. I trust you will, however, take pride in being able to see your handiwork in the text and footnotes.

I also acknowledge the assistance of **Trisha Valliappan** and **Susan Engel** from Federation Press in the editing, typesetting and publication of this second edition. I doubt any work this size is ever produced without editorial difficulties, but Trisha and Susan have worked constructively throughout to see this edition to publication. Thank you Trisha and Susan.

Finally, particular mention must be made of two people who have played invaluable roles in this project but who were both too humble to be listed as editors. The Deputy Clerk, **Steven Reynolds**, played an integral role in coordinating comments on the edited text from officers of the Department of the Legislative Council and in offering his own detailed observations and insights on key sections of the text. Without his co-ordinating role it is doubtful the publication of this second edition would have become a reality. Last but by no means least particular thanks are due to **Les Jeckeln**, the former Clerk from 1977 to 1989. Les has reviewed, proofread and edited every chapter of this Book. Whilst long retired, Les maintains both an extraordinary attention to detail and an encyclopaedic memory of the practices of the House. The chapters of this book have benefited hugely from his detailed scrutiny and review. Whilst his name does not appear as an editor, we are delighted to have been able to include a photograph of Les on the dust jacket from a particularly momentous day in the history of the Legislative Council in 1969 when Les was Usher of the Black Rod. Thank you Steven and Les.

Whilst acknowledging the contribution of so many to this edition, responsibility for any errors in the text rests entirely with the editors.

Work on this edition has continued throughout the Presidency of four Presidents of the Legislative Council: the Hon **Peter Primrose**, the Hon **Amanda Fazio**, the Hon **Don Harwin** and the Hon **John Ajaka**, who remains in office at the time of publication. They have always been particularly supportive of this project for which I am very grateful.

I hope that this second edition of *New South Wales Legislative Council Practice* brings for members, parliamentary practitioners and all interested observers of parliamentary democracy in New South Wales new insights into, and understanding of, the contemporary practices and procedures of the New South Wales Legislative Council.

David Blunt
Clerk of the Parliaments and
Clerk of the Legislative Council
November 2020

List of Chapters

CONTENTS

APPENDICES:

CHAPTER 1

THE NEW SOUTH WALES SYSTEM OF GOVERNMENT

This chapter provides a summary of the New South Wales system of government which incorporates a number of key principles and elements: the rule of law; a federal system; a written and unwritten constitution; a bicameral Parliament; a representative system of government through the ballot box; a separation of powers with the relationship between the Legislature and the executive defined according to the Westminster system; and a government responsible to the people through the Parliament. The chapter concludes with a discussion of the rationale of bicameralism and the contemporary role of the Legislative Council.

THE RULE OF LAW

The New South Wales system of government is founded on the rule of law. The rule of law is the principle that a legal-political regime for the governance of a society should operate in accordance with written, publicly disclosed, clear and consistent laws which are enforced in a constant and predictable manner and which apply to all citizens, including officials of government.

The rule of law protects the rights of citizens from arbitrary and abusive use of government power by ensuring that all persons – regardless of their rank, status or office – are subject to the same law and the same legal and judicial processes. Neither the sovereign, the sovereign's representatives, nor government officials are above the law, and they cannot rule or act with arbitrary power.

Although the principle of the rule of law is not written into the New South Wales Constitution or the Commonwealth Constitution, it is a fundamental tenet of the New South Wales and Australian system of government.

NEW SOUTH WALES IN A FEDERAL SYSTEM

Australia is a Federation. The Commonwealth of Australia was formed when six British colonies – New South Wales, Victoria, Queensland, South Australia, Western Australia and Tasmania – joined in a federation in 1901 under the Commonwealth Constitution.[1]

The Commonwealth Constitution sets out the distribution of legislative power between the Commonwealth and the States. Broadly speaking, it confers express legislative power on the Commonwealth Parliament, with residual power belonging to the States.

Below the level of the Federal and State Governments, there are more than 500 local government areas across Australia, including approximately 130 in New South Wales. Local government in New South Wales is the responsibility of the State under part 8 of the *Constitution Act 1902*.

THE NEW SOUTH WALES CONSTITUTION

The New South Wales Constitution may be narrowly defined as the *Constitution Act 1902*. This act establishes many of the institutions of government in New South Wales, confers powers upon them, and imposes limits upon those powers. The *Constitution Act 1902* superseded the *Constitution Act 1855*, which was the first real 'constitution' of New South Wales. However, many of the institutions of government in New South Wales were originally established by earlier acts of the Imperial Parliament[2] and Letters Patent.

Whilst the Constitution of New South Wales may be narrowly defined as the *Constitution Act 1902*, on a broader reading the New South Wales Constitution includes a number of other acts, notably the *Australia Acts* of 1986, together with relevant aspects of the common law and a range of Westminster-derived constitutional conventions which must be read into the operation of and interaction between the institutions of state.[3] As discussed further later in this chapter, some of these constitutional conventions are as important as the words of the *Constitution Act 1902* that they support.

Early acts of the Imperial Parliament and Letters Patent

The first institutions of government in New South Wales were established by acts of the Imperial Parliament and Letters Patent:[4]

---

1 The Constitution of the Commonwealth of Australia was enacted by the *Commonwealth of Australia Constitution Act 1900*, an act of the United Kingdom Parliament. The Constitution came into force on 1 January 1901.

2 The English Parliament became the Parliament of Great Britain following the Union with Scotland in 1707, and the Parliament of the United Kingdom following the Union with Ireland in 1801.

3 *Commonwealth v Limerick Steamship Co Ltd* (1924) 35 CLR 69 at 102; *Egan v Willis* (1998) 195 CLR 424 at 450. See also A Twomey, *The Constitution of New South Wales*, (Federation Press, 2004), pp 25-26.

4 Letters Patent are a type of legal instrument in the form of an open letter issued by the monarch granting an office, a right or status to someone or to some entity. In the United Kingdom, Letters

- The office of Governor was established by Letters Patent on 12 October 1786.[5]
- The first legislative body, an advisory Legislative Council, was established by an Imperial statute of 1823, known as the *New South Wales Act 1823* (Imp).[6]
- The Supreme Court was established by Letters Patent, pursuant to the *New South Wales Act 1823* (Imp), on 13 October 1823.[7]
- The Executive Council was established by Letters Patent in 1825.[8]

The *Constitution Act 1855*

In 1855, the colony of New South Wales was granted self-governance under the *Constitution Act 1855*.[9] At the time of its enactment, the *Constitution Act 1855* entailed an acceptance that the British-appointed Governors and the Colonial Office in London would cede political power and responsibility for the day-to-day administration of the colony to the newly established Parliament. Henceforth, responsibility for administration of the colony of New South Wales would rest with ministers who enjoyed the support of the majority in the Legislative Assembly.

The *Constitution Act 1855* established many of the remaining constitutional arrangements in place today, including a bicameral or two-house Parliament, comprising the Legislative Council and the Legislative Assembly.[10] It also provided for the appointment of public officers by the Governor on the advice of the Executive Council, except for those officers 'liable to retire from office on political grounds'.[11] These officers were the Colonial Secretary, Colonial Treasurer, Auditor-General, Attorney General and Solicitor General.[12]

Patent are issued under the Royal Prerogative and constituted a rare, if significant, form of legislation without the consent of Parliament.

5 Letters Patent, 12 October 1786. See *Historical Records of New South Wales*, vol 1, pt 2 (Government Printer, 1893), p 24.

6 4 Geo IV, c 96. For further information, see the discussion in Chapter 2 (The History of the Legislative Council) under the heading 'Phase one (1823–1855): The Early Colonial Council'.

7 Twomey, (n 3), p 2.

8 Letters Patent, 16 July 1825. See *Historical Records of Australia*, Series I, vol 12 (Australian Government Publishing Service, 1919), pp 101-102.

9 18 & 19 Vic, c 54, sch 1. The *Constitution Act 1855* has a particular status. The Constitution Bill was introduced into the Legislative Council on 9 August 1853, reserved by the Governor on 22 December 1853 and sent to the United Kingdom for the signification of Her Majesty's pleasure. However, upon its receipt, the bill, as passed by the Council and reserved by the Governor, was amended by the Westminster Parliament to remove certain provisions, before it was recorded as a schedule to an Imperial act now known as the *Constitution Statute 1855*. It is thus somewhat doubtful whether the *Constitution Act 1855*, as thus produced, was in strict legal order. For a discussion of its citation, see Twomey, (n 3), p 20.

10 *Constitution Act 1855*, s 1.

11 Ibid, s 37. See also s 51 and sch B.

12 Ibid, ss 18 and 51.

The *Constitution Act 1902*

Following federation in 1901, the *Constitution Act 1855* was repealed and replaced by the *Constitution Act 1902.* The new *Constitution Act* 'did not establish a comprehensive constitutional scheme, or create new offices or institutions'.[13] It merely consolidated existing statutes relating to the Constitution of New South Wales which were brought into being before federation. In addition, the legislative power conferred on the Parliament of New South Wales by section 5 of the *Constitution Act 1902* was made expressly 'subject to the provisions of the Commonwealth of Australia Constitution Act'.[14] As indicated, the *Constitution Act 1902* remains in force today, although it has been subject to numerous amendments since it was enacted.

Significantly, however, the *Constitution Act 1902*, as with its forerunner, the *Constitution Act 1855*, was drafted in the light of British constitutional experience. The British Constitution is unwritten, in the sense that it essentially comprises a collection of statutes, practices and understandings. It is not surprising, therefore, that the text of the *Constitution Act 1902*, at best, captures only part of the system according to which the State of New South Wales is governed. Like many, if not all, Westminster-derived constitutions, it omits many of the fundamental elements of the system of government in New South Wales. In particular, as is discussed later in this chapter,[15] the *Constitution Act 1902* makes few if any references to the institutions of the executive government, such as Cabinet or the Premier, and the expression of the relationship between the Parliament and the executive government is muted and oblique.

The *Australia Acts* of 1986

In 1986, the Commonwealth Parliament and the Parliament of the United Kingdom passed the *Australia Acts*,[16] eliminating the remaining ties between the legislatures and judiciaries of Australia and their counterparts in the United Kingdom. The *Australia Acts* constitute an important part of the broader Constitution of New South Wales.

By way of background, in 1828, the Imperial Parliament legislated to make it clear that all British laws and statutes in force at that time should be applied in the administration of justice by the courts in New South Wales.[17] However, this raised the issue of whether the New South Wales Legislature had the power to pass laws that were inconsistent with or 'repugnant to' Imperial law.

---

13 *Egan v Willis and Cahill* (1996) 40 NSWLR 650 at 658 per Gleeson CJ.

14 Twomey, (n 3), pp 23-24.

15 See the discussion under the heading 'A Westminster system'.

16 The *Australia Acts* of 1986 were a pair of separate but related pieces of legislation: one an act of the Commonwealth Parliament of Australia – the *Australia Act 1986* (Cth) – and the other an act of the Parliament of the United Kingdom – the *Australia Act 1986* (UK). Prior to the enactment of the *Australia Acts*, all the Australian States enacted legislation requesting and consenting to the passage of the acts. In New South Wales, the relevant act was the *Australia Acts (Request) Act 1985*. For further information, see Twomey, (n 3), pp 92-94.

17 *Australian Courts Act 1828*, 9 Geo IV, c 83 (Imp).

The issue remained unresolved until the passage of the *Colonial Laws Validity Act 1867* (Imp), which made it clear that no colonial law was to be deemed invalid unless it was repugnant to an Imperial act which specifically extended, either by express enactment or by necessary intendment, to the colony. This arrangement did not change at federation in 1901.[18]

In 1931, the Commonwealth Parliament was released from imperial constraints on its legislative power by the *Statute of Westminster 1931* (UK).

However, it was only in 1986 that the States, including New South Wales, were released from imperial constraints on their legislative power with the enactment of the *Australia Acts*. Under section 1 of the *Australia Acts*, the UK Parliament abdicated any legislative power over the States and Territories. Section 2 provides:

> It is hereby declared and enacted that the legislative powers of the Parliament of each State include full power to make laws for the peace, order and good government of that State …

In 1987, following the passage of the *Australia Acts*, the *Constitution Act 1902* was amended by the *Constitution (Amendment) Act 1987* to provide that the Governor summons Parliament and gives royal assent in his or her name, with no provision for reservation to, or disallowance by, the Queen, unless she is present in the State.

INSTITUTIONS OF THE NEW SOUTH WALES SYSTEM OF GOVERNMENT

The Sovereign

The *Constitution Act 1902*, which as noted has been amended on numerous occasions since it was first enacted, refers variously to the King, 'His Majesty', Her Majesty Queen Elizabeth II and 'Her Majesty' throughout, depending on when the relevant provision was enacted.[19] The Sovereign is now primarily confined to the role of formally appointing and removing the Governor, on the advice of the Premier, although she may exercise some executive powers whilst present in the State.

The Governor

As noted above, the Office of the Governor was established by Letters Patent on 12 October 1786. Today, the office is continued by section 9A of the *Constitution Act 1902*, which provides that the Governor holds office during the pleasure of the Sovereign,

18 Today, the *Imperial Acts Application Act 1969* continues the application in New South Wales of many imperial laws, notably in the context of this book, the *Bill of Rights 1689*.

19 Section 13 of the *Interpretation Act 1987* provides that 'a reference to the Sovereign (whether the words "Her Majesty" or "His Majesty" or any other words are used) is a reference to the Sovereign for the time being'.

having been appointed on the advice of the Premier.[20] By section 7 of the *Australia Act 1986* (Cth), the Governor is the representative of the Queen in New South Wales.

The *Constitution Act 1902* confers certain powers on the Governor with respect to the Parliament, the executive government and the judiciary. These include the power to:

- prorogue the Legislative Council and the Legislative Assembly and fix the time and place for holding a session of Parliament (s 10), dissolve the Legislative Assembly (s 24B), issue writs for elections (s 11A), summon the Legislative Assembly (s 23), administer the pledge of loyalty to members and authorise commissioners to administer the pledge of loyalty (s 12);
- appoint members of the Executive Council (s 35C), preside at meetings of the Executive Council (s 35D), appoint the Premier and other ministers (s 35E), and use the Public Seal of the State (s 9H);
- receive the resignation of members of the Council (s 22J) and the resignation of the President (s 22G(3)(c));
- convene a joint sitting of the Council and the Assembly for the purpose of filling a casual vacancy in the Council (s 22D);
- convene a joint sitting of the Council and the Assembly for the purpose of seeking agreement over the provisions of an Assembly bill (s 5B);
- appoint the date for a referendum on bills and assent to bills approved at a referendum (ss 7A and 7B);
- make regulations with respect to the interests of members (s 14A);
- approve standing orders of the Houses of the Parliament (s 15);
- appoint certain officers of the Parliament (s 47); and
- remove a judge from office on an address from both Houses of the Parliament (s 53).

Other powers exercised by the Governor under the *Constitution Act 1902* are implied. For example, the power to assent to bills is implied from reference to the Governor giving assent to every bill in section 8A and from the role of the Sovereign as part of the Legislature under section 3.[21]

Certain other powers are conferred on the Governor by statute. Common statutory powers of the Governor include the power to make regulations, proclaim the commencement of acts and make appointments to public authorities.

The Commonwealth Constitution also empowers the Governor to issue writs for elections for senators for the State (s 12) and in certain circumstances to fill casual vacancies in the

20 *Australia Act 1986* (Cth), s 7(5).
21 Twomey, (n 3), p 625.

representation of New South Wales in the Australian Senate on a temporary basis when the Parliament of New South Wales is not in session (s 15).

When exercising his or her powers, the Governor is generally required to act on the advice of responsible ministers, either through the Executive Council or through direct advice from the relevant minister.[22] The obligation to act on advice is a convention deriving from the system of responsible government, which requires that ministers take responsibility for the executive acts of the Governor.[23] It is expressly recognised by section 14 of the *Interpretation Act 1987* in relation to the exercise of statutory powers.[24]

However, in certain circumstances the Governor may exercise reserve powers without the advice of ministers or the Executive Council or indeed contrary to their advice.[25] The reserve powers were originally prerogative or common law powers of the Crown, but today have their source in the *Constitution Act 1902* or have been modified by that act.[26] For example, the power to appoint the Premier, which is not exercised on the advice of the Executive Council,[27] is conferred by section 35E(1) of the *Constitution Act 1902*.

The reserve powers mainly concern the appointment of the Premier, the dismissal of the Premier and the dissolution of Parliament.[28] The conventions which apply in relation to the exercise of these powers are discussed in detail in other texts.[29]

The Lieutenant-Governor and the Administrator

Section 9B of the *Constitution Act 1902* provides for the appointment of a Lieutenant-Governor of the State and an Administrator of the State. Under section 9C, the Lieutenant-Governor or Administrator assumes the administration of the government of the State if there is a vacancy in the office of Governor or the Governor is unavailable.[30] One such circumstance occurs when the Governor has assumed the administration of the government of the Commonwealth.[31]

The Lieutenant-Governor is appointed by the Queen with the advice of the Premier and holds office during Her Majesty's pleasure.[32] The office has previously been held by the

22 Ibid, p 628.
23 Ibid, pp 630-631.
24 Section 14 of the *Interpretation Act 1987* provides that 'In any Act or instrument, a reference to the Governor is a reference to the Governor with the advice of the Executive Council, and includes a reference to any person for the time being lawfully administering the Government'.
25 Twomey, (n 3), p 636.
26 Ibid.
27 *Constitution Act 1902*, s 47; Twomey, (n 3), p 636. The Governor may act on the advice of the outgoing Premier.
28 Twomey, (n 3), p 636.
29 See Twomey, (n 3), pp 636-659 and authorities cited.
30 See the definition of 'unavailable' in section 9 of the *Constitution Act 1902*.
31 By convention, the longest serving State Governor is appointed as Administrator of the Commonwealth in the absence of the Governor-General.
32 *Constitution Act 1902*, s 9B(2); Twomey, (n 3), p 672.

Chief Justice of the Supreme Court or a former Chief Justice, but there is no requirement that this be the case.[33]

The Queen may also appoint a person as the Administrator of the State, and a person so appointed holds office during Her Majesty's pleasure.[34] However, in the absence of any such appointment, the Administrator is the Chief Justice of the Supreme Court or, if that person is the Lieutenant-Governor, or if there is a vacancy in the office of Chief Justice or the Chief Justice is unavailable, the next most senior judge of the Supreme Court who is available.[35]

Under section 9D of the *Constitution Act 1902*, the Governor may appoint the Lieutenant-Governor or the Administrator as his or her deputy during short periods of absence from the State or Sydney or short periods of illness not exceeding four weeks. Such appointment requires the concurrence of the Premier or the next most senior minister. The deputy exercises and performs such of the Governor's powers and functions as are specified in the instrument of appointment for the period specified in that instrument.[36]

The Legislature (Parliament)[37]

The Parliament of New South Wales comprises two Houses: the Legislative Council and the Legislative Assembly.[38] However, section 3 of the *Constitution Act 1902* provides for a third element of the Legislature: the Sovereign. Section 3 provides:

> The Legislature means His Majesty the King[39] with the advice and consent of the Legislative Council and Legislative Assembly.

33 Twomey, (n 3), p 673.

34 *Constitution Act 1902*, s 9B(4); Twomey, (n 3), p 673.

35 *Constitution Act 1902*, s 9B(3).

36 Ibid, s 9D(1).

37 The use of the term 'The Legislature' rather than 'The Parliament' in the *Constitution Act 1902* is a hold-over from the use of that term at the establishment of the first legislative body in New South Wales in 1823 under the *New South Wales Act 1823* (Imp). In Victoria, reference to 'The Legislature' was changed to 'Parliament' with the enactment of the *Constitution Act 1855* (Vic). In New South Wales, the term 'The Legislature' was retained. Whilst a distinction is sometimes drawn between 'a legislature' having only a legislative function, and 'a parliament' having both a legislative and scrutiny function under a system of responsible government, there is no suggestion that the use of the term 'The Legislature' in the *Constitution Act 1902* in any way limits the powers of the Parliament of New South Wales. The two terms are used interchangeably in this book, although the word 'parliament' is generally preferred as a more accurate reflection of the status of the Parliament of New South Wales.

38 The Legislative Council and the Legislative Assembly are sometimes called the Upper House and the Lower House. These terms derive from the historical class-based divisions of society in England. However, the terms are not reflective of the powers of the respective Houses, with the powers of the Legislative Council restricted in respect of certain appropriation bills.

39 Section 13 of the *Interpretation Act 1987* provides that 'a reference to the Sovereign (whether the words "Her Majesty" or "His Majesty" or any other words are used) is a reference to the Sovereign for the time being'.

The *Constitution Act 1902* constitutes the Legislative Council and the Legislative Assembly as separate and independent Houses of the Parliament. Their membership and electoral arrangements are very different:

- The Legislative Council has 42 members,[40] called members of the Legislative Council or MLCs. They are elected at periodic Council elections,[41] according to a system of proportional representation,[42] with the entire State acting as a single electoral district. Only half the members of the Council, 21 members, are returned at any one periodic Council election,[43] with members serving two terms of the Legislative Assembly.[44] A list of the 42 members of the Legislative Council at the date of publication of this edition of *New South Wales Legislative Council Practice* is provided in Appendix 1 (Members of the Legislative Council at the date of publication).
- The Legislative Assembly has 93 members,[45] called members of the Legislative Assembly or MLAs.[46] They are elected at a general election,[47] according to a system of optional preferential voting,[48] with the State divided into 93 electoral districts,[49] each returning one member.[50]

These different electoral arrangements reflect important differences between the Houses in relation to their respective constitutions and roles within the Parliament. The longer term of Council members allows for the development of expertise in legislative processes and public affairs, and enables members to bring a longer-term perspective to bear on matters before the House. It also facilitates a greater degree of independence from the executive government, with the Premier and the majority of ministers being drawn from the Assembly. Furthermore, the statewide electorate, combined with the system of proportional representation, provides for the representation of a wide diversity of views and interests in the Council by enhancing the electoral opportunities of candidates not from the major political parties.

The *Constitution Act 1902* also establishes the Legislative Council as a continuing body, since only half of its members are elected at any periodic Council election, although it can be prorogued and its business suspended before a periodic Council election. By contrast, the Assembly generally expires (although it may also be dissolved) prior to an Assembly general election, to be reconstituted again following the election.

---

40 *Constitution Act 1902*, s 17(2).
41 Ibid, s 22A.
42 Ibid, sch 6.
43 Ibid, s 3 and sch 6.
44 Ibid, s 22B.
45 Ibid, s 25.
46 Members of the Legislative Assembly are also often referred to as MPs or members of Parliament.
47 *Constitution Act 1902*, s 24A.
48 Ibid, sch 7.
49 Ibid, s 27.
50 Ibid, s 26.

The power of the Parliament to make laws

The general legislative power of the Parliament of New South Wales is contained in part 2 of the *Constitution Act 1902*. Section 5 of part 2 provides:

> **5 General legislative powers**
>
> The Legislature shall, subject to the provisions of the Commonwealth of Australia Constitution Act, have power to make laws for the peace, welfare, and good government of New South Wales in all cases whatsoever –
>
> Provided that all Bills for appropriating any part of the public revenue, or for imposing any new rate, tax or impost, shall originate in the Legislative Assembly.

The power of the Parliament 'to make laws for the peace, welfare and good government of New South Wales', and restrictions on that power – the territorial restriction, the restrictions under the Commonwealth Constitution and the *Australia Acts* of 1986, and the restrictions under sections 7A and 7B of the *Constitution Act 1902* – is discussed in detail in Chapter 15 (Legislation).[51]

The respective powers of the two Houses in the making of laws

The Legislative Council and the Legislative Assembly have equal powers in the making of laws, save in respect of certain appropriation bills. Under section 5 of the *Constitution Act 1902*, all bills that appropriate any part of the public revenue, or which impose any new rate, tax or impost, must originate in the Assembly. The Council cannot initiate such bills. Furthermore, under section 5A of the *Constitution Act 1902*, should the Council fail to pass a bill appropriating revenue or moneys 'for the ordinary annual services of the Government', or pass it in a form unacceptable to the Assembly, the bill may be submitted to the Governor for assent without the Council's concurrence. In all other respects, the powers of the Council and the Assembly in the making of laws are the same.

Deadlocks between the two Houses over a bill, other than an appropriation bill 'for the ordinary annual services of the Government' under section 5A of the *Constitution Act 1902*, may be resolved under section 5B of the *Constitution Act 1902*, which provides that after certain other measures have been tried and have failed, the bill may be submitted to a referendum of the people.

The resolution of deadlocks through the mechanisms in sections 5A and 5B of the *Constitution Act 1902* is discussed in more detail in Chapter 15 (Legislation).[52]

---

51 See the discussion under the heading 'The power of the Parliament to make laws'.

52 See the discussion under the heading 'The resolution of deadlocks on bills introduced in the Assembly'.

The Executive Council

As noted previously, the Executive Council was established by Letters Patent in 1825. Today, it is continued by section 35B of the *Constitution Act 1902*. Its role is to advise the Governor in the government of the State.

The membership of the Executive Council consists of such persons as may be appointed by the Governor from time to time at the Governor's pleasure. The Governor may appoint one of the members of the Executive Council as Vice-President of the Executive Council,[53] as discussed further below. Ministers are appointed to the Executive Council in a particular order, according to their seniority. If the Premier resigns as a minister and a member of the Executive Council, this action involves the resignation of all the Premier's ministerial colleagues from their respective offices and as members of the Executive Council.

The Executive Council is not a deliberative body. Rather, it formally advises the Governor concerning the exercise by the Governor of his or her constitutional and statutory powers. Advice is conveyed through Executive Council Minutes, which contain the advice of the relevant minister, or the advice of Cabinet as conveyed by the relevant minister. The Governor, by signing Executive Council Minutes, gives legal effect to the decisions of the relevant minister.

The Executive Council holds weekly meetings, usually on Wednesday mornings. The quorum for a meeting of the Executive Council is two members.[54] The usual practice is for the Governor to attend accompanied by two ministers who are rostered for duty.[55]

The Vice-President of the Executive Council

The Vice-President of the Executive Council is appointed by the Governor from amongst the members of the Executive Council.[56] Until 1987, the Vice-President of the Executive Council was required to be a member of the Legislative Council.[57] However, following an amendment in 1987, the *Constitution Act 1902* now provides that the Vice-President of the Executive Council is capable of being elected and sitting or voting as a member of either House of the Parliament.[58] As it is, a member of the Legislative Assembly has never been appointed to the position.

---

53 *Constitution Act 1902*, s 35C.

54 Ibid, s 35D(3).

55 For further information, see Twomey, (n 3), pp 696-703.

56 *Constitution Act 1902*, s 35C(3).

57 This is because prior to 1987, under the disqualification provisions of the *Constitution Act 1902* concerning the holding by a member of Parliament of an office of profit, only members of the Legislative Council, and not members of the Legislative Assembly, could hold the office.

58 *Constitution Act 1902*, s 13B(3)(b), inserted by the *Constitution (Amendment) Act 1987*. In support of this amendment, the Leader of the Government in the Legislative Council at the time argued that the expansion of the exemption to include members of the Lower House would provide 'greater flexibility', and was 'consistent with practice adopted by the Commonwealth over a long period'. See *Hansard*, NSW Legislative Council, 27 May 1987, pp 12510-12511 per the Hon Jack Hallam.

The position of Vice-President of the Executive Council appears to have been intermittently established in the first years of responsible government. From 3 October 1856 to 7 September 1857, the former Colonial Secretary, the Hon Sir Edward Deas Thomson, served as Vice-President of the Executive Council and representative of the Parker Ministry in the Legislative Council. The position was re-established during the first Parkes Ministry from 14 May 1872 to 8 February 1875, when the position was held by the Hon Saul Samuel, a member of the Legislative Council.[59] Finally, the position was permanently established at the commencement of the fourth Robertson Ministry (August to December 1877), when the position was held by the Hon Joseph Docker.[60] Since that time, the position has always been held by a representative of the government in the Legislative Council.[61]

As noted above, although the Vice-President of the Executive Council presides at meetings of the Executive Council in the absence of the Governor, in practice this is unlikely to occur,[62] as there is provision for the Lieutenant-Governor or the Administrator to assume the administration of the State if the Governor is unavailable,[63] and for the Governor to appoint a deputy for short absences.[64]

Cabinet

The *Constitution Act 1902* makes no reference to Cabinet. However, by convention derived from the United Kingdom, Cabinet is an integral and essential institution of government in New South Wales.

Cabinet, in simple terms, is a council of ministers that advises the Crown.[65] It is the supreme decision-making body in the government – the deliberative body at which the executive government determines its legislative agenda and policy settings, determines how important matters are to be managed by the government and approves appointments.

59 *Minutes*, NSW Legislative Council, 14 May 1872, p 21.

60 *Minutes*, NSW Legislative Council, 22 August 1877, p 149.

61 D Clune and G Griffith, *Decision and Deliberation: The Parliament of New South Wales 1856-2003*, (Federation Press, 2006), p 72.

62 Twomey, (n 3), p 699.

63 *Constitution Act 1902*, s 9C.

64 Ibid, s 9D.

65 Cabinet originally developed in England as a subset of the Privy Council, used by the Monarch for handling sensitive matters. As originally constituted, Cabinet meetings were presided over by the Monarch, whose role was far from symbolic. However, during the reign of George I (1714-1727), the first Monarch of the German House of Hanover, the King removed himself from Cabinet, it is speculated because of his poor command of English. Later Hanoverian Monarchs followed this practice. See I Killey, *Constitutional Conventions in Australia: An introduction to the unwritten rules of Australia's constitutions*, (Australian Scholarly Publishing, 2009), pp 49-50.

Whilst the Executive Council may be regarded as the formal manifestation of executive prerogative, Cabinet is the real core and essence of the executive government.

In New South Wales, Cabinet is comprised of all ministers[66] of the Crown meeting together, chaired by the Premier.[67] As ministers are appointed from amongst the members of the Executive Council under section 35E of the *Constitution Act 1902*, all members of Cabinet are also members of the Executive Council. Convention also requires that members of Cabinet be members of Parliament.

The Judiciary

As noted previously, the court system in New South Wales was established in 1823 when the Imperial Parliament passed the *New South Wales Act 1823* (Imp)[68] to authorise His Majesty, by Charters or Letters Patent, to establish a Supreme Court of New South Wales.[69] The Charter of Justice was issued in the form of Letters Patent on 13 October 1823, establishing the Supreme Court and appointing the Hon Francis Forbes as Chief Justice.[70] Subsequently, the *Australian Courts Act 1828* (Imp)[71] repealed the *New South Wales Act 1823* (Imp)[72] and added greater detail concerning the Supreme Court and its jurisdiction.[73]

In 1855, the *Constitution Act 1855* provided that all courts and all judicial officers were to continue to subsist in the same form, except insofar as they were abolished, altered or varied by any act of the Legislature.[74] In 1900, the provisions of the *Constitution Act 1855* dealing with the courts and judges were repealed and equivalent provisions inserted into the *Supreme Court and Circuit Court Act 1900*.

As a result, reference to the judiciary in the *Constitution Act 1902* is minimal. The only reference now is part 9, which adopts various provisions which recognise the independence of the judiciary. Part 9 was only inserted into the *Constitution Act 1902* in 1992,[75] in response to a requirement in the memorandum of understanding, commonly known as the Charter of Reform, which was signed on 31 October 1991 by Premier

66 Although Cabinet committees such as the Budget Expenditure Review Committee can act as a *de facto* inner Cabinet in practice.
67 By contrast, in the Commonwealth, Cabinet comprises only senior ministers.
68 4 Geo IV, c 96.
69 *New South Wales Act 1823*, 4 Geo IV, c 96 (Imp), s 1.
70 Twomey, (n 3), p 2.
71 9 Geo IV, c 83.
72 4 Geo IV, c 96.
73 Twomey, (n 3), p 718.
74 *Constitution Act 1855*, s 41.
75 *Constitution (Amendment) Act 1992*.

Greiner and three non-aligned independents in the Assembly.[76] The memorandum required 'Constitutional recognition of the independence of the Judiciary'.[77]

Whilst the *Constitution Act 1902* has minimal reference to the judiciary, nevertheless judicial independence is a fundamental principle which underlies the system of government in New South Wales.[78]

KEY PRINCIPLES UNDERLYING THE BROADER 'CONSTITUTION'

Whilst the New South Wales Constitution may be narrowly defined as the *Constitution Act 1902*, together with other legislation such as the *Australia Acts* of 1986, they are supported by a number of key principles and conventions which collectively make up the broader 'Constitution' of New South Wales. These principles and conventions are discussed below.

Representative democracy

New South Wales is a representative democracy, in which government is chosen and given its authority by a broadly enfranchised population through regular and free elections.

Under this system, the people delegate the task of government to representatives, that is, members of Parliament, chosen at regular elections. In its 1997 decision in *Lange v Australian Broadcasting Corporation*, the High Court found that:

> [A]t federation, representative government was understood to mean a system of government where the people in free elections elected their representatives to the legislative chamber which occupies the most powerful position in the political system.[79]

Under the system of representative democracy adopted in New South Wales, whilst every act of the Parliament is carried out in the name of the Crown, the authority for those acts flows from the people of New South Wales.

---

76 'Memorandum of Understanding between the Hon Nick Greiner MP, Premier, For and on behalf of the Liberal/National Party Government and Mr John Hatton MP, Ms Clover Moore MP, and Dr Peter Macdonald MP', 1991. A copy of the memorandum is at *Hansard,* NSW Legislative Assembly, 31 October 1991, pp 4004-4033. Under the memorandum, in return for implementation of the Charter of Reform, the independents would support the government on motions regarding supply and confidence.

77 For further information, see Twomey, (n 3), pp 718-720. For further information regarding the dismissal of judges, see the discussion in Chapter 23 (Relations with the Judiciary) under the heading 'Removal of judicial officers'.

78 For further information, see the discussion later in this chapter under the heading 'The separation of powers'.

79 (1997) 189 CLR 520 at 559.

Elections are the central mechanism for delivering representative democracy. Accurate representation requires elections to be full (everybody is represented), fair (each vote has equal weight), free (from intimidation or corruption of the electoral system) and regular (in order to respond to changing opinions). Entailed in this system is a real choice for enfranchised members of the population as to whom they give their vote, complemented by widespread acceptance of regular and peaceful changes of government.

The separation of powers

An important concept of political governance is that of the separation of powers, or *trias politica*, a term coined by Montesquieu.[80] The separation of powers describes a model of governance under which legislative, executive and judicial functions are carried out separately and independently of each other.[81] Moreover, each branch of government is able to place specified restraints on the powers exerted by the other.

The New South Wales *Constitution Act 1902*, unlike the Commonwealth Constitution, does not include in its structure or wording any formal separation of powers. Although section 5 of the *Constitution Act 1902* confers legislative power on the Parliament, there are no express provisions which vest, exclusively or otherwise, executive power in the executive government or judicial power in the judiciary. Nor is there any history of such a formal separation of powers in the Constitution.[82]

Nevertheless, the doctrine of the separation of powers is central to an understanding of the system of government in New South Wales. The separation between the executive and legislative branches of government on the one hand, and the judiciary on the other, is taken as axiomatic in the New South Wales system of government. The separation between the Legislature and the executive is defined according to the Westminster system, discussed below.

A Westminster system

Whilst establishing many of the institutions of state, the *Constitution Act 1902* is virtually silent concerning the relationship between the legislative and executive branches of government. As noted, the act makes no mention of Cabinet, or that the Crown is bound to follow the advice of Cabinet except in exceptional circumstances. There is no express requirement that ministers be members of Parliament. Nor does the act express the constitutional understanding that the Premier must resign the moment the government loses the confidence of the Assembly. Nor does it recognise the conventions of individual ministerial responsibility to Parliament and Cabinet solidarity. Only certain very modest

80 French Enlightenment thinker Charles-Louis de Secondat, Baron de La Brède et de Montesquieu (1689-1755).

81 This is sometimes expressed in the following terms: the Parliament makes the laws, the executive government implements the laws, and the courts interpret the laws.

82 *Building Construction Employees and Builders' Labourers Federation of NSW v Minister for Industrial Relations* (1986) 7 NSWLR 372.

aspects of the relationship between the legislative and executive branches of government are expressed:

- under section 13B(3)(a), a person who holds or accepts the office of minister of the Crown as an office of the executive government is capable of being elected and of sitting and voting as a member of either House of the Parliament;
- under section 13B(3)(c), a person who holds or accepts the office of parliamentary secretary is capable of being elected and of sitting and voting as a member of either House of the Parliament; and
- section 35E provides for the appointment of the Premier and other ministers by the Governor from amongst the members of the Executive Council.

This muted and oblique expression of the relationship between the Parliament and the executive government is common in former British colonial jurisdictions. Constitutions established in former British colonies generally concentrate on the formation of colonial legislatures and are often 'silent, or almost silent, as to the relations between the legislature and executive'.[83]

In reality, the relationship between the Parliament and the executive government in New South Wales is defined according to the Westminster system of parliamentary democracy. Under the Westminster system, as adopted in New South Wales, the executive government is formed out of the members of Parliament and is subject to the scrutiny and control of the Parliament. This entails an overlapping of legislative and executive functions. Important conventions and features of the Westminster system in New South Wales are:

- a head of state – the Governor – who is the nominal or theoretical source of executive authority, who holds all the executive powers, but in practice exercises the vast bulk of those powers in accordance with advice (with the exception of some powers which may be exercised without advice – the 'reserve powers');
- an elected Parliament;
- a *de facto* executive branch made up of members of Parliament;
- ministers who are appointed from amongst the members of the Executive Council and who exercise executive authority;
- the formation of the government by the political party or coalition of parties holding a majority of seats in the Assembly;[84] and

83 H Jenkyns, *British Rule and Jurisdiction beyond the Seas*, (Clarendon Press, 1902) cited in Twomey, (n 3), p 27.

84 Although the principle that the government is formed by the party or coalition of parties with majority support in the Legislative Assembly is expressed as a convention, Twomey observes that it finds written expression in the Colonial Regulations of 1892, Regulation no 57, which provided that the Governor should grant a commission to the person who holds the confidence of the Lower House of the Legislature. See Twomey, (n 3), p 637. In 1996 in *Egan v Willis and Cahill* in the New

- the Premier and ministry must resign on the passing of a motion of no confidence in the Assembly, forcing a general election, unless a new government is formed.[85]

Further information on the formation of the government, including the appointment of the Premier and the ministry, is provided in Chapter 7 (Parties, the Government and the Legislative Council).[86]

Responsible government[87]

The Westminster system of parliamentary democracy adopted in New South Wales defines the relationship between the Parliament and the executive government according to the principles of responsible government. Responsible government embodies the understanding that the executive government, including the Cabinet, is responsible to Parliament, and through Parliament to the people, rather than to a monarch (or in colonial times, the Imperial Government).

In New South Wales, responsible government was established by the *Constitution Act 1855* and continued in the *Constitution Act 1902*. As stated by McHugh J in *Egan v Willis*:

> To a person familiar with the history of British parliamentary institutions and the constitutional history of New South Wales, it seems plain enough that the Constitution of 1855 gave the people of New South Wales self-government by means of a system of responsible government … The Constitution Act 1902 (NSW), the current successor of the Constitution of 1855, makes that even plainer.[88]

There are several early judicial statements recognising the importance of the system of responsible government as adopted in Australia. As early as 1920 in *Amalgamated Society of Engineers v Adelaide Steamship Company Ltd* the High Court described responsible government as:

South Wales Court of Appeal, Gleeson CJ specifically acknowledged that the Constitution 'does not reflect the conventional requirement that the Governor may only appoint as Premier a person who commands the confidence of the Legislative Assembly, or that the ministry must have the confidence of that House'. See *Egan v Willis and Cahill* (1996) 40 NSWLR 650 at 660 per Gleeson CJ.

85 Since 1995, this convention may also find legal expression in section 24B of the *Constitution Act 1902*, which provides for the dissolution of the Legislative Assembly by the Governor in certain circumstances, including following a motion of no confidence in the government. For further information, see Twomey, (n 3), pp 651-653.

86 See the discussion under the heading 'The Government'.

87 The term 'responsible government' was coined in the 1830s in Upper Canada to refer to a government that was responsible to the elected members of the House of Assembly. The term came to prominence following its use by Lord Durham in the 1839 *Report on the Affairs of British North America* (the Durham Report). To this day, the parallel nature of government institutions in Canada and Australia reflect the influence of the Durham Report and the granting of responsible government in Canada.

88 *Egan v Willis* (1998) 195 CLR 424 at 475 per McHugh J.

> The greatest institution which exists in the Empire, and which pertains to every Constitution established within the Empire – I mean the institution of responsible government, a government under which the Executive is directly responsible to – nay, is almost the creature of – the Legislature.[89]

Also in 1920 in the High Court decision of *Horne v Barber*,[90] Isaacs J described responsible government as the 'keystone of our political system':

> When a man becomes a member of Parliament, he undertakes high public duties. Those duties are inseparable from the position: he cannot retain the honour and divest himself of the duty. One of the duties is that of watching on behalf of the general community the conduct of the Executive, of criticising it, and, if necessary, of calling it to account in the constitutional way by censure from his place in Parliament — censure which, if sufficiently supported, means removal from office. That is the whole essence of responsible government which is the keystone of our political system and is the main constitutional safeguard the community possesses.[91]

In 1960 in the High Court decision of *Clayton v Heffron*[92] Dixon CJ, McTiernan, Taylor and Windeyer JJ observed:

> [A]t the same time [as the creation of the new Legislature by the *Constitution Act 1855*] the principles of responsible government were introduced and with that came the principles and conventions and general tradition of British parliamentary procedure.[93]

These judicial observations on responsible government described a system of collective executive accountability to the Parliament, whereby government is conducted by ministers who are members of Parliament. However, the precise scope of that doctrine, especially the relationship between an executive government and the upper house of a parliament, was not expressly explored by the courts until the High Court decision in 1998 in *Egan v Willis*[94] concerning the New South Wales Legislative Council.

In *Egan v Willis*, the High Court explored two views of responsible government in New South Wales. The 'liberal' view speaks of the Parliament, and especially the Legislative Council, as a 'watchdog' scrutinising the executive. This view finds expression in the writings of John Stuart Mill, the English philosopher and political theorist:

> Instead of the function of governing, for which it is radically unfit, the proper office of a representative assembly is to watch and control the government; to

89 (1920) 28 CLR 129 at 147.

90 (1920) 27 CLR 494.

91 Ibid, at 500 per Isaacs J. See also *Victorian Stevedoring and General Contracting Company Pty Ltd and Meakes v Dignan* (1931) 46 CLR 73 at 114 in which Evatt J observed: '[P]rior to the establishment of the Commonwealth of Australia in 1901, responsible government had become one of the central characteristics of our polity. Over and over again, its existence in the constitutional scheme of the Commonwealth has been recognized by this Court.'

92 (1960) 105 CLR 214.

93 Ibid, at 251 per Dixon CJ, McTiernan, Taylor and Windeyer JJ.

94 (1998) 195 CLR 424.

> throw the light of publicity on its acts; to compel a full exposition and justification of all of them which any one considers questionable; to censure them if found condemnable, and, if the men who compose the government abuse their trust, or fulfil it in a manner which conflicts with the deliberate sense of the nation, to expel them from office, and either expressly or virtually appoint their successors. This is surely ample power, and security enough for the liberty of the nation.[95]

The other 'executive' view of responsible government expounded by Anthony Birch[96] talks of the responsibility of the government to govern in accordance with its mandate, in which parliament's function is primarily the airing of public concerns rather than a scrutiny or watchdog role. Under this model, a fundamental distinction is to be made between the functions of the two houses of a parliament, with paramountcy attaching to the lower house.[97]

In its decision in *Egan v Willis*, the High Court explicitly chose the broader, liberal understanding of the system of responsible government in New South Wales, and by implication Australia, emphasising the collective accountability of the executive government to both Houses of the Parliament, including the Legislative Council, as against the narrower 'executive' model of responsible government. In their joint judgment, Gaudron, Gummow and Hayne JJ defined responsible government in the following terms:

> A system of responsible government traditionally has been considered to encompass 'the means by which Parliament brings the Executive to account' so that 'the Executive's primary responsibility in its prosecution of government is owed to Parliament'. The point was made by Mill, writing in 1861, who spoke of the task of the Legislature 'to watch and control the government: to throw the light of publicity on its acts'. It has been said of the contemporary position in Australia that, whilst 'the primary role of Parliament is to pass laws, it also has important functions to question and criticise government on behalf of the people' and that to secure accountability of government activity is the very essence of responsible government'.[98]

As indicated, a key feature of the 'liberal' view of responsible government is that although the government has a majority in the Lower House and effectively controls that House, this does not undermine the claim of the Upper House to form an important element of the system of responsible government by holding the government to account. In effect, whilst government is made in the Lower House, the executive government is nonetheless accountable to both Houses of the Parliament.

---

95 JS Mill, *Considerations on Representative Government* [1861], (Everyman ed, 1972), p 104.

96 AH Birch, *Representative and Responsible Government*, (George Allen and Unwin Ltd, 1964).

97 This distinction between the two views of responsible government was also adopted in Clune and Griffith, (n 61), pp 9-12.

98 *Egan v Willis* (1998) 195 CLR 424 at 451 per Gaudron, Gummow and Hayne JJ.

THE RATIONALE FOR BICAMERALISM

As discussed, the Parliament of New South Wales is a bicameral parliament, comprising two Houses: the Legislative Council (the Upper House) and the Legislative Assembly (the Lower House).

Bicameralism is a widespread and prominent feature of the political landscape both in Australia[99] and internationally, where around two-thirds of democratic national legislatures are bicameral.[100]

There are various arguments in favour of bicameralism. The first is that a second chamber elected under a different system from that of the first chamber improves the representativeness of a parliament by broadening the range of views and opinions that it may reflect. Modern society, with its geographic, social and economic variety, may be better represented in a bicameral parliament with different electoral systems for each house than can be achieved in a unicameral or single house parliament elected solely through single member constituencies.

Second, bicameralism, if constructed with appropriate electoral and constitutional arrangements, offers a means of restraining the potential for abuse of executive and legislative power. The constitutional principle of the division of power is a simple one. Unlimited power vested in an individual or group can be abused. It can be used to retain power, to reward supporters and punish opponents, and to divert public moneys to private ends. So power must be limited. It has been argued that the only satisfactory method of limiting power is to divide it between different bodies with some sort of veto over the actions of the others.[101]

An early proponent of these views was Montesquieu. Montesquieu was aware of the dangerous implications of a single representative body in which legislative and executive power was combined, a condition observable in many assemblies of the British or Westminster type. As he stated in his great work *The Spirit of the Laws*:

> [C]onstant experience shows us that every man invested with power is apt to abuse it, and to carry his authority as far as it will go … To prevent this abuse, it is necessary from the very nature of things that power should be a check to power.[102]

Montesquieu accordingly posited that the Legislature should be bicameral, each of the houses having the power to block laws proposed by the other house.

---

99 The New South Wales Parliament is one of six bicameral parliaments in Australia, the others being the Australian, Victorian, Tasmanian, South Australian and Western Australian Parliaments. The Parliaments in Queensland, the Australian Capital Territory and the Northern Territory are unicameral parliaments.

100 J Uhr, 'Bicameralism and Democratic Deliberation', in N Aroney, S Prasser and JR Nethercote (eds), *Restraining Elective Dictatorships: The Upper House Solution?*, (University of Western Australia Press, 2008), p 14.

101 H Evans, 'The Case for Bicameralism', in Aroney, Prasser and Nethercote, (n 100), p 67.

102 Montesquieu, The Spirit of the Laws, XI, ch 4, (1748), p 197.

In turn, John Stuart Mill, previously cited, wrote in *Considerations on Representative Government*:

> The consideration which tells most, in my judgement, in favour of the two Chambers (and this I do regard as of some moment), is the evil effect produced upon the mind of any holder of power, whether an individual or an assembly, by the consciousness of having only themselves to consult. It is important that no set of persons should, in great affairs, be able, even temporarily, to make their *sic volo* prevail without asking anyone else for his consent. A majority in a single assembly … easily becomes despotic and overweening if released from the necessity of considering whether its acts will be concurred in by another constitutional authority. The same reason which induced the Romans to have two consuls makes it desirable that there should be two Chambers – that neither of them may be exposed to the corrupting influence of undivided power, even for the space of a single year.[103]

The Federalist, the famous series of 85 essays written by Alexander Hamilton, James Madison and John Jay in 1787 and 1788 to explain the United States Constitution, developed these ideas further. James Madison wrote in article 62 concerning the Constitution of the United States Senate:

> … those who administer [government] may forget their obligations to their constituents, and prove unfaithful to their important trust. In this point of view, a senate, as a second branch of the legislative assembly, distinct from, and dividing the power with, a first, must be in all cases a salutary check on the government. It doubles the security to the people, by requiring the concurrence of two distinct bodies in schemes of usurpation or perfidy, where the ambition or corruption of one would otherwise be sufficient.[104]

Subsequently, in his 1833 *Commentaries on the Constitution of the United States*, Joseph Story observed that the Constitution of the United States adopts as a fundamental rule the exercise of legislative power by two distinct and independent branches, and that 'there is scarcely in the whole science of politics a more important maxim'.[105]

A third argument for bicameralism is that it offers the benefit of improved public deliberations and decision-making by parliament through broader representation and greater scope for scrutiny and review of executive government in a way that is not generally performed by a single house dominated by the executive government.

Again this view finds expression in *The Federalist*. James Madison, in article 62 on the Senate, followed his views on the capacity of a second chamber to act as 'a salutary check on the government' by citing the value of a second chamber as a second expression of public opinion:

> The necessity of a senate is not less indicated by the propensity of all single and numerous assemblies, to yield to the impulse of sudden and violent passions, and

103 Mill, (n 95), pp 325-326.

104 A Hamilton, J Madison and J Jay, *The Federalist*, (Glazier, Masters & Smith, 1842), pp 285-286.

105 J Story, *Commentaries on the Constitution of the United States*, vol II, (Hilliard, Gray and Company, 1833), p 27.

> to be seduced by factious leaders into intemperate and pernicious resolutions. … All that need be remarked is, that a body which is to correct this infirmity, ought itself to be free from it, and consequently ought to be less numerous. It ought, moreover, to possess great firmness, and consequently ought to hold its authority by a tenure of considerable duration.[106]

A final rationale for bicameralism is that it provides a mechanism for the representation of state interests in a federation, a concept that emerged from the American Revolution, and which finds expression in the Australian Senate.

In summary, a second chamber of parliament, if carefully implemented with appropriate legislative and procedural powers and, importantly, electoral legitimacy such as afforded through a system of proportional representation, offers the potential to constrain executive power, often held by one party or a coalition of parties in the first chamber, and to enhance representative democracy and ultimately good government.

THE ROLE OF THE LEGISLATIVE COUNCIL

Consistent with the rationale for bicameralism and a second chamber of parliament outlined above, there are three clear functions of the Legislative Council within the broader system of government in New South Wales: to represent the people, to legislate and to scrutinise executive government as a 'House of Review'.

To represent the people

The system of proportional representation used for Legislative Council elections provides a different and alternative system of representation to the system of optional preferential voting used for Legislative Assembly elections.

The majority of members of the Assembly are usually from one of the major political parties. This is because under the optional preferential voting system used for Legislative Assembly elections, candidates require the support of at least half of voters in their electorate once preferences are distributed. This is often difficult for candidates from minor parties or independents to achieve.

By contrast, under the system of proportional representation used for Legislative Council elections, the quota required for election to the Council is 4.55 per cent of the total valid votes cast statewide. Consequently, representatives of minor parties and independents are more likely to be elected to the Council than they are to the Assembly.

In addition, the filling of only half of its seats at each periodic Council election ensures that the Council reflects the views of the electorate at different stages in the electoral cycle. The longer term of Council members, twice the term of Assembly members, allows for the development of expertise in parliamentary processes and public affairs and for members to bring a longer-term perspective on matters before the House. The statewide

106 Hamilton, Madison and Jay, (n 104), p 286.

electorate also relieves Council members to some extent of the workload associated with individual geographical constituencies, giving them more opportunity for participation in the work of the House and its committees.

As a consequence, the Legislative Council provides a second, complementary dimension to the representation of the interests and opinions of the people, thus enhancing the democratic quality of the Parliament.

To legislate

The Council has a law-making function. As indicated previously, under the *Constitution Act 1902*, the two Houses have equal power in the making of laws, save in respect of certain appropriation bills.

As a result, the government of the day requires the confidence of both Houses of Parliament, and not just the Lower House, in order to implement its legislative agenda.

In New South Wales, neither of the two major sides of Australian politics has held an absolute majority in the Council since 1988. It may be argued that this has enhanced the independence of the Council in its law-making function.

Critics of upper houses, including the Legislative Council, argue that they are a check on the government of the day. In particular, incoming governments often claim that they have a mandate: that their program announced during the election campaign has been approved by the electorate and that the Legislative Council should not impede the legislation necessary for its implementation.

Such claims ignore the scrutiny role of parliament which is fundamental to a system of responsible government. The government of the day has a right and duty to organise and operate the machinery of government, to govern and to implement the initiatives and broad directions of its election policy. However, it remains subject to the supervision of parliament under the system of responsible government, including via detailed scrutiny of its legislative proposals.

The Council may also initiate legislation. The ability of members of the Council to initiate legislation means that the Council is not confined to considering only those legislative proposals brought forward by the executive government.

In addition, the Council has a role in reviewing delegated legislation made by the executive under the authority of primary legislation, such as statutory rules, by-laws, ordinances and various other 'instruments'. The Council may disallow a regulation made by the executive government, and the concurrence of the other House in the disallowance is not needed.[107]

107 For further information, see the discussion in Chapter 18 (Delegated legislation) under the heading 'Disallowance of delegated legislation'.

Often, the legislative function of the House goes hand in hand with its role of scrutinising the government and holding it to account as a 'House of Review', as is discussed below.

To scrutinise the executive government as a 'House of Review'

The Council acts as a 'House of Review' by scrutinising the actions of the executive government and holding it to account. Although the government is made in the Lower House, under the system of responsible government in New South Wales, the government is nevertheless also accountable to the Council, as was observed by the High Court in *Egan v Willis*.[108]

Indeed, the reality of responsible government in New South Wales is that the executive has come to dominate the Lower House through the mechanism of strict party control. This is often a feature of the Westminster system of governance, under which government is formed by convention in the Lower House, where the government of the day generally holds an absolute majority. As a result, the Legislative Council has a crucial role in superintending the activities of the government.

It is notable that since 1988, the lack of government control of the Council has coincided with an increased level of Council scrutiny of executive government actions. An important element of this scrutiny function is the examination of financial measures and spending proposals developed by the executive government, including money bills. Whilst section 5A of the *Constitution Act 1902* provides that an appropriation bill 'for the ordinary annual services of the Government' cannot ultimately be blocked by the Council's failure to pass it in a form acceptable to the Assembly, the Council nevertheless has a role in overseeing the expenditure proposals of the executive. In particular, this function is carried out through the annual budget estimates inquiry conducted by the Council's portfolio committees.[109]

Other important elements of this scrutiny function are the direct questioning of ministers in the Council[110] and orders for the production of State papers to expose to parliamentary and if appropriate public scrutiny the operations of government departments and agencies.[111] The Council has an ongoing responsibility to examine the administration of the law by the government and public service, including insisting on accountability for the administration by ministers of their portfolios.

The scrutiny function of the Council is also carried out through the Council's committee system.[112] Council committees are usually comprised of between six and eight members drawn from the various political parties in the House. They are appointed by the Council

108 (1998) 195 CLR 424.

109 For further information, see the discussion in Chapter 20 (Committees) under the heading 'Budget estimates'.

110 For further information, see the discussion in Chapter 14 (Questions).

111 For further information, see the discussion in Chapter 19 (Documents tabled in the Legislative Council) under the heading 'Orders for the production of State papers'.

112 For further information, see the discussion in Chapter 20 (Committees).

to conduct inquiries on behalf of the House into policy issues, proposed legislation or executive activity.[113] Legislative Council committee inquiries are distinguished by the power of the House and its committees to compel witnesses to attend and to answer questions, and the protection of parliamentary privilege afforded to all participants in the process.[114]

113 For further information, see the discussion in Chapter 20 (Committees) under the heading 'The role of committees'.

114 For further information, see the discussion in Chapter 21 (Witnesses).

CHAPTER 2

THE HISTORY OF THE LEGISLATIVE COUNCIL

This chapter traces the history and development of the New South Wales Legislative Council from colonial times. There have been four distinct phases in the history of the Legislative Council:

- From its formation in 1823 until the enactment of the *Constitution Act 1855*, the Legislative Council sat first as an advisory body to the Governor and later as a single house legislature, with a partly elected membership first introduced in 1842.
- From 1855 – with the enactment of the *Constitution Act 1855* and the introduction of the Legislative Assembly – until 1933, the Council was a nominee body, with its membership appointed by the Governor on the advice of the Premier.
- From 1933 until 1978, the Council was indirectly elected, with its members chosen by the members of both Houses.
- From 1978 onwards, the Council has been directly elected by the people according to a system of proportional representation.[1]

In addition to these different phases in the membership of the Council, there have also been major changes to the provisions governing deadlocks between the Legislative Council and the Legislative Assembly, especially in relation to appropriation and taxation bills. The Council has also been the subject of numerous other attempts at reform, together with various attempts to abolish it.

These reforms and attempts at reform or abolition are not just of historical interest. They reflect the continuing struggle over more than 150 years between differing political forces to define the role and functions of the Legislative Council within the New South Wales system of government.

1 The Legislative Council became fully elected in 1984.

PHASE ONE (1823–1855): THE EARLY COLONIAL COUNCIL

The Legislative Council is the first and oldest legislative body in Australia. It was established in 1823 as an advisory body to the Governor, some 35 years after the establishment of the Colony of New South Wales. Prior to 1823, the Governors had exercised almost unlimited power by orders and proclamations subject only to the constraints imposed from London.

The Council was established under section 24 of an Imperial statute known as the *New South Wales Act 1823* (Imp).[2] Section 24 provided that the Council comprise between five and seven residents of the Colony appointed by the King,[3] to be presided over by the Governor. Legislative power was conferred on the Governor to make 'Laws and Ordinances for the Peace, Welfare and good Government of said Colony', with the advice of the Council, or the majority of it, subject to the following:

- Only the Governor could initiate legislation, however if the majority of the Council rejected a proposed law, it did not become law. However, if it appeared to the Governor that such a law was 'essential to the Peace and Safety' of the Colony and could not 'without extreme Injury to the Welfare and good Government of the said Colony be rejected', and if at least one member of the Council assented to the law, the proposed law had full force and effect until the pleasure of His Majesty was made known, provided the Governor recorded his reasons in the Council *Minutes.*
- The Governor was also required to obtain a certificate from the Chief Justice of the Supreme Court that a proposed law was not repugnant to the 'Laws of England' but was consistent with such laws as the circumstances of the Colony would admit.
- The Governor was further required to transmit to England within six months all laws passed by the Council, to be laid before both Houses of the Westminster Parliament. The King could disallow a law within three years of it being made.

The first Legislative Council, consisting of five nominated officials, met for the first time on 25 August 1824, and was presided over by the Governor, Sir Thomas Brisbane.[4] The members of the Council were Francis Forbes, the first Chief Justice of the Supreme Court; William Stewart, Lieutenant-Governor; Frederick Goulburn, Colonial Secretary; James Bowman, Colonial Surgeon; and John Oxley, Surveyor General.

The first meetings of the Council were held in Government House, which was then on the corner of Bridge and Phillip Streets. The business of the Council was conducted in secret, and members were required to take an oath of secrecy not to directly or

2 4 Geo IV, c 96 (Imp).

3 Casual vacancies were to be filled by the Governor until His Majesty made a new appointment.

4 *Votes and Proceedings*, NSW Legislative Council, 25 August 1824, p 2. Prior to the attainment of responsible government in 1856, the official records of the colonial Legislative Council were the *Votes and Proceedings*.

indirectly communicate or reveal to any person matters brought under consideration in the Council.

Initially, the Council operated without any rules or orders to regulate its proceedings, aside from those set out in section 24 of the *New South Wales Act 1823* (Imp),[5] together with any instructions from the Governor. However, it soon began to develop its own body of practice and conventions based on those of the British Parliament.[6] In December 1827, three members were appointed to draft formal rules and orders for the conduct and despatch of business. The new standing orders were adopted on 31 December 1827.[7]

In 1828, the *New South Wales Act 1823* (Imp) was replaced by another Imperial statute now known as the *Australian Courts Act 1828* (Imp).[8] The act increased the size of the Council to between 10 and 15 members, all nominated by the King.[9] Members were no longer required to take an oath of secrecy, thus allowing public discussion of legislative proposals. The grant of legislative power remained unchanged. However, the Governor could no longer enact a law without the approval of the majority of the members of the Council. The Governor was also required to give eight days' notice in newspapers of proposed laws and ordinances, except in an emergency, and suggestions for proposed laws could be made by other members of the Council.[10]

In 1838, after prolonged agitation, the public and press were permitted to attend the sittings of the Legislative Council. By way of background, on 29 May 1838, a petition was presented by the Attorney General from 'certain Magistrates, Landholders, and other Free Inhabitants of the Colony', 'praying that the doors of the Council Chamber be opened for the admission of the public, during the deliberations of the Council, subject to such regulations as may be necessary and proper'.[11] The petition was received, a resolution agreed to that strangers be admitted, and a committee appointed to frame appropriate regulations for the admission of visitors. On 5 June 1838, the House resolved to adopt the rules and regulations proposed by the committee in its report tabled the

5 4 Geo IV, c 96 (Imp).

6 See for example, the appointment of a committee of members on the subject of the Female Factory at Parramatta, *Votes and Proceedings*, NSW Legislative Council, 21 November 1824, pp 14-15; an address to the Governor requesting a return on convictions by magistrates, *Votes and Proceedings*, NSW Legislative Council, 12 July 1825, pp 17-18; an address to the Governor for records of punishment by magistrates, *Votes and Proceedings*, NSW Legislative Council, 30 August 1825, pp 20-21; witnesses called to give evidence before the House, *Votes and Proceedings*, NSW Legislative Council, 15 September 1825, p 22; and a petition received against a bill, *Votes and Proceedings*, NSW Legislative Council, 27 September 1825, pp 22-23.

7 *Votes and Proceedings*, NSW Legislative Council, 31 December 1827, pp 39-40. The standing orders numbered 24 in total.

8 9 Geo IV, c 83 (Imp).

9 Ibid, s 20.

10 Ibid, s 21.

11 *Votes and Proceedings*, NSW Legislative Council, 29 May 1838, p 5.

previous sitting day. The regulations restricted members to admitting two strangers only.[12]

1842: Partial election of the Council

In 1842, further changes to the Council were introduced through another Imperial statute: the *Australian Constitutions Act (No 1) 1842* (Imp).[13] For the first time, the Council was to be partly elected, with 24 members elected on a very limited property-based franchise[14] and 12 members appointed by the Crown. This was the first form of representative government in Australia. Both categories of members were to serve for no longer than five years, subject to early dissolution of the Council by the Governor. Amongst the distinguishing features of the new Council was the power to initiate legislation and the replacement of the Governor at meetings of the Council with an elected Speaker, although the election of the Speaker was subject to disallowance by the Governor. The Speaker had a casting but not deliberative vote. A quorum was one third of the members, excluding the Speaker.

The first partially elected Council sat for the first time on 1 August 1843. A chamber had been built for the new Council on the northern end of the former 'Rum Hospital' building.[15]

In 1851, by the *Electoral Act 1851*,[16] the membership of the Council was further increased to 54 members, with 18 nominated by the Crown and 36 elected on a limited franchise. By 1852, the Legislature had taken over the entire 'Rum Hospital' building.

1840s–1855: Towards responsible government

The introduction of representative government in New South Wales in 1842, together with the first election for membership of the Council in 1843, was the catalyst for increasing demands for self-government in the Colony, creating tensions with the Colonial Office in London and between the elected portion of the Council and the Governor. Between 1843 and the early 1850s, there ensued an extended period of struggle for independence based on demands for plenary legislative power to be held by a local legislature and

12 *Votes and Proceedings*, NSW Legislative Council, 5 June 1838, pp 11-12. The admission of visitors to view the proceedings of the Legislative Council in subsequent years is discussed further in Chapter 3 (Parliamentary privilege in New South Wales) under the heading 'Removing and excluding visitors who disturb the proceedings' and in Chapter 11 (Publication of and access to the proceedings of the Legislative Council) under the heading 'Public access to proceedings in the chamber'.

13 5 & 6 Vic, c 76 (Imp).

14 The franchise was men of 21 years and over who were natural born or naturalised subjects of the Queen, owning freehold property of a clear value of £200 or a householder occupying a dwelling with the clear annual value of £20 who had paid all his rates and taxes.

15 For further information, see the discussion in Chapter 25 (The Parliament buildings and the Legislative Council chamber).

16 14 Vic, No 48.

limitations on the Crown's power in London to disallow or refuse assent to New South Wales laws concerning local matters. Of note was the Legislative Council's 'declaration, protest and remonstrance' to the British Government of 1 May 1851 in which it declared that 'plenary powers of Legislation should be conferred upon and exercised by the Colonial Legislature'.[17] Ultimately, the British adopted a more prudent and conciliatory approach to the colonies in Australia than they had in North America, leading to the enactment of the *Constitution Act 1855*.[18]

The *Constitution Act 1855* had its origins in the work of two committees appointed by the Legislative Council in 1852[19] and 1853[20] tasked with preparing a draft Constitution Act.

On 28 July 1853, the second committee proposed a bill to establish a bicameral Parliament. Under the bill, a new Legislative Assembly would be created consisting of 54 elected members. The proposed franchise was persons having a salary of £100 a year and occupants of any room or lodging paying £40 a year for board and lodging or £10 a year for lodging only.[21] The maximum term of the Assembly would be five years and no more.

In turn, the new Legislative Council would consist of 20 members nominated by the Governor with the advice of the Executive Council, together with an unspecified number of members upon whom the Crown had conferred a hereditary title and a right to a seat in the Council for life, somewhat like the House of Lords.

The Constitution bill was introduced in the Legislative Council on 9 August 1853. On 2 September 1853, a 'this day six months' amendment which would have effectively disposed of the bill at the second reading stage was defeated 33 votes to 8 and the second reading of the bill agreed to.[22] The bill was then subject to further public consultation.

When consideration of the bill resumed in a Committee of the whole House on 8 December 1853, the proposal for hereditary members of the Council was dropped and the Council was made a nominee chamber of a minimum of 21 members 'summoned' by the Governor on the advice of the Executive Council. Initially, the Council was to be constituted for a five year interregnum, after which the operation of the new Parliament

17 *Votes and Proceedings*, NSW Legislative Council, 1 May 1851, pp 1-3. For further information, see A Twomey, *The Constitution of New South Wales*, (Federation Press, 2004), pp 8-11.

18 For a detailed discussion, see Twomey, (n 17), pp 4-14.

19 *Votes and Proceedings*, NSW Legislative Council, 16 June 1852, p 26. See 'Report from the Select Committee appointed to prepare a Constitution for the Colony', *Journals*, NSW Legislative Council, 1852, vol 1, p 475.

20 *Votes and Proceedings*, NSW Legislative Council, 20 May 1853, p 21. See 'Report from the Select Committee appointed to prepare a Constitution for the Colony', *Journals*, NSW Legislative Council, 1853, vol 2, p 117.

21 *Journals*, NSW Legislative Council, 1853, vol 2, p 120.

22 *Votes and Proceedings*, NSW Legislative Council, 2 September 1853, p 189.

could be reviewed. Thereafter, the newly elected government could advise the Governor of persons to be nominated to the Council for life.[23]

The bill was read a third time in the Council on 21 December 1853.[24] After the passage of the bill, the Council adopted a resolution:

> (1) That in the opinion of this House the 'Bill to confer a Constitution on New South Wales, and to grant a Civil List to Her Majesty', which has just passed this House, is an embodiment of all the rights for which this House and preceding Legislative Councils have for years past been contending, and will, when passed into Law, redress all the grievances enumerated in the Petitions to Her Majesty and both Houses of Parliament, adopted by this House on the 5th December, 1851.
>
> …
>
> (9) And as a necessary consequence [the bill] establishes Responsible Government, properly so called, and places in the hands of Responsible Ministers the appointment of all offices of trust and emolument within the Colony …[25]

The bill, numbered 17 Vic No 41, was reserved by the Governor on 22 December 1853 and sent to the United Kingdom for royal assent.

In the Westminster Parliament, the bill was amended by the British Government to remove certain provisions concerning assent, reservation and disallowance of legislation before it was attached as a schedule to an enabling bill. This enabling bill subsequently became the *Constitution Statute 1855* (Imp).[26] The *Constitution Statute 1855*, to which the *Constitution Act 1855* was appended, was assented to by Her Majesty Queen Victoria on 21 July 1855.[27]

The 1855 constitutional settlement

The *Constitution Act 1855*[28] established for the first time a system of responsible government in New South Wales, with the government responsible to the Parliament, and through Parliament to the people, rather than to the Imperial Government in London.

---

23 *Journals*, NSW Legislative Council, 1853, vol 1, p 321. Various other alternative proposals were rejected. An amendment to make the Legislative Council a wholly elected chamber was defeated 30 votes to 9 and an amendment to have a House of 36 members consisting of 12 members nominated by the Legislative Assembly, 12 members nominated by the Governor and a further 12 members nominated by those 24 members was defeated 34 votes to 2.

24 *Votes and Proceedings*, NSW Legislative Council, 21 December 1853, p 287.

25 Ibid, p 288.

26 18 & 19 Vic, c 54 (Imp).

27 For further information, see Twomey, (n 17), pp 16-22.

28 18 & 19 Vic, c 54 (Imp), sch 1.

Under the *Constitution Act 1855*, the Council was given very strong powers, equal to those of the newly created Legislative Assembly, except that the Council lacked the right to initiate taxation and appropriation bills. However, the Council could amend or reject any bill sent to it by the Assembly, including money bills. This legislative power was envisaged by the drafters of the Constitution as 'an effectual check on the democratic element in the Assembly'.[29] It was also envisaged that the Council would 'be competent to discharge with efficiency, the revising, deliberative, and conservative functions which will devolve on it'.[30]

The extensive power accorded to the Council under the *Constitution Act 1855* was given in the full recognition that a fiercely independent and uncooperative Council could be brought to heel by the expedient of 'swamping the House', threatened or otherwise.[31] Swamping was the appointment of new members to the Council by the Governor, on the advice of the Premier of the day, in order for the government to gain a majority in the Council. It was accepted as the method by which serious deadlocks between the two Houses were to be resolved, should the Council's use of its extensive legislative powers exceed political limits.[32] However, to prevent swamping from reducing the Council to an absurdity, the Governor had discretion to reject the advice of the Premier recommending appointments to the Council. In reality, conservatives did not believe that the circumstances would ever prevail where the political pressure was such that the Governor would consent to swamping the Council.[33]

At the same time, the decision to make the Council a nominee chamber under the constitutional settlement of 1855 served to prevent the Council from challenging the underlying assumption that governments were to be made and unmade in the Lower House. In short, the nominated Council was not to usurp the primacy and democratic legitimacy of the elected Assembly.

PHASE TWO (1856–1933): THE APPOINTED COUNCIL

1856–1861: The five year interregnum

The new Parliament established under the *Constitution Act 1855* met for the first time on 22 May 1856. The Legislative Council did so in a new chamber built on the southern

29 'Report from the Select Committee appointed to prepare a Constitution for the Colony', *Journals*, NSW Legislative Council, 1852, vol 1, p 477.

30 Ibid.

31 Whilst the *Constitution Act 1855* specified a minimum of 21 members of the Council, it did not specify a maximum.

32 The practice had its origins at the time of the *Representation of the People Act 1832* (Imp) (known informally as the 1832 Reform Act or Great Reform Act) in the United Kingdom, where the threat of 'swamping' the House of Lords with new members was used in order to secure government legislation extending the franchise.

33 D Clune and G Griffith, *Decision and Deliberation: The Parliament of New South Wales 1856-2003*, (Federation Press, 2006), pp 109-110.

end of the former 'Rum Hospital' building, the chamber it still occupies today.[34] The reconstituted Legislative Council had reverted to a wholly nominee body, with 32 members appointed by the Governor, whilst the new Legislative Assembly had 54 directly elected members. Whilst it retained the same name, the new Legislative Council was a very different and legally distinct institution. Amongst the new members of the Council were three judges.[35] One of them, Chief Justice Sir Alfred Stephen, subsequently agreed to become the first President of the Council.

At the time, there were no political parties in New South Wales in the modern sense, but there was a division between proponents of colonial liberalism who generally held a majority in the Assembly, and conservatives and landholders who held a majority in the Council. Of the 32 nominated members who took their seats in the new Council on 22 May 1856, all were conservatives.

Inevitably, the views of liberals and conservatives as to the role of the Council differed. Both liberals and conservatives regarded the role of the Council as that of a 'House of Review' – a safeguard, or check, within the constitutional settlement against impetuous or ill-considered majority rule by the Assembly. As stated in the report of the 1853 select committee into the new Constitution, the Council was to be 'a safe, revising, deliberative, and conservative element between the Lower House and Her Majesty's Representative in the colony'.[36] However, within this broad consensus as to the role of the Council, there remained considerable difference of opinion as to the kind of safeguards that the Council was to offer. Conservatives inevitably tended to view the Council as a defender of the rights of property, with the power to modify or even block proposed legislation contrary to the interests of conservatives and landholders. In the conservative camp, the *Sydney Morning Herald* had this to say on the role of the Legislative Council:

> It now remains to see whether the Upper House will fulfil the objects of its institution. It was never intended to govern the country; it was never designed to originate great legislative change; it was never meant to be the battlefield of parties. Its office is to interpose between the Executive and the Lower House, to modify measures which in substance are inevitable, and to prevent a sudden resolution from plunging the country into irreparable wrong. It is required that it should set an example of firmness and decorum, that all its movements should be calm, dispassionate, and inoffensive, and yet that it should know when to announce itself as the constitutional check upon its mercurial and less mannerly neighbour – the Assembly.[37]

---

34 For further information, see the discussion in Chapter 25 (The Parliament buildings and the Legislative Council chamber).

35 The last serving judge in the Council, Justice Roger Therry, resigned on 3 March 1859. For a more detailed discussion of judges in the early Legislative Council, see JM Bennett, *Colonial Law Lords: The Judiciary and the Beginnings of Responsible Government in New South Wales*, (Federation Press, 2008).

36 'Report from the Select Committee appointed to prepare a Constitution for the Colony', *Journals*, NSW Legislative Council, 1853, vol 2, p 117.

37 Editorial, *Sydney Morning Herald*, 15 May 1856, p 4.

By contrast, the liberals tended to support a legislative review model of the Council, able to assist the Assembly in the legislative task by scrutinising and, where necessary, making modest modifications to proposed legislation to assist in the legislation's understanding and application, but without significantly modifying the content or intent of the legislation.[38]

The subsequent interregnum from 1856 to 1861 was marked by repeated clashes between the conservative Council and the elected Assembly, especially as the Assembly became more radical during and after the second Cowper Ministry from 1857 to 1859. In particular, between 1858 and 1861, various important government bills were defeated in the Council, including the Chinese Immigration Bill 1858, the Electoral Law Amendment Bill 1858, the Appropriation Bill 1860 and the Robertson land bills of 1860. Partly as a result of Council opposition, six ministries in the Assembly fell during the years 1856 to 1861.

The power of the Council to thwart government legislation prompted a number of early attempts at reform of the composition of the Council, based on proposals for popular election of its members. Between 1859 and 1861, a total of four bills were introduced by the Forster Ministry (1859-1860) and the first Robertson Ministry (1860-1861) in an attempt to institute an elected Council. All failed.[39]

With the Robertson Ministry having failed at reform of the Council, the second Cowper Ministry (1861-1863) attempted to secure the passage of its legislative agenda in the Council, notably the passage of the Robertson land bills, through the only other method available to it: swamping the Council. On 10 May 1861, to the consternation of conservative forces and under considerable pressure, Governor Sir John Young agreed to Cowper's request for 21 appointments to the Council for the term of its last sitting day. However, on this occasion the swamping misfired when the President of the Council, Sir William Burton, not being consulted about the appointments, felt he had been treated with discourtesy, resigned as President and as a member and withdrew from the chamber followed by several other members. With the Chairman of Committees also being absent, the Clerk declared the House adjourned until the next sitting day, which was after the end of the five year interregnum.[40]

Nevertheless, the experience of the swamping of 1861 had a chastening effect on conservatives. As Connolly writes:

> In 1853, the leading conservatives in New South Wales had felt sufficiently confident in their society to choose a nominated Legislative Council, knowing full well that it could be swamped to break a constitutional deadlock with the Assembly. They had not believed that democratic pressures would be so

38 Clune and Griffith, (n 33), pp 66-77.

39 For further information, see the discussion in L Lovelock and J Evans, *New South Wales Legislative Council Practice*, 1st ed, (Federation Press, 2008), pp 22-23.

40 *Minutes*, NSW Legislative Council, 10 May 1861, p 201.

> strong that the Governor could be coerced into using the power of swamping 'unwisely'.[41]

At the end of the five years of interregnum, the membership of the Legislative Council expired.

1861–1925: Failed reform

The reconstituted Council which met for the first time on 3 September 1861 at the commencement of the second session of the Fourth Parliament had 23 members appointed for life by the Governor on the advice of the Executive Council. Twelve members were reappointed from the previous Council. However, the new Council had been purged of some of its most extreme conservative elements, with appointments agreed to by Premier Cowper and Governor Young of general acceptance to all parties, as well as the electorate and the press. The Hon William Charles Wentworth agreed to be President on the condition that:

> [T]he Council is not to be swamped on any future occasion, until after the rejection by it of some vital question upon which the opinion of the country had previously been taken, after a dissolution of the Assembly for that express purpose.[42]

Effectively, the position adopted from 1861 was that the Council would continue to have a role to play as the House of Review, but that its power to block the legislative agenda of the government should be exercised carefully and responsibly where the government's policies had the endorsement of the people at the ballot box. At the same time, the integrity of the Council against unreasonable swamping by the government would be protected and maintained by the Governor. The Council had emerged from the five year interregnum intact, but with a tacit admission that the Assembly was supreme in respect of appropriation and taxation matters, and that the Council could not, through virtual legislative blackmail, force governments to resign because they were unable to implement either promised social and political reforms, or more importantly, to pass money bills. It is notable, for example, that the second Cowper Ministry in 1861 finally secured the passage of its Crown lands bills[43] through the reconstituted Council.

Nevertheless, Cowper remained committed to reform of the Council's electoral arrangements, introducing two bills in November 1861 and June 1862 for an elected Legislative Council. Once again, both bills failed.[44]

In May 1872, Sir Henry Parkes became Premier for the first time. He was to be Premier on five occasions between 1872 and 1889. Parkes favoured an elected Upper House with

---

41 CN Connolly, *Politics, Ideology and the New South Wales Legislative Council, 1856-1872*, (PhD Thesis, Australian National University, 1974), p 314, cited in Clune and Griffith, (n 33), p 111.

42 Correspondence with Governor Young, 14 June 1861, cited in Clune and Griffith, (n 33), p 112.

43 Crown Lands Alienation Bill 1861 and Crown Lands Occupation Bill 1861.

44 For further information, see the discussion in *New South Wales Legislative Council Practice*, 1st ed, (n 39), pp 24-25.

a wide franchise. In 1873 and 1874, he also attempted reform of the Council's electoral arrangements on no fewer than three occasions. Once again, all three attempts failed.[45]

Having failed at electoral reform of the Council, in 1880, during his third Ministry (1878-1883), Parkes tried instead to alter the powers of the Council, introducing a bill to declare that the intention of section 1 of the *Constitution Act 1855* was that the Council had the power to reject money bills, but no power to amend or alter any such bill. This bill lapsed on the prorogation of the Parliament.

During the various Parkes Ministries, the membership of the Council also expanded considerably as Parkes sought to secure his legislative agenda. Council membership rose to 35 during the second Parkes Ministry (1877), to 53 during the third Parkes Ministry (1878-1883) and to 62 during the fourth Parkes Ministry (1887-1889). This growth in the membership of the Council corresponded with an apparent decline in the discretion of the Governor over appointments to the Council.[46] As responsible government developed in New South Wales, the Governor became less inclined to reject ministerial advice for the appointment of new members except on very solid grounds.[47]

Whilst relations between the liberal/free trade Parkes Ministries and the Council had followed a pattern of somewhat muted political conflict, relations between the Council and the government were to break down more fundamentally with the election of the Hon George Reid as Premier (1894-1899). Reid introduced a new program of liberal legislation, based on free trade and direct taxation. Opposed to Reid was a partisan protectionist Council which was very unsympathetic to his legislative agenda.

The political touchstone that provoked open conflict between Reid and the Council was the Land and Income Tax Assessment Bill, defeated in the Council by 41 votes to 4 on 20 June 1895.[48] It was a trigger for the dissolution of Parliament and an election openly fought by Reid on the powers of the Council. At a rally held in his electorate, Reid specifically invited voters to 'clear the fossils' out of the 'rotten and corrupt' Council. Reid went on to state:

> [T]here never was such a body of men in this world who had sworn to do their duty to the people who more steadily, selfishly, and deliberately betrayed the public interest to serve their own personal ends.[49]

Reid won the election, and gained the appointment of 10 new members to the Council. The Land and Income Tax Assessment Bill 1895 was reintroduced and a free conference of managers[50] between the two Houses was held in an attempt to reach a compromise.

---

45 Ibid, pp 25-26.

46 G Hawker, *The Parliament of New South Wales, 1856–1865*, (New South Wales Government Printer, 1971), p 143.

47 A Keith, *Responsible Government in the Dominions*, (Clarendon Press, 2nd ed, 1928), p 114.

48 *Minutes*, NSW Legislative Council, 20 June 1895, p 238.

49 For a report of this rally, see the *Evening News*, 18 July 1895, p 6.

50 A free conference of managers is a form of communication between the Houses to discuss disagreement over bills. For further information, see the discussion in Chapter 15 (Legislation)

After four days of negotiation, and with the very real threat of swamping of the Council, a compromise was reached on amendments to the bill.[51]

In accepting the compromise, the Council appears to have accepted that as a nominated House it could not hold out against the mandate of the government as expressed at the polls, whilst nevertheless continuing to assert its power to amend taxation measures.

Reid also once more attempted reform of the Council. In August 1895 the Constitution Act Amendment Bill 1895 was introduced in the Council.[52] The bill proposed that the number of members of the Council be fixed at 60 – to preclude further swamping – with members to be appointed by the Governor on the advice of the Executive Council for terms of five years. Twelve members were to retire each year, but were eligible for re-appointment. New arrangements were also proposed for dealing with deadlocks between the Houses.[53] The bill was heavily criticised in the Council and an amendment to the second reading that the bill be read a second time 'this day six months' was carried by 39 votes to 13, effectively defeating the bill and preventing it from being introduced again that session.[54]

There followed in the period between 1896 and 1901 several further unsuccessful attempts at reform of the Council to curtail its powers with respect to appropriation and taxation bills and for the resolution of disagreements between the Houses.[55] Once again, all failed.[56]

The coming of Federation in 1901 saw a further shift in the political landscape. With the referral of certain powers and responsibilities to the Commonwealth Parliament, and the removal of the fiscal question of free trade verses protectionism to the federal arena, a new political division arose in New South Wales between the recently created reformist Labor Party, with a legislative agenda of industrial, social and constitutional reform, and the free traders who renamed themselves the Liberal Party.[57]

---

under the heading 'Conferences on bills' and Chapter 22 (Relations with the Legislative Assembly) under the heading 'Conferences between the Houses'.

51 *Minutes*, NSW Legislative Council, 27 November 1895, p 134.

52 *Minutes*, NSW Legislative Council, 28 August 1895, p 18.

53 Where the Council did not return an appropriation bill within one month, the bill could be sent for assent on a two-thirds majority resolution of the Assembly. The Council could amend but not reject bills dealing with taxation, authorising public works and the raising of loans, and the Assembly could determine if the bill was to be presented, with or without amendment, for assent. All other deadlocked bills could be put to a referendum by majority resolution of the Assembly if rejected or unacceptably amended by the Council in two successive sessions. Where a bill failed at a referendum, it or a similar bill could not be put to another referendum for three years.

54 *Minutes*, NSW Legislative Council, 26 September 1895, p 46.

55 See the Referendum Bill 1896, the Constitution Act Amendment Bill 1900, and the Constitution Act Amendment Bill 1901.

56 However, a major re-write of the standing orders was completed in 1895, adopting many of the procedures in the Legislative Assembly. See S Want and J Moore, edited by D Blunt, *Annotated Standing Orders of the New South Wales Legislative Council*, (Federation Press, 2018), Appendix.

57 Clune and Griffith, (n 33), p 158.

1926: Labor's first attempt to abolish the Council

In 1898, the New South Wales Labor Party adopted abolition of the Legislative Council as part of its party platform. The basis of this move was twofold: the Council's membership was perceived to reflect the interests of wealth and privilege and to be inherently conservative; and the existence of a second chamber was held to be anathema to the sovereignty of the elected government in the Assembly.

On 21 October 1910, the first Labor Ministry in New South Wales, that of the Hon James McGowen, took office. Over the next 15 years, various Labor ministries maintained an uneasy relationship with the Council. For example, during the period 1911 to 1913, the McGowen Ministry had a number of bills rejected by the Council. However, following the June 1913 election, when the Holman Labor Ministry was returned with a decisive majority, much of the previously rejected legislation was accepted by the Council in modified form, in recognition of the expression of the public will at the election.

At the same time, elements within the Labor Party continued to press for the abolition of the Council. The Annual Conference of the Labor Party in 1916 censured the Holman Ministry for failing to take action to abolish the Council. However it was not until the election of Premier the Hon John (Jack) Lang in June 1925 that Labor was in a strong enough position to move to abolish the Council.

What followed was to be the most tumultuous but also defining decade in the history of the Legislative Council.

The Lang Ministry came to office with a legislative program of social and economic reform which from the outset ran into problems in the Council. In response, Lang prepared the grounds for the abolition of the Council through the traditional method of swamping the House. Two new Labor members were appointed in July 1925[58] and a further 25 in December 1925.[59] Documents tabled in the Council on 12 January 1926 show that before agreeing to make the latter appointments, Governor de Chair sought an undertaking from Premier Lang that the new members would not be used to abolish the Council, but Lang refused. The Governor was prepared to appoint 15 members, but Lang complained that the Governor had rejected the advice of ministers and insisted that no less than 25 additional members was adequate. Eventually the Governor agreed to the appointment of the 25 additional members, under protest that the number was more than was needed.[60]

Shortly afterwards, on 20 January 1926, the Lang Ministry introduced the Constitution (Amendment) Bill 1926 into the Council, which provided for the Council's abolition. The second reading debate on the bill was adjourned on 22 January 1926 by a narrow 44 votes to 43 and the session concluded three days later. The bill failed to pass when

58 *Minutes*, NSW Legislative Council, 12 August 1925, p 3.

59 *Minutes*, NSW Legislative Council, 21 December 1925, p 130.

60 *Minutes*, NSW Legislative Council, 12 January 1926, p 142. See also papers and correspondence between Governor de Chair and Premier Lang relating to the appointment of the 25 members: *Joint Volume of Parliamentary Papers*, 1929-1930, vol 1, p 343.

two Labor members crossed the floor and five, including four of the 25 Labor members appointed in December 1925, were absent for the vote. In effect, a number of Lang's new appointees had not supported the vote to abolish the Council. All seven were subsequently expelled from the Labor Party. In the next session on 23 February 1926, an attempt to restore the bill to the *Notice Paper* was defeated by 47 votes to 41.[61]

In March 1926, following the enactment of legislation to enable the appointment of women to the Council,[62] Lang unsuccessfully asked the Governor to appoint a further 10 members to the Council, again presumably with a view to its abolition. On this occasion, the Governor refused to make the appointments, apparently on the grounds that Lang was not able to demonstrate that he had an electoral mandate for such fundamental constitutional change as abolition of the Council. Petitions by the Lang Ministry to the Dominions Office in London also failed.

At the election on 8 October 1927 the first Lang Ministry lost office.

1928–1930: Entrenchment of the Council and further failed reform

In response to Lang's attempt to abolish the Council, and with the example of Queensland Labor's 1922 abolition of that State's Legislative Council fresh in mind, the new conservative Nationalist Bavin Ministry acted in 1928 to safeguard the existence of the Council. The Constitution (Legislative Council) Amendment Bill 1928, introduced in the Council in May 1928, inserted a new section 7A 'manner and form' requirement into the *Constitution Act 1902* to protect the Council from abolition.[63]

Following the passage of the Constitution (Legislative Council) Amendment Bill 1929 through both Houses in the following session, the bill was reserved for assent on 26 March 1929. Assent was given on 8 November 1929.[64] However, the government did not issue a proclamation to bring section 7A into effect until 24 September 1930, with the section actually coming into force on 1 October 1930.[65]

The new section 7A, still in force today, entrenched the Council by requiring that no bill to abolish it, or alter its constitution or powers, could receive royal assent unless it was passed by both Houses and approved at a referendum by a majority of the electors. Moreover, section 7A was itself entrenched, with the result that it could not be altered or repealed except by a bill similarly approved at a referendum.

The delay in the proclamation and commencement of the *Constitution (Legislative Council) Amendment Act 1929* from March 1929 to October 1930 was to permit the Bavin Ministry to enact further legislation to reconstitute the Council and codify its powers before the requirements of the new section 7A came into effect.

---

61 *Minutes*, NSW Legislative Council, 23 February 1926, p 26.
62 *Constitution (Amendment) Act 1925*.
63 *Minutes*, NSW Legislative Council, 9 May 1928, p 18.
64 *Minutes*, NSW Legislative Council, 12 November 1929, p 68.
65 *NSW Government Gazette*, No 144, 26 September 1930, p 3779.

To this end, on 19 September 1929, the Bavin Ministry introduced in the Council the Constitution (Further Amendment) Bill 1929.[66] The bill provided for a Council of 60 members indirectly elected by the members of both Houses sitting and voting together. Members were to be elected for a term of nine years, with one-third retiring every three years. Members had to be at least 30 years of age and be capable of sitting and voting as a member of the Assembly.

The Constitution (Further Amendment) Bill 1929 also sought to reform the deadlock provisions governing relations between the two Houses. Clause 4(2) of the bill, as introduced in the Council, provided that the Council could reject but not amend money bills, or suggest amendments that would increase any proposed charge or burden on the people. A bill was not to be taken as a money bill if it only contained provisions for the imposition or appropriation of fines or penalties, or fees for licences or services.

The bill was the subject of detailed debate. Most attention focused on the powers of the Council in relation to money bills.[67] After a number of amendments were made in each House,[68] a final form of wording of clause 4 was agreed to providing, in part, for appropriation bills to be presented to the Governor for assent even where they had been rejected, unacceptably amended or not passed by the Council.[69] As Premier Bavin had given a commitment that the bill would be submitted to the electors at a referendum,[70] the bill was not presented for assent at this time.

The machinery legislation to provide for the referendum on the bill was put in place by the *Constitution Further Amendment (Referendum) Act 1930*, which provided for the referendum to be held on 17 May 1930. However, in the context of the economic crisis caused by the start of the Great Depression, the referendum was postponed, initially to be held in conjunction with the next general election and, finally, to a date to be fixed by the incoming government. Accordingly, the Constitution (Further Amendment) Bill 1929, including its reforms to the powers of the Council, was never enacted.

The Bavin Ministry lost office at the election held on 25 October 1930. A new Lang Ministry took office on 4 November 1930.

1930–1932: Labor's second attempt to abolish the Council

Following his re-election, Premier Lang once again set out to abolish the Council. On 2 December 1930, the Vice-President of the Executive Council, the Hon Albert Willis,

66 *Minutes*, NSW Legislative Council, 19 September 1929, p 23.

67 *Hansard*, NSW Legislative Council, 24 September 1929, p 208; 25 September 1929, p 263; *Hansard*, NSW Legislative Assembly, 6 October 1929, p 1076 per the Hon Thomas Bavin; 7 October 1929, p 1115 per the Hon Jack Lang.

68 *Hansard*, NSW Legislative Assembly, 19 November 1929, pp 1472, 1481; *Minutes*, NSW Legislative Council, 29 November 1929, pp 88-90; 3 December 1929, pp 113-115; *Hansard*, NSW Legislative Council, 3 December 1929, p 1893.

69 *Hansard*, NSW Legislative Assembly, 4 December 1929, pp 1975-1985; *Minutes*, NSW Legislative Council, 4 December 1929, p 118.

70 *Hansard*, NSW Legislative Assembly, 6 November 1929, p 1085.

introduced two bills in the Council, one to repeal section 7A of the *Constitution Act 1902*, by now in force, and the other to abolish the Council.[71] On the advice of the President, Sir John Peden,[72] that a referendum was necessary to abolish the Council under the requirements of section 7A of the *Constitution Act 1902*, the Council allowed both bills to pass without division, with the intention of challenging the bills in the courts. An injunction was then secured in the Court of Equity preventing assent to the bills on the basis of their failure to observe the requirements of section 7A.[73] The plaintiffs were members of the Council led by the Hon Arthur Trethowan, a founder of the Country Party. The Full Bench of the New South Wales Supreme Court,[74] the High Court of Australia[75] and ultimately the Privy Council in London[76] subsequently held section 7A to be valid and a referendum necessary for its repeal. The bills thus failed to meet the manner and form requirements of section 7A and could not be presented for assent.

Whilst the fate of the 1930 bills was being determined by the courts, Premier Lang continued to push for further appointments to the Council. On 20 November 1931, 25 additional members were appointed to the Council,[77] giving Lang control of the House and increasing the membership of the House to 109. The new appointments included the first two female members of the Council, the Hon Catherine Green and the Hon Ellen Webster. However, troubles with faction fighting in the Labor Party and the crisis of the Great Depression subsequently curtailed Lang's struggle with the Council. Finally, on 13 May 1932, in perhaps the most dramatic constitutional event in the State's history, Governor Sir Philip Game exercised his reserve powers to dismiss Lang from office after Lang sought to prevent the Commonwealth Government from seizing New South Wales revenues for interest owed by the New South Wales Government to foreign bondholders.

1932–1933: Successful reform

Following the dismissal of the Lang Ministry, the conservative Stevens-Bruxner Ministry took office on 16 May 1932 with a commitment to reconstitute the Council. The public were now seen to be receptive to a reconstitution of the Council, and in particular placing the Governor beyond the pressures and criticisms associated with attempts to swamp the Council. Less certain was the form that the reconstitution should take. Various proposals went before a Cabinet sub-committee, including options for a nominee House, an elected House and a partly nominee and partly elected House. Arguments were expressed in favour of both direct and indirect methods of election.

---

71 *Minutes*, NSW Legislative Council, 2 December 1930, p 22.
72 The President was also Dean of the Law Faculty at the University of Sydney.
73 *Minutes*, NSW Legislative Council, 11 December 1930, p 39.
74 *Minutes*, NSW Legislative Council, 20 January 1931, p 51; *Trethowan v Peden* (1930) 31 SR (NSW) 183.
75 *Attorney-General (NSW) v Trethowan* (1931) 44 CLR 394.
76 *Attorney-General (NSW) v Trethowan* [1932] AC 526.
77 *Minutes*, NSW Legislative Council, 24 November 1931, p 370.

Advocates of the direct election option based their position on the Bryce Report of 1918 on reform of the House of Lords in the United Kingdom,[78] which contended that such a plan 'would produce a Chamber both homogenous and directly responsible to the people … it would enjoy their confidence and mirror their views and ideas', and that with frequent elections, renewed public opinion would refresh and strengthen a second chamber. However, the conservative Stevens-Bruxner Ministry favoured indirect election of the Council.

In order to secure the numbers for reform of the Council, the Stevens-Bruxner Ministry first took the opportunity to add once again to the membership of the Council, with two additional members appointed in June 1932[79] and a further 20 members appointed in September 1932,[80] resulting in a peak of 125 members in September 1932.

Having secured the numbers in the Council, on 13 September 1932 the Stevens-Bruxner Ministry introduced the Constitution Amendment (Legislative Council) Bill 1932 into the Council.[81] The bill revived the Bavin Ministry's 1929 proposals for the reconstitution of the Council and proposed new mechanisms for the resolution of deadlocks on bills between the two Houses.

Following extensive debate, the Council agreed to the second reading of the bill by 53 votes to 25.[82] After consideration in detail and amendment in committee,[83] the bill was forwarded to the Assembly on 29 September 1932. The Assembly agreed to the bill on 16 December 1932 with minor amendments which were agreed to by the Council.[84]

A second bill, the Constitution Further Amendment (Legislative Council Elections) Bill 1932, providing for the indirect election of the Council, was introduced and passed by the Council on 15 December 1932[85] and agreed to by the Assembly on 20 December 1932.[86]

A third bill, the Constitution Further Amendment (Referendum) Bill 1932, providing arrangements for the holding of a referendum on 13 May 1933 on the reconstitution of the Council, was introduced in the Assembly and passed both Houses on 16 December 1932.[87]

78 Conference on the Reform of the Second Chamber, London, 1918.
79 *Minutes*, NSW Legislative Council, 23 June 1932, p 5.
80 *Minutes*, NSW Legislative Council, 8 September 1932, p 15 (17 members were appointed but only 16 took their seats); 14 September 1932, p 24 (two members); 21 September 1932, p 35 (one member); 9 November 1932, p 116 (Mr McKillop resigned without taking up his earlier appointment).
81 *Minutes*, NSW Legislative Council, 13 September 1932, p 20; *Hansard*, NSW Legislative Council, 13 September 1932, p 107.
82 *Minutes*, NSW Legislative Council, 21 September 1932, pp 36-37.
83 *Minutes*, NSW Legislative Council, 28 September 1932, p 48.
84 *Minutes*, NSW Legislative Council, 16 December 1932, pp 205-206.
85 *Minutes*, NSW Legislative Council, 15 December 1932, pp 190-191, 198.
86 *Minutes*, NSW Legislative Council, 20 December 1932, p 215.
87 *Minutes*, NSW Legislative Council, 16 December 1932, p 210.

Following a torrid and bitter campaign highlighting the deep schisms that had developed in New South Wales politics between Labor and non-Labor forces and within Labor itself, the Constitution Amendment (Legislative Council) Bill 1932 was approved at the referendum held on 13 May 1933 by 716,938 votes (51.5 per cent) to 676,034, a narrow majority of 40,904.[88]

On 19 May 1933, six days after the referendum, Mr Albert Piddington, a barrister and associate of Lang, and four Labor members of the Council sought an injunction in the Supreme Court to restrain the Constitution Amendment (Legislative Council) Bill 1932 and the Constitution Further Amendment (Legislative Council Elections) Bill 1932 from being submitted to the Governor for assent. The main argument in the Supreme Court was that the referendum was invalid as section 7A of the *Constitution Act 1902* required that a copy of the bill, the subject of the referendum, be provided to or made available to each elector. The Court rejected the argument in *Piddington v Attorney-General (NSW)*,[89] holding that 'submission' in section 7A means nothing more than holding a vote of the electors as to whether they assent to or disapprove of the bill.

On 28 June 1933, the Hon James Concannon,[90] a Labor member of the Council, moved a motion to refer nine questions regarding the validity of the Constitution Amendment (Legislative Council) Bill 1932 to the Supreme Court, but the motion was defeated on division by 49 votes to 36.[91]

In another action, the Hon Patrick Doyle, also a Labor member of the Council, sought an injunction in the Supreme Court advancing similar arguments as in *Piddington*. Doyle also challenged the validity of the machinery elections bill, alleging that the bill should have been submitted to a referendum in accordance with section 7A.[92] The Supreme Court dismissed the action[93] and Doyle was also unsuccessful in an appeal to the Privy Council.[94]

The 1933 constitutional settlement

The *Constitution Amendment (Legislative Council) Act 1932* (No 2 of 1933), as approved at the referendum on 13 May 1933, was assented to on 22 June 1933.[95] It provided for a Legislative Council of 60 members elected by members of both Houses of Parliament, by proportional voting, for a normal term of 12 years, with a quarter of the members being elected every three years. The Council could no longer be swamped by politically motivated appointments made by the Governor on the recommendation of the Premier.

88 *Minutes*, NSW Legislative Council, 22 June 1933, p 14.
89 (1933) 33 SR (NSW) 317 at 324.
90 Mr Concannon was one of the four members in Piddington's action.
91 *Minutes*, NSW Legislative Council, 28 June 1933, pp 24-25.
92 Mr Piddington KC appeared as counsel for the plaintiffs.
93 *Doyle v Attorney-General (NSW)* (1933) 33 SR (NSW) 484.
94 *Doyle v Attorney-General (NSW)* [1934] AC 511.
95 *Minutes*, NSW Legislative Council, 22 June 1933, p 14.

The President was to be elected by the members of the Legislative Council rather than being appointed by the Governor.

The *Constitution Amendment (Legislative Council) Act 1932* also altered the powers of the Council through the insertion of sections 5A, 5B and 5C into the *Constitution Act 1902*. Still in force today, these sections make provision for the resolution of deadlocks between the Houses on bills introduced in the Assembly. The power of the Council to insist on changes to appropriation bills 'for the ordinary annual services of the Government' was removed, but it retained the power to amend or reject all other legislation. These provisions are discussed in detail in Chapter 15 (Legislation)[96] and Chapter 17 (Financial legislation).

PHASE THREE (1933–1978): THE INDIRECTLY ELECTED COUNCIL

1934–1961: Labor's further attempts to abolish the Council

After the 1933 reconstitution, a series of four elections was held in November and December 1933 to elect the new members of the Council. Subsequently, the reconstituted Council of 60 members met for the first time on 24 April 1934.[97]

However, despite the reconstitution of the Council and the enactment of section 7A of the *Constitution Act 1902*, abolition of the Council remained Labor policy. There were three further attempts by Labor to reform or abolish the Council during the period 1934 to 1961. Once again they were unsuccessful.

The first two attempts occurred during the period in which the McKell Labor Ministry (1941-1947) was faced with a conservative Council:

- The Constitution (Legislative Council Reform) Bill 1943, introduced in the Assembly on 19 November 1943, was defeated in the Council when an amendment to the second reading motion that the bill be read a second time 'this day six months' was carried on division by 34 votes to 21, thus preventing the bill being considered again in the same session.[98]
- The Legislative Council Abolition Bill 1946, introduced in the Council on 4 December 1946, was defeated at the second reading stage when, with the numbers being equal at 29 ayes and 29 noes on the question that the bill be now read a second time, President Farrar, referring to the practice and precedent

96 See the discussion under the heading 'The resolution of deadlocks on bills introduced in the Assembly'.

97 The Council was initially made up of four groups of members elected for terms of 3, 6, 9 and 12 years respectively. At subsequent triennial elections to fill the retiring members' vacancies, they were succeeded by members whose terms were for 12 years.

98 *Minutes*, NSW Legislative Council, 14 December 1943, p 78. Under then standing order 168 a bill ordered to be read a second time 'this day six months' could not be considered again in the same session.

> as set out in parliamentary authorities, cast his vote with the noes 'in order to preserve the status quo of the Legislative Council'.[99]

Commentators have expressed varying views as to the seriousness of the McKell Ministry's attempts at reform and abolition of the Council in 1943 and 1946.[100] Amongst other things, the timing of both bills close to the end of a session preceding an election was awkward, although in the case of the 1946 bill the timing may have been linked to the granting of leave of absence to three members of the opposition, providing the possibility of getting the Legislative Council Abolition Bill 1946 passed.

There followed between 1948 and 1959 an uneasy truce between Labor and the Council after Labor gained the balance of power in the Council. However, when Labor lost this balance of power in 1959 following a split in the Labor Party and the formation of the Democratic Labor Party, the Heffron Labor Ministry again sought to abolish the Council through the Constitution Amendment (Legislative Council Abolition) Bill of 1959-1960, introduced into the Assembly in November 1959. Like its 1946 predecessor, the bill provided for the abolition of the Council and a prohibition on the establishment of a new second chamber unless approved by the voters at a referendum.

This attempt at abolition raised many significant issues in terms of parliamentary practice, law and politics. When the bill initially reached the Council on 2 December 1959, the Council immediately resolved by 33 votes to 25 to send a message to the Assembly returning the bill and declining to take the bill into consideration on the grounds that a bill affecting the constitution of the Council should have originated in the Council.[101] Seven Labor members who voted for the motion returning the bill to the Assembly without consideration were subsequently expelled from the Labor Party. On 6 April 1960, after the necessary interval of three months required under the deadlock provisions of section 5B of the *Constitution Act 1902*, the Assembly again sent the bill to the Council, and the Council again resolved, this time by 34 votes to 24, to return the bill to the Assembly on the same grounds as before.[102]

In accordance with section 5B, the following day, 7 April 1960, the Assembly sent a further message to the Council requesting a free conference of managers of the two Houses on the bill. The Council sent back a message to the Assembly that, as it had neither rejected nor failed to pass the bill within the meaning of section 5B, it did not consider any situation had arisen where a free conference of managers of the two Houses was either necessary or proper, and refused the request.[103]

Subsequently, on 13 April 1960, both Houses received messages from the Governor convening a joint sitting on the bill in the Council chamber on 20 April 1960. Despite the Council resolving on division that a situation had not arisen conferring constitutional

---

99 *Minutes*, NSW Legislative Council, 11 December 1946, p 32.
100 For a fuller discussion, see Clune and Griffith, (n 33), pp 388-396.
101 *Minutes*, NSW Legislative Council, 2 December 1959, pp 137-138.
102 *Minutes*, NSW Legislative Council, 6 April 1960, pp 203-205.
103 *Minutes*, NSW Legislative Council, 7 April 1960, pp 213-215.

power on His Excellency to convene the joint sitting, and an Address-in-Reply to the Governor to that effect being adopted,[104] the joint sitting ultimately took place in accordance with section 5B. Only government (Labor) members from the Council attended the joint sitting, the opposition refusing to participate.

On 12 May 1960, the Assembly resolved that the Constitution Amendment (Legislative Council Abolition) Bill be submitted to a referendum in accordance with the provisions of section 5B.[105] Later that day, the Hon Colonel Hector Clayton, Leader of the Opposition in the Council, instituted legal proceedings in the Supreme Court seeking an injunction to prevent the referendum being held. The argument submitted by the plaintiffs was that the Council had returned the bill to the Assembly without deliberation, and had not rejected or failed to pass the bill within the meaning of section 5B. In *Clayton v Heffron*, the Full Bench of the Supreme Court found for the defendants on the grounds that the words 'rejects or fails to pass' were intended to cover entirely the situations where the Council withholds consent to a measure.[106] The Court also held that a free conference not being held on the bill did not render the Governor's actions in convening a joint sitting invalid and, further, that the Council's lack of participation in the process did not prevent the bill being put to a referendum. Special leave to appeal to the High Court was denied, with the Court ruling that the failure of the Council to participate in the free conference did not bring the procedure prescribed by section 5B to a halt.[107] Ultimately the government's handling of the constitutional requirements under section 5B was upheld.

In January 1961, Premier Heffron announced that the referendum would be held on 29 April 1961. Following a spirited campaign by conservative parties opposing abolition of the Council, the bill was rejected at the referendum by 1,089,193 votes (57.5 per cent) to 802,512.[108]

This brought to an end the last formal attempt to abolish the Council.

PHASE FOUR (1978 ONWARDS): THE DIRECTLY ELECTED COUNCIL

1978: Direct election and reconstitution from 60 to 45 members

The third major reconstitution of the Legislative Council occurred in 1978, when the Council became directly, rather than indirectly, elected.

By way of background, in April 1976 during the election campaign that led to the election of the Wran Labor Government in May 1976, the Hon Neville Wran, Leader

104 *Minutes*, NSW Legislative Council, 13 April 1960, pp 231-233.

105 *Votes and Proceedings*, NSW Legislative Assembly, 12 May 1960, p 324.

106 *Clayton v Heffron* (1960) 77 WN (NSW) 767 at 785-786 per Evatt CJ and Sugerman J, at 805-807 per Herron J.

107 *Clayton v Heffron* (1960) 105 CLR 214 at 215-216 per the whole court.

108 There were 49,352 informal votes recorded.

of the Opposition in the Legislative Assembly, promised that if elected to government, he would hold a referendum to decide the number of members and future method of election of the Legislative Council.

On 1 June 1977, during the second session of the 45th Parliament, Premier Wran introduced in the Assembly the Constitution and Parliamentary Electorates and Elections (Amendment) Bill 1977 which provided for a reduction in membership of the Council from 60 to 45 members and for members to be directly elected by the people. The process of reform was itself ground-breaking, both in the way it was conducted and the outcome.

Briefly, when the bill was received in the Council it was referred to a select committee. When the bill was not returned to the Assembly within two months, and after the required interval of a further three months under the provision of section 5B of the *Constitution Act 1902*, the bill was reintroduced in the Assembly on 10 November 1997, and again sent to the Council. This bill was also referred by the Council to the earlier select committee. When the select committee reported, the Council rejected the bill at the second reading stage. The Assembly then requested a free conference of managers on the bill under section 5B. At the free conference, which extended over several days, a compromise was reached on the reconstitution of the Council and the method of its election.[109] At the request of the Council, the Assembly again sent the bill to the Council where it was amended to give effect to the agreement reached at the free conference, before being returned to the Assembly.[110]

The amended Constitution and Parliamentary Electorates and Elections (Amendment) Bill 1978 finally passed both Houses on 8 March 1978. Three bills to give effect to complementary changes and set the date for a referendum on the reform bill passed both Houses on the same day.[111]

On 17 June 1978, in accordance with section 7A of the *Constitution Act 1902*, the Constitution and Parliamentary Electorates and Elections (Amendment) Bill 1978 was submitted to the people at a referendum. The referendum achieved overwhelming

---

109 For further information, see D Clune, 'Connecting with the People: The 1978 reconstitution of the Legislative Council', Part Two of the Legislative Council's Oral History Project, February 2017, which includes accounts from two members and one officer of the House present at the free conference.

110 Details of the reform process and compromise reached over the bill at a free conference are discussed in more detail in *New South Wales Legislative Council Practice*, 1st ed, (n 39), Appendix 2.

111 *Minutes*, NSW Legislative Council, 8 March 1978, pp 891-893. The Constitution (Referendum) Bill 1978 set 17 June 1978 as the date for the holding of the referendum on the Constitution and Parliamentary Electorates and Elections (Amendment) Bill 1978. The Constitution (Amendment) Bill 1978 repealed a requirement in section 7 of the *Constitution Act 1902* to require bills reforming the Council, when approved at a referendum, to be reserved for Her Majesty's assent and laid before both Houses of the Imperial Parliament. The Constitution (Referendum) Bill 1978 clarified the application of the *Parliamentary Electorates and Elections Act 1912* to the conduct of the referendum.

support, with 2,251,336 votes in favour and 403,313 against. The bill was assented to on 10 August 1978.

The *Constitution and Parliamentary Electorates and Elections (Amendment) Act 1978* amended the *Constitution Act 1902* to provide that the term of Council members was to be three terms of that of Assembly members, with 15 seats to be filled at each periodic Council election. A process was put in place for reducing the membership of the House from 60 to 45 members over the course of three elections.[112]

The *Constitution and Parliamentary Electorates and Elections (Amendment) Act 1978* also implemented a system of proportional representation for election to the Council, with the whole of the State a single electoral district for the return of the 15 members of the Council, and voters required to vote for a minimum of 10 candidates. As a result, the quota for a candidate to be elected to the Council was 6.25 per cent of the total valid votes cast.

Casual vacancies in the Council were to be filled by the Governor declaring to be elected the person applying for appointment who was next on the group list of members from which the member who caused the vacancy had been elected. When a vacancy could not be filled under this method a joint sitting of both Houses was to be held.

The first three periodic Council elections under these arrangements were held on 7 October 1978, 19 September 1981 and 24 March 1984. Accordingly, it was not until 1 May 1984 at the commencement of the 48th Parliament, following the third periodic Council election on 24 March 1984, that the Council met as a fully reconstituted House with 45 members directly elected by the people.

It is doubtful whether Premier Wran, or indeed any of those involved in the 1978 reconstitution of the Legislative Council, imagined the profound consequences of reconstitution for the future development of the Legislative Council as an effective House of Review. Dr David Clune, former parliamentary historian, has contrasted the impact of the 1933 and 1978 reconstitutions:

> The 1933 reconstruction of the Legislative Council ultimately resulted in a house that was stable to the point of somnolent. If not a complete wrong turning, it did lead it into a *cul de sac*. The 1978 reconstitution, by contrast, initiated a revitalisation. Democratic election led to a rejuvenated house of review, with enhanced powers of scrutiny and an energetic and efficient committee system.

112 The process for reconstitution of the Council was as follows: at the first periodic Council election following the reconstitution, 15 members were to be directly elected to the Council, with 28 existing members elected prior to the reconstitution to continue to hold a seat (designated 14 long-term and 14 short-term continuing members). At the second periodic Council election, another 15 members were to be directly elected, with only the 14 designated long-term members to continue to hold a seat. At the third periodic Council election, a further 15 members were to be directly elected, at which point the Council was to consist of the 45 members elected at the past three elections. As a result, the membership of the Council was to fall from 60 to 43 on the return of the writ for the first periodic Council election, before increasing to 44 and subsequently 45 on the return of the writs for the second and third periodic Council elections.

> Connecting the Council with the people gave it legitimacy and purpose. The ramifications are still unfolding.[113]

1987: Group voting tickets and 'above the line' voting

In 1987, a system of group voting tickets and 'above the line' voting was introduced for periodic Council elections similar to that used in the Australian Senate.[114] Under this system, a voter could continue to vote for 10 or more individual candidates, who would henceforth be listed 'below the line'. Alternatively, a voter could indicate a preference for a group of candidates by voting 'above the line', with the voter's preferences to be distributed in accordance with a group voting ticket lodged by that group or party with the Electoral Commissioner. The changes were in place for the fourth periodic Council election, held on 19 March 1988.

The rationale for the introduction of 'above the line' voting and group voting tickets was to make voting simpler.[115] On the second reading of the Parliamentary Electorates and Elections (Further Amendment) Bill 1987 in the Council, the Minister Assisting the Premier, the Hon Jack Hallam, indicated that:

> The introduction of 'above the line' voting would allow voters by a single mark to adopt the registered voting ticket of the group of candidates of the voter's choice instead of numbering ten or more squares to indicate the voter's preferred candidates.[116]

Further changes in 1990 provided for the first time for the registration of political parties. In addition, groups were allowed to lodge three group voting tickets for the Council instead of one or two, and party names were added to ballot papers for the Council.[117]

1991: Reconstitution from 45 to 42 members

In March 1988, a new Coalition Government led by the Hon Nick Greiner took office in New South Wales after 12 years in opposition. For the first time since the reconstitution of the House in 1978, the new government found itself well short of a majority in the Council, reliant on the support of Labor or the cross-bench to implement its legislative agenda. Almost inevitably, various proposals for reform soon emerged in order to improve the government's position in the House.[118]

---

113 D Clune, (n 109), p 39.

114 *Parliamentary Electorates and Elections (Further Amendment) Act 1987*.

115 At the 1984 periodic Council election the informal vote was 6.7 per cent, whereas the informal vote for the Legislative Assembly was only 2.4 per cent.

116 *Hansard*, NSW Legislative Council, 19 November 1987, p 16421.

117 *Constitution and Parliamentary Electorates and Elections (Amendment) Act 1990*, sch 1(6), (13) and (14).

118 For example, in April 1989, the Hon Joe Schipp, Minister for Housing, proposed a Council of 39 seats, divided into three provinces of 33 electorates, each providing 13 members. This would have increased the quota for election to the Council to 7.14 per cent. See Clune and Griffith, (n 33), p 587.

In late March 1990, the Constitution (Legislative Council) Amendment Bill 1990 passed the Assembly and was presented to the Council for concurrence. The bill proposed to reduce the Council to 40 members, and their term to two terms of the Assembly, creating a quota for election to the Council of 4.8 per cent of the total valid votes at an election. In the event, the bill did not proceed.

However, the new Greiner Government also had other electoral reforms to pursue. In late 1990, the government sought a redistribution of the electoral boundaries of the Legislative Assembly, in an effort to remove the perceived Labor bias of the 1986-1987 redistribution.[119] To achieve this, it needed the support of the cross-bench in the Council. In return, the government was prepared to offer the cross-bench various concessions on reform of the Council.

In February 1991, the government introduced a new bill in the Assembly, the Constitution (Legislative Council) Amendment Bill 1991. The bill proposed a modest reduction in the number of members of the Council from 45 to 42, with the last three members elected to the House in 1984 to lose their seats on the reconstitution of the House, being the date of commencement of the legislation.[120] The bill also proposed a reduction in the term of office of members of the Council from three terms of the Legislative Assembly to two, meaning that 21 members were to be elected at each periodic Council election rather than the previous 15. Significantly, in proposing this arrangement, the bill incorporated a reduction in the quota of votes a candidate required for election to the Council from 6.25 per cent to 4.55 per cent, thereby making it easier for minor parties to gain seats on the cross-bench. Also benefiting minor parties was a provision to permit party names to appear on ballot papers. The voting system was also to be changed to require a voter to vote for 15 candidates rather than the previous 10. The bill also provided for casual vacancies in the Council to be filled at joint sittings of both Houses by a person of the same political party as the original member, in line with the method used in the Senate, rather than the 'next in the group' method introduced in 1978.

The bill passed the Parliament without amendment. In turn, the bill was required to be submitted to a referendum in accordance with the requirements of section 7A of the *Constitution Act 1902*, as amongst other things the bill proposed to amend the Sixth Schedule to the *Constitution Act 1902* dealing with election of the Council. Under the *Constitution (Referendum) Act 1991*, the referendum was set down as the date for the next general election. The Hon Marie Bignold, one of the three members who was to lose her seat under the reconstitution, challenged the validity of the act in the Supreme Court for naming the date of the next general election as 'the day for the taking of the poll' rather than appointing a particular day.[121] In dismissing the application, Kirby J concluded that the naming of the day for the next general election was a valid appointment under section 7A(3).[122] Special leave to appeal to the High Court was refused.

---

119 The reforms were contained in the Constitution (Legislative Assembly) Amendment Bill 1990.

120 The three members were the Hon Gordon Ibbett, the Hon Judy Jakins and the Hon Marie Bignold.

121 *Bignold v Dickson* (1991) 23 NSWLR 683.

122 Ibid, at 698.

The bill was approved at the referendum held with the general election on 25 May 1991, 1,864,529 votes to 1,364,863.

The *Constitution (Legislative Council) Amendment Act 1991* received assent and commenced on 1 July 1991. From that day, the Council was reconstituted to consist of 42 members comprising the 15 members elected at the fifth periodic Council election held on 25 May 1991, the 15 members elected at the fourth periodic Council election held on 19 March 1988, but only the first 12 of the 15 members elected at the third periodic Council election held on 24 March 1984.[123]

This was the last time that the number of members of the Council was changed, despite later attempts at further reform.

1991: Reform of the election of the President

In December 1991, the arrangements for the election of the President of the Legislative Council were significantly altered. The *Constitution (Legislative Council) Further Amendment Act 1991* inserted a new section 22G(1) into the *Constitution Act 1902* and amended section 22G(2) to require the Council to elect a new President at its first meeting following any periodic Council election and at any other time when the office became vacant. Previously, the *Constitution Act 1902* had not required an election for President after an election in circumstances where the President was a continuing member from the previous Parliament. More detailed discussion on this change to the arrangements for the election of the President is provided in Chapter 6 (Office holders and administration of the Legislative Council).[124]

The *Constitution (Legislative Council) Further Amendment Act 1991* also amended section 22H of the *Constitution Act 1902* to reduce the quorum of the Council from 12 to 8 members, exclusive of the President or other person presiding.

As introduced, the Constitution (Legislative Council) Further Amendment Bill 1991 also sought to alter the voting rights of the President and Chairman of Committees (as the position was then known) by providing both office holders with a deliberative vote only and not a casting vote, mirroring the situation in the Australian Senate. However, this proposal was removed from the bill through an opposition amendment in committee.[125]

---

123 To allow for the reduction of the term of service of members from three terms of the Assembly to two, the terms of service of the 12 remaining members elected at the third (1984) periodic Council election and the last nine members elected at the fourth (1988) periodic Council election were scheduled to expire on dissolution or expiry of that Parliament (the 50th Parliament). The terms of service of the first six members elected at the fourth (1988) periodic Council election and the 15 elected at the fifth (1991) periodic Council election were scheduled to expire on dissolution or expiry of the following Parliament (the 51st Parliament).

124 See the discussion under the heading 'History of the method of appointing or electing the President'.

125 *Hansard*, NSW Legislative Council, 25 September 1991, pp 1729-1730.

1991: Fixed four-year terms of the Assembly

In October 1991 the Greiner Government introduced in the Assembly two bills to provide for a fixed four-year term of the Legislative Assembly: the Constitution (Fixed Term Parliaments) Special Provisions Bill 1991 and the Constitution (Fixed Term Parliaments) Amendment Bill 1991.[126] Four-year terms had been introduced in 1981 under the *Constitution (Legislative Assembly) Amendment Act 1981*. However that act, in extending the maximum period between general elections for the Legislative Assembly from three years to four years, did not fix the term of a Parliament. There was nothing to prevent the Assembly being dissolved before the four years had expired.

The first bill, the Constitution (Fixed Term Parliaments) Special Provisions Bill 1991, provided that the next general election would be held on 25 March 1995 and that the Assembly could only be dissolved sooner on the following grounds: where a motion of no confidence in the government had been passed; where the Assembly had rejected or failed to pass an appropriation bill 'for the ordinary annual services of the Government'; where the election date needed to be moved forward (not more than two months) because of a clash with a federal election, holiday period or some other inconvenience; or where the Governor could otherwise do so in accordance with established constitutional conventions.[127] The bill itself also contained entrenchment provisions to ensure that it could not be repealed or amended except by a referendum. It also provided that a referendum on the second bill was to be held no later than the date of the next general election.

The second bill, the Constitution (Fixed Term Parliaments) Amendment Bill 1991, provided for the entrenchment in the *Constitution Act 1902* of fixed four-year terms with future elections to be held on the fourth Saturday in March every four years. It was required to be submitted to a referendum under section 7B of the *Constitution Act 1902*.

Both bills were referred to the Joint Select Committee on Fixed Term Parliaments which reported to both Houses in relation to the Constitution (Fixed Term Parliaments) Special Provisions Bill 1991 on 3 December 1991, supporting fixed term parliaments and suggesting some minor amendments to the bills.[128] The Constitution (Fixed Term Parliaments) Special Provisions Bill 1991 was subsequently passed by the Council and assented to in December 1991.[129]

After a series of delays caused by prorogation, the Constitution (Fixed Term Parliaments) Amendment Bill 1991 was finally passed by the Council in May 1993.[130] The bill was

126 The bills were introduced in accordance with the 1991 'Memorandum of Understanding between the Hon Nick Greiner MP, Premier, For and on behalf of the Liberal/National Party Government and Mr John Hatton MP, Ms Clover Moore MP, and Dr Peter Macdonald MP'. A copy of the memorandum is at *Hansard*, NSW Legislative Assembly, 31 October 1991, pp 4004-4033. Amongst other things, the memorandum included an undertaking to provide for fixed term parliaments.

127 Twomey, (n 17), pp 650-651.

128 *Minutes*, NSW Legislative Council, 3 December 1991, p 296.

129 *Minutes*, NSW Legislative Council, 11 December 1991, p 374.

130 *Minutes*, NSW Legislative Council, 21 May 1993, p 179.

overwhelmingly approved at the referendum held with the general election on 25 March 1995, 2,449,796 votes to 795,706. The *Constitution (Fixed Term Parliaments) Amendment Act 1993* received assent on 2 May 1995.

As a consequence of this reform, the term of members of the Council is, except in unusual circumstances where the Assembly is dissolved sooner than its full term, fixed at eight years, being two terms of the Legislative Assembly.

1996–1999: The *Egan* decisions

In the late 1990s, the Legislative Council became embroiled in a series of three court cases in the New South Wales Court of Appeal, the High Court and again in the New South Wales Court of Appeal concerning the power of the Legislative Council to order the production of State papers.

The three decisions handed down – the so-called *Egan* decisions – were of landmark significance.[131] Not only did they confirm in general terms the power of the Legislative Council to order the production of State papers, they also confirmed the fundamental role of the Council in scrutinising the activities of the executive government and holding it to account under the system of responsible government in New South Wales.

Further details on the *Egan* decisions are provided in Chapter 3 (Parliamentary privilege in New South Wales)[132] and in Chapter 19 (Documents tabled in the Legislative Council).[133]

1999: The abolition of group voting tickets

In 1999, further changes were made to the electoral arrangements of the Legislative Council with the abolition of group voting tickets.

By way of background, the sixth periodic Council election, held on 25 March 1995, delivered an unexpected result when the Hon Alan Corbett, representing the A Better Future for Our Children Party, was elected with 1.28 per cent of the first preference vote, on a campaign that cost less than $500. He was returned due to a flow of preferences seemingly based on voter identification with his party name.

Mr Corbett's election was attributable at least in part to the electoral reforms of 1987 (the introduction of group voting tickets and 'above the line' voting) and 1991 (the reduction in the term of members to two terms of the Assembly, with an associated reduction in the quota of valid votes a candidate required for election to the Council from 6.25 per cent to 4.55 per cent).

---

131 See the decision of the New South Wales Court of Appeal in *Egan v Willis and Cahill* (1996) 40 NSWLR 650, the decision of the High Court in *Egan v Willis* (1998) 195 CLR 424 and the decision of the New South Wales Court of Appeal in *Egan v Chadwick* (1999) 46 NSWLR 563.

132 See the discussion under the heading 'The power to order the production of State papers'.

133 See the discussion under the heading 'The *Egan* decisions'.

With the example of Mr Corbett in 1995 no doubt in mind, the seventh periodic Council election of 27 March 1999 saw a record 264 candidates representing some 80 parties or groups standing for election, resulting in a ballot paper measuring 1 metre by 70 cm. Quickly labelled 'the tablecloth', it attracted a good deal of public consternation and anger on election day, as well as leading to ridicule of the electoral system and the Council itself.

The 1999 election also delivered some very curious results. Two candidates were elected from parties with one per cent or less of first preference votes and 0.22 of a quota.[134] A further minor party candidate was elected with only 0.2 per cent of first preference votes and 0.04 of a quota.[135] The reason for this was the flow of preferences under the group ticket voting system. Like-minded minor parties were able to compete for votes, sure of their ability to swap preferences, thereby securing the election of a candidate from one of the minor parties despite receiving a relatively small proportion of the primary vote.

Following the 1999 election, criticism of the manner and method of voting for the Council mounted and calls for reform of the Council were made with renewed vigour. On 2 June 1999, the Treasurer and Leader of the Government in the Legislative Council, the Hon Michael Egan, proposed reducing the number of members in the Council from 42 to 34, thereby increasing the quota required for election to 5.55 per cent and making it more difficult for candidates to be elected on preference deals. Deadlocks were to be resolved by a joint sitting of both Houses at which bills could be passed by a majority of votes (except for appropriation bills to which section 5A applied) – a reform which would have significantly diminished the power of the Council to amend or reject legislation. In addition, the Treasurer proposed imposing more stringent requirements for registration of parties, together with an increase in the amount of the registration fee.[136]

On 20 October 1999, the government introduced the Parliamentary Electorates and Elections Amendment Bill 1999, which contained some but not all of Mr Egan's proposals. The key reform proposed in the bill was the abolition of the group ticket voting system. Under the proposed reforms, parties would no longer be able to lodge with the Electoral Commissioner before an election a list indicating their preference flows. Parties would still be required to field 15 candidates below the line to qualify for a group box above the line. However, group votes 'above the line' would henceforth only indicate a vote for the 15 or more candidates of that group 'below the line'. If voters wanted to indicate further

134 The Hon Peter Wong (Unity) and the Hon Peter Breen (Reform the Legal System).

135 The Hon Malcolm Jones (Outdoor Recreation Party).

136 Media release, Hon Michael Egan MLC, 'Egan announces proposal to reform NSW Upper House', 2 June 1999. It is arguable that any such further reduction in the number of members of the House would have significantly curtailed the role and function of the Legislative Council as a House of Review. See N Laurie, 'Size Matters – the problem of proportionally shrinking Parliaments', Paper presented to the 39th Conference of Presiding Officers and Clerks, Adelaide, July 2008; and L Lovelock, 'The Declining Membership of the NSW Legislative Council Cross Bench and its Implications for Responsible Government', *Australasian Parliamentary Review*, (Vol 24, No 1, Autumn 2009), pp 82-95.

preference flows above the line, they would have to do so by continuing to number 2, 3, 4 and so on above the line. In effect, the only preferences that could flow between parties would be those preferences filled in by voters themselves. This proposed reform had two significant implications:

- The inability of parties to direct preferences meant that their votes would be 'exhausted' if and when the last candidate in their group was eliminated for failing to accumulate a quota.
- The new method of voting above the line would make it easier for major parties that handed out how-to-vote cards on election day to direct preferences through the numbering of group voting squares 2, 3, 4 and so on 'above the line'. By contrast, smaller parties and independents without the resources to hand out how-to-vote cards across the State would be less able to influence the flow of preferences from voters who put them number 1 on their ballot paper.

Other important proposals in the bill involved a tightening of the rules for registration of political parties to require a minimum of 1000 members (instead of the previous 200), the introduction of a substantial application fee of $3,500 for registration of a political party (there was previously no fee) and a further $5,000 fee to contest an election, and the requirement for a party to be registered for 12 months prior to an election.

The Parliamentary Electorates and Elections Amendment Bill 1999 passed the Council on 10 November 1999. The abolition of the group ticket voting system and the requirement for a party to be registered for 12 months prior to an election were agreed to without amendment. However, amendments were adopted to reduce the cost for registering a party from $3,500 to $2,000 and to reduce the minimum number of members for registration of a political party from 1,000 to 750.[137] The bill passed the Assembly on 25 November 1999 and was assented to by the Governor on 30 November 1999.

The eighth, ninth, tenth, eleventh and twelfth periodic Council elections of 6 March 2003, 24 March 2007, 24 March 2011, 26 March 2015 and 23 March 2019 were all conducted under these revised arrangements. In all these elections, no candidate has been elected, even following the flow of preferences, with less than a third of a quota.

At the Commonwealth level, at the 2013 Senate election, group voting tickets and so-called 'preference harvesting' tactics led to parties winning representation with less than 0.5 per cent of the vote. Following a review by the Commonwealth Parliament's Joint Standing Committee on Electoral Matters, the Commonwealth Parliament followed the Parliament of New South Wales in abolishing group voting tickets.[138] The reformed system was first used at the 2016 Senate double dissolution election.

137 *Hansard*, NSW Legislative Council, 10 November 1999, pp 2559-2569.

138 *Electoral Amendment Act 2016* (Cth). For further information and background, see R Laing (ed), *Odgers' Australian Senate Practice*, as revised by H Evans, 14th ed, (Department of the Senate, 2016), p 125.

1999–Present: Consequences of the 1999 reforms

One early consequence of the 1999 reforms to the system of election for the Legislative Council was a fall in the numbers of cross-bench members following subsequent elections, from 13 members following the 1999 periodic Council election, to 11 following the 2003 periodic Council election and 8 following the 2007 periodic Council election.[139] Following the 2007 election, the government only required three out of the eight cross-bench votes to effectively guarantee support for its measures.[140] This coincided with a change in the functioning of the House with for instance a significant reduction in the numbers of orders for the production of State papers, and concerns about the impact on the Legislative Council 'as a House of Review within a system of responsible government'.[141]

The 1999 reforms also changed the composition of the now reduced cross-bench. Dr David Clune, former parliamentary historian, has commented, highlighting that change as a positive one for the Council:

> The 1999 electoral changes, which led to the election of minor party blocs rather than micro party candidates … were a stabilising factor. It was easier for the Government to negotiate with groups … Minor parties were more constrained in their behaviours as they had well-known aims and policies and could be held accountable if they did not act in accord with them. Usually, deal-making was about using a strategic position to progress a defined agenda.[142]

Since the 2007 election, the size of the cross-bench has gradually expanded again, to 9 following the 2011 periodic Council election, 10 following the 2015 periodic Council election and 11 following the 2019 periodic Council election.[143] Following the 2019 election the government now requires five non-government votes to guarantee support for its measures.[144] There has consequently been a return to near record levels of orders for the production of State papers, the creation of additional new committees and more committee inquiries, and the expansion of the annual budget estimates process.

---

139 This fall reflected a decline in the minor party vote in the Council from 35 per cent of the overall vote in 1999 to 23 per cent in 2003 and 25 per cent in 2007.

140 Lovelock, (n 136), p 82.

141 Ibid, pp 82, 94-95.

142 D Clune, 'At Cross-purposes? Governments and the Crossbench in the NSW Legislative Council, 1988-2011', Part Four of the Legislative Council's Oral History Project, August 2019, p 47.

143 Since falling to 23 per cent in 2003, support for minor parties in the Council has rebounded, reaching 35 per cent of the overall vote in 2019. There has also been an increase in the number of voters indicating preferences above the line, up from 15.3 per cent in 2015 to 27.6 per cent in 2019. This increase is likely due to voter experience with the new Senate voting system introduced in 2016, where voters are instructed to complete at least six preferences above the line. See A Green, '2019 New South Wales Election: Analysis of Results', NSW Parliamentary Library Research Service Background Paper 1/2019, p 4.

144 For further information, see Table 7.1 in Chapter 7 (Parties, the Government and the Legislative Council) under the heading 'Party representation in the Legislative Council since 1978'.

It has taken some time, and in the meantime there have been a number of parliamentary terms when the Legislative Council was less assertive, however, perhaps the Council has now returned post-reconstitution to the proper role of an upper house as a 'House of Review', but as Dr Clune suggests, without the risks to its legitimacy associated with the election of members with a very small percentage of primary votes as occurred in 1995 and 1999.

CONCLUSION

For much of its existence, the Legislative Council has been a contested institution. It has faced, and ultimately withstood, numerous attempts at abolition. For many years its legislative power was at issue, before the matter was largely resolved in the settlement of 1933. And where the 1933 reconstitution diminished the role of the Council as a 'House of Review', that role has been revived, in ways probably not anticipated by its framers, but the reconstitution of the House as a directly elected body in 1978. Since then the Council has continued to evolve into a modern and at time assertive House of Review which is a crucial part of the system of responsible government in New South Wales.

Dr David Clune, former parliamentary historian, has commented on the contemporary Legislative Council, through the prism of the role of the cross-bench in the period from 1988 to 2011. Dr Clune's summary is a useful description of the contemporary operation of the Legislative Council in practice:

> The crossbenchers, on the whole, acted responsibly and were prepared to negotiate to ensure stable government. There was occasional egotism, exhibitionism and extremism but it was not the norm. The Government realised that the crossbenchers sometimes had legitimate concerns that were worth listening to. All sides, by now, saw communication and 'give and take' as the customary order in the upper house. The general consensus was that a compromise outcome was better than nothing. …
>
> In spite of its ideological diversity, the crossbench often came together to advance the rights of the house. It held the government to account by ordering the production of documents on controversial issues, strengthened the committee system, and supported other measures to increase scrutiny of the executive.
>
> Lack of government control did not lead to confusion, disruption and disillusionment, as it has in the Senate in recent years. Governments, on the whole, were able to pass their legislation, though sometimes in a highly amended form. Often this was for the better. The Council's role as a house of review has revived. Its strengthened committee system plays a major role in ensuring accountability and allowing community input. Crossbench power had the potential to produce a dysfunctional Legislative Council. Instead, in the view of most participants, it led to better government.[145]

It should be emphasised that the cross-bench is only part of the revitalisation of the role of the Legislative Council. Leaders of the Opposition have initiated major procedural

145 Clune, (n 142), pp 46-47.

reforms to enhance the scrutiny functions of the House. Of note, at the beginning of the 57th Parliament in May 2019, a number of significant procedural reforms were implemented, including to Question Time, the budget estimates process and committee processes, which were jointly initiated by the opposition and cross-bench. Other reforms to enhance the scrutiny role of the House have been supported by the government[146] or even initiated by the government.[147]

As stated in the first edition of *New South Wales Legislative Council Practice*, published in 2008:

> The Legislative Council is the most important of the constitutional checks and balances on excessive concentration of power under the New South Wales Westminster system of responsible government. The fact that neither of the two major sides of Australian politics has held an absolute majority in the Council since 1988 has enhanced the Council's capacity to provide effective oversight of government through legislative review, scrutiny of government spending and questioning of government ministers and officials. The Council is one place where government can, of right, be questioned and obliged to answer.[148]

146 For example, the Leader of the Government in the Legislative Council, the Hon Don Harwin, expressed the government's support for most of the 2019 procedural reforms. See *Hansard*, NSW Legislative Council, 8 May 2019.

147 For example, the Leader of the Government in the Legislative Council, the Hon Michael Egan, led the implementation of the 2004 standing orders.

148 *New South Wales Legislative Council Practice*, 1st ed, (n 39), p 46.

CHAPTER 3

PARLIAMENTARY PRIVILEGE IN NEW SOUTH WALES

This chapter examines the operation of parliamentary privilege in New South Wales, including its nature and purpose, origins and current application.

THE NATURE AND PURPOSE OF PARLIAMENTARY PRIVILEGE

Parliamentary privilege is the sum of certain immunities, rights and powers enjoyed by the individual Houses of the Parliament of New South Wales, together with their members and committees, as constituent parts of the Legislature.[1]

The immunities that attach to parliamentary action in the Legislative Council are the immunity of freedom of 'speech and debates' and the immunity that attaches to participation in certain other 'proceedings in Parliament', such as voting in the House, without external review in the courts. The rights of the House are the right to control its own proceedings and the right to the attendance and service of its members. The powers of the House include certain residual powers to determine its membership, notably through the expulsion of members, the power to maintain order, including suspending members and removing and excluding visitors, the power to order the production of State papers and the power to conduct inquiries and call and compel evidence from witnesses.

The purpose of these immunities, rights and powers is to enable the Legislative Council and its members to carry out their legislative, representative and scrutiny functions in the interests of the public they represent. As stated by Lord Cockburn CJ in *Wason v Walter*,[2] referring to Great Britain:

> … the nation profits by public opinion being thus freely brought to bear on the discharge of public duties.[3]

---

1 Section 3 of the *Constitution Act 1902* provides that 'The Legislature means His Majesty the King with the advice and consent of the Legislative Council and Legislative Assembly'.

2 (1868) LR 4 QB 73.

3 *Wason v Walter* (1868) LR 4 QB 73 at 94 per Lord Cockburn CJ.

Privilege is also central to preserving the autonomy of parliament. It sits within the doctrine of the separation of powers that operates in Westminster parliamentary systems, ensuring the independence of parliament from the other branches of government: the executive and the judiciary.[4] As stated in *Odgers*, referring to the immunity attaching to parliamentary proceedings generally:

> This immunity is in essence a safeguard of the separation of powers: it prevents the other branches of government, the executive and the judiciary, calling into question or inquiring into the proceedings of the legislature.[5]

The granting of immunity to members in their parliamentary actions, especially against threats or reprisals, is accordingly fundamental to the system of responsible and representative government in New South Wales.

There is no general statute which establishes the immunities, rights and powers of the Houses of the Parliament of New South Wales, their members and committees. Rather, they rest upon a complex interaction between the common law principle that the Houses possess such privileges as are necessary for their effective functioning, certain statutes,[6] and the statutory adoption of Article 9 of section 1 of the English *Bill of Rights 1689*.[7] Using modern wording,[8] this famous article declares:

> That the freedom of speech and debates or proceedings in Parliament ought not to be impeached or questioned in any court or place out of Parliament.

This basis of the law of privilege in New South Wales differs significantly from other Australian jurisdictions. In all other Australian jurisdictions, with the partial exception of Tasmania,[9] the immunities, rights and powers of the Houses of Parliament are determined by reference either to those of the British House of Commons at a certain

---

4 See *Mees v Road Corporation* (2003) 128 FLR 418 at [76] per Gray J.

5 R Laing (ed), *Odgers' Australian Senate Practice*, as revised by H Evans, 14th ed, (Department of the Senate, 2016), p 45.

6 Notably the *Parliamentary Evidence Act 1901*.

7 1 Wm & M sess 2, c 2. The long title of the *Bill of Rights 1689* is 'An Act Declaring the Rights and Liberties of the Subject and Settling the Succession of the Crown'. The familiar title of the '*Bill of Rights 1689*' comes from the *Short Titles Act 1896* (UK). The act is also sometimes called the *Bill of Rights 1688*. This is because on 13 February 1689, at the time the English Parliament presented the Declaration of Rights to William and Mary, then Prince and Princess of Orange prior to their coronation, years were held to begin at Easter under the Julian Calendar. In 1752, Britain adopted the New Style Gregorian calendar and the beginning of the year was set as 1 January. Following the coronation of King William III and Queen Mary II, the bill passed through the English Parliament and was assented to on 16 December 1689.

8 As originally enacted, Article 9 declares: 'That the Freedome of Speech and Debates or Proceedings in Parlyament ought not to be impeached or questioned in any Court or Place out of Parlyament'.

9 Tasmania is similar to New South Wales in that, whilst it passed legislation in 1858 – the *Parliamentary Privileges Act 1858* (Tas) – codifying certain powers to summon witnesses, to require the production of documents and to punish certain defined contempts, the remainder of its privileges also rely on the common law principle of necessity. The *Parliamentary Privileges Act 1858* (Tas) was enacted following the decision of the Privy Council in *Fenton v Hampton* (1858) 14 ER 727, in which the Privy Council found that the privileges of the House of Lords and the

date,[10] by the enactment of subsequent more comprehensive privileges legislation such as the *Parliamentary Privileges Act 1987* (Cth),[11] or by the passage of constitutional provisions conferring wide-ranging powers on their Houses.[12] Certain jurisdictions combine these approaches.

Individual and collective privileges

In discussing the privileges of the Houses of the Parliament of New South Wales, a distinction may be drawn between those privileges that attach to parliamentary action – notably 'freedom of speech and debates' – enjoyed by members, witnesses and parliamentary officers in an individual capacity, and those privileges such as the power to order the production of State papers which are exercised by the Houses in a collective capacity.

Whilst certain privileges attach to members as individuals, it is nevertheless important to recognise that they belong to the House as a whole. For example, the immunity of freedom of speech is enjoyed by members individually, but only in connection with their service to the House. It cannot be claimed by members in relation to activities external to the House connected with the member's wider non-parliamentary duties. As stated by Lord Browne-Wilkinson in *Prebble v Television New Zealand Ltd*:

> The privilege protected by Article 9 is the privilege of Parliament itself. The actions of any individual member of Parliament, even if he has an individual privilege of his own, cannot determine whether or not the privilege of Parliament is to apply.[13]

Privilege, notably freedom of speech, is also not enjoyed by members for their personal benefit. For example, whilst the immunity of freedom of speech may protect individual members from legal proceedings, it may equally prevent them from relying on their parliamentary statements in such proceedings.

The term 'parliamentary privilege'

From time to time, it has been suggested that the term 'parliamentary privilege' is an unhelpful or 'unfortunate' one, in the sense that it conveys some form of special treatment or benefit for members of Parliament.[14] Indeed, at one time in 18th and early 19th century England, such a criticism would have been justified.[15] However in modern

---

House of Commons in England were not conferred upon a Legislative Assembly of a colony by the introduction of the common law of England into that colony.

10 *Constitution Act 1901* (Cth), s 49; *Constitution Act 1975* (Vic), s 19(1); *Constitution of Queensland Act 2001* (Qld), s 9; *Constitution Act 1934* (SA), s 38.

11 See also *Parliamentary Privileges Act 1891* (WA); *Parliament of Queensland Act 2001* (Qld); *Legislative Assembly (Powers and Privileges) Act 1991* (NT).

12 *Australian Capital Territory (Self Government) Act 1988* (ACT), s 24(3); *Parliament of Queensland Act 2001* (Qld), ch 3.

13 *Prebble v Television New Zealand Ltd* [1995] 1 AC 321 at 335 per Lord Browne-Wilkinson.

14 UK Government Green Paper, *Parliamentary privilege*, April 2012, p 10.

15 For further information, see the discussion later in this chapter under the heading 'The struggle between the Parliament of the United Kingdom and the courts in the 19th century'.

times, the term 'parliamentary privilege' captures only those immunities, rights and powers that exists to enable the Houses, their members and committees to carry out their legislative, representative and scrutiny functions in the interests of the public they represent. Privilege clearly does not exist for members' personal benefit or protection.[16]

In 1967, the UK House of Commons Select Committee on Parliamentary Privilege recommended that the House of Commons discontinue the use of the term 'parliamentary privilege', instead advocating adoption of the term 'rights and immunities'.[17] Subsequently, however, in 1999, the UK Parliament's Joint Committee on Parliamentary Privilege disagreed, stating that '[e]veryone is accustomed to the present title, parliamentarians and non-parliamentarians alike, and the textbooks and cases all use this nomenclature'.[18] This is clearly the case in New South Wales, where the term 'parliamentary privilege' is of continuing use and widespread understanding, although it is to be hoped with due recognition of its modern nature and purpose.

THE HISTORICAL DEVELOPMENT OF PARLIAMENTARY PRIVILEGE IN ENGLAND

Parliamentary privilege developed in England over many centuries. Two periods are often distinguished: the long struggle of the English Parliament, particularly the House of Commons, for independence from the Crown, culminating in the adoption of the *Bill of Rights 1689*; and the 19th century struggle between the English Parliament and the courts as to their respective jurisdictions.[19]

Whilst the privileges of the Houses of the Parliament of New South Wales are not those of the Houses of the Parliament in what is now the United Kingdom, the development of privilege in England is nevertheless central to an appreciation of the current law of privilege in New South Wales.

The struggle between the English Parliament and the Crown culminating in the *Bill of Rights 1689*

Parliamentary privilege in England, particularly freedom of speech in debate and freedom from arrest of members,[20] arose out of the long struggle for supremacy during the Tudor and Stuart periods between the House of Commons and the Crown.

16 For authority for this, see *R v Chaytor* [2010] UKSC 52.

17 Select Committee on Parliamentary Privilege, UK House of Commons, *Report from the Select Committee on Parliamentary Privilege*, December 1967, paras 12-14.

18 Joint Committee on Parliamentary Privilege, UK Parliament, *Report: Volume I – Report and Proceedings of the Committee*, Session 1998-1999, p 87.

19 The English Parliament became the Parliament of Great Britain following the Union with Scotland in 1707, and the Parliament of the United Kingdom following the Union with Ireland in 1801.

20 The privilege of freedom from arrest often went hand in hand with unsuccessful assertions of the privilege of freedom of speech.

The Stuart Kings in particular did not tolerate intrusion of the parliament into affairs they considered to be their own by divine right, and the common law courts were routinely used by the Crown in both civil and criminal proceedings to impede the House of Commons and punish its members, notably through arrest, despite protestations of privilege by the Commons.[21]

For its part, the House of Commons asserted that the privileges of freedom of speech and freedom from arrest were inherent to the House by virtue of their descent from the *lex et consuetudo parliamenti* – the law and custom of parliament. They were not privileges to be sought and obtained from the Crown and, as such, the Crown could not act directly against a member of the House of Commons for something he said in the House, including by the member's arrest.

The struggle between the Stuart Kings and the House of Commons for supremacy culminated in the English Civil War, the trial and execution of Charles I, the restoration of the monarchy under Charles II, the 'vacation' of the throne by James II, the 'Glorious Revolution' and the adoption of the *Bill of Rights 1689*, which was essentially the price extracted by the Parliament from King William III and Queen Mary II in return for the Crown.[22] Article 9 of the *Bill of Rights 1689* was enacted as the final statutory expression of the fundamental principle for which the House of Commons had fought for centuries: that members of Parliament are free from all impeachment, imprisonment or molestation, other than by the House itself, for all proceedings that occur within its walls. As stated in *Erskine May*:

> In 1689, by the Bill of Rights, statute law brought into sharper focus an important part (but only a part) of what the English Parliament had long claimed. The statute did not supersede the privilege of freedom of speech but it put the claim on a more defined basis. The continued exclusion of interference in or by the courts in the proceedings of either House was succinctly and robustly asserted.[23]

The long and complex development of parliamentary privilege over this period in England is traced in more detail in authorities such as *Erskine May's Treatise on The Law, Privileges, Proceedings and Usage of Parliament*,[24] Hatsell's *Precedents of proceedings in the House of Commons; with observations*[25] and Redlich's *The Procedure of the House of Commons – A Study of its History and Present Form*.[26]

---

21 Of particular note is Sir John Eliot's case (1629), in which Eliot and two other members of the House of Commons were arrested and found guilty in the Court of King's Bench of seditious words spoken in debate and for violence against the Speaker, who had been physically restrained in the Chair in order to delay the adjournment of the House. Although the men claimed privilege, they were nonetheless imprisoned and fined. Indeed, Sir John Eliot died from the rigours of his imprisonment.

22 Certain further important matters of separation were adopted in the *Act of Settlement 1701*.

23 D Natzler KCB and M Hutton (eds), *Erskine May's Treatise on The Law, Privileges, Proceedings and Usage of Parliament*, 25th ed, (LexisNexis, 2019), para 13.9.

24 Ibid, ch 12.

25 J Hatsell, *Precedents of proceedings in the House of Commons: with observations*, 4th ed, Vol I, (Irish University Press, 1818).

26 J Redlich, *The Procedures of the House of Commons – A Study of its History and Present Form*, Vol III, (Archibald Constable & Co Ltd, 1903), pp 42-50.

The struggle between the Parliament of the United Kingdom and the courts in the 19th century

The second significant period in the development of privilege in what was by now the United Kingdom was the struggle during the 19th century between the Parliament of the United Kingdom and the courts as to their respective jurisdictions in relation to privilege.

As parliamentary privilege evolved in the United Kingdom, the Houses of Parliament claimed that the law and custom of Parliament was distinct from the common law, as enforced by the common law courts, in the same way as was the law administered in equity, ecclesiastical and admiralty courts. As such, the law and custom of Parliament was said to be beyond the notice of the common law courts. This claim of a separate law of Parliament was said to be derived from the ancient role of the undivided High Court of Parliament of medieval England in dispensing royal justice, prior to the evolution of the common law courts. Both Houses argued that they alone were the judges of the extent and application of their privileges, without reference to the common law courts. Indeed, following the enactment of the *Bill of Rights 1689*, parliamentary supremacy and the privileges of Parliament and its members were pushed to the extreme. It was said that '[t]he most trifling civil injuries to members, even trespass committed upon their servants, though on occasions unconnected with the discharge of any Parliamentary duty, have been repeatedly the subject of enquiry under the head of privilege'.[27]

For many centuries, the common law courts expressed judicial ignorance of the *lex et consuetudo parliamenti*. This continued in the 18th century after the enactment of the *Bill of Rights 1689* and the *Act of Settlement 1701*, although significant dissenting judgments were handed down during this period.[28] However, during the 19th century, a number of important cases – notably *Burdett v Abbot*[29] in 1811, *Stockdale v Hansard*[30] in 1839, *Howard v Gosset*[31] in 1845 and *Bradlaugh v Gossett*[32] in 1884 – fundamentally redefined the relationship between the parliament and the courts.

In the leading case of *Stockdale v Hansard*,[33] heard in the Court of Queen's Bench, the court pointedly rejected a submission that the *lex et consuetudo parliamenti* was a separate body of law unknown to the judges of the common law courts. As Patteson J observed, '… there is nothing so mysterious in the law and custom of Parliament, so far at least as the rest of the community not within its walls is concerned, that this Court may not acquire a knowledge of it in the same manner as of any other branch of the law'.[34]

---

27 *Stockdale v Hansard* (1839) 112 ER 1112 at 1116-1117. See also *Erskine May*, 25th ed, (n 23), para 16.1.

28 For a summary, see *Erskine May*, 25th ed, (n 23), paras 16.1 and 16.2.

29 (1811) 104 ER 501.

30 The principal case was *Stockdale v Hansard* (1839) 112 ER 1112.

31 (1845) 10 QB 359.

32 (1884) 12 QBD 271.

33 (1839) 112 ER 1112. The case concerned a claim for damages brought on several occasions by Stockdale (a publisher) against Messrs Hansard (the printers of the House of Commons debates) for libel in relation to papers ordered to be printed by the House of Commons.

34 Ibid, at 1185 per Patteson J.

The court also clearly established that it is for the common law courts to determine the extent of the privileges of the parliament. Of note, Lord Denman CJ observed that the inherent privileges of parliament are grounded on three principles, 'necessity, practice, universal acquiescence', from which he laid down his oft-cited test of the existence of a privilege:

> If the necessity can be made out, no more need be said: it is the foundation of every privilege of Parliament, and justifies all that it requires.[35]

Consistent with this approach, the court read down an attempt by the House of Commons to establish its privileges by resolution. Responding to the proceedings brought by Stockdale, the House of Commons had passed a series of resolutions asserting, amongst other things, 'that the House had sole and exclusive jurisdiction to determine upon the existence and extent of its privileges'. The court rejected this proposition, with Lord Denman CJ describing it as 'abhorrent to the first principles of the Constitution of England'.[36]

At the same time, the court did accept that the Houses of the Parliament had exclusive jurisdiction to regulate their own internal proceedings and affairs without interference from any outside body. As Lord Denman CJ stated:

> By consequence, whatever is done within the walls of either assembly must pass without question in any other place.[37]

Bradlaugh v Gossett[38] is the leading authority upholding the exclusive jurisdiction of the Commons in matters relating to the internal proceedings of the House, a concept known in the United Kingdom as 'exclusive cognisance'. Bradlaugh was a member of the House of Commons, and evidently a disruptive one. When the House passed a resolution preventing him from taking the oath of office until such time as he provided an assurance not to disturb proceedings further, he sought a declaration from the courts that the order of the House was *ultra vires* and to restrain the Serjeant-at-Arms from continuing to prevent him from entering the House and administering the oath to himself. The Court of Queen's Bench found against Bradlaugh, determining that the order of the House was a matter relating to the internal management by the House of its proceedings, over which the court had no jurisdiction.[39] In an oft-cited statement, Lord Coleridge CJ observed:

> What is said or done within the walls of Parliament cannot be inquired into in a court of law. … The jurisdiction of the Houses over their members, their right to impose discipline within their walls, is absolute and exclusive. To use the words of Lord Ellenborough, 'They would sink into utter contempt and inefficiency without it'.[40]

---

35 Ibid, at 1169 per Lord Denman CJ.

36 Ibid, at 1154 per Lord Denman CJ. See also *Erskine May*, 25th ed, (n 23), para 16.3. In referring to the 'Constitution of England', Lord Denman CJ was likely referring to significant historical laws such as the *Acts of Union* in 1707 and the *Act of Union 1800* which together formulated the British body politic. Britain did not and does not to this day have a written constitution.

37 Ibid, at 1156 per Lord Denman CJ.

38 (1884) 12 QBD 271 at 275.

39 *Bradlaugh v Gossett* (1884) 12 QBD 271 at 275 per Coleridge CJ, at 278-280 per Stephen J.

40 Ibid, at 275 per Coleridge CJ.

In summary of this 19th century case law in England, *Erskine May* comments:

> In the nineteenth century, a series of cases forced upon the Commons and the courts a comprehensive review of the issues which divided them, from which it became clear that some of the earlier claims to jurisdiction made in the name of privilege by the House of Commons were untenable in a court of law: that the law of Parliament was part of the general law, that its principles were not beyond the judicial knowledge of the judges, and that the duty of the common law to define its limits could no longer be disputed. At the same time, it was established that there was a sphere in which the jurisdiction of the House of Commons was absolute and exclusive.[41]

It is notable that none of the leading 19th century cases cited above made anything more than cursory reference to Article 9 of the *Bill of Rights 1689*. As stated by *Erskine May*, the decisions were instead 'based on constitutional first principles'.[42]

Once again, the long and complex development of parliamentary privilege in England over this period is traced in more detail in *Erskine May's Treatise on The Law, Privileges, Proceedings and Usage of Parliament*.[43]

The application of these principles established in the United Kingdom during the 19th century to the relationship between parliament and the courts in New South Wales and Australia is discussed further later in this chapter.[44]

THE RECEPTION OF PARLIAMENTARY PRIVILEGE IN NEW SOUTH WALES

The privileges of the Houses of the Parliament of New South Wales are not those inherent in the Houses of Parliament in what is now the United Kingdom by virtue of the *lex et consuetudo parliamenti*. Rather, they derive from a complex inheritance of those privileges that stem from the common law test of necessity, from certain statutes, and from the statutory adoption of Article 9 of the *Bill of Rights 1689*. In 1980, McLelland J summarised the position in *Namoi Shire Council v Attorney-General (NSW)*, referring to the Legislative Assembly, but of equal application to the Legislative Council, as follows:

> The privileges of the respective Houses of the United Kingdom Parliament do not provide a valid measure of the privileges of the Legislative Assembly of New South Wales. The former are derived from (a) the historical status of the Parliament at Westminster as a court, referred to above; (b) the constitutional foundation of the authority of the United Kingdom Parliament, as being ancient usage and prescription, rather than some definitive instrument; and (c) the constitutional struggles in England culminating in the Revolution Settlement.
>
> However, in the case of a legislature established by statute, as was the legislature of New South Wales, the privileges and immunities of the respective Houses and

41 *Erskine May*, 25th ed, (n 23), para 16.3.

42 Ibid, para 16.1.

43 Ibid, ch 17.

44 See the discussion under the heading 'The relationship between parliament and the courts in New South Wales'.

> their members are limited to those either expressly conferred by or pursuant to statute; or necessarily incidental to the existence and status of the body in question, or to the reasonable and proper exercise of the functions vested in it …[45]

Such privileges as derive from the common law test of 'necessity'

New South Wales was originally established as a British penal colony in 1788. It was not until 1823 that it became a full colony under an Imperial statute known as the *New South Wales Act 1823* (Imp).[46] From 1824 until 1843 the Legislative Council was a wholly appointed body presided over by the Governor. Between 1843 and 1855 the Council was partially elected, chose its own Speaker to preside at meetings, and initiated its own legislation.[47]

It is open to interpretation whether English law, including the law of privilege, both statute and common law, applied in New South Wales from 1788, 1823 or later. One view is that it was only with the passing of the *Australian Courts Act 1828* (Imp),[48] which provided for the application in New South Wales and Van Diemen's Land of 'all Laws and Statutes in force within the Realm of England at the Time of the passing of this Act … so far as the same can be applied', that English law, including Article 9 of the *Bill of Rights 1689*, clearly applied in the colony.[49]

Whatever the status of the law of privilege in New South Wales during colonial times, the most significant year for the law of parliamentary privilege in New South Wales is 1856, when New South Wales attained self-government under the *Constitution Act 1855*.[50] Significantly, however, unlike the constitutions of other Australian colonies at the time, the new constitution of New South Wales did not include an express grant of privilege from the Imperial Parliament to the Houses of the Parliament of New South Wales, for example one based on the privileges of the House of Commons as at a particular date. Such a grant of privilege had been considered by the Legislative Council of the colony in 1853 prior to the attainment of self-government, but was ultimately rejected.[51]

---

45 *Namoi Shire Council v Attorney-General (NSW)* [1980] 2 NSWLR 639 at 643 per McLelland J.

46 4 Geo IV, c 96.

47 For further information, see the discussion in Chapter 2 (The history of the Legislative Council) under the heading 'Phase one (1823–1855): The early colonial Council'.

48 9 Geo IV, c 83.

49 Section 6 of the *Imperial Acts Application Act 1969* subsequently retrospectively declared Article 9 of the *Bill of Rights 1689* to have been in force in New South Wales from 25 July 1828.

50 18 & 19 Vic, c 54, sch 1. For further information, see the discussion in Chapter 2 (The history of the Legislative Council) under the heading 'The 1855 constitutional settlement'.

51 During consideration of the Constitution Bill in a Committee of the whole House in the Legislative Council on 14 December 1853, upon clause 35 being moved (which referred to the adoption of standing orders), Sir James Martin, a future Premier and Chief Justice, moved a series of amendments for a new clause respecting the privileges of the new Legislature, including a provision that each of the Houses of the new Legislature should have the same privileges as the House of Commons at Westminster. In the event, however, the Hon Edward Deas Thomson, the Colonial Secretary, Mr William Wentworth, the Chair of the two Select Committees on the

Accordingly, the privileges of the Houses of the Parliament at the advent of responsible government fell back on the common law test of necessity, or reasonable necessity, although nothing appears to turn on the use of the word 'reasonable'.[52]

Necessity as a test of the existence of a privilege had previously been articulated by Lord Denman in *Stockdale v Hansard*[53] in 1839 in reference to the privileges of the House of Commons. However in 1842, in the seminal decision of *Kielley v Carson*,[54] the Judicial Committee of the Privy Council of England adopted the same test for determining the privileges of local legislatures established in British colonies, such as the Parliament of New South Wales.

The case itself concerned the powers of the Newfoundland House of Assembly to arrest a person for a breach of privilege committed outside of the House. The Privy Council held that the House of Assembly had only such powers and immunities as were 'necessary to the existence of such a body'[55] and 'reasonably necessary for the proper exercise of their functions and duties'.[56] As such, the powers were more limited in scope than those enjoyed by the English Parliament by virtue of the *lex et consuetudo parliamenti*, which was held to apply exclusively to the House of Commons and the House of Lords.

This common law test of necessity established in *Kielley v Carson* was reiterated by the Privy Council, the High Court of Australia and the New South Wales Supreme Court in subsequent 19th and 20th century case law.[57] Mahoney P summarised these decisions and the meaning of necessity in 1996 in *Egan v Willis and Cahill*[58] as follows:

Proposed New Constitution and a future President of the Council, and Sir William Manning, the Solicitor General, all spoke against the amendments. Whilst they all acknowledged the need to guarantee the privileges of the new Legislature, they argued that this should be achieved by the bringing in of a separate privileges bill, which could be considered by both Houses of the new Parliament. They also argued that some of the provisions sought to be introduced by Mr Martin, especially those concerning the press, went beyond those that were necessary, labelling them 'exceedingly questionable' and 'untenable'. In the event, Mr Martin withdrew his amendments, whilst maintaining that 'the time was not far distant when their necessity would become imperative'. See Parliamentary reports, *Sydney Morning Herald*, 14 December 1853, p 7.

52 *Egan v Willis* (1998) 195 CLR 424 at 447 per Gaudron, Gummow and Hayne JJ.

53 (1839) 112 ER 1112 at 1169 per Lord Denman CJ.

54 (1842) 13 ER 225.

55 *Kielley v Carson* (1842) 13 ER 225 at 234.

56 Ibid, at 235. The Privy Council, in adopting this approach, overturned its earlier decision in *Beaumont v Barrett* (1836) 1 Moo PC 59 that the Jamaica House of Assembly, also established by Letters Patent, had authority to find a newspaper publisher guilty of contempt and to commit him to prison.

57 See the subsequent decisions in *Fenton v Hampton* (1858) 14 ER 727 (Legislative Council of Van Diemen's Land); *Doyle v Falconer* (1866) 16 ER 293 (House of Assembly of Dominica); *Barton v Taylor* (1886) 11 AC 197 (NSW Legislative Assembly); *Norton v Crick* (1894) 15 LR (NSW) 172 (NSW Legislative Assembly); *Fielding v Thomas* [1896] AC 600 (Nova Scotia House of Assembly); *Willis and Christie v Perry* (1912) 13 CLR 592 (NSW Legislative Assembly); *Armstrong v Budd* (1969) 71 SR (NSW) 386 (NSW Legislative Council); *Egan v Willis and Cahill* (1996) 40 NSWLR 650 (NSW Legislative Council) and *Egan v Willis* (1998) 195 CLR 424 (NSW Legislative Council). For further information, see L Lovelock and J Evans, *New South Wales Legislative Council Practice,* 1st ed, (Federation Press, 2008), pp 52-53.

58 (1996) 40 NSWLR 650.

> The decisions in this area of the law show that the powers which have been held to be inherent in legislative bodies have not been limited to powers without which it would not have been possible for the bodies to function. They have extended to powers which are clearly adapted to the needs and purposes of the body in question.[59]

Today, necessity remains the source of the majority of the powers enjoyed by the Legislative Council such as the power of the House to suspend and expel members, the power to order the production of State papers and the power to conduct inquiries. These powers are examined in detail later in this chapter.[60]

Necessity also underpins the immunities enjoyed by members of the Legislative Council, particularly the immunity of freedom of speech.[61] However, it is notable that this immunity also finds statutory expression through the adoption of Article 9 of the *Bill of Rights 1689*, in force in New South Wales under the *Imperial Acts Application Act 1969*, and presumed to have been in force previously under the *Australian Courts Act 1828* (Imp).[62] Again this is examined in detail later in this chapter.[63]

The common law powers of the House as 'protective' or 'self-defensive' only

Whilst the decision in *Kielley v Carson* established necessity as the common law test of the privileges of local legislatures established in British colonies, subsequent decisions of the Privy Council in *Fenton v Hampton*,[64] *Doyle v Falconer*,[65] *Barton v Taylor*[66] and later 20th century case law established the limits of necessity. It was held that local legislatures did not possess powers that are punitive in nature, such as the imposition of fines or arrest and imprisonment. Rather, they possess protective and self-defensive powers only. As expressed by Sir James Colvile, on behalf of the Privy Council, in *Doyle v Falconer*: 'The right to remove for self-security is one thing, the right to inflict punishment is another'.[67]

Of note is the 1886 case of *Barton v Taylor*.[68] This case concerned a member of the Legislative Assembly of New South Wales who had entered the chamber twice[69] within a week of the House having passed a resolution that he be suspended from the service

59 *Egan v Willis and Cahill* (1996) 40 NSWLR 650 at 676 per Mahoney P.

60 See the discussion under the heading 'The powers of the House'.

61 In *Chenard v Arissol* [1949] AC 127 at 133, the Privy Council held that free speech was reasonably necessary to a Legislative Assembly, be it representative or unrepresentative in its composition.

62 9 Geo IV, c 83. As noted, on enactment, section 6 of the *Imperial Acts Application Act 1969* subsequently retrospectively declared Article 9 of the *Bill of Rights 1689* to have been in force in New South Wales from 25 July 1828.

63 See the discussion under the heading 'Such immunities as derive from Article 9 of the *Bill of Rights 1689*'.

64 (1858) 14 ER 727.

65 (1866) 16 ER 293.

66 (1886) 11 AC 197.

67 (1866) 16 ER 293 at 299 per Sir James Colvile.

68 (1886) 11 AC 197.

69 *Votes and Proceedings*, NSW Legislative Assembly, 23 April 1884, p 418; 24 April 1884, p 422.

of the House.[70] The member was removed from the chamber and prevented from re-entering it. In his judgment delivered on behalf of the Privy Council, Lord Selborne observed:

> Whatever, in a reasonable sense, is necessary for these purposes, is impliedly granted whenever any such legislative body is established by competent authority. For these purposes, protective and self-defensive powers only, and not punitive, are necessary.[71]

The High Court of Australia subsequently adopted the same test as Lord Selborne, again in relation to New South Wales, in 1912 in *Willis and Christie v Perry*,[72] in which it was decided that the Speaker of the Legislative Assembly had no power to cause a member who had been disorderly in the chamber, and who had left it in a disorderly manner, to be detained outside the chamber and brought back into it.[73] The 'only purpose' of such action, according to Griffith CJ, was to punish the member concerned.[74]

The New South Wales Supreme Court adopted the same distinction in *Armstrong v Budd*[75] in 1969. The case confirmed the power of the Legislative Council to expel a member for conduct unworthy of a member of the House. Wallace P concluded his judgment:

> In the result I am of the opinion that the Legislative Council has an implied power to expel a member if it adjudges him to have been guilty of conduct unworthy of a member. The nature of this power is that it is solely defensive – a power to preserve and safeguard the dignity and honour of the Council and the proper conduct and exercise of its duties. The power extends to conduct outside the Council provided the exercise of the power is solely and genuinely inspired by the said defensive objectives. The manner and the occasion of the exercise of the power are for the decision of the Council.[76]

Sugerman JA in turn observed:

> Necessity stops short where punishment begins. It has uniformly been held unnecessary to the existence of a local legislature and the proper exercise of its functions, within the principle under discussion, that it should have power to punish for contempts committed beyond its walls or even within them, by strangers or by members.[77]

---

70 *Votes and Proceedings*, NSW Legislative Assembly, 17 April 1884, p 408. The period of suspension was interpreted as one week, based on reference to the standing orders of the Imperial Parliament. See *Barton v Taylor* (1886) 11 AC 197 at 199-200.

71 *Barton v Taylor* (1886) 11 AC 197 at 203 per Lord Selborne.

72 (1912) 13 CLR 592.

73 Ibid, at 597-598 per Griffith CJ.

74 Ibid, at 598 per Griffith CJ.

75 (1969) 71 SR (NSW) 386.

76 *Armstrong v Budd* (1969) 71 SR (NSW) 386 at 403 per Wallace P.

77 Ibid, at 406 per Sugerman JA.

The same distinction was adopted by Mahoney P in the New South Wales Supreme Court in *Egan v Willis and Cahill* in 1996,[78] and again by Gaudron, Gummow and Hayne JJ in the High Court in *Egan v Willis* in 1998.[79]

Nevertheless, there are difficulties in establishing a boundary between the 'necessary' and 'self-defensive' application of the powers of the Legislative Council and their 'punitive' application.[80] What is punitive, and therefore beyond the power of the House, at least based on the inheritance from 19th century case law, depends on both the nature of the action taken and its purpose or objective, in particular whether the action is for the defence of the institution itself. For example, in *Armstrong v Budd*,[81] expulsion of a member was upheld by the Supreme Court as within the Council's power as it was deemed necessary to the defence of the institution. Equally, however, the most common punitive powers of other parliaments, the powers to fine or imprison, are likely beyond the power of the Council, regardless of the motivation. The same principle may apply to the suspension of a member for an indefinite period of time,[82] the exclusion of a member from parliamentary accommodation,[83] and the withdrawal of a suspended member's salary,[84] all of which have been held to be punitive. Even such powers as are held by the Council, such as the powers of suspension or expulsion, may be deemed punitive and unlawful if they are applied in a manner that is not necessary to the defence of the institution, such as punishing a member for statements made or actions taken outside the House.

Has the common law moved beyond 'protective' and 'self-defensive' powers only?

There is some judicial support for the proposition that the powers of the Houses of the Parliament of New South Wales, no longer being a local legislature of a British colony, have moved beyond those restrictions – notably the 'protective' or 'self-defensive' restrictions – deriving from the common law test of necessity developed by the Privy Council in *Kielley v Carson* in 1842. At the very least, it is well established that the powers of the Houses in New South Wales have changed to fit their changing role and operation.[85]

78 *Egan v Willis and Cahill* (1996) 40 NSWLR 650 at 676 per Mahoney P.

79 *Egan v Willis* (1998) 195 CLR 424 at 447-448, 453-454 per Gaudron, Gummow and Hayne JJ.

80 *Egan v Willis and Cahill* (1996) 40 NSWLR 650 at 667 per Gleeson CJ.

81 (1969) 71 SR (NSW) 386.

82 *Barton v Taylor* (1886) 11 AC 197.

83 *Barnes v Purcell* [1946] St R Qd 87.

84 *R v Dickson; Ex parte Barnes* [1947] St R Qd 133.

85 This is similarly the case with the privileges of the UK Parliament derived by virtue of the *lex et consuetudo parliamenti*. As stated by the 1999 UK Joint Committee on Parliamentary Privilege: 'Although of ancient origin, parliamentary privilege is not static or immutable'. See Joint Committee on Parliamentary Privilege, UK Parliament, *Report: Volume I – Report and Proceedings of the Committee*, Session 1998-1999, p 12.

In 1969 in *Armstrong v Budd*,[86] Wallace P cited the gradual falling away of various aspects of imperial control when he observed that the reasonable necessity test must be given an ambulatory meaning 'to enable it to have sense and sensibility when applied' to contemporary conditions:

> When … Lord Selbourne said that whatever in a reasonable sense is necessary to the existence and proper exercise of the functions of a self-governing colonial legislature has been impliedly granted, the critical question is to decide what is 'reasonable' under present-day conditions and modern habits of thought to preserve the existence and proper exercise of the functions of the Legislative Council as it now exists. It would be unthinkable to 'peg' Lord Selbourne's remarks to the conditions in New South Wales when it had just emerged from convict days. Indeed when *Kielley v Carson* was decided convicts were still being sent to western portions of Australia and had only ceased to be sent out to New South Wales one year earlier. This is not to say that the implied power as enunciated by the Privy Council can be enlarged by the passage of time, but the word 'reasonable' in this context must have an ambulatory meaning to enable it to have sense and sensibility when applied to the conditions obtaining in 1969.[87]

This line of thought was revisited by the New South Wales Court of Appeal in 1996 in *Egan v Willis and Cahill*.[88]

Priestley JA noted that *Kielley v Carson* was decided in 1842 in relation to the powers of the Newfoundland House of Assembly, a subordinate legislature established 10 years earlier in 1832 by Letters Patent, with the questions at issue decided on the basis of the Royal Prerogative. At the time, the population of Newfoundland was approximately 60,000.[89]

By contrast, Priestley JA observed that under section 5 of the *Constitution Act 1902*, the Parliament of New South Wales has full plenary legislative power to make laws for the peace, welfare and good government of New South Wales in all cases whatsoever, without any reference to imperial control, and subject only to the provisions of the Commonwealth Constitution.[90] Since the passage of the *Australia Acts* of 1986, all the external limitations upon the power and capacity of the State to make laws for itself had disappeared, with the exception of the Commonwealth Constitution.[91] He continued:

> … there is undoubted constitutional and legal significance in the enhancement of the powers of the New South Wales legislature since *Armstrong v Budd* was decided. It is in the light of that present situation that the question what is reasonably necessary for the Legislative Council to exercise its functions properly must be considered.[92]

---

86 (1969) 71 SR (NSW) 386.

87 *Armstrong v Budd* (1969) 71 SR (NSW) 386 at 402 per Wallace P.

88 (1996) 40 NSWLR 650.

89 *Egan v Willis and Cahill* (1996) 40 NSWLR 650 at 690 per Priestley JA.

90 For further information, see the discussion in Chapter 15 (Legislation) under the heading 'Restrictions on the power of the Parliament to make laws'.

91 *Egan v Willis and Cahill* (1996) 40 NSWLR 650 at 691 per Priestley JA.

92 Ibid, at 692 per Priestley JA.

Similarly, Mahoney P observed:

> Since 1969 there have been further fundamental changes in the position of the New South Wales Parliament. … The effect and, indeed, the purpose of the [*Australia Act 1986* (Cth)] … was … to alter the grundnorm of the Australian legal system. If they were not so before, the parliaments of the Australian States became (subject to what I say) the legislatures of independent political entities in a Federal system and had the plenary powers appropriate to such legislative bodies. The powers of the State legislatures, and accordingly, of the Houses composing them cannot now be determined upon the basis that their legislative powers are limited to the powers appropriate only to a colonial legislative body, that the functions which they are to perform are limited accordingly, and that the powers which they are to have because of what they are and what they may do are to be measured by legal maxims appropriate to powers which are derived from grant. The State Parliaments are, in the relevant sense, legislatures with plenary powers which derive not from grant but from their characters as organs representative of the democratic societies which they represent. In so far as inherent powers are concerned, they have the powers appropriate to a body of that character.[93]

The matter arose again in 1998 in *Egan v Willis*.[94] The Commonwealth Attorney General made a submission that the powers and privileges of the Houses of the Parliament of New South Wales should be determined on the basis of what is appropriate, or reasonably necessary, having regard to the recognised current functions and status of each House of the Parliament as part of an independent representative body with plenary legislative power. The submission further observed that the passage of the *Australia Acts* of 1986 made clear the status of State Parliaments as independent legislative bodies no longer subordinate to the British Parliament.[95] The submission concluded:

> As State Parliaments no longer possess any inferior colonial status, the appropriate analogy for determining the implied (or inherent) powers and privileges of Houses of the NSW Parliament is not with inferior colonial assemblies, but with other Australian Parliaments.[96]

In their majority joint judgment in *Egan v Willis*, Gaudron, Gummow and Hayne JJ indicated that they did not find it necessary to consider whether such submissions were right, noting only that there was no suggestion of any diminution of the powers of the Houses in New South Wales, and that the matter could be concluded upon earlier authorities.[97] However, they did acknowledge the changing nature of what is 'reasonably necessary':

> What is 'reasonably necessary' at any time for the 'proper exercise' of the 'functions' of the Legislative Council is to be understood by reference to what,

93 Ibid, at 685-686 per Mahoney P.

94 *Egan v Willis* (1998) 195 CLR 424.

95 *Egan v Willis*, Written submission of the Attorney General for the Commonwealth, Intervening, pp 2-5.

96 Ibid, p 5.

97 *Egan v Willis* (1998) 195 CLR 424 at 448 per Gaudron, Gummow and Hayne JJ.

> at the time in question, have come to be conventional practices established and maintained by the Legislative Council.[98]

Kirby J, however, found that the value of the 19th century case law was primarily historical rather than judicial:

> Where the asserted privilege of one House of a State Parliament is not expressly provided for by law, but must be implied as essential to the existence of the body as a Parliamentary chamber or as reasonably necessary to the performance of its functions as such, the starting point for determining the validity of this assertion is not the series of cases of the nineteenth century in which the Privy Council and colonial courts defined the implied privileges of colonial legislatures. It is the ascertainment of the privileges that must be inferred from the recognised functions and status of the body as a House of Parliament of an Australian State and thus of part of the legislature of a constituent of the Australian Commonwealth.[99]

Kirby J went on to observe that 'the Council should be seen as a constituent House of a Parliament of a State of Australia which bears a significantly different relationship to the people governed by it than that which existed in colonial times'.[100]

The matter was revisited again in 2017 by the Court of Appeal in *Obeid v R*,[101] but on this occasion with somewhat different results. The case concerned amongst other things the power of the Legislative Council to adjudicate upon and punish a former member, Mr Edward Obeid, for offences committed whilst in office. Counsel for Mr Obeid sought a declaration that it was for the House alone, and not the courts, to judge his conduct whilst a member of the Council. In his judgment, Leeming JA pointedly rejected the submission of counsel for Mr Obeid that the Council had the power to punish Mr Obeid, effectively a punitive power, contrary to the line of authority stemming from *Kielley v Carson*:

> … I find it impossible to reach the conclusion that for wholly *non-constitutional* reasons there should be some implication by which the powers of the chamber have become assimilated to the powers of the House of Commons. I can see no non constitutional reason for rejecting the line of authority stemming from *Kielley v Carson* (many cases of which were appeals from New South Wales itself) continuing to apply to the Legislative Council, where powers remain unaugmented by statute.[102]

It is notable that Twomey also has disputed the proposition that the privileges of the Houses in New South Wales have been enhanced since the reception of necessity at common law in the 19th century. Her argument is that federation had no effect upon the former colonial status of New South Wales, that if anything the Commonwealth Constitution constrains the legislative power of the Parliament of New South Wales,

98 Ibid, at 454 per Gaudron, Gummow and Hayne JJ.
99 Ibid, at 495 per Kirby J.
100 Ibid, at 496 per Kirby J.
101 [2017] NSWCCA 221.
102 Ibid, at [313] per Leeming JA, Hammill and N Adams JJ agreeing at [471] and [474].

and that the functions of the Houses in New South Wales do not appear to have changed in the past 100 years.[103]

In summary, the privileges of the Houses of the Parliament of New South Wales continue to be founded on the common law test of necessity. It is well established that what is necessary changes over time, but the case law is not settled as to whether necessity continues to be constrained to 'protective' and 'self-defensive' powers only. For the time being, however, in the absence of clear judicial authority to the contrary, or alternatively the enactment of express statutory provisions concerning the powers of the Houses, it must be assumed that the power of the Houses remains so constrained.

Such privileges as derive from statute

The second basis of parliamentary privilege in New South Wales is statute.

As noted above, at self-government in 1856, the new *Constitution Act 1855* did not include an express grant of privilege to the Houses of the Parliament of New South Wales, for example one based on the privileges of the House of Commons. It did, however, grant the new Parliament the power to make laws for the peace, welfare and good government of the colony in all cases whatsoever. This clearly provided a power to enact laws with respect to parliamentary privilege.[104]

Subsequently, between 1856 and 1912, there were six legislative attempts to enact comprehensive privileges legislation in New South Wales. All failed, often due to opposition in the Legislative Council. However, the Parliament did adopt the *Parliamentary Evidence Acts* of 1881 and 1901. This is examined further below. In more recent times the Parliament has also adopted certain other acts that deal with aspects of privilege such as the *Defamation Acts* of 1974 and 2005, the *Parliamentary Papers (Supplementary Provisions) Act 1975* and the *Parliamentary Precincts Act 1997*. These are discussed in context later in this chapter.

Attempts between 1856 and 1912 to enact privileges legislation

The first months after the establishment of self-government in New South Wales saw considerable debate in the Parliament about the scope and nature of the privileges of the Houses. Debate in particular focused on the capacity of the Houses to punish contempts. Spice was added to the debate when a member of the Legislative Assembly was horsewhipped within the gates of Parliament.[105]

---

103 A Twomey, *The Constitution of New South Wales*, (Federation Press, 2004), pp 492–493.

104 It is likely that before the passing of the *Colonial Laws Validity Act 1867* (Imp), restrictions remained on the power of the Parliament of New South Wales to legislate for the extension of its privileges, at least to the extent that it may have sought to pass laws repugnant to the fundamental laws of England. After 1867 any such limitation was removed.

105 The matter was raised in the Legislative Assembly as an alleged breach of privilege: *Votes and Proceedings*, NSW Legislative Assembly, 6 August 1856, p 45. See also Parliamentary reports, *Sydney Morning Herald*, 7 August 1856, p 5. The member was reportedly so violently attacked as to be unable to attend his legislative duties for the remainder of the day.

On 12 August 1856, the first attempt to enact privileges legislation in New South Wales was made with the introduction of the Privileges of Parliament Declaration Bill 1856 in the Legislative Assembly.[106] Clause I of the bill sought to declare and define the privileges of the two Houses by providing that they 'shall have the same privileges as the House of Commons at Westminster now has or is entitled to'. Clause II listed certain contempts and breaches of privilege, whilst clauses IV and VIII provided a power to punish contempt or breaches of privilege by imprisonment. Clause VII placed beyond judicial review the propriety of any warrant of commitment issued by either House. Clause IX was a re-enactment of Article 9 of the *Bill of Rights 1689*.

On 2 September 1856, an editorial in the *Sydney Morning Herald*, the third in four months on the subject of parliamentary privilege, was highly critical of the bill, stating that '[s]uch a compound of folly, assurance, and oppression was probably never offered to a legislative body'. In an era when the proceedings of the Houses were only reported in the press,[107] the proposal to make 'misrepresenting the proceedings of the House' a ground for contempt was highly contentious. The bill's main aim, according to the editorial, was 'to destroy the liberty of the press'.[108] After a change in the ministry, in which the Attorney General, who sponsored the bill, lost his portfolio, the second reading of the bill was discharged in the Assembly on 16 September 1856.[109]

Two further attempts to enact privileges legislation were made in 1878 and 1879, with the introduction of two bills, both entitled the Parliamentary Powers and Privileges Bill. Both were blocked by the Legislative Council. The first bill passed the Assembly but was defeated at the second reading stage in the Council on 16 May 1878 by eight votes to seven.[110] The second bill was dropped after ongoing disagreement between the Assembly and Council.[111] The Council disagreed with the bills because they would

106 *Votes and Proceedings*, NSW Legislative Assembly, 12 August 1856, p 62.

107 It was not until 28 October 1879, at the start of the third session of the 9th Parliament, that the debates of the New South Wales Parliament were reported by *Hansard*.

108 Parliamentary reports, *Sydney Morning Herald*, 2 September 1856, p 2.

109 *Votes and Proceedings*, NSW Legislative Assembly, 16 September 1856, p 106.

110 *Minutes*, NSW Legislative Council, 16 May 1878, p 100.

111 The bill was passed by the Legislative Assembly on 30 October 1878 and introduced into the Legislative Council on the same day. The Council returned the bill on 13 February 1879, with a number of amendments. Whilst the Assembly was willing to agree to some of the amendments, it disagreed with others, and when no compromise could be reached by the two Houses, the Assembly requested a free conference, to which the Council agreed. Following the holding of the free conference on 10 April 1879, on 17 April 1879 the question that the House resolve into a Committee of the whole House to consider the report of the Council's managers was negatived on division. See *Minutes*, NSW Legislative Council, 17 April 1879, p 174. A subsequent message from the Assembly 'desiring to be informed of the steps taken by the Council' was referred by the Council to a select committee, the report of which was adopted by the House on 14 May 1879. Based on the report of the select committee, the House adopted a return message to the Assembly the same day indicating that the Assembly's request to be informed of the steps taken by the Council 'does not seem to be in accordance with the mode sanctioned by Parliamentary usages of obtaining information with reference to any Bill while it is pending in the Legislative Council'. See *Minutes*, NSW Legislative Council, 14 May 1979, pp 220-221. The Assembly subsequently resolved, on the motion of Sir Henry Parkes, to remove the message from the Assembly records. See *Votes*

have provided both Houses with the capacity to deal with contempts and breaches of privilege committed outside Parliament.[112] It was argued that 'no necessity has been shown for the existence of any powers in excess of those which the Council has already sanctioned for securing the orderly and efficient conduct of public business'; and that 'the ordinary judicial tribunals of the country are open to any member of either House of Parliament who may feel himself aggrieved by any act done or word spoken, written, or published to his injury by any person outside the precincts of Parliament'.[113]

On 31 October 1901, in a fourth attempt to enact privileges legislation, Mr Richard Meagher, a future Speaker and also member of the Legislative Council, who was considered an authority on the standing orders and parliamentary procedure, introduced a private member's bill, the Parliamentary Privileges Bill 1901, in the Assembly containing many of those provisions to which the Council had objected in 1878.[114] It was read a first time but was interrupted by prorogation.

Another two attempts to enact privileges legislation were made in 1912. Both bills were introduced in the Assembly by the Minister for Justice, the Hon William Holman. The first, the Parliamentary Privileges Bill 1912, did not progress beyond the granting of leave for its introduction on 19 March 1912 before it was interrupted by prorogation.[115] The second, the Parliamentary Powers and Privileges Bill 1912,[116] was presented and read a first time,[117] during which Mr Holman explained that its purpose was to confer on the Houses of the Parliament the same powers as the British House of Commons, including the power to punish for contempt and breaches of privilege.[118] Once again it was interrupted by prorogation.

More detailed information on these attempts at the passage of privileges legislation in New South Wales between 1856 and 1912 can be found in *Decision and Deliberation: The Parliament of New South Wales 1856–2003*.[119]

The *Parliamentary Evidence Acts* of 1881 and 1901

Whilst attempts between 1856 and 1912 at passing comprehensive privileges legislation in New South Wales all failed, in 1881 the Parliament did enact the *Parliamentary Evidence*

---

and Proceedings, NSW Legislative Assembly, 14 May 1879, pp 511-512. The bill, seemingly almost forgotten amidst this stand-off, did not proceed further.

112 Exception was also taken to related clauses of the bills which conferred on either House the power to direct, by resolution, the Attorney General to prosecute any contempt or breaches of privilege committed by strangers within or outside the parliamentary precincts.

113 Parliamentary reports, *Sydney Morning Herald*, 17 May 1878, p 3.

114 *Votes and Proceedings*, NSW Legislative Assembly, 31 October 1901, p 290.

115 *Votes and Proceedings*, NSW Legislative Assembly, 19 March 1912, pp 279-280.

116 It was originally titled the Parliamentary Privileges Bill.

117 *Votes and Proceedings*, NSW Legislative Assembly, 30 July 1912, p 19; 8 August 1912, p 43; 14 November 1912, p 214.

118 *Hansard*, NSW Legislative Assembly, 14 November 1912, pp 3335-3336.

119 D Clune and G Griffith, *Decision and Deliberation: The Parliament of New South Wales 1856–2003*, (Federation Press, 2006), pp 132-135.

Act 1881, modelled almost entirely on certain provisions of the second Parliamentary Powers and Privileges Bill of 1878, cited above. The act gave the Houses and their committees the power to send for and examine persons, and punitive powers to punish non-attendance and the giving of false evidence.

By way of background, 20 years earlier in 1858 in *Fenton v Hampton*,[120] the Privy Council had found that the Legislative Council of Tasmania[121] did not have the power to arrest for contempt a person who failed to appear at the Bar of the House to answer a charge of disobeying a summons to appear before a select committee of the House.

The Tasmanian Parliament responded almost immediately with the enactment of the *Parliamentary Privileges Act 1858* (Tas), which amongst other things placed the powers of the Houses in Tasmania to summons witnesses on a firmer footing. However, the decision also had significant implications for the Parliament of New South Wales, which like the Tasmanian Parliament did not have a legislative grant conferring upon its Houses the privileges of the House of Commons. On various occasions, in 1864,[122] 1870[123] and 1875, the Legislative Assembly and its Committee of Supply were significantly constrained in the taking of evidence from witnesses at the Bar of the House. Of note was the occasion on 16 July 1875, when a witness at the Bar of the House refused to give evidence and withdrew from the House in a case concerning allegations of bribery against a member.[124]

Matters came to a head in early August 1881 with the so-called Milburn Creek affair, in which it emerged that a portion of government compensation paid to the Milburn Creek Copper Mining Company was surreptitiously kept by the company trustees, one of whom was the Secretary for Mines, and that money had also probably been used to bribe members of Parliament to vote for the award of compensation. The affair prompted members of the Assembly to seek the introduction of legislation to enable the House to compel witnesses from the Mines Department to attend and give evidence under oath as to whether any member of Parliament or government officer had received monetary or other consideration from the company.[125]

The Parliamentary Evidence Bill 1881 was subsequently passed with unusual expedition. It was introduced in the Assembly on 17 August 1881,[126] read a second time on 18 August 1881,[127] and read a third time and transmitted to the Council on 7 September 1881.[128]

---

120 (1858) 14 ER 727.

121 The decision referred to Van Diemen's Land.

122 *Votes and Proceedings*, NSW Legislative Assembly, 21 October 1864, pp 28-29.

123 *Sessional papers*, NSW Legislative Assembly, Session 1870, Minutes of evidence taken at the Bar of the Legislative Assembly in Committee of Supply, Recent changes in the organisation of the Police Force, pp 693, 721.

124 *Votes and Proceedings*, NSW Legislative Assembly, 16 July 1875, p 291. This was referred to during the second reading debate of the Parliamentary Evidence Bill 1881. See *Hansard*, NSW Legislative Assembly, 18 August 1881, p 728.

125 *Hansard*, NSW Legislative Assembly, 9 August 1881, pp 534, 556; 18 August 1881, pp 727-730.

126 *Votes and Proceedings*, NSW Legislative Assembly, 17 August 1881, p 105.

127 *Votes and Proceedings*, NSW Legislative Assembly, 18 August 1881, p 112.

128 *Votes and Proceedings*, NSW Legislative Assembly, 7 September 1881, p 156.

The Council read the bill a second time on 14 September 1881[129] and returned it to the Assembly the next day.[130] The bill received royal assent on 4 October 1881.[131] Ironically, the Parliament having acted so expeditiously to place its powers to take evidence on a firmer footing, the matters concerning the Milburn Creek Copper Mining Company were subsequently investigated by a Royal Commission.

It is also notable that despite the enactment of the *Parliamentary Evidence Act 1881*, Council committees continued to encounter difficulties in relation to the calling of witnesses and the taking of evidence during the late 19th century. Four particularly controversial inquiries between 1887 and 1890 – the Inquiry into the Law respecting the practice of Medicine and Surgery,[132] the Inquiry into Torpedo Defences of the Colony,[133] the Inquiry into On Ling[134] and the Inquiry into the Medical Bill[135] – saw repeated instances where witnesses refused to attend hearings, refused to take an oath or affirmation, declined to answer questions and refused to table documents.[136]

In 1901 the *Parliamentary Evidence Act 1881* was replaced by the *Parliamentary Evidence Act 1901* as part of a systematic consolidation of the statute book following federation. Whilst the sections of the bill were revised, its provisions concerning the summonsing, attendance and examination of witnesses remained unchanged.[137] With certain amendments, it remains in force today.

The insertion in 1930 of section 7A into the *Constitution Act 1902*

In 1930, section 7A was inserted into the *Constitution Act 1902*.[138] It provides, amongst other things, that the Legislative Council shall not be abolished or dissolved, nor shall its powers be altered, except by a bill passed by both Houses and approved at a referendum by a majority of the electors. Section 7A is itself entrenched, with the result that it cannot be altered or repealed except by a bill similarly approved at a referendum.

For many years, there was uncertainty concerning the impact of section 7A on any future attempt to enact privileges legislation in New South Wales. Potentially, it meant that assent to a bill to enact privileges legislation in New South Wales required the

129 *Minutes*, NSW Legislative Council, 14 September 1881, p 66.
130 *Votes and Proceedings*, NSW Legislative Assembly, 15 September 1881, p 172.
131 *Votes and Proceedings*, NSW Legislative Assembly, 4 October 1881, p 209.
132 *Journals*, NSW Legislative Council, 1887, vol 42, pt 3, pp 325-418.
133 *Journals*, NSW Legislative Council, 1887-1888, vol 43, pt 2, pp 651-738.
134 *Journals*, NSW Legislative Council, 1889, vol 45, pt 1, pp 387-398.
135 *Journals*, NSW Legislative Council, 1890, vol 47, pt 2, pp 1467-1474.
136 *Consolidated Index to the Minutes of Proceedings and Printed Papers*, NSW Legislative Council, 1874-1893, vol 2, pp 1113-1115.
137 In the event, the updated Parliamentary Evidence Bill received almost no scrutiny in either the Council or the Assembly. See *Hansard*, NSW Legislative Council, 12 September 1901, p 1281; *Hansard*, NSW Legislative Assembly, 2 October 1901, pp 1914-1915.
138 For further information, see the discussion in Chapter 2 (The history of the Legislative Council) under the heading '1928–1930: Entrenchment of the Council and further failed reform'.

endorsement of the people of New South Wales at a referendum, on the basis that such a bill could be seen as altering the powers of the Council.[139]

This uncertainty was resolved in 1997 following the decision of the New South Wales Court of Appeal in *Arena v Nader*.[140]

By way of background, in 1997, following allegations made in the Legislative Council by the Hon Franca Arena, the Parliament passed the *Special Commissions of Inquiry Amendment Act 1997* to enable either House, by resolution, to authorise the Governor to establish a Special Commission of Inquiry to investigate the allegations.[141] Mrs Arena's lawyers filed proceedings in the Supreme Court, which were removed to the Court of Appeal, challenging the validity of the *Special Commissions of Inquiry Amendment Act 1997*. Amongst the grounds of the challenge, it was argued that the act enlarged the powers of the Legislative Council, which amounted to the powers of the Council being 'altered' within the meaning of section 7A, and that accordingly the act could not become law unless passed in accordance with the provisions of section 7A.

In *Arena v Nader*,[142] Priestley, Handley and Meagher JJA dismissed this aspect of the appeal on two grounds:

- First, the powers referred to in section 7A are the powers of the Legislative Council as part of the Legislature relating to the Legislature's law-making function. The powers referred to are not the powers of the Houses collectively in relation to parliamentary privilege.
- Second, the meaning of the word 'altered' in section 7A should be given a purposive construction. Section 7A was enacted for the specific purpose of preventing the abolition or dissolution of the Legislative Council except by the procedure laid down therein. The 1997 act was not directed to such end, nor did it bring about an alteration of the powers of the Legislative Council in the sense in which alteration is used in section 7A.[143]

The High Court, in refusing special leave to appeal, appeared to confirm the Court of Appeal's view as to the meaning of both 'powers' and 'altered'. Brennan CJ, Gummow and Hayne JJ noted:

> The Act does not alter the powers of the House: rather, it affects the privileges which govern the manner in which the House transacts its business.[144]

---

139 For further information, see Joint Select Committee upon Parliamentary Privilege, *Parliamentary Privilege in New South Wales*, September 1985, pp 20-22. See also Crown Solicitor, 'Whether a code of conduct may fall within s 7A of [the] Constitution Act 1902', 29 August 1995, pp 4-7, and Crown Solicitor, 'Whether a code of conduct may fall within s 7A of the Constitution Act 1902', 7 September 1995. See also an earlier opinion by LJ Priestley QC and JB Bryson, 'Registration of the pecuniary interests of members of Parliament', 13 August 1980 and Solicitor General, 'The privileges of the Parliament of New South Wales', 25 March 1983.

140 (1997) 42 NSWLR 427.

141 For further information, see the discussion later in this chapter under the heading 'The Arena case'.

142 (1997) 42 NSWLR 427.

143 *Arena v Nader* (1997) 42 NSWLR 427 at 436 per Priestley, Handley and Meagher JJA.

144 *Arena v Nader* (1997) 71 ALJR 1604 at 1605 per Brennan CJ, Gummow and Hayne JJ.

In the absence of any subsequent case law to the contrary, it seems settled that section 7A is not an impediment to the enactment of privileges legislation in New South Wales.

More recent proposals for comprehensive privileges legislation

Proposals for more comprehensive privileges legislation have also arisen in more recent times:

- In 1985, the Joint Select Committee on Parliamentary Privilege recommended that 'the *Constitution Act 1902* be amended to place beyond doubt that the powers, privileges and immunities of the Houses of the New South Wales Parliament are those of the British House of Commons as at 1856',[145] and that the power to fine be invested by statute.[146]
- In 1997, the Leader of the Opposition in the Legislative Council, the Hon John Hannaford, prepared in consultation with Parliamentary Counsel a draft Parliamentary Powers, Privileges and Immunities Bill 1997. The bill was never introduced into the House, but was provided to the Clerk by Mr Hannaford on his retirement.
- On six occasions between 1993 and 2006, the Legislative Council Privileges Committee recommended the adoption of a parliamentary privileges act.[147]
- In November 2009, the Legislative Assembly Standing Committee on Parliamentary Privilege and Ethics, in a report entitled *Memorandum of understanding – Execution of search warrants by the Independent Commission Against Corruption on members' offices* recommended the introduction of legislation similar to section 16 of the *Parliamentary Privileges Act 1987* (Cth) to confirm the immunities in Article 9 of the *Bill of Rights 1689*.[148]

145 That is to say, at the advent of responsible government. See Joint Select Committee on Parliamentary Privilege, *Parliamentary Privilege in New South Wales*, September 1985, p 20.

146 Ibid, p 126.

147 Standing Committee upon Parliamentary Privilege, *Report concerning the publication of an article appearing in the Sun Herald newspaper containing details of in camera evidence*, October 1993, Recommendation 5; Standing Committee on Parliamentary Privilege and Ethics, *Report on inquiry into sanctions where a minister fails to table documents*, Report No 1, 10 May 1996, Recommendation 3; Standing Committee on Parliamentary Privilege and Ethics, *Report on inquiry into statements made by Mr Gallacher and Mr Hannaford*, Report No 11, 30 Nov 1999, Resolution 4; Standing Committee on Parliamentary Privilege and Ethics, *Report on sections 13 and 13B of the Constitution Act 1902*, Report No 15, 1 December 2001, Recommendation 2; Standing Committee on Parliamentary Privilege and Ethics, *Parliamentary privilege and seizure of documents by ICAC*, Report No 25, 3 December 2003, Recommendation 3; Privileges Committee, *Review of Members' Code of Conduct and draft Constitution (Disclosures by Members) Amendment Regulation 2006*, Report No 35, October 2006, Recommendation 9.

148 Standing Committee on Parliamentary Privilege and Ethics, NSW Legislative Assembly, *Memorandum of understanding – Execution of search warrants by the Independent Commission Against Corruption on members' offices*, 26 November 2009, p 12.

- On 2 December 2010, the Speaker tabled in the Legislative Assembly a draft Parliamentary Privileges Bill 2010.[149] It being the second last sitting day of the 54th Parliament, the draft bill was not progressed before prorogation.

Most recently, on 22 June 2016, the President tabled in the Legislative Council correspondence from the Premier to the Presiding Officers, dated 1 June 2016, and correspondence from the Presiding Officers in response to the Premier, dated 21 June 2016, in relation to proposals for reform of the ethics regime for members, including the adoption of an ethics or standards commissioner, together with a proposal to address areas of uncertainty in relation to parliamentary privilege.[150]

Such immunities as derive from Article 9 of the *Bill of Rights 1689*

The third basis of parliamentary privilege in New South Wales is the statutory adoption as law in the State of Article 9 of the *Bill of Rights 1689*.

As noted previously, Article 9 was enacted by the English Parliament as a statutory expression of the fundamental principle for which the House of Commons had fought for centuries: that members of Parliament are free from all impeachment, imprisonment or molestation, other than by the House itself, for all proceedings that occur within Parliament.

As previously indicated, Article 9 is presumed to have become law in New South Wales[151] in 1828 with the passage of the *Australian Courts Act 1828* (Imp).[152] However, it is notable that at the time, Article 9 was of no legal or judicial notice whatsoever, and continued as such for over 150 years. In 1881 in *Gipps v McElhone*,[153] a defamation case concerning a member of the Legislative Assembly, the privilege of freedom of speech in New South Wales was upheld as a matter of inherent necessity, without reference to Article 9. Windeyer J stated: 'This privilege is based not on *lex et consuetudo* of Parliament, but upon necessity'.[154]

In 1971, the *Australian Courts Act 1828* (Imp) was replaced by the *Imperial Acts Application Act 1969*, which continued Article 9 in force in New South Wales by virtue of section 6

149 *Votes and Proceedings*, NSW Legislative Assembly, 2 December 2010, p 2562.

150 *Minutes*, NSW Legislative Council, 22 June 2016, p 966.

151 Although the reference to 'Parliament' in the *Bill of Rights 1689* is of course a reference to the English Parliament, to the extent that it has been adopted and applied in New South Wales, it is interpreted as referring to the Parliament of New South Wales. See *Egan v Willis* (1998) 195 CLR 424 at 445 per Gaudron, Gummow and Hayne JJ.

152 9 Geo IV, c 83. See NSW Law Reform Commission, *Report on the Application of Imperial Acts*, November 1967, p 60. Indeed, the High Court has noted that it may well be regarded as axiomatic that from the beginnings of European settlement a statute such as the *Bill of Rights 1689* was of application under the common law principles on the reception of law in settled colonies. See *Commissioner of Stamps (SA) v Telegraph Investment Co Pty Ltd* (1995) 184 CLR 453 at 467 and *Egan v Willis* (1998) 195 CLR 424 at 445.

153 (1881) 2 LR (NSW) 18.

154 Ibid, at 25 per Windeyer J.

and schedule 2.[155] This re-adoption of Article 9 was on the recommendation of the Law Reform Commission, which had been tasked by the government with reviewing the application of all Imperial Acts in force in New South Wales. It is notable, however, that in recommending that the *Bill of Rights 1689* be retained as law in New South Wales, the Law Reform Commission made next to no reference to Article 9, merely noting that in the 1958 decision in *In re Parliamentary Privileges Act 1770*,[156] the Judicial Committee of the Privy Council said that 'though the form was new, this was but an assertion of an ancient privilege'.[157]

Indeed, David McGee, the former Clerk of the New Zealand Parliament, has written that one is hard-pressed to find any judicial citation of Article 9 before 1972 when it appeared in the English High Court case of *Church of Scientology v Johnson-Smith*.[158]

However, in recent times, there has been an explosion of interest in Article 9, such that the immunities enjoyed by members of Parliament generally in Westminster systems, including in New South Wales, are often seen almost exclusively through the prism of Article 9. McGee speculates that this may in part be due to a tendency to look for an authoritative legislative or judicial expression of the law in a form recognisable to practising lawyers, rather than understanding Article 9 as an expression of the wider legal principle developed throughout English history of avoiding judicial involvement in parliamentary proceedings.[159]

In New South Wales case law, the first reference to Article 9 appears to be that made by McClelland J in 1980 in *Namoi Shire Council v Attorney-General (NSW)*,[160] heard in the Equity Division of the Supreme Court, although on that occasion Article 9 was incidental to the decision. Far greater judicial note of Article 9 was taken by Carruthers J in 1987 in *R v Jackson*,[161] and Article 9 has been referred to prominently in a number of New South Wales cases since.[162]

---

155 Section 6 of the act declares, among other things, that each Imperial enactment mentioned in part 1 of the Second Schedule to the act, which includes 1 Wm and M sess 2, c 2 (the *Bill of Rights 1689*), so far as it was in force in England on 25 July 1828, was and remains in force in New South Wales on and from that day, except to the extent (if any) that it is affected by any Imperial enactments or State acts from time to time in New South Wales. As confirmed by the joint judgment in *Egan v Willis*, there is no suggestion that Article 9 has been affected by any Imperial or State act. See *Egan v Willis* (1998) 195 CLR 424 at 445.

156 [1958] AC 331.

157 NSW Law Reform Commission, *Report on the Application of Imperial Acts*, November 1967, p 60.

158 [1972] 1 All ER 378. See D McGee, 'The Scope of Parliamentary Privilege', *New Zealand Law Journal,* (March 2004), p 84.

159 McGee, (n 158). See also *Buchanan v Jennings* [2002] 3 NZLR 145 at [138] per Tipping J.

160 (1980) 2 NSWLR 639.

161 (1987) 8 NSWLR 116.

162 See, for example, *R v Grassby* (1991) 55 A Crim R 419; *Stewart v Ronalds* [2009] NSWCA 277; *La Perouse Local Aboriginal Land Council v Minister Administering the Crown Lands Act* [2012] NSWLEC 5; *R v Obeid (No 2)* [2015] NSWSC 1380; *Obeid v R* [2015] NSWCCA 309.

At the national level, the first reference to Article 9 by the High Court appears to be the 1978 decision in *Sankey v Whitlam*.[163] Subsequently, two judgments by Cantor and Hunt JJ in the Supreme Court of New South Wales in 1985 and 1986,[164] which interpreted and applied Article 9 in a manner unacceptable to the Commonwealth Parliament, led to the Commonwealth's adoption of the *Parliamentary Privileges Act 1987*, which gives significant guidance as to the meaning of Article 9 at the Commonwealth level.

Modern authoritative texts on parliamentary privilege, including *Erskine May* and *Odgers*, together with authoritative texts on constitutional law such as Professor Twomey's *The Constitution of New South Wales* also pay due regard to Article 9 when discussing the immunities that attach to parliamentary action.[165]

It should be emphasised, however, that the courts have not lost sight of the broader constitutional principles underlying Article 9. As stated by Lord Browne-Wilkinson in *Prebble v Television New Zealand Ltd*:

> In addition to Article 9 itself, there is a long line of authority which supports a wider principle, of which Article 9 is merely one manifestation, viz that the courts and Parliament are both astute to recognise their respective constitutional roles. So far as the courts are concerned they will not allow any challenge to be made to what is said or done within the walls of Parliament in performance of its legislative functions and protection of its established privileges.[166]

Indeed in some case law, such as the 1998 decision of Lord Woolf MR in the English case of *R v Parliamentary Commissioner for Standards; Ex parte Al Fayad*,[167] Article 9 has continued to be treated as of secondary significance in defining the relationship between parliament and the courts. Lord Woolf preferred to approach the issues in that case on the basis of the broader principles which underlie the relationship.[168]

The petition to the Governor for the 'usual rights and privileges'

It is traditional at the start of each new Parliament in New South Wales for the President of the Legislative Council and the Speaker of the Legislative Assembly to petition the Governor for the 'usual rights and privileges', particularly freedom of speech in debates. This petition has been made by the Speaker since 1856[169] and was first made by the President in 1934.[170] The procedure is founded on the traditions of the English

163 (1978) 142 CLR 1.

164 *R v Murphy,* Unreported, NSW Supreme Court, 5 June 1985 and *R v Murphy* (1986) 5 NSWLR 18.

165 *Erskine May*, 25th ed, (n 23), paras 13.10-13.15; *Odgers*, 14th ed, (n 5), pp 45-75; Twomey, (n 103), pp 496-502.

166 *Prebble v Television New Zealand Ltd* [1995] 1 AC 321 at 332 per Lord Browne-Wilkinson.

167 [1998] 1 All ER 93 (CA).

168 See McGee, 'The Scope of Parliamentary Privilege', (n 158), p 84.

169 *Votes and Proceedings*, NSW Legislative Assembly, 23 May 1856, p 5.

170 *Hansard*, NSW Legislative Council, 24 April 1934, p 6. The petition was not made again until 2003. See *Minutes*, NSW Legislative Council, 8 May 2003, p 72. It has been made by the President at the commencement of each Parliament ever since.

Parliament.[171] However, as the immunities, rights and powers of the Houses of the Parliament of New South Wales are founded firmly on the common law principle of necessity, various statutes and the adoption of Article 9 of the *Bill of Rights 1689*, the petitioning of the Governor for the 'usual rights and privileges' is merely an affirmation of the Houses' independence from the Crown and the privileges that flow from that at common law.

THE RELATIONSHIP BETWEEN PARLIAMENT AND THE COURTS IN NEW SOUTH WALES

As noted previously, during the 19th century, the principle was established in the United Kingdom that parliamentary privilege is part of the general law, to be adjudicated by the courts, but that there is a sphere of operations concerning the internal proceedings of the Houses of the Westminster Parliament where the 'exclusive cognisance' of the Houses is absolute.

This principle has equal application in New South Wales. The courts are expected to uphold the immunities attaching to parliamentary actions by preventing the impeaching or questioning of parliamentary proceedings where they arise in court proceedings.[172] The courts are also expected to adjudge the existence but not the exercise of the inherent powers of the Houses in New South Wales at common law. Equally, however, it is accepted that there is a sphere of operation concerning the internal decisions and processes of the Houses in New South Wales over which the control of the Houses is absolute and exclusive, for example through the adoption of standing orders.[173] Whilst such matters are usually ascribed as falling within the 'exclusive cognisance' of the Houses, the term 'exclusive jurisdiction' is also used.[174]

The expectation that the courts may adjudicate the existence, but not the exercise, of the inherent powers of the Houses of the Parliament finds expression in the well-known dictum of Dixon CJ, speaking for the whole of the High Court, in *R v Richards; Ex parte Fitzpatrick and Brown* in 1955:

---

171 *Erskine May*, 25th ed, (n 23), paras 12.3-12.8.

172 For further information, see the discussion later in this chapter under the heading 'The immunities that attach to parliamentary action'.

173 For a discussion of the different meaning attributed to the term 'exclusive cognisance' in different jurisdictions, see R Laing, 'Exclusive Cognisance: Is it a Relevant Concept in the 21st Century?', *Australasian Parliamentary Review*, (Vol 30, No 2, Spring/Summer 2015), pp 59-60. The view adopted here of 'exclusive cognisance' as the exclusive jurisdiction of a House over its internal affairs or its exclusive right to control its own proceedings is consistent with the view adopted in M Harris and D Wilson (eds), *McGee Parliamentary Practice in New Zealand*, 4th ed, (Oratia Books, 2017), pp 742-743. The same concept is adopted in E Campbell, *Parliamentary Privilege*, (Federation Press, 2003), pp 177-178 and in G Griffith, 'Parliamentary Privilege: First Principles and Recent Applications', NSW Parliamentary Library Research Service Briefing Paper 1/2009, p 2.

174 For further information, see the discussion later in this chapter under the heading 'The right of the House to control its proceedings'.

> It is unnecessary to discuss at length the situation in England … Stated shortly it is this: it is for the courts to judge of the existence in either House of Parliament of a privilege, but, given an undoubted privilege, it is for the House to judge of the occasion and of the manner of its exercise.[175]

Whilst this statement by Dixon CJ was made in relation to the Houses of the Australian Parliament, in *Egan v Willis* in 1998, Gaudron, Gummow and Hayne JJ held that it 'has equal application' in relation to the New South Wales Parliament.[176]

However, delineating between the existence but not exercise of the powers of the Houses of the Parliament of New South Wales is sometimes difficult to do. This is particularly the case because the Houses' reliance on inherent powers at common law means that the extent of their powers is not fully known, placing an added burden on the courts in interpreting the existence and extent of these privileges.[177]

Determining the existence of a power may involve consideration of its exercise, and whether it is 'reasonably necessary' to the functioning of the House concerned.[178] In 2005 in *Canada (House of Commons) v Vaid*[179] in the Supreme Court of Canada, Binnie J noted:

> The distinction between defining the scope of a privilege, which is the function of the courts, and judging the appropriateness of its exercise, which is a matter for the legislative assembly, may sometimes be difficult to draw in practice.[180]

This difficulty may arise particularly where the courts, as in New South Wales, are called on to consider the purpose behind any order of the Houses to determine if it is punitive or non-punitive in nature.[181]

The issue of justiciability was raised in the High Court in *Egan v Willis*,[182] in which the Treasurer, the Hon Michael Egan, sought a declaration that a resolution of the Council adjudging him guilty of contempt and suspending him from the service of the House for failing to table certain papers was invalid. One of the intervening parties, the Attorney General for South Australia, argued that the proceedings which precipitated the case were 'proceedings in Parliament' and could not, therefore, be the subject of inquiry by the courts.

In the High Court's decision, only McHugh J agreed with that submission. His judgment was that the power of the House to suspend a member who was obstructing its business had been established beyond any doubt. On that basis, he concluded that '[i]t was for

175 (1955) 92 CLR 157 at 162 per Dixon CJ for the whole court.

176 *Egan v Willis* (1998) 195 CLR 424 at 446 per Gaudron, Gummow and Hayne JJ. See also *Egan v Willis and Cahill* (1996) 40 NSWLR 650 at 653 per Gleeson CJ and *Alford v Parliamentary Joint Committee on Corporations and Financial Services* [2018] HCA 57 at [30] and [57].

177 Twomey, (n 103), p 490.

178 For a discussion, see M Groves and E Campbell, 'Parliamentary Privilege and the Courts: Questions of Justiciability', *Oxford University Commonwealth Law Journal*, (Winter 2007), p 175.

179 [2005] 1 SCR 667.

180 *Canada (House of Commons) v Vaid* [2005] 1 SCR 667 at 700 per Binnie J.

181 See, for example, *Armstrong v Budd* (1969) 71 SR (NSW) 386.

182 *Egan v Willis* (1998) 195 CLR 424.

the Council, and the Council alone, to determine the facts of the case and whether they fell within the privilege or power to suspend for obstruction'.[183]

The approach adopted by McHugh J did not find support amongst the majority. The majority found that the courts may consider the purpose of any suspension of a member to determine if it was within the powers of the House.[184]

Parliamentary privilege and the criminal law

There is no suggestion that the exclusive jurisdiction of the Houses of the Parliament of New South Wales over their internal proceedings overrides the application of the criminal law to the conduct of members. The House of Commons accepted that freedom from arrest did not apply in criminal matters from as early as 1429.[185] In 1884, in the defining case of *Bradlaugh v Gossett,*[186] Stephen J accepted that matters 'within the walls of the House of Commons' were within the jurisdiction of the House, but qualified that statement by observing:

> I know of no authority for the proposition that an ordinary crime committed in the House of Commons would be withdrawn from the ordinary course of criminal justice.[187]

In more recent times, in 2010 in *R v Chaytor*, the UK Supreme Court rejected a challenge based on exclusive cognisance to the prosecution of a member of the UK House of Commons for false accounting. Lord Phillips PSC and Lord Rodger JSC both argued that the House of Commons does not assert exclusive jurisdiction to deal with criminal conduct, and that the jurisdiction of the House of Commons to deal with a matter as a contempt overlaps with the jurisdiction of the ordinary courts to deal with a matter as a criminal offence.[188]

---

183 Ibid, at 466-467 per McHugh J. The Crown Solicitor for South Australia later argued that, post *Egan*, 'there is now clear authority that the courts can inquire into the validity of the reasons for the orders made by the Council, including orders which affect the right of members of the House to vote in the House'. See B Selway, 'Mr Egan, the Legislative Council and Responsible Government' in A Stone and G Williams (eds), *The High Court at the Crossroads*, (Federation Press, 2000), pp 50-54.

184 *Egan v Willis* (1998) 195 CLR 424 at 455 per Gaudron, Gummow and Hayne JJ, at 477, 504-505 per Kirby J, and at 514 per Callinan J. This would seem to be consistent with *Barnes v Purcell* [1946] St R Qd 87 at 103 where the Queensland Supreme Court found: 'There is no authority for the proposition that Parliament has the exclusive right to construe the standing orders to determine the punishment which may be inflicted upon a member who has been suspended by resolution of the House'.

185 *Erskine May*, 25th ed, (n 23), para 12.5.

186 (1884) 12 QBD 271.

187 Ibid, at 283 per Stephen J. See also *Criminal Justice Commission v Nationwide News Pty Ltd* [1996] 2 Qd R 444 at 456 per Pincus JA and *Attorney General v Macpherson* (1870) LR 3 PC 268, which concerned a member of the New South Wales Legislative Assembly charged with assaulting another member in an ante-chamber adjoining the chamber whilst Parliament was sitting. The Privy Council overruled a demurrer by the accused founded on the contention that if the assault occurred it was a contempt of Parliament.

188 *R v Chaytor* [2010] UKSC 52 at [83] per Lord Phillips, at [108] per Lord Rodger.

In *R v Obeid (No 2)*[189] and *Obeid v R*[190] in 2015, Beech-Jones J in the New South Wales Supreme Court and Bathurst CJ, Beazley P and Leeming JA in the New South Wales Court of Criminal Appeal found that the underlying principle of exclusive cognisance had no bearing upon the Supreme Court's jurisdiction to hear and determine the common law misdemeanour of wilful misconduct in public office.[191]

Similarly, in *Attorney-General for the State of Victoria v Glass*[192] in 2016, Warren CJ, Beach and Ferguson JJA in the Victorian Court of Appeal held that the principle of ministerial responsibility does not require that ministers be held accountable to parliament and no-one else, and that conduct by a minister that is beyond power is capable of being investigated by the police and other authorities and reviewed by the courts.[193]

Parliamentary privilege and the rights of individuals

A further aspect of the relationship between parliament and the courts in New South Wales and other jurisdictions has to do with the rights of individuals. Whilst the courts seek at every opportunity to protect the right of individuals to have their cases heard with all evidence available, in certain circumstances parliamentary privilege may override such rights. It is, in effect, an exception to the general principle of the rule of law.

As early *Stockdale v Hansard*,[194] the Court of Queen's Bench asserted that the exercise of parliamentary powers, especially where they invade the rights of others, are subject to judicial examination 'not with tenderness, but with jealousy'. Patteson J observed:

> All persons ought to be very tender in preserving to the Houses all privileges which may be necessary for their exercise, and to place the most implicit confidence in their representatives as to the due exercise of those privileges. But power, and especially the power of invading the rights of others, is a very different thing: it is to be regarded, not with tenderness, but with jealousy; and, unless the legality of it be clearly established, those who act under it must be answerable for the consequences. [195]

In more recent times, the increasing development of a body of human rights law has seen a renewed emphasis on upholding the rights of individuals. Citing the decision in *Stockdale v Hansard* with approval, the Supreme Court of Canada observed in *Canada (House of Commons) v Vaid* in 2005:

189 [2015] NSWSC 1380.
190 [2015] NSWCCA 309.
191 *R v Obeid (No 2)* [2015] NSWSC 1380 at [154] per Beech-Jones J; *Obeid v R* [2015] NSWCCA 309 at [36] per Bathurst CJ, Beazley P and Leeming JA.
192 [2016] VSCA 306.
193 *Attorney-General for the State of Victoria v Glass* [2016] VSCA 306 at [60] per Warren CJ, Beach and Ferguson JJA.
194 (1839) 112 ER 1112 at 1169.
195 *Stockdale v Hansard* (1839) 112 ER 1112 at 1192 per Patteson J.

> The role of the courts is to ensure that a claim of privilege does not immunize from the ordinary law the consequences of conduct by Parliament or its officers and employees that exceeds the necessary scope of the category of privilege.[196]

Ultimately, however, the rule of law is not an absolute principle; its claims must be balanced against the competing claims of other principles such as the separation of powers.[197] *Prebble v Television New Zealand Ltd*,[198] on appeal from the New Zealand Court of Appeal to the Privy Council, is the leading authority for the established principle that where there are competing interests at play in court proceedings – the need to ensure that parliaments can exercise their powers freely on behalf of their electors, and the interests of justice in ensuring that all relevant evidence is available to the courts – the first must prevail.[199] However, their Lordships did accept that, where the exclusion of material from court proceedings on the grounds of parliamentary privilege makes it 'impossible fairly to determine the issue between the parties', the interests of justice may, in extreme cases, demand a stay of proceedings.[200] In such cases, the remedy is said to lie with the parliament itself.[201]

In modern times, in order to minimise the potential for parliamentary privilege to adversely affect the right of individuals to access the courts, the courts ensure that the exercise of privilege is strictly constrained. This is discussed further below.

THE IMMUNITIES THAT ATTACH TO PARLIAMENTARY ACTION

There is no legal liability in the courts for words spoken or actions taken by members of the Legislative Council in the course of parliamentary proceedings, except insofar as this protection may be abrogated by statute.[202] As discussed previously, this legal immunity is now often seen through the prism of Article 9 of the *Bill of Rights 1689*. However, the immunity predates Article 9, and is in fact part of the wider compact between the legislative and judicial branches of government reached over several centuries in England, according to which the courts will not allow examination of the internal proceedings of parliament. This principle of non-intervention by the courts in parliamentary proceedings is mandatory, and reflects the constitutional separation of powers between the legislature and the judiciary.

196 *Canada (House of Commons) v Vaid* [2005] 1 SCR 667 at para 29.11.

197 For discussion, see Joint Committee on Parliamentary Privilege, UK Parliament, *Parliamentary Privilege: Report of Session 2013-2014*, 3 July 2013, para 19.

198 [1995] 1 AC 321.

199 *Prebble v Television New Zealand Ltd* [1995] 1 AC 321 at 336 per Lord Browne-Wilkinson. For further information, see E Campbell, *Parliamentary Privilege*, (n 173), pp 106-107.

200 *Prebble v Television New Zealand Ltd* [1995] 1 AC 321 at 338 per Lord Browne-Wilkinson.

201 *Halden v Marks* (1996) 17 WAR 447 at 462-463 per Rowland, Murray and Anderson JJ.

202 This has occurred twice in New South Wales. For further information, see the discussion later in this chapter under the heading 'Express statutory abrogation of parliamentary privilege'.

Nevertheless, in modern times, the immunity is generally expressed through reference to Article 9 of section 1 of the *Bill of Rights 1689*. As noted before, this famous article declares:

> That the freedom of speech and debates or proceedings in Parliament ought not to be impeached or questioned in any court or place out of Parliament.[203]

The immunity from court proceedings that attaches to parliamentary action is the principal immunity possessed by the Houses of the Parliament of New South Wales, although the immunity is enjoyed by members individually. It applies also to officers of the Houses, witnesses before committees and other participants in 'proceedings in Parliament'. Its effect is to protect such persons from legal liability for words spoken or things done in the course of, or for the purpose of or incidental to, any proceedings in Parliament.

For all that, uncertainty exists as to the precise meaning of several terms used in Article 9 and the immunities flowing from them, namely the terms 'freedom of speech and debates', 'proceedings in Parliament', 'impeached or questioned' and 'in any court or place out of Parliament'. These terms are examined further below.

The meaning of 'freedom of speech and debates'

The immunity that attaches to parliamentary action articulated in Article 9 is expressed as encompassing 'freedom of speech and debates'.

This immunity permits members to speak freely in 'speech or debates' in the Legislative Council or in a committee meeting whilst enjoying complete immunity from legal reprisal, including being sued or prosecuted, for statements they may make, regardless of their truth or falsehood. In 1869 in *Ex parte Wason*[204] Lord Cockburn CJ put it in these terms:

> It is clear that statements made by Members of either House of Parliament in their places in the House, though they might be untrue to their knowledge, could not be made the foundation of civil or criminal proceedings, however injurious they might be to the interest of a third party.[205]

The immunity of freedom of speech and debates is accordingly wide in scope. It prevents 'speech and debates' in the Legislative Council or a committee from being questioned or impeached in a court or place outside of parliament for the purposes of establishing that the privileged material was false, misleading or made in bad faith.[206]

---

203 As indicated previously, Article 9 is in force in New South Wales by virtue of section 6 and schedule 2 of the *Imperial Acts Application Act 1969*, except to the extent (if any) that it is affected by any Imperial enactments or State acts from time to time in New South Wales.

204 (1869) LR 4 QB 573.

205 Ibid, at 576 per Lord Cockburn CJ.

206 On the other hand, casual conversations between members during debate are not protected by Article 9, despite taking place in the parliamentary chamber. See *Coffin v Coffin* (1808) 4 Mass 1 per Parsons CJ.

The immunity is also absolute: unlike qualified privilege under the laws of defamation, it is not abrogated by the presence of malice or of fraudulent purpose or falsity.

A comparable principle exists in the courts. Statements made by a judge, witness or advocate in court proceedings enjoy absolute privilege at common law. In both cases the rationale is the same: the public interest in the freedom of speech in the proceedings, whether parliamentary or judicial, outweighs any right to inquire into the state of mind of those who participated in the proceedings, even though the price is that a person may be unjustly defamed.

Freedom of speech in parliament is sometimes criticised in the media and elsewhere as a licence to slander. This is an erroneous conception. Properly conceived and exercised, the privilege of freedom of speech afforded to members of Parliament is to allow them to raise matters in the public interest and to allow parliament to debate those matters, whilst granting members an appropriate level of protection against threats or reprisals. In *Prebble v Television New Zealand Ltd*, Lord Browne-Wilkinson cited the basic concept underlying Article 9 as:

> … the need to ensure so far as possible that a member of the legislature and witnesses before committees of the House can speak freely without fear that what they say will later be held against them in the courts. The important public interest protected by such privilege is to ensure that the member or witness *at the time he speaks* is not inhibited from stating fully and freely what he has to say. If there were any exceptions which permitted his statements to be questioned subsequently, at the time when he speaks in Parliament he would not know whether or not there would subsequently be a challenge to what he is saying. Therefore he would not have the confidence the privilege is designed to protect.[207]

Limitations imposed by the House on the freedom of 'speech and debates'

Whilst the immunity attaching to 'speech and debates' in the Legislative Council is absolute, the exercise of free speech by members is still subject to control by the House itself in order to prevent the privilege from being abused. These controls are an aspect of the right of the House to control its own proceedings, discussed later in this chapter.[208]

There are three important constraints that the House has imposed on 'speech and debates' by its members: the rules of debate, the *sub judice* convention and the restriction on offensive conduct.

The rules of debate

The most important limitation imposed by the House on the exercise of free speech by its members is the collective rules of debate.

---

207 *Prebble v Television New Zealand Ltd* [1995] 1 AC 321 at 333-334 per Lord Browne-Wilkinson.

208 See the discussion under the heading 'The right of the House to control its proceedings'.

The Legislative Council has adopted in its standing orders various rules of debate. For example, members may not reflect on any resolution or vote of the House (SO 91(1)), refer to the Queen or the Governor disrespectfully (SO 91(2)) or make personal reflections on members or officers of either House (SO 91(3)) other than by substantive motion. The rules of debate set out in the standing orders have been augmented by various rulings of the President. A detailed discussion of these rules is provided in Chapter 13 (Debate).[209]

The sub judice convention

A second limitation imposed by the House on the exercise of free speech by its members is the *sub judice* convention. This convention dictates that the House in certain circumstances will not discuss the substance of matters set to be tried and decided in the courts in order to prevent prejudicing the proceedings. Again, a more detailed discussion of this convention is provided in Chapter 13 (Debate).[210]

Offensive conduct

The House also has the power to discipline members who, by their spoken word, offend the House. Spoken words may be so injurious, grossly defamatory or malicious as to amount to a contempt. In 1967, the UK House of Commons Select Committee on Parliamentary Privilege adjudged that:

> … contempt 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 the 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 upon another Member of the House. The House has power, by the exercise of its penal jurisdiction, to control such abuse.[211]

In September 1997, the Hon Franca Arena made statements in the House alleging a 'cover-up' of high-profile paedophiles. On a Special Commission of Inquiry reporting that the statements of Mrs Arena were without basis, the House passed a resolution that the conduct of Mrs Arena fell below the standard the House is entitled to expect of a member and brought the House into disrepute, that Mrs Arena submit an apology for the statements, and that failing this, she be suspended from the service of the House.[212] Subsequently the House agreed to accept a 'statement of regret' from Mrs Arena in place of the apology.[213] This case is discussed in more detail later in this chapter.[214]

---

209 See the discussion under the heading 'Rules regarding the content of speeches'.

210 See the discussion under the heading 'The *sub judice* convention'.

211 Select Committee on Parliamentary Privilege, UK House of Commons, *Report from the select committee on parliamentary privilege*, December 1967, para 60.

212 *Minutes*, NSW Legislative Council, 1 July 1998, pp 631-632, 633-635.

213 *Minutes*, NSW Legislative Council, 16 September 1998, pp 693-696.

214 See the discussion under the heading 'The Arena case'.

On a previous occasion on 12 November 1936, the Hon John Martin made statements in the House alleging conspiracy and corruption in the election of another member.[215] The House subsequently established a select committee to inquire into the allegations,[216] which concluded that none of the imputations and assertions was supported by evidence. The House adopted the report of the committee on the last sitting day in 1936.[217] However, as the House did not sit again for a further seven months, no further action was taken.

These and other matters are considered further in Table 3.1 later in this chapter under the heading 'Cases of contempt and matters of privilege in the Council'.

In 1917, the Legislative Assembly expelled a member, Mr Richard Price, for making statements found on inquiry by a Royal Commissioner to be wanton, reckless and 'without any foundation whatsoever'.[218]

On 25 February 1988, the Australian Senate adopted a resolution setting out amongst other things the manner in which senators are expected to exercise their freedom of speech.[219] The Privileges Committee of the Legislative Council has on various occasions recommended that the House adopt a similar resolution.[220] Of note, in 1996, the Committee recommended adoption of a draft code of conduct for members which included the following clause relating to the exercise of freedom of speech:

> Members should be mindful of the privileges conferred when speaking in the House and should seek to avoid causing undeserved harm to any individual who does not enjoy the same privileges.[221]

The House has never acted upon these recommendations of the Privileges Committee. Nevertheless, the cases cited above demonstrate that members have a responsibility to ensure that the privilege of freedom of speech, which is a privilege of the House but which they enjoy individually, is used responsibly and is not abused. The House has made clear that members should at all times consider the basis, cogency and responsibility of statements they make in the House.

---

215 *Hansard*, NSW Legislative Council, 12 November 1936, pp 428-430.

216 *Minutes*, NSW Legislative Council, 25 November 1936, p 50.

217 *Minutes*, NSW Legislative Council, 22 December 1936, p 91.

218 *Votes and Proceedings*, NSW Legislative Assembly, 17 October 1917, pp 128-134.

219 *Odgers,* 14th ed, (n 5), p 795.

220 Standing Committee on Parliamentary Privilege and Ethics, *Report on inquiry into the establishment of a draft code of conduct for members*, Report No 3, October 1996, Appendix 1, p 6; Standing Committee on Parliamentary Privilege and Ethics, *Report on inquiry into statements by Mr Gallacher and Mr Hannaford*, Report No 11, November 1999, pp 18-19. The matter was also addressed in Privileges Committee, *Statements made by Mr David Shoebridge*, Report No 57, November 2011, p 7.

221 Standing Committee on Parliamentary Privilege and Ethics, *Report on inquiry into the establishment of a draft code of conduct for members*, Report No 3, October 1996, Appendix 1, p 6.

Right of reply to statements made by members in the House

Whilst persons adversely referred to in the House in debate have no form of legal redress through the courts, under standing orders 202 and 203 the Council has adopted a procedural mechanism to give such persons an opportunity to have a written response to the adverse comment made public in *Hansard*.

Briefly, persons who believe that they have been adversely referred to in the House by a member may make a written submission to the President requesting that a response be published in the parliamentary record (SO 202(1)). The President may refer any such submission to the Privileges Committee (SO 202(2)), which must consider the submission, but may not inquire into the truth or merits of either the original statement in the House by the member or the submission seeking a response (SO 203(3)). The focus is on providing a succinct, relevant and expeditious response, rather than on seeking to adjudicate on the issues at stake. If the Privileges Committee reports to the House recommending that a response be incorporated in *Hansard*, that recommendation takes effect if the House resolves to adopt the committee's report. In such instances, the reply is published in *Hansard* on the same day. Whilst the standing orders specify that the procedure is available to a 'person referred to', this has been interpreted broadly to allow corporations and other bodies also to seek a right of reply.

Since the adoption of the right of reply process in November 1997,[222] the Council has incorporated into *Hansard* well over 30 replies to statements made in the House with almost all statements referred to the Privileges Committee resulting in a recommendation that a response be provided, and almost all of the committee's reports being adopted by the House. The great majority of responses have been published within three months of the initial correspondence to the President.[223]

Persons reflected upon adversely in committee proceedings have a right to respond through committee procedures.

Additional statutory protection for witnesses before committees

In addition to the immunity attaching to parliamentary action under Article 9 and as a matter of inherent necessity, witnesses before committees also receive statutory

222 *Minutes*, NSW Legislative Council, 13 November 1997, pp 176-178. The procedure was adopted following statements made by the Hon Franca Arena in the House on 31 October 1996 in relation to a reference to the Royal Commission into the New South Wales Police Service. Following those statements, on 14 November 1996, the Council resolved that the Standing Orders Committee inquire into and report on procedures for a person to respond to allegations made against them in the House. See *Minutes*, NSW Legislative Council, 14 November 1996, p 447. In February 1997, the Committee recommended the adoption of a right of reply process similar to that operating in the Australian Senate since 1988. See Standing Orders Committee, *Report on a citizen's right of reply*, Report No 26, November 1997, p 4. The House subsequently adopted a right of reply process by resolution of continuing effect on 13 November 1997, before the procedure was subsequently incorporated in standing orders 202 and 203 in 2004.

223 Privileges Committee, *The right of reply process*, Report No 61, June 2012, pp 3-5.

protection under section 12(1) of the *Parliamentary Evidence Act 1901*, which provides that no action shall be maintainable against any witness who has given evidence, whether on oath or otherwise, under the authority of the act, for or in respect of any defamatory words spoken by the witness whilst giving such evidence.

Whilst essentially replicating the immunity under Article 9, it is readily apparent why this provision exists. It was adopted by the Parliament in 1881 in the *Parliamentary Evidence Act 1881* as part of the Parliament's attempt to firmly establish its power to call and compel evidence from witnesses. At the same time, the Parliament had to provide those witnesses with the assurance of full protection against legal reprisal.

The meaning of 'proceedings in Parliament'

The immunity that attaches to parliamentary action articulated in Article 9 is expressed as extending beyond 'freedom of speech and debates' to other 'proceedings in Parliament'.

At the time Article 9 was enacted in 1689, 'freedom of speech and debates' was clearly the most common and obvious occasion on which parliamentary privilege was asserted by the Houses of the English Parliament. However, by that time, committee proceedings were also well established as modes of parliamentary action, as was the circulation and presentation in Parliament of petitions. Accordingly, by the inclusion of the phrase 'or proceedings in Parliament', the framers of Article 9 clearly intended to extend the scope of the immunity from legal liability in the courts beyond parliamentary 'speech and debates' to other transactions of parliamentary business.[224]

Today, the proportion of parliamentary business that falls under the category of 'proceedings in Parliament' is considerably greater than it was in the Houses of the English Parliament in the latter part of the 17th century. As a result, the extension of the immunity attaching to 'speech and debates' to other 'proceedings in Parliament' has only increased in importance. However, whilst the meaning of 'freedom of speech and debates' in Article 9 is tolerably clear, the meaning of 'proceedings in Parliament' is more ambiguous. The *Bill of Rights 1689* itself provides no further guidance. Nor is it defined in statute in New South Wales. However, some guidance is available.

Erskine May describes 'proceedings in Parliament' as:

> [S]ome formal action, usually a decision, taken by the House in its collective capacity. While business which involves actions and decisions of the House are clearly proceedings, debate is an intrinsic part of that process which is recognised by its inclusion in the formulation of article IX. An individual Member takes part in a proceeding usually by a speech, but also by various recognised forms of formal action, such as voting, giving notice of a motion, or presenting a petition or report from a committee, most of such actions being time-saving substitutes for speaking.

224 *McGee Parliamentary Practice in New Zealand*, 4th ed, (n 173), p 726.

> Officers of the House take part in its proceedings principally by carrying out its orders, general or particular. Members of the public also may take part in the proceedings of a House, for example by giving evidence before it or one of its committees, or by securing presentation of a petition.[225]

Halsbury's Laws of England states:

> An exact and complete definition of 'proceedings in Parliament' has never been given by the courts of law or by either House. In its narrow sense the expression is used in both Houses to denote the formal transaction of business in the House or in committees.
>
> It covers both the asking of a question and the giving of written notice of such question, and includes everything said or done by a member in the exercise of his functions as a member in a committee of either House, as well as everything said or done in either House in the transaction of parliamentary business.
>
> In its wider sense 'proceedings in Parliament' has been used to include matters connected with, or ancillary to, the formal transaction of business. A select committee of the Commons, citing and approving a Canadian dictum, stated in its report that it would be unreasonable to conclude that no act is within the scope of a member's duties in the course of parliamentary business unless it is done in the House or a committee of it and while the House or committee is sitting.[226]

Professor Carney writes:

> At the core of these proceedings are, of course, the proceedings of parliamentary sittings – the speeches and debates, as well as the passage of legislation. Also included are the tabling of motions and amendments to motions or bills and the tabling, asking and answering of questions to Ministers and other members. A register of members' pecuniary interests might also attract privilege. The proceedings of parliamentary committees including the evidence given by any person to those committees are also covered, as are those who present petitions to parliament. …
>
> It is clear that members are not protected by the privilege in respect of all their parliamentary duties when performed outside parliamentary proceedings. However, the closer the relevant activity is connected to the proceedings of parliament, the easier it is to argue that it should be protected by privilege.[227]

Accordingly, it is clear and incontrovertible that 'proceedings in Parliament' include the formal transaction of business in the Legislative Council such as the procedural steps in the passage of legislation through the House, the giving of notices, the moving of motions and amendments, voting in divisions in the House, the tabling of documents, the asking and answering of questions and the presentation of petitions.

---

225 *Erskine May*, 25th ed, (n 23), para 13.12.

226 Lord Hailsham of St Marylebone, *Halsbury's Laws of England*, 4th ed, vol 34, (Butterworths, 1980), para 1486.

227 G Carney, *Members of Parliament: Law and Ethics*, (Prospect Media, 2000), pp 210-211.

'Proceedings in Parliament' also clearly include various aspects of committee proceedings, such as the participation of members and witnesses in committee hearings, the preparation of submissions to committee inquiries, including drafts,[228] and the publication by committees of documents, notably committee reports.[229]

However, beyond these clear examples of formal transaction of business in the House or in committees, the boundaries of parliamentary action falling within the meaning of 'proceedings in Parliament' become less clear. The matter is discussed further below.

Section 16(2) of the *Parliamentary Privileges Act* (Cth) and 'reasonable incidentality'

In 1987, the Commonwealth Parliament enacted the *Parliamentary Privileges Act 1987* (Cth) in order to provide a clearer and more comprehensive definition of the meaning of 'proceedings in Parliament' in Article 9. Section 16(2) provides:

> (2) For the purposes of the provisions of article 9 of the Bill of Rights, 1688 as applying in relation to the Parliament, and for the purposes of this section, ***proceedings in Parliament*** means all words spoken and acts done in the course of, or for purposes of or incidental to, the transacting of the business of a House or of a committee, and, without limiting the generality of the foregoing, includes:
>
> (a) the giving of evidence before a House or a committee, and evidence so given;
> (b) the presentation or submission of a document to a House or a committee;
> (c) the preparation of a document for purposes of or incidental to the transacting of any such business; and
> (d) the formulation, making or publication of a document, including a report, by or pursuant to an order of a House or a committee and the document so formulated, made or published.

Section 16(2) is notable in defining 'proceedings in Parliament' as 'all words spoken and acts done in the course of, *or for purposes of or incidental to*, the transacting of the business

228 However, submissions published separately outside of the course of a committee's inquiry, or without the authority of a committee, are not 'proceedings in Parliament' and are not covered by privilege. Equally material that is published separately elsewhere but which is used as content in a submission, such as an attachment, is not covered by privilege.

229 It has not been judicially decided whether a committee must be validly constituted (that is, must have a quorum) and be acting within any applicable statutory limitations for its proceedings to constitute 'proceedings in Parliament'. See Twomey, (n 103), p 496 and *Criminal Justice Commission v Parliamentary Criminal Justice Commissioner* [2001] QCA 218 at [25] per McPherson JA. The Crown Solicitor has expressed the view that, whilst the absence of a quorum would affect the validity of a committee's decisions, the meeting would still amount to a 'proceeding in Parliament'. See RD Grove, M Swinson and S Hesford (eds), *New South Wales Legislative Assembly Practice, Procedure and* Privilege, 1st ed, (Department of the Legislative Assembly, 2007), p 319.

of a House or of a committee' (emphasis added). In 2011 in *Attorney General and Gow v Leigh*, the New Zealand Supreme Court referred to this construction as the 'concept of reasonable incidentality'.[230]

Section 16 has now been replicated, with certain variations, by the Queensland Parliament in section 9 of the *Parliament of Queensland Act 2001* (Qld) and by the New Zealand Parliament in section 10 of the *Parliamentary Privilege Act 2014* (NZ), discussed further below. It is also in force in the Australian Capital Territory[231] and the Northern Territory.[232]

It has not, however, been adopted as law in New South Wales,[233] raising the question as to its relevance in New South Wales.

As previously noted, New South Wales is singular amongst Australian jurisdictions in the degree to which it relies on the common law test of necessity to determine the existence (but not exercise) of the powers of the Houses of the Parliament of New South Wales at common law. It also underpins the immunities of the Houses at common law.

However, whilst the immunities of the Houses in New South Wales are underpinned by necessity, it is also the case that the Parliament has adopted the *Bill of Rights 1689* as law in New South Wales by virtue of the *Imperial Acts Application Act 1969*. Although of relatively recent judicial notice, nevertheless it is of legal force in the State. As such, the meaning of the phrase 'proceedings in Parliament' within Article 9 is a matter of statutory interpretation by the courts in New South Wales. As Article 9 itself provides no further guidance as to the meaning of 'proceedings in Parliament', according to normal processes of statutory interpretation, its meaning should be interpreted consistently with its purpose at enactment and the 'mischief' it is intended to address.[234] The phrase 'proceedings in Parliament' was clearly enacted with the intention of extending the immunity attaching to 'speech and debates' in Parliament to other modes of parliamentary action such as committee proceedings and the circulation of petitions, as part of a broader settlement with the restored English Crown preventing all outside interference in all aspects of the proceedings of parliament. To the extent that section 16(2) provides an accurate articulation of this purpose of the drafters of Article 9, it is a useful guide to the meaning of 'proceedings in Parliament' in New South Wales.

---

230 *Attorney General and Gow v Leigh* [2011] NZSC 106 at [11].

231 Section 24 of the *Australian Capital Territory (Self-Government) Act 1988* makes the *Parliamentary Privileges Act 1987* (Cth) definitive of the powers, privileges and immunities of the ACT Legislative Assembly.

232 *Legislative Assembly (Powers and Privileges) Act 1991* (NT), s 6(2).

233 But note the comment below in relation to the adoption of the *Special Commissions of Inquiry Amendment Act 1997*.

234 For further information on the purposive approaches to statutory interpretation, see D Pearce and R Geddes, *Statutory Interpretation in Australia*, 8th ed, (LexisNexis Butterworths, 2014), ch 2. In New South Wales, section 33 of the *Interpretation Act 1987* specifically requires that in interpreting the provisions of a New South Wales act, regard is to be had to the objects or purpose of the act.

Consistent with this approach, a number of decisions of the courts in New South Wales, such as *Stewart v Ronalds*[235] and *Sportsbet Pty Ltd v State of New South Wales*,[236] make extensive reference to section 16(2) in determining the boundaries of parliamentary action attracting privilege in New South Wales.

It is also notable that in 1997, the Parliament of New South Wales enacted the *Special Commissions of Inquiry Amendment Act 1997* which adopted the following definition of parliamentary proceedings in the *Special Commissions of Inquiry Act 1983*, clearly drawing on the Commonwealth definition in section 16(2):

> ***parliamentary proceedings*** means any debates or proceedings in Parliament or in a parliamentary committee, and includes all words spoken and acts done in the course of, or for the purposes of or incidental to, the transacting of the business of either House of Parliament or any parliamentary committee.

This provision expired six months after it commenced.[237]

Section 16(2) has also informed the approach of the Legislative Council itself in determining what constitutes 'proceedings in Parliament'.[238]

By contrast with the Commonwealth approach in section 16(2), now replicated in certain other Australian jurisdictions and in New Zealand, in the United Kingdom and Canada there has been renewed interest in necessity as a test of the legal immunity attaching to parliamentary action. In *Canada (House of Commons) v Vaid* in 2005, the Supreme Court of Canada spoke of a 'doctrine of necessity':

> If the existence and scope of a privilege have not been authoritatively established, the court will be required to test the claim against the doctrine of necessity—the foundation of all parliamentary privilege.[239]

In *R v Chaytor* in the UK in 2010, Lord Phillips arrived at a 'necessary connection' test, very similar in substance to that adopted in *Vaid*.[240] The 'doctrine of necessity' was in turn endorsed in 2013 by the UK Parliament's Joint Committee on Parliamentary Privilege.[241]

---

235 [2009] NSWCA 277.

236 [2009] FCA 1283.

237 For further information, see the discussion later in this chapter under the heading 'The Arena case'.

238 See, for example, the 'Memorandum of Understanding on the Execution of Search Warrants in the Premises of Members of the New South Wales Parliament between the Commissioner of Police, the President of the Legislative Council and the Speaker of the Legislative Assembly', November 2010, tabled in the House on 5 May 2011: *Minutes*, NSW Legislative Council, 5 May 2011, p 54. See also the test developed by the Privileges Committee, the so-called 'Breen test', for determining whether a document is covered by parliamentary privilege: Standing Committee on Parliamentary Privilege and Ethics, *Parliamentary privilege and seizure of documents by ICAC No 2*, Report No 28, March 2004, p 8. For further information, see the discussion later in this chapter under the heading 'Members' documents and processes of discovery and seizure'.

239 *Canada (House of Commons) v Vaid* [2005] 1 SCR 667 at [4].

240 *R v Chaytor* [2010] UKSC 52 at [47] per Lord Phillips.

241 Joint Committee on Parliamentary Privilege, UK Parliament, *Parliamentary privilege: Report of session 2013-2014*, 3 July 2013, paras 24 and 27.

The matter arose in New Zealand in 2011 in the decision of the New Zealand Supreme Court in *Attorney General and Gow v Leigh*.[242] Following the UK and Canadian approach, the New Zealand Supreme Court adopted the test of necessity for determining the immunities of the Parliament of New Zealand, in doing so referring to both *Vaid's* 'doctrine of necessity' and Lord Phillips' 'necessary connection' test,[243] whilst reading down 'reasonable incidentality'. The court adopted this approach in part based on the perceived uncertainty of 'reasonable incidentality', but also on the basis of protecting the rights of individuals:

> A test based on the degree of connection or incidentality of the occasion to proceedings literally in Parliament would have an unsatisfactory degree of uncertainty. Necessity has a sharper focus and involves significantly less uncertainty than closeness of connection. Furthermore, any test involving less than necessity would impinge too much on common law rights. Necessity is therefore the appropriate test.[244]

The Parliament of New Zealand responded to the decision in *Attorney General and Gow v Leigh* by enacting the *Parliamentary Privilege Act 2014* (NZ) with the specific purpose of nullifying the decision. It legislated that 'no necessity test is required or permitted to be used',[245] instead adopting an equivalent provision to section 16(2) in the *Parliamentary Privilege Act 2014*,[246] on the grounds that since 1865, the privilege of freedom of speech in New Zealand has been firmly rooted in statute, to be determined in accordance with normal principles of statutory interpretation.[247]

The response of the Parliament of New Zealand to the decision in *Attorney General and Gow v Leigh* may reflect the fact that the 'reasonable incidentality' test is potentially a broader test than the 'doctrine of necessity' in determining the boundaries of parliamentary action attracting legal immunity before the courts. It is significant that the New South Wales case of *Re Opel Networks Pty Ltd*[248] raised similar issues to those raised in *Attorney General and Gow v Leigh*, but was decided in the opposite in favour of the Parliament based on reference to section 16(2) of the *Parliamentary Privileges Act 1987* (Cth).[249]

---

242 [2011] NZSC 106.

243 *Attorney General and Gow v Leigh* [2011] NZSC 106 at [4]-[5].

244 Ibid, at [11].

245 *Parliamentary Privilege Act 2014* (NZ), s 10(4) and (5).

246 Ibid, s 10.

247 Privileges Committee, New Zealand Parliament, *Parliamentary privileges bill: Commentary*, June 2014, p 10. See also P Joseph, 'Parliament's Attenuated Privilege of Freedom of Speech', *Law Quarterly Review,* (Vol 126, October 2010), p 568; *McGee Parliamentary Practice in New Zealand*, 4th ed, (n 173), p 708.

248 [2010] NSWSC 142.

249 In *Attorney General and Gow v Leigh*, the New Zealand Supreme Court found that statements made by an official (Mr Gow) to a minister for the purposes of replying to questions in the New Zealand Parliament were not themselves parliamentary proceedings, and as such were not protected by absolute privilege and could be the subject of court proceedings. By contrast, in *Re Opel Networks Pty Ltd,* Austin J held that the preparation of briefs by departmental officials for a minister in Question Time is for the purposes of or incidental to the transacting of the business of the House, and that accordingly such documents are protected by privilege.

However, whilst the 'reasonable incidentality' test is potentially a broader test of 'proceedings in Parliament' than the 'doctrine of necessity', it is not an open-ended test. As Fitzgerald P observed in 1997 in *O'Chee v Rowley*:

> While the phrase '… for the purposes of or incidental to, the transacting of the business of a House …' in s 16(2) of the Parliamentary Privileges Act is to be given a generous operation, they do not transform every action of a parliamentarian in the pursuit of his or her vocation into 'proceedings in Parliament'.[250]

In summary, notwithstanding the concern expressed by the New Zealand Supreme Court in *Attorney General and Gow v Leigh* that 'reasonable incidentality' is an uncertain test, the courts in New South Wales and Australia have been readily able to identify and apply appropriate limits to the immunity attaching to parliamentary action based on the test in section 16(2) of the *Parliamentary Privileges Act 1987* (Cth). This is discussed further below.

Further guidance on whether specific documents are 'proceedings in Parliament'

As indicated above, the basic proposition from section 16(2) of the *Parliamentary Privileges Act 1987* (Cth) is that documents may come within the meaning of 'proceedings in Parliament' where they have been created for the purposes of or incidental to the transaction of business by the House, but also where they have been retained, or subsequently used, for such a purpose. Based on this, further guidance on whether particular types of documents or actions attract privilege as 'proceedings in Parliament' is provided below.

Tabled papers

The act of tabling a paper in the House is undoubtedly a 'proceeding in Parliament' covered by privilege. However, it is an entirely different question as to whether the contents of a paper so tabled also attracts privilege by virtue of being prepared for the purposes of or incidental to 'proceedings in Parliament'.

A tabled paper is undoubtedly a 'proceedings in Parliament' if prepared specifically for the purposes of tabling in the House. In such cases, the protection of absolute privilege applies to the content not only of the document tabled in the House, but all copies of the document. For example, absolute privilege covers both the specific copy of a committee report tabled in the House, as well as other copies of the report in existence, including drafts and electronic versions.

It is also arguable that the protection of absolute privilege applies to the content of all copies of tabled reports prepared by agencies that report directly to Parliament, such as the Audit Office and the Independent Commission Against Corruption (ICAC). Unlike other government bodies, these agencies have reporting to Parliament as their essential purpose. In some cases reports are prepared by such bodies at the specific direction of the Parliament.

250 *O'Chee v Rowley* (1997) 150 ALR 199 at 203.

The protection of absolute privilege may also extend to the content of reports prepared at the instigation of the executive government, but where the report was prepared specifically for tabling in Parliament. In 2016 in *Carrigan v Honourable Senator Michaelia Cash*,[251] White J held that a report prepared at the direction of the Commonwealth Minister for Health into the actions of the Vice President of the Fair Work Commission was prepared for the purposes of or incidental to the transacting of the business of a House of the Commonwealth Parliament, based on an analysis of the purpose of the report's author and the legal framework for the removal of the Vice President.[252]

However, in 2009 in the New South Wales Court of Appeal decision in *Stewart v Ronalds*,[253] Hodgson JA found that privilege did not extend to a report commissioned by the Premier into the conduct of a minister, even though the report was subsequently tabled in the Legislative Assembly. Hodgson JA observed:

> It is true that the business of Parliament includes holding the Executive to account, and the maintenance of the confidence of Parliament in relation to the composition of the Executive; but this does not necessarily mean that the tabling in Parliament of a report obtained by the Executive for its purposes makes that report, so obtained by the Executive, a proceeding in Parliament.
>
> …
>
> … it seems arguable to me that this role of Parliament is not itself business of Parliament or a committee of Parliament, and that the tabling of a report prepared at the request of the Executive and provided to the Executive for the purposes of the Executive is not itself Parliamentary business that makes the report itself immune to criticism in the courts.[254]

A similar conclusion was reached in 2002 by Crispin J in the Supreme Court of the ACT in *Szwarcbord v Gallop*.[255] Crispin J held that the fact that the Chief Minister of the ACT held a copy of a report of a Board of Inquiry for the purposes of tabling in the ACT Legislative Assembly did not prevent the tendering of the report as evidence by the plaintiffs in the proceedings. Crispin J made some useful observations in *obiter*:

> … privilege may not prevent even documents that have been tabled from being admitted into evidence if they were not prepared for purposes of or incidental to business of the Parliament and their subsequent production would not reveal words used or acts done that might fairly be regarded as falling within the concept of 'proceedings in Parliament'.[256]

Accordingly, the act of tabling a document in the House, not prepared for the purposes of 'proceedings in Parliament', does not extend privilege to copies of that document. For example, the tabling of a newspaper article in the House would not prevent other copies

251 [2016] FCA 1466.
252 *Carrigan v Honourable Senator Michaelia Cash* [2016] FCA 1466 at [74].
253 [2009] NSWCA 277.
254 *Stewart v Ronalds* [2009] NSWCA 277 at [121] and [124] per Hodgson JA.
255 (2002) 167 FLR 262.
256 *Szwarcbord v Gallop* (2002) 167 FLR 262 at 268 per Crispin J.

of that article in circulation from being used against the author in judicial proceedings for defamation.[257]

Where a document tabled in the House was not prepared for the purposes of or incidental to 'proceedings in Parliament', section 27 of the *Defamation Act 2005* provides the protection of absolute privilege to the publication and printing by order of the Legislative Council of that copy of the document only.[258]

Returns to order

Based on the authorities cited above, it is doubtful whether absolute privilege would necessarily extend to the contents of documents collated and tabled in a return to order, where they were not originally prepared for the purposes of or incidental to 'proceedings in Parliament'. By section 28 of the *Defamation Act 2005*, there is a defence to the publication of defamatory material in a public document or copy of a public document if it were published by a parliamentary body for the information of the public or the advancement of education.

However, documents directly created pursuant to an order for papers by the House, such as an index to a return to order, are clearly prepared for the purposes of 'proceedings in Parliament', and accordingly are protected by absolute privilege.[259]

Petitions

The tabling of a petition in the House clearly brings a petition within the meaning of 'proceedings in Parliament', and extends privilege to that petition. However, the Australian Senate's Committee on Privileges has held that the circulation of a petition for signature before its presentation to the House does not constitute 'proceedings in Parliament'.[260]

The Register of Disclosures by Members

As indicated in Chapter 5 (Members), members of the Legislative Council are required to disclose their pecuniary and other interests through regular disclosure returns. The returns are recorded and made public in the 'Register of Disclosures by Members of the Legislative Council'.

In the past, there has been doubt whether the 'Register of Disclosures by Members of the Legislative Council' falls within the meaning of 'proceedings in Parliament'.

---

257 See in support Crown Solicitor, 'Parliamentary Privilege and the Register of Disclosures by Members', 17 October 2012, p 15. See also *Odgers,* 14th ed, (n 5), p 74.

258 For further information, see the discussion later in this chapter under the heading 'Statutory protection of the publication and broadcasting of proceedings'.

259 *Odgers,* 14th ed, (n 5), p 74.

260 Ibid, p 66.

In the UK in 1990 in *Rost v Edwards*,[261] Popplewell J found that the register of disclosures in the UK Parliament is not covered by privilege. Popplewell J argued that, despite the requirements of comity between the courts and the Parliament, there could be no reason for 'ousting the jurisdiction of the court and for limiting or even defeating a proper claim by a party to litigation'.[262]

However, this judgment was strongly criticised by the UK Joint Committee on Parliamentary Privilege in 1999, on the basis that enforcement of the register rests solely with the UK Parliament. The committee observed:

> Both Houses have procedures for registration of members' personal pecuniary interests. These procedures are part of the machinery brought into being by each House for the better conduct of its business. They are under the sole control of each House and not subject to supervision by courts of law. We consider these procedures also qualify, or should qualify, for the protection afforded by article 9 to proceedings in Parliament.[263]

The matter arose in New South Wales in 2012, when ICAC sought from the Clerk of the Parliaments certain returns by members for the purposes of an investigation. The Crown Solicitor advised that, whilst 'there are competing arguments, which are relatively finely balanced, on whether the Register would constitute "proceedings in Parliament", he was inclined to the view that the Registers could constitute "proceedings in Parliament"'.[264]

In response to this advice, the Parliament passed the *Independent Commission Against Corruption Amendment (Register of Disclosures by Members) Act 2012* to specify that ICAC may make use of the register of either House for the purposes of any investigation or for the purposes of any findings or recommendations, thereby effectively waiving privilege over the register.

In all other respects, on the basis of the advice of the Crown Solicitor and the legislative response of the Parliament, the 'Register of Disclosures by Members of the Legislative Council' must be considered to fall within the meaning of 'proceedings in Parliament', and therefore may not be used for the purposes of private litigation against a member or former member.[265]

Correspondence to and reports of the Parliamentary Ethics Adviser

It seems likely that members' correspondence to the Parliamentary Ethics Adviser would constitute 'proceedings in Parliament', based on the authority of *Hamilton v Al Fayed*[266] in the UK in 2001.

---

261 [1990] 2 WLR 1280.

262 *Rost v Edwards* [1990] 2 WLR 1280 at 1293 per Popplewell J.

263 Joint Committee on Parliamentary Privilege, UK Parliament, *Report: Volume I – Report and Proceedings of the Committee*, Session 1998-1999, ch 2, para 119.

264 Crown Solicitor, 'Parliamentary Privilege and the Register of Disclosures by Members', 17 October 2012, p 13.

265 See also Crown Solicitor, 'Response to ICAC request for statement re extracts from interest register', June 2014.

266 [2001] 1 AC 396 at 406 per Lord Browne-Wilkinson.

Annual reports of the Parliamentary Ethics Adviser, prepared for the purposes of tabling in the Houses, are clearly 'proceedings in Parliament'. Advice prepared for members by the Parliamentary Ethics Adviser would also likely constitute 'proceedings in Parliament'. There is some room for doubt as to whether reports prepared by the Parliamentary Ethics Adviser for ministers and former ministers on post-separation employment under the *Code of Conduct for Ministers of the Crown* would constitute 'proceedings in Parliament'. However, given that they are in most cases required to be tabled in the House according to regulation,[267] it seems likely that they also attract privilege.

Material prepared for members by parliamentary staff

In the course of their work, parliamentary staff prepare various briefs, advices and other research material for members, most of which would be expected to fall within the meaning of 'proceedings in Parliament'.

The NSW Parliamentary Library Research Service also routinely provides general background briefing notes to all members on issues of public significance. Here the protection afforded by qualified privilege under the law of defamation likely applies, as discussed later in this chapter.[268]

Material prepared for ministers by public servants

In the course of their parliamentary duties, ministers routinely receive draft material from public servants such as draft answers to questions and draft material for budget estimates hearings, together with drafts of proposed legislation.

In 2000 in *Re OPEL Networks Pty Ltd*,[269] Austin J held that the preparation of briefs by departmental officials for a minister to use in Question Time is for the purposes of or incidental to the transacting of business of the House, and that accordingly such documents are protected by privilege. His Honour observed:

> It seems to me necessarily true, and not dependent upon the evidence of the particular case, that if briefings and draft briefings to Parliamentarians for Question Time and other Parliamentary debate are amenable to subpoenas and other orders for production, the Commonwealth officers whose task it is to prepare those documents will be impeded in their preparation, by the knowledge that the documents may be used in legal proceedings and for investigatory purposes that might well affect the quality of information available to Parliament. To take a step that would have that consequence would, I think, derogate from the force of the Bill of Rights and run contrary to the historical justification for that legislation.[270]

---

267 *Independent Commission Against Corruption Regulation 2017*, Appendix, Schedule to the Code, pt 5.

268 See the discussion under the heading 'The law of defamation and the republication of proceedings'.

269 [2010] NSWSC 142.

270 *Re OPEL Networks Pty Ltd (in liq)* [2010] NSWSC 142 at [118].

The New Zealand Supreme Court decision in *Attorney General and Gow v Leigh*[271] in 2011, which reached the opposite conclusion, was subsequently nullified by the enactment of the New Zealand *Parliamentary Privilege Act 2014*.[272]

Equally, however, there is authority in *Sportsbet Pty Ltd v State of New South Wales*[273] that, whilst material prepared for a minister's use in Parliament is covered by privilege, privilege does not extend to every document concerning the preparation of draft legislation.[274]

Nor is parliamentary privilege a legitimate basis for a claim that documents produced to the House in a return to order should not be published.[275]

Correspondence from constituents to members

Correspondence from a constituent to a member likely comes within the meaning of 'proceedings in Parliament' if prepared for the purposes of or incidental to proceedings in the House or a committee, for example if it was prepared with a specific request that the matter be raised in the House. There is also a strong basis for supposing that correspondence falls within the meaning of 'proceedings in Parliament' where it has been retained by a member for the purposes of raising in the House, or has in fact been raised in the House. However, if correspondence was provided to a member in order that the member make representations to a minister for action by the executive government, it would likely not constitute 'proceedings in Parliament'.

The authority most often cited in support of this proposition is the 1997 decision of the Supreme Court of Queensland in *O'Chee v Rowley*.[276] This case involved a defamation action brought by Mr Rowley against Senator O'Chee for comments made in a radio interview which were critical of Mr Rowley's activities. Mr Rowley sought discovery of various documents that were in the Senator's possession, including file notes prepared by the Senator, but also correspondence to the Senator. The majority (McPherson JA, Moynihan J agreeing, Fitzgerald P dissenting) took the view that the file notes and correspondence were covered by privilege, on the basis that the material had been created or retained by the Senator for the purposes of carrying on parliamentary business.[277] As stated by MacPherson JA:

> Generally, it seems to me that if documents like these came into the possession of Senator O'Chee and he retained them with a view to using them, or the

271 [2011] NZSC 106.

272 For further information, see the discussion earlier in this chapter under the heading 'Section 16(2) of the *Parliamentary Privileges Act* (Cth) and 'reasonable incidentality''.

273 [2009] FCA 1283.

274 *Sportsbet Pty Limited v State of New South Wales* [2009] FCA 1283 at [20]-[21] per Jagot J.

275 For further information, see the discussion in Chapter 19 (Documents) under the heading 'Claims for non-publication based on parliamentary privilege'.

276 (1997) 150 ALR 199.

277 *O'Chee v Rowley* (1997) 150 ALR 199 at 208 per MacPherson JA, at 215 per Moynihan J, at 203-204 per Fitzgerald P.

> information they contain, for the purpose of Senate questions or debate on a particular topic, then it can fairly be said that his procuring, obtaining or retaining possession of them were 'acts done … for purposes of or incidental to the transacting of the business' of that House.[278]

However, in 2000 in *Rowley v Armstrong*[279] in the Queensland Supreme Court, Jones J held that 'an informant in making a communication to a parliamentary representative is not regarded as participating in proceedings in Parliament'.[280] The 92nd report of the Senate Committee of Privileges subsequently included legal advices which argued that this decision was flawed and should hold no weight as an authority.[281]

Also of note is the 1991 decision of the New South Wales Supreme Court in *R v Grassby*.[282] This case involved an application by Mr Grassby, a former minister in the Whitlam Government, for an order staying proceedings against him for criminal defamation related to the publication by him of a three and a half page document supplied to Mr Maher, a member of the Legislative Assembly. That document was supplied with a request that Mr Maher read it in Parliament, and made a number of defamatory imputations including that three individuals were implicated in the 1977 murder of Donald MacKay, a prominent anti-drugs campaigner. Mr Grassby sought a stay of proceedings on a number of grounds, including that he would not receive a fair trial because parliamentary privilege would prevent the adducing of evidence relating to the performance by Mr Maher of his parliamentary functions. Allen J was not persuaded, finding that privilege did not attach to communication between Mr Grassby and Mr Maher, even if the information had subsequently been used in 'proceedings in Parliament', which seemingly it had not.[283] The Legislative Council Privileges Committee subsequently distinguished this case, noting that it concerned the position of a constituent in sending material to a member, rather than the use or retention of material by a member, and that there was not even a remote connection between the provision of the document to the member and any actual or potential 'proceedings in Parliament'.[284]

In 1994 in *Police v Dyers*,[285] documents held by a member of the Legislative Council, the Hon Stephen Mutch, were subpoenaed. In response to the subpoena, both Mr Mutch and the President of the Council submitted affidavits claiming parliamentary privilege and public interest immunity. The basis of the claim of privilege was that the member had used the relevant material to prepare speeches in the House. The magistrate affirmed the application of privilege to the documents on the two grounds requested.

---

278 Ibid, at 209 per MacPherson JA.

279 [2000] QSC 88.

280 Ibid, at [34] per Jones J.

281 Standing Committee of Privileges, Australian Senate, *Matters arising from 67th report of the committee of privileges*, Report No 92, June 2000.

282 (1991) 55 A Crim R 419.

283 Ibid, at 431.

284 Standing Committee on Parliamentary Privilege and Ethics, *Parliamentary privilege and seizure of documents by ICAC No 2*, Report No 28, March 2004, p 6.

285 Unreported, Bankstown Local Court, 24 and 25 October 1994.

The Senate Committee of Privileges has expressed the view that an individual citizen should be free to approach a member of Parliament directly seeking to have a matter raised in Parliament, and that in such circumstances it is appropriate for such material to be protected by privilege, on the understanding that the material is intended to be used for purposes of or incidental to the transaction of the business of the House. If the member does not act with a view to raising the matter in parliamentary proceedings, the immunity ceases to exist.[286] Carney argues that such an approach is preferable to the approach adopted in *O'Chee v Rowley*, on the basis that it better facilitates the flow of information to members of Parliament.[287]

Protected disclosures to members

For the reasons articulated above, it is likely that protected disclosures by whistle-blowers to members of Parliament constitute 'proceedings in Parliament'.[288]

This issue arose in the Legislative Council in November 1996 following the serving of notice on the Hon Franca Arena by the Royal Commissioner into the New South Wales Police Service, calling for documents concerning allegations of paedophilia made by Mrs Arena in the House. Some of the documents covered by the notice were used by Mrs Arena in a speech in the House on 31 October 1996.[289] However, other documents were provided to her after the speech. In advice tendered to the Council by Mr Paul Lakatos and Mr Bret Walker SC, they contended that parliamentary privilege extended both to the documents used by Mrs Arena which she referred to in her speech, but also to documents she subsequently received after her speech:

> The member received information both before and after her speech to Parliament on 31 October 1996. As to the material received by her before the speech, the nexus between that material and the speech or proceedings in Parliament is that the material so informed the member in relation to the considerations in making the speech and its contents, that any critical consideration of those matters [which is the information sought by the notices], is calculated to call into question or impeach the freedom of speech or proceedings in Parliament.
>
> The information received by the member after her speech is equally the subject of the privilege because the purpose behind the present speech was to ensure scrutiny of executive action in duly pursuing persons alleged to be involved in paedophile activities. Those persons who had any information regarding these matters, would have been encouraged to contact the member for the purpose of continuing or following-up that scrutiny. The reaction of

286 Senate Committee of Privileges, Australian Senate, *Possible improper action against a person (Dr William De Maria)*, Report No 72, June 1998, paras 2.11–2.12.

287 G Carney, 'Lifting the veil of mystery: freedom of speech under parliamentary privilege', in J Jones and J McMillan (eds), *Public law intersections: papers presented at the Public Law Weekend*, (2000-2001), p 150.

288 H Evans, 'Members' informants: any protection?' *The Table*, (1997), p 19. See also J Attwood, 'Parliamentary privilege and members' sources of information', Australasian Study of Parliament Group Annual Conference – Parliamentary Privilege, Melbourne, 2002.

289 *Hansard*, NSW Legislative Council, 31 October 1996, pp 5621-5625.

> the public is part of representative democracy in that it may, or in this case, would become part of future privileged statements to be made by the member in the Parliament.[290]

A limited protection of information provided to members of Parliament is found in section 19 of the *Public Interest Disclosures Act 1994*.[291]

Correspondence prepared by members

Members of Parliament routinely engage in a range of correspondence as part of the discharge of their parliamentary duties including correspondence to constituents, ministers and government agencies.

In general terms, most such items of correspondence would not be considered to constitute 'proceedings in Parliament', and therefore would not be covered by parliamentary privilege, even though they fall within the scope of a member's duties as a member of Parliament.[292]

However, correspondence prepared by a member may in certain circumstances fall within the scope of 'proceedings in Parliament', for example where it encompasses discussions related to draft oral questions in the House,[293] or proposed motions or draft speeches to be made in the House.

In 1985, the Joint Select Committee upon Parliamentary Privilege in New South Wales recommended that absolute privilege should attach to all correspondence between members and ministers in matters relating to their role as members of Parliament. It was recommended that absolute privilege apply to the minister's reply, whilst only

---

290 P Lakatos and B Walker SC, 'In the matter of advice as to claim of parliamentary privilege before Royal Commission into NSW Police Service', 6 December 1996.

291 Section 19 provides that a disclosure by a public official to a member of parliament is protected in specified circumstances: the public official must, without success, have already made substantially the same disclosure to an investigating authority, public authority or officer of a public authority; the public official must have reasonable grounds for believing that the disclosure is substantially true; and the disclosure must be substantially true. Informants who are not public officials remain outside the protection offered by the act.

292 In the UK in 1957, the House of Commons Committee of Privileges considered the case of Mr Strauss (more generally known as the *Strauss Case*). Mr Strauss, a member of the House of Commons, had written a letter to the minister criticising certain alleged practices of the London Electricity Board. A copy of the letter was provided to the chairman of the Board. The Board's solicitor subsequently wrote to Mr Strauss threatening to institute proceedings for libel. The House of Commons Committee of Privileges found that in writing to the minister, Mr Strauss was engaging in 'proceedings in Parliament', and that in threatening libel action, both the Board and its solicitor had acted in breach of the privileges of the House. Subsequently, however, the House of Commons refused to accept the committee's view, and in a free vote, carried a motion declaring that Mr Strauss' letter was not a 'proceeding in Parliament' and that no breach of privilege had been committed. For further information, see *Erskine May*, 25th ed, (n 23), para 16.5.

293 In the UK in 1939, the House of Commons agreed that notice in writing of a question to be asked in the House was protected by privilege. See *Erskine May*, 25th ed, (n 23), para 16.5.

qualified privilege apply to the correspondence whilst it is being processed by the department, instrumentality or authority to which it is referred by the minister.[294] This recommendation has not been implemented.

Party proceedings

It is relatively clear that party proceedings such as caucus meetings are not 'proceedings in Parliament', even though they occur within the parliamentary precincts. However, the case law on this matter is not settled.

In 1958 in *R v Turnbull* in the Tasmanian Supreme Court, Gibson J concluded:

> The Caucus, or private meeting of members of a party, to determine joint action in Parliament, is essentially a body which operates outside Parliament, whatever effect it intends to produce in Parliament, and cannot, in my opinion, claim parliamentary privilege.[295]

However, in 1997 in the New Zealand High Court case of *Rata v Attorney General*,[296] Master Thompson held that, caucus being integral to the parliamentary system, caucus proceedings do form part of the 'proceedings in Parliament'.[297] This decision was subsequently severely criticised,[298] and was overturned in 2004 in *Hauta v Prebble*,[299] in which the New Zealand Court of Appeal affirmed the view from *R v Turnbull*.[300]

The matter has arisen in New South Wales on two occasions. In 1999 in *Della Bosca v Arena*,[301] Levine J concluded that 'the question of whether or not proceedings of "Caucus" are embraced by the doctrine of absolute privilege in relation to the proceedings of Parliament is clearly an arguable one'.[302] The matter was later settled. In 2016, in the NSW Civil and Administrative Tribunal in *Gold and Copper Resources Pty Limited v NSW Trade and Investment*,[303] McAteer J found that under the *Government Information (Public Access) Act 2009*, party room briefings are operationally analogous to the exemption provided to cabinet papers, and as such are protected by privilege.[304] This decision is unlikely to be regarded as authoritative.

---

294 Joint Select Committee upon Parliamentary Privilege, *Parliamentary privilege in New South Wales,* September 1985, pp 105-110.

295 [1958] Tas SR 80 at 84 per Gibson J.

296 (1997) 10 PRNZ 304.

297 Ibid, at 313.

298 See D McGee, 'Parliament and Caucus', *New Zealand Law Journal*, (Vol 137, April 1997), p 138. See also PA Joseph, *Constitutional and Administrative Law in New Zealand*, 2nd ed, (Brookers, 2001), pp 402-403.

299 [2004] NZCA 147.

300 *Hauta v Prebble* [2004] NZCA 147 at [63] per McGrath, Glazebrook and O'Regan JJ.

301 [1999] NSWSC 1057.

302 *Della Bosca v Arena* [1999] NSWSC 1057 at [24] per Levine J.

303 [2016] NSWCATAD 267.

304 *Gold and Copper Resources Pty Limited v NSW Trade and Investment* [2016] NSWCATAD 267 at [96] per McAteer J.

The meaning of 'ought not to be impeached or questioned'

The immunity that attaches to parliamentary action – that is to say, 'the freedom of speech and debates or proceedings in Parliament' – under Article 9 of the *Bill of Rights 1689* is captured in the expression that such action 'ought not to be impeached or questioned'.

McGee observes that at the time Article 9 was drafted, it may well be that there was considered to be little, if any, distinction between the use of the words 'impeached' and 'questioned'. Today, however, the two words conveniently capture the two-pronged meaning of Article 9:

- Freedom of 'speech and debates or proceedings in Parliament' are understood to be 'impeached' where an attempt is made to make a member or another person directly liable in court or other similar proceedings for what they have said or done in parliament.
- Freedom of 'speech and debates or proceedings in Parliament' are understood to be 'questioned' when what a member has said or done in parliament is sought to be critically examined in court or other similar proceedings, even where the action may arise from events outside of parliament.[305]

Accordingly, the immunity that attaches to parliamentary action operates not only as a complete defence to prosecution brought against a member in respect of his or her parliamentary actions, but also constrains the evidence that can be tendered to a court in respect of matters that have their origins outside of parliament.

This distinction arose in Australia in two trials of Justice Lionel Murphy for conspiring to pervert the course of justice conducted in the New South Wales Supreme Court in 1985 and 1986. During the course of both trials, the prosecution and defence both used evidence previously given to Senate committees by Justice Murphy and the main prosecution witness, including *in camera* evidence. Both Cantor J in 1985[306] and Hunt J in 1986[307] rejected argument that Article 9 prevented this course, including submissions made on behalf of the President of the Senate in the second case, although for different reasons. Hunt J in effect found that, whilst Article 9 prevented parliamentary proceedings being the actual cause of an action (ie 'impeached'), it did not prevent evidence of those proceedings being used to support an action (ie 'questioned').[308]

The Commonwealth Parliament responded to the decisions of Cantor and Hunt JJ by enacting the *Parliamentary Privileges Act 1987* (Cth), which reasserted the traditional interpretation of both 'impeached' and 'questioned'. Section 16(3) provides:

> In proceedings in any court or tribunal, it is not lawful for evidence to be tendered or received, questions asked or statements, submissions or comments made, concerning proceedings in Parliament, by way of, or for the purpose of:

305 *McGee Parliamentary Practice in New Zealand*, 4th ed, (n 173), pp 733-734.
306 Unreported, 5 June 1985.
307 *R v Murphy* (1986) 5 NSWLR 18.
308 Ibid, at 30 per Hunt J.

(a) questioning or relying on the truth, motive, intention or good faith of anything forming part of those proceedings in Parliament;

(b) otherwise questioning or establishing the credibility, motive, intention or good faith of any person; or

(c) drawing, or inviting the drawing of, inferences or conclusions wholly or partly from anything forming part of those proceedings in Parliament.[309]

The validity of section 16 was upheld in 1998 by the Federal Court in *Amann Aviation Pty Ltd v Commonwealth*,[310] with Beaumont J finding section 16(3) to be 'declaratory of the position both in England and in Australia before the enactment of the Act'.[311] Similarly, in *Prebble v Television New Zealand Ltd*,[312] on appeal from the New Zealand Court of Appeal to the Privy Council, Lord Browne-Wilkinson stated that section 16(3) of the *Parliamentary Privileges Act 1987* (Cth), 'contains … the true principle to be applied' as to the effect of Article 9 and the admissibility of evidence.[313]

Although section 16(3) of the *Parliamentary Privileges Act 1987* (Cth) is not law in New South Wales, it is nevertheless declaratory of the long historical and judicial understanding that the courts are precluded from examining proceedings in the Houses of the Parliament of New South Wales, including questioning the truthfulness or motive of those taking part in those proceedings or drawing inferences or conclusions from them, including that parliamentary actions were inspired by improper motives or were untrue or misleading.[314] This prohibition on impeaching or questioning goes to the separation of powers between the legislature and the courts; a court has no legitimate

309 For further information on the meaning of paras (a), (b) and (c), see *Odgers,* 14th ed, (n 5), p 53.

310 (1988) 19 FCR 223.

311 *Amann Aviation Pty Ltd v Commonwealth* (1988) 19 FCR 223 at 231 per Beaumont J. See also *Rann v Olsen* (2000) 159 FLR 132 at [225] per Prior J and *McCloy v Latham* [2015] NSWSC 1782 at [14] per McDougall J.

312 [1995] 1 AC 321.

313 *Prebble v Television New Zealand Ltd* [1995] 1 AC 321 at 333 per Lord Browne-Wilkinson. However, the constitutionality of section 16(3) of the *Parliamentary Privileges Act 1987* (Cth) was critically considered by two State courts: first by Queensland's Court of Appeal in *Lawrance v Katter* (1996) 141 ALR 447, and then by the Full Court of the Supreme Court of South Australia in *Rann v Olsen* (2000) 159 FLR 132. Both cases were actions for defamation in respect of statements made outside parliament in the course of media interviews. The decisions in these two cases revealed some differences of judicial opinion on the validity and operation of section 16(3). The High Court granted special leave to appeal the case of *Lawrance v Katter*. During proceedings in the High Court on 26 June 1997, Brennan CJ observed: 'If one deals with the scope and operation of 16(3), obviously constitutional constraints affect the complexion of the construction that will be placed upon it'. However, in the event, the appeal was discontinued. For further information, see E Campbell, 'Parliamentary Privilege and Admissibility of Evidence', *Federal Law Review*, (No 27, 1999), p 367. See also E Campbell, 'Rules of Evidence and the Constitution', *Monash University Law Review*, (Vol 26, No 2, 2000), p 312.

314 *Prebble v Television New Zealand Ltd* [1995] 1 AC 321 at 337 per Lord Browne-Wilkinson. See the New South Wales cases of *NSW Branch of the Australian Medical Association v Minister for Health and Community Services* (1992) 26 NSWLR 114 at 128 per Hungerford J and *Kable v New South Wales* [2000] NSWSC 1173 at [16] per Master Harrison. For further case law in other jurisdictions, see *Odgers,* 14th ed, (n 5), pp 48-49.

occasion to pass judgement on such proceedings.[315] In the words of Blackstone: 'whatever matter arises concerning either House of Parliament ought to be examined, discussed and adjudged in that House to which it relates and not elsewhere'.[316]

The remedy for a parliamentary wrong, if one has been committed, must be sought from parliament and cannot be gained through the courts.[317]

The 'historical exceptions' doctrine

Whilst Article 9 captures the underlying principle of non-intervention by the courts in parliamentary proceedings through the prohibition on *impeaching* or *questioning* those proceedings, it is important to emphasise that Article 9 does not operate as a blanket prohibition on the use of parliamentary records in the courts *per se*. There is no objection to the use of parliamentary records to establish what was said or done in parliament as a matter of historical fact – for example the fact that a member spoke, that a certain statement was made, or that a document was tabled. This is sometimes referred to as the 'historical exceptions' doctrine.

The courts apply the immunity attaching to parliamentary action not by refusing to admit evidence of what was said in parliament, but by refusing to allow the substance of what was said in parliament to be the subject of any submission or interference.[318] As Lord Browne-Wilkinson observed in *Prebble v Television New Zealand Ltd* in 1995:

> … their Lordships are of the view that parties to litigation … cannot bring into question anything said or done in the House by suggesting (whether by direct evidence, cross-examination, inference or submission) that the actions or words were inspired by improper motives or were untrue or misleading. Such matters lie entirely within the jurisdiction of the House, subject to any statutory exception … However, their Lordships wish to make it clear that this principle does not exclude all references in court proceedings to what has taken place in the House. … A number of the authorities on the scope of article 9 betray some confusion between the right to prove the occurrence of Parliamentary events and the embargo on questioning their propriety.[319]

The decision in *Prebble* was subsequently cited with approval by Kirby J in *Egan v Willis* in 1998:

> … it is important to avoid confusion between the right to prove the occurrence of parliamentary events and the prohibition on questioning their propriety, as for example, suggesting that a member had misled the House or acted wrongly or from improper motives.[320]

---

315 *Hamilton v Al Fayed* [l999] 1 WLR 1569 (CA) at 1582 per Lord Woolf MR. See also *Prebble v Television New Zealand Ltd* [1995] 1 AC 321 at 332 per Lord Browne-Wilkinson.

316 W Blackstone, *Commentaries on the Laws of England*, 17th ed, (1830), p 163.

317 *British Railways Boards v Pickin* [1974] AC 765 (HL) at 793 per Lord Wilberforce; cited in *McGee Parliamentary Practice in New Zealand*, 4th ed, (n 173), p 717.

318 *Comalco Ltd v Australian Broadcasting Corporation* (1983) 50 ACTR 1 at 5 per Blackburn CJ.

319 *Prebble v Television New Zealand Ltd* [1995] 1 AC 321 at 337 per Lord Browne-Wilkinson.

320 (1998) 195 CLR 424 at 490 per Kirby J.

This distinction also finds expression in a long line of New South Wales cases, including *Uren v John Fairfax & Sons Ltd*,[321] *Mundey v Askin*,[322] *Henning v Australian Consolidated Press Ltd*,[323] *R v Jackson*,[324] *New South Wales Branch of the Australian Medical Association v Minister for Health*,[325] and *La Perouse Local Aboriginal Land Council v Minister Administering the Crown Lands Act*.[326]

However, some commentators have expressed concerns that the 'historical exceptions' doctrine has not always been applied correctly by the courts.[327] David McGee, the former Clerk of the New Zealand Parliament, writes:

> The so-called historical exception has thus become a means for litigants to smuggle into their cases parliamentary material whose admission inevitably impeaches freedom of speech in Parliament and to lead the Courts, rather than the Parliament itself, to adjudge the accuracy and motivation of parliamentary contributions.[328]

In *Erglis v Buckley*[329] in 2004, the Queensland Court of Appeal was called upon to determine whether an allegedly defamatory letter sent by the defendants[330] to the Queensland Minister for Health, which the minister subsequently tabled and read in the Queensland Parliament, could be relied on by the plaintiff, Ms Erglis,[331] for the purpose of increasing the amount of damages payable to her. In interlocutory proceedings, Philippides J of the Supreme Court of Queensland had ruled that the paragraphs of the statement of claim which referred to the republication in Parliament be struck out on the basis that they impeached or questioned proceedings in Parliament within the meaning of section 8 of the *Parliament of Queensland Act 2001*.[332] However, the Court of Appeal subsequently overturned that decision, by a majority of 2:1. McPherson JA, in the majority, found that the tabling of the letter was relied on by the plaintiff only as a matter of history, and that such limited purpose did not impeach, question or impair parliamentary freedom of speech and debate.[333] However, in his dissenting judgment, Jerrard JA held that reliance on material tabled in Parliament, even where it was being

321 (1979) 2 NSWLR 287 at 289 per Begg J.
322 (1982) 2 NSWLR 369 at 373 per Moffitt P, Reynolds and Samuels JJA.
323 (1982) 2 NSWLR 374 at 375 per Hunt J.
324 (1987) 8 NSWLR 116 at 118-119 per Carruthers J.
325 (1992) 26 NSWLR 114. In this case, it was found that parliamentary privilege would not be breached by the examination of a parliamentary committee report on a provisional basis to determine whether its admission into evidence might involve a breach of privilege. Hungerford J referred to the authority of *Amann Aviation Pty Ltd v Commonwealth of Australia* (1988) 19 FCR 223.
326 [2012] NSWLEC 5 at [81] per Sheahan J.
327 See, for example, J Allen, 'Parliamentary Privilege: Will the Empire Strike Back?', *New Zealand Universities Law Review*, (Vol 20, No 205, 2002), p 205; McGee, 'The Scope of Parliamentary Privilege', (n 158); Joseph, (n 247).
328 McGee, 'The Scope of Parliamentary Privilege', (n 158), p 86.
329 [2004] QCA 223.
330 The defendants were 11 nurses employed in the Royal Brisbane Hospital.
331 Ms Erglis was also a nurse employed at the Royal Brisbane Hospital.
332 *Erglis v Buckley* [2003] QSC 440 at [29] per Philippides J.
333 *Erglis v Buckley* [2004] QCA 223 at [19] per McPherson JA.

used in an action brought against third parties, must inevitably call into question the proceedings in Parliament. Moreover, he recognised that a foreseeable consequence of the admission of the letter would be unwillingness of citizens to provide information to members of Parliament, with consequences for the flow of information to Parliament.[334]

Petitioning the House for leave to produce parliamentary records

Historically, Westminster parliaments in many jurisdictions developed practices to enable parties to actions before the courts to petition the parliament for leave to produce official parliamentary records, such as *Hansard*, in court, where such production would not involve the impeaching or questioning of proceedings, as discussed above.[335]

In modern times, because the courts have on the whole been scrupulous in respecting parliamentary privilege, most parliaments, including the House of Commons,[336] the Senate[337] and the New Zealand House of Representatives[338] have discarded these procedures, relying on the courts to ensure that proceedings in parliament are not impeached or questioned.

In the Legislative Council, it was practice before 1995 for parties in legal proceedings to petition the Council to obtain leave to adduce official parliamentary records as evidence in a court. However, consistent with the approach in other parliaments, in 1995 the Parliament of New South Wales enacted the *Evidence Act 1995*, which obviates the requirement for parties to petition the Parliament for such leave.[339] Since that time official parliamentary records of the House have been admissible in evidence without the need to petition the House. However, in certain one-off instances, the Council has continued to require the presentation of a petition seeking the production of parliamentary records, notwithstanding the enactment of the *Evidence Act 1995*.[340] In such circumstances, the House may give leave for the documents to be produced and for the Clerk, or the Clerk's representative, to attend the court to produce the documents.[341]

---

334 Ibid, at [34] per Jerrard JA.

335 For further information, see *Prebble v Television New Zealand Ltd* [1995] 1 AC 321 at 337 per Lord Browne-Wilkinson.

336 In 1980, the House of Commons resolved to allow references to be made in court to the Official Report and Committee reports and evidence, without the presentation of a petition. See *Erskine May*, 25th ed, (n 23), para 13.15.

337 However, the Senate does require senators and Senate officers to seek Senate approval before giving evidence in respect of Senate or Senate committee proceedings. See *Odgers,* 14th ed, (n 5), p 47; standing order 183.

338 *McGee Parliamentary Practice in New Zealand*, 4th ed, (n 173), pp 746-747.

339 *Evidence Act 1995*, s 155.

340 *See, for example, Minutes*, NSW Legislative Council, 26 June 1996, pp 284-285; 2 December 1997, p 261; 3 December 1997, p 282; 22 June 2000, p 536; 23 June 2000, p 554. These instances are documented in S Want and J Moore, edited by D Blunt, *Annotated Standing Orders of the New South Wales Legislative Council*, (Federation Press, 2018), pp 153-156.

341 As occurred in *Sankey v Whitlam* (1978) 142 CLR 1. See also documents tabled by the Hon Franca Arena, retained in the custody of the Clerk and provided to the Special Commission of Inquiry into Allegations made in Parliament by the Honourable Franca Arena MLC and to the Commissioner of Police. See *Minutes*, NSW Legislative Council, 21 October 1997, pp 123-126.

Other circumstances where proceedings in Parliament have been admitted in court

In addition to the 'historical exceptions' doctrine, there are a number of other circumstances in New South Wales and in other jurisdictions where parliamentary material has been admitted in court proceedings. Some of these circumstances are entirely appropriate, such as the use of parliamentary material as an aid to statutory interpretation and judicial review of the legislative process. However, others are more controversial, such as the use of parliamentary material in administrative review decisions and to support actions for defamation based on 'effective repetition'. These matters are discussed below.

Material as an aid to statutory interpretation

Section 34 of the *Interpretation Act 1987* provides that extrinsic material, including second reading speeches, explanatory memoranda to bills, material in the official records of proceedings such as the *Minutes of Proceedings*, parliamentary committee reports and other material may legitimately be used in court to assist in the interpretation of acts and statutory rules. The use of such materials for this purpose does not amount to impeaching or questioning 'proceedings in Parliament'. However, the use of the material must be confined to the 'ascertainment of the meaning of the provision' and is restricted to such defined conditions as where the provision is 'ambiguous' or 'obscure'. It should not be used as a cloak to seek to examine the motives of what was said or done in parliament.[342]

Judicial review of the legislative process

It is well established that the High Court may strike down any federal or state laws that it regards as unconstitutional, for example, laws that breach the implied freedom of political communication[343] in the Commonwealth Constitution.

However, beyond this, the courts have traditionally been reluctant to intervene in the legislative process, regarding such matters as internal to the proceedings of parliament.[344] The exception to this is where constitutional provisions, such as the 'manner and form' provisions of the *Constitution Act 1902*,[345] stipulate specific procedures for the enactment of particular laws. Where questions arise as to whether such procedures have been followed and a law validly enacted, the courts may make use of the parliamentary record such as *Hansard* and the *Minutes of Proceedings*.[346]

342 *Kable v New South Wales* [2000] NSWSC 1173 at [16] per Master Harrison.

343 See, for example, *Unions NSW v New South Wales* [2019] HCA 1, in which the High Court found that section 29(10) of the *Electoral Funding Act 2018*, which reduced the monetary limit of electoral expenditure by third-party campaigners from over $1.2 million to $500,000 in the six months leading up to a State election, to be invalid as it breached the implied freedom of political communication in the Commonwealth Constitution.

344 *Namoi Shire Council v Attorney-General (NSW)* (1980) 2 NSWLR 639 at 644-645 per McLelland J.

345 Sections 7A and 7B. For further information on these provisions, see the discussion in Chapter 15 (Legislation) under the heading ''Manner and form' restrictions on bills to amend the *Constitution Act 1902*'.

346 For further information, see Campbell, *Parliamentary Privilege*, (n 173), p 113; and Twomey, (n 103), pp 240-245.

In 1930 in *Trethowan v Peden*,[347] the Supreme Court granted an injunction preventing the Lang Labor Government presenting two bills to abolish the Legislative Council to the Governor for assent, on the grounds that their presentation without first securing the assent of the people in a referendum would contravene section 7A of the *Constitution Act 1902*.[348]

The Supreme Court similarly considered the operation of section 5B of the *Constitution Act 1902* in *Clayton v Heffron* in 1960.[349]

Judicial review of administrative decisions

In the 1970s, the Commonwealth Parliament enacted various pieces of legislation[350] to enable persons or other parties affected by most administrative decisions made by Commonwealth departments and agencies to appeal such decisions to the courts. New South Wales followed suit with the *Administrative Decisions Review Act 1997*.

Such legislation has facilitated an enormous growth in the ambit and scope of judicial review of administrative decision making in Australia. Other countries have seen similar growth in administrative law. However, it brings with it the greater likelihood that material potentially covered by parliamentary privilege may be sought to be adduced into evidence during such proceedings.

There are a number of well documented decisions in the UK and elsewhere where such administrative decisions have been informed by the use of parliamentary statements.[351] Perhaps notable amongst these is the 2007 decision of the Privy Council in *Toussaint v Attorney General of St Vincent and the Grenadines*,[352] where the appellant was allowed to rely on statements made by the Prime Minister of St Vincent and the Grenadines in the House of Assembly of Saint Vincent and the Grenadines as evidence of unlawful motivation.

The matter arose in New South Wales in 2012 in *La Perouse Local Aboriginal Land Council v Minister Administering the Crown Lands Act*,[353] where Sheahan J permitted the tendering

---

347 (1930) 31 SR (NSW) 183. See also the subsequent decisions of the High Court in *Attorney-General (NSW) v Trethowan* (1931) 44 CLR 394 and the decision of the Privy Council in *Attorney-General (NSW) v Trethowan* [1932] AC 526.

348 Whilst the correctness of the grant of this injunction was not considered in subsequent proceedings in the High Court or the Privy Council, it has remained controversial, with Dixon CJ doubting its correctness in *Hughes and Vale Pty Ltd v Gair* (1954) 90 CLR 203 at 205-206. For further information, see Campbell, *Parliamentary Privilege*, (n 173), pp 113-118, and Twomey, (n 103), pp 241-242.

349 (1960) 77 WN (NSW) 767. See also the subsequent decision of the High Court in *Clayton v Heffron* (1960) 105 CLR 214.

350 Notably the *Administrative Appeals Tribunal Act 1975* (Cth) and the *Administrative Decisions (Judicial Review) Act 1977* (Cth).

351 For further information, see Joseph, (n 247), pp 583–589. See also Joint Committee on Parliamentary Privilege, UK Parliament, *Parliamentary privilege: Report of session 2013-2014*, 3 July 2013, pp 32-33.

352 [2007] 1 WLR 2825.

353 [2012] NSWLEC 5.

of evidence given by the Minister for Police before the Legislative Council's General Purpose Standing Committee No 3, although he subsequently added that the extract did not address the key issues at stake and 'can have limited weight in the circumstances'.[354]

At the Commonwealth level, attempts to use privileged material to support actions to challenge administrative decisions appear to have been restricted by the provisions of section 16(3) of the *Parliamentary Privileges Act 1987* (Cth).[355]

The 1998-1999 UK Parliament's Joint Committee on Parliamentary Privilege expressed the view that the Parliament should welcome the use of ministerial statements in judicial review of administrative decision making. It argued that this can only reinforce ministerial accountability to the parliament, and that the intent of Article 9 is to protect the legislature rather than the executive from the courts.[356]

It is notable, however, that the UK Parliament's 2013 Joint Committee on Parliamentary Privilege did not support this position, suggesting that it could lead to 'damaging consequences', including the blurring of the constitutional separation of parliament and the courts.[357]

The concern arising from the use of ministerial statements in administrative review decisions is that ministers may in the future be careful not to inform parliaments generally of their reasons for making particular decisions – an effective 'chilling' of public debate – with the potential to restrict parliamentary scrutiny of executive decision making. In the Westminster system, ministers are no less members of parliament because they hold ministerial office, and as such they are entitled to the protection of Article 9.[358]

McGee speculates that the correct distinction may lie, on the one hand, between using a parliamentary statement in judicial review proceedings to establish precisely what the government policy or position on a particular issue is, which is potentially a legitimate use of parliamentary proceedings, and on the other hand, using the statement itself as grounds for review, for example reviewing a statement to determine whether it was actuated by bias, which would be contrary to Article 9.[359]

Repetition and 'effective repetition'

It is clear that members who walk outside the House of which they are a member and repeat an utterance made inside the House, even if they repeat exactly what they said in

354 *La Perouse Local Aboriginal Land Council v Minister Administering the Crown Lands Act* [2012] NSWLEC 5 at [81] per Sheahan J.

355 See *Amann Aviation Pty Ltd v The Commonwealth* (1988) 19 FCR 223 and *Hamsher v Swift* (1992) 33 FCR 545.

356 Joint Committee on Parliamentary Privilege, UK Parliament, *Report: Volume I – Report and Proceedings of the Committee*, Session 1998-1999, ch 2, p 21.

357 Joint Committee on Parliamentary Privilege, UK Parliament, *Parliamentary privilege: Report of session 2013-2014*, 3 July 2013, paras 126 and 132.

358 For further information, see Joseph, (n 247), pp 583-589.

359 *McGee Parliamentary Practice in New Zealand*, 4th ed, (n 173), p 740.

the House, are not protected by absolute privilege and are no longer immune from the ordinary laws of defamation.[360]

Equally, it is clear that members who choose to have a copy of their speech in the House republished under their own authority and sanction, for example by sending a copy of a speech they made in the House to a newspaper or other publication, are also not protected by absolute privilege.[361] Members distribute copies of their speeches or other parliamentary contributions, not being the official records of the House, at their own risk.[362]

However, the situation where a member outside the House of which he or she is a member acknowledges or affirms, but does not repeat, an utterance made inside the House is less clear. Statements to the effect that 'I stand by what I said in the House' or 'I do not resile from what I said in the House' fall into this category. In such circumstances, questions arise whether the privileged material in the House can be used in a defamation action to give context and meaning to the subsequent statement made outside the House. This concept of incorporation or adoption of words by reference to previous statements in parliament has become known as 'effective repetition'.

In 1992 in the Supreme Court of Victoria in *Beitzel v Crabb*,[363] Hampel J dismissed an application by a member of the Victorian Parliament to strike out an action against him on the basis that it relied on words spoken in the Parliament. His Honour found that the cause of action arose from the adoption of statements said in the Parliament in a later media interview. However, following the ruling against the member, the case was settled with no further action.

In 1996 in the Supreme Court of Queensland in *Laurance v Katter*,[364] the majority held that section 16(3) of the *Parliamentary Privileges Act 1987* (Cth) did not prevent the plaintiff relying on remarks made in the Commonwealth House of Representatives in an action for defamation based on statements made later outside the Parliament. Once again, however, the matter did not progress further when the case was settled. An application for special leave to appeal to the High Court was withdrawn.

Odgers argues that, at the Commonwealth level, reference to protected statements in the Commonwealth Parliament to establish the meaning of unprotected statements made outside Parliament is clearly prohibited by the *Parliamentary Privileges Act 1987* (Cth), whilst acknowledging that in *Laurance v Katter* two judges of the Supreme Court of Queensland held otherwise.[365]

---

360 *R v Creevey* (1813) 105 ER 102.

361 *R v Lord Abingdon* (1794) 1 Esp 226; *Australian Broadcasting Corporation v Chatterton* (1986) 46 SASR 1.

362 For further information, see the discussions later in this chapter under the headings 'Statutory protection of the publication and broadcasting of proceedings' and 'The law of defamation and the republication of proceedings'.

363 [1992] 2 VR 121.

364 (1996) 141 ALR 447.

365 *Odgers,* 14th ed, (n 5), p 59. The matter was further addressed by the Senate Committee of Privileges in its 134th Report. The committee set out principles to be followed for amendment of section 16 of the *Parliamentary Privileges Act 1987* (Cth) should a legislative remedy to this issue become

Whilst the proceedings in *Beitzel v Crabb* and *Laurance v Katter* were settled out of court, in the various decisions in the New Zealand matter of *Buchanan v Jennings*,[366] the courts awarded damages against a member of the New Zealand Parliament, Mr Jennings, for 'effective repetition' outside of Parliament of defamatory statements he made against Mr Buchanan in the Parliament. Following extensive criticism of these decisions, in 2014 the New Zealand Parliament passed the *Parliamentary Privilege Act 2014* (NZ), which, amongst its various purposes, specifically lists the abolition and prohibition of parliamentary proceedings informing or supporting 'effective repetition' claims.[367]

The matter arose in New South Wales in defamation proceedings brought by the Hon John Della Bosca against the Hon Franca Arena for repeating, during a Labor Party caucus meeting and in radio and TV interviews, claims first made in the Legislative Council of a 'high level paedophile cover up'.[368] The matter was subsequently considered by Levine J in the New South Wales Supreme Court. Levine J, whilst citing 'areas of peril', was not persuaded that the proceedings should be stayed at that point on the ground that the particular cause of action would 'canvass Hansard'.[369] Once again, the matter was later settled out of court.

In view of this very mixed case law on the issue, and in the absence of an equivalent of section 16(3) in New South Wales, members should remain wary of the risks involved in 'effective repetition' outside of the House of statements made in it.

The meaning of 'place out of Parliament'

The immunity that attaches to parliamentary action – that is to say, the prohibition on impeaching or questioning 'speech and debates or proceedings in Parliament' – under Article 9 of the *Bill of Rights 1689* is expressed as applying 'in any court or place out of Parliament'.

---

desirable, either following a court decision or to pre-empt a decision. See Senate Committee of Privileges, Australian Senate, *Effective Repetition*, Report No 134, June 2008, pp 7-8. No further action has been taken at the Commonwealth level.

366 See the decision of the New Zealand High Court in *Buchanan v Jennings* [2001] 3 NZLR 71; the decision of the New Zealand Court of Appeal in *Buchanan v Jennings* [2002] 3 NZLR 145, Tipping J dissenting; and the decision of the Privy Council in *Buchanan v Jennings* [2004] UKPC 36.

367 *Parliamentary Privilege Act 2014* (NZ), s 3(2)(d).

368 'Arena to pay Della Bosca $25,000', *Sydney Morning Herald*, 7 February 2001.

369 *Della Bosca v Arena* [1999] NSWSC 1057 at [31]. It is also noted that the matter arose again in 2014 in the UK Court of Appeal decision in *Makudi v Baron Triseman of Tottenham* [2014] QB 839; [2014] EWCA Civ 179, in which Laws LJ articulated a new test for determining whether Article 9 protects the repetition outside Parliament of a statement made in Parliament. Laws LJ suggested that there may be instances where the protection of Article 9 indeed extends to extra-parliamentary statements, citing cases where there is: (1) a public interest in repetition of the parliamentary utterance which the speaker ought reasonably to serve, and (2) so close a nexus between the occasions of his speaking, in and then out of Parliament, that the prospect of his obligation to speak on the second occasion (or the expectation or promise that he would do so) is reasonably foreseeable at the time of the first and his purpose in speaking on both occasions is the same or very closely related.

The meaning of the phrase 'any court' is clear: it is a reference to the common law courts. However, the meaning of 'or place out of Parliament' is less clear. As Hunt J observed rhetorically in *R v Murphy*, technically 'place out of Parliament' encompasses any forum where parliamentary proceedings are impeached or questioned, including in the media.[370] Clearly, however, that is not the meaning.

At the time Article 9 was adopted in 1689, it was intended to prevent abuses which had occurred against members of the House of Commons, perpetrated by the Crown, in the common law courts, but also in the royal courts.[371] In this context, the phrase 'or place out of Parliament' in Article 9 should be taken as a reference at the time to the royal courts.[372]

In modern times, comparable parallel executive and judicial functions are exercised by various tribunals and other bodies established mainly by legislation. In New South Wales, this would include royal commissions of inquiry established under the *Royal Commissions Act 1923* and by Letters Patent.[373] It would also include statutory bodies such as the Ombudsman.[374] Equally the Law Enforcement Conduct Commission, formerly the Police Integrity Commission, would likely be regarded as a 'place out of Parliament'.[375] So would ICAC.[376]

At the Commonwealth level, section 16(3) of the *Parliamentary Privileges Act 1987* (Cth) applies to 'proceedings in any court or tribunal'. Tribunal is defined as meaning any person or body (other than a House, a committee or a court) having power to examine

---

370 *R v Murphy* (1986) 5 NSWLR 18 at 29 per Hunt J. See also *Pepper v Hart* [1993] AC 593 at 638 per Lord Browne-Wilkinson.

371 These were courts established by Royal prerogative which exercised judicial functions in conflict with the jurisdiction of the common law courts. Examples of the type were the Court of Kings Bench and the Court of Commissioners for Ecclesiastical Causes, both specifically referred to in the *Bill of Rights 1689*. The use of these courts by King James II was one of the grievances of the Parliament.

372 H Evans, 'Parliamentary Privilege: Reasons of Mr Justice Hunt – An Analysis', *Legislative Studies*, (Autumn 1987), pp 18-19; *McGee Parliamentary Practice in New Zealand*, 4th ed, (n 173), pp 740-742.

373 Royal commissions in New South Wales, as in Australia generally, have accepted that they are 'places' out of Parliament and therefore limited in their operation by Article 9. See *Royal Commission into Certain Crown Leaseholds* (1956) St R Qd 225 at 229 per Townley J; *Royal Commission into the matter of the Brisbane Line* (1944) 18 ALJ 70 per Lowe J.

374 *NSW Branch of the Australian Medical Association v Minister for Health and Community Services* (1992) 26 NSWLR 114 at 120 per Hungerford J.

375 Crown Solicitor, 'Question of Breach of parliamentary privilege arising from Operation Malta Report', 10 April 2003. See also B Walker SC, 'Operation Ibis – Parliamentary privilege', 8 July 2003.

376 Crown Solicitor, 'Parliamentary Privilege and the Register of Disclosures by Members', 17 October 2012, p 15. This view was supported by the Commissioner of ICAC: Correspondence from Commissioner Irene Moss to the Clerk of the Parliaments, 17 September 2002. This correspondence was cited in the House on 26 September 2002. See *Minutes*, NSW Legislative Council, 26 September 2002, pp 401-402.

witnesses on oath, including a royal commission or other commission of inquiry of the Commonwealth or of a State or Territory having that power.[377]

However, it would be absurd to suggest that Article 9 prevents any comment in the media, the public or elsewhere on what is said in parliament. To take the view that 'place out of Parliament' includes places other than the common law courts, tribunals and other bodies exercising judicial functions would involve too literal a reading of Article 9 and a failure to appreciate its purpose. As the UK Parliament's Joint Committee on Parliamentary Privilege commented: 'That cannot be right, and this meaning has never been suggested'.[378]

A particular question arises in relation to police questioning of members about parliamentary proceedings. Professor Carney suggests such questioning is not permissible, on the basis that Article 9 extends not only to bodies with coercive powers to compel evidence, but to bodies with the power to examine witnesses. In support he cites *Sandys* case in 1938 in the UK, where a member of the House of Commons was questioned and summonsed to appear before a military court of inquiry. The matter was subsequently found to constitute a clear breach of privilege.[379] By contrast, Professor Campbell suggests that police questioning is permissible, on the basis that the police do not have the coercive power to compel evidence by the imposition of sanctions (including disciplinary sanctions) for refusal to answer. She suggests that Article 9 was not enacted to prevent the questioning of proceedings in parliament by agencies of the executive branch of government exercising non-coercive powers.[380] Of course, nothing prevents members from freely and voluntarily co-operating with police investigations, or investigations by other agencies,[381] into matters raised in parliament.

---

377 In *O'Chee v Rowley* (1997) 150 ALR 199 at 201, Fitzgerald P suggested that 'place out of Parliament' might be wider than suggested by the terms of section 16(3) of the *Parliamentary Privileges Act 1987* (Cth). There is also some suggestion in other authorities that the meaning of 'place out of Parliament' may not be restricted to bodies carrying out statutory functions of a quasi-judicial nature, and may for example include political party proceedings against a member and investigations in the Press Council. See Twomey, (n 103), p 502 and *McGee Parliamentary Practice in New Zealand*, 4th ed, (n 173), p 742.

378 Joint Committee on Parliamentary Privilege, UK Parliament, *Report: Volume I – Report and Proceedings of the Committee*, Session 1998-1999, p 29.

379 Carney, *Members of Parliament: Law and Ethics*, (n 227), pp 226-227.

380 Campbell, *Parliamentary Privilege*, (n 173), p 21.

381 In 2003, the former Police Integrity Commission (PIC) undertook an investigation of possible police misconduct following a speech made in the Legislative Council on 27 May 2003 by the Hon Charlie Lynn. In legal advice provided to the Commission solicitor, Mr Bret Walker SC indicated that the PIC should be regarded as a 'place out of Parliament' for the purposes of Article 9, but that there was no difficulty in Mr Lynn being questioned as to his sources, so as to enable PIC to pursue the topic of possible police misconduct, so long as the questioning was not under statutory compulsion and the nature of his answers was not to any degree at all the subject of unfavourable comment by the commission. See B Walker SC, 'Operation Ibis – Parliamentary privilege', para 14.

When it is desired that an executive commission of inquiry examine 'speech or debates' or 'proceedings in Parliament' then any abrogation of Article 9 can only be done by express words in statute.[382]

Members' documents and processes of discovery and seizure

Whilst the immunity under Article 9 prevents the impeaching or questioning of 'speech and debates or proceedings in Parliament', the question arises as to whether the immunity also applies during investigations by the police and quasi-judicial bodies such as ICAC prior to the bringing of court proceedings, preventing the seizure of privileged material as part of compulsory processes of discovery, such as subpoenas, orders for discovery and search warrants. It is generally thought that it does.

In 1997 in *O'Chee v Rowley*,[383] the majority of the Queensland Court of Appeal held that where a document is a 'proceeding in Parliament', it is immune from compulsory court processes of discovery or disclosure.[384] In his judgment, McPherson JA held that to require Senator O'Chee to produce documents forming part of parliamentary proceedings for inspection in an action for defamation had 'an obvious potential to deter him and other Parliamentarians from preparing or assembling documentary information for future debates and questions in the House'.[385] McPherson JA went on to observe:

> Proceedings in parliament will inevitably be hindered, impeded or impaired if members realise that the acts of the kind done here for purposes of parliamentary debates or question time are vulnerable to compulsory court process of that kind (the production of documents to the Court for inspection). That is a state of affairs which, I am persuaded, both the Bill of Rights and the [Parliamentary Privileges] Act of 1987 are intended to prevent.[386]

Subsequent case law at the Commonwealth level is discussed in *Odgers*.[387] The same principle has also been accepted in the United States.[388]

The alternate view of such processes of discovery, expressed by Twomey and in the past by ICAC and the Crown Solicitor,[389] is that discovery or seizure of documents and other material under warrant or similar processes does not of itself amount to a breach

382 *Duke of Newcastle v Morris* (1870) LR 4 HL 661. For further information, see the discussion later in this chapter under the heading 'Express statutory abrogation of parliamentary privilege'.

383 (1997) 150 ALR 199.

384 *O'Chee v Rowley* (1997) 150 ALR 199 at 215 per McPherson JA, at 215 per Moynihan J, Fitzgerald P in dissent at 203-204.

385 Ibid, at 212 per McPherson JA.

386 Ibid.

387 *Odgers,* 14th ed, (n 5), p 62.

388 See the decisions in *Brown and Williamson Tobacco Corp v Williams* 62 F 3d 408 (1995) and *US v Rayburn Office Building Room 2113 Washington DC 20515* 552 US 1295 (2008).

389 Standing Committee on Parliamentary Privilege and Ethics, *Parliamentary privilege and seizure of documents by ICAC*, Report No 25, December 2003, pp 26-28.

of the immunity under Article 9. It is only if the documents or material are subsequently sought to be used in court proceedings that the prohibition on impeaching or questioning material arises.[390]

The matter arose in the Legislative Council on 3 October 2003, when officers of the ICAC executed a search warrant at the Parliament House office of the Hon Peter Breen, a member of the Council. During the execution of the warrant, the officers seized a quantity of documents, as well as two computer hard drives and Mr Breen's laptop computer. It later became evident that at least one document seized was potentially covered by parliamentary privilege.

The House referred the matter to the Standing Committee on Parliamentary Privilege and Ethics for inquiry and report. The Committee found that 'Article 9 applies so as to prevent the seizure of documents under search warrant'. In adopting this finding, the committee acknowledged the contrary argument that Article 9 does not prevent the seizure of documents, but only restricts their subsequent use. However, the committee concluded, citing a range of material, that the overriding purpose of Article 9 is to grant members some level of immunity in the conduct of their parliamentary activities, particularly against the executive, and that failure to uphold the immunity would lead to a chilling effect on the flow of information to members.[391]

The House subsequently accepted this position and adopted a resolution to require the return of the seized material to the President and a process to be put in place involving the Clerk and a representative of ICAC resolving any claims of privilege.[392] This led to the return of the seized material by ICAC. Subsequently, most of the seized documents were released to ICAC for its investigation, with privilege claimed in respect of a small number of documents which were retained by the Clerk. In 2004, following a further inquiry by the Privileges Committee into the matter,[393] the House upheld the claim of privilege relating to those particular documents,[394] which were subsequently returned to Mr Breen. In supporting Mr Breen's claim of privilege, the Privileges Committee found that, whilst the documents were not brought into existence for the purposes of or incidental to the transaction of parliamentary business, at least some of the documents were nevertheless subsequently used by Mr Breen in speeches or questions in the House.[395] The Committee adopted the following test to determine whether or not the documents fell within the scope of 'proceedings in Parliament':

390 Twomey, (n 103), pp 502-503.

391 Standing Committee on Parliamentary Privilege and Ethics, *Parliamentary privilege and seizure of documents by ICAC*, Report No 25, December 2003, p 36.

392 *Minutes*, NSW Legislative Council, 4 December 2003, pp 493-495.

393 Standing Committee on Parliamentary Privilege and Ethics, *Parliamentary privilege and seizure of documents by ICAC No 2*, Report No 28, March 2004.

394 *Minutes*, NSW Legislative Council, 1 April 2004, p 650.

395 Standing Committee on Parliamentary Privilege and Ethics, *Parliamentary privilege and seizure of documents by ICAC No 2*, Report No 28, March 2004, pp 8-10.

(1) Were the documents **brought into existence** for the purposes of or incidental to the transacting of business in a House or a committee?[396]

- □ YES → falls within 'proceedings in Parliament'.
- □ NO → move to question 2.

(2) Have the documents been **subsequently used** for the purposes of or incidental to the transacting of business in a House or a committee?

- □ YES → falls within 'proceedings in Parliament'.
- □ NO → move to question 3.

(3) Have the documents been **retained** for the purposes of or incidental to the transacting of business in a House or a committee?

- □ YES → falls within 'proceedings in Parliament'.
- □ NO → does not fall within 'proceedings in Parliament'.[397]

This test has subsequently been cited with approval and further refined by the Senate Committee of Privileges.[398]

It is also notable that in various cases involving the execution of search warrants in the offices of Commonwealth Senators, the law enforcement bodies concerned have agreed to seized material being quarantined until questions of privilege are resolved.[399]

Protocols with the Commissioner of ICAC and Commissioner of Police

Following the Breen matter cited above, in April 2005 the House referred to the Privileges Committee a further inquiry into appropriate protocols to be adopted by law enforcement agencies and investigative bodies, such as ICAC, when executing search warrants on members' offices.[400] In its report on the matter in February 2006, the Privileges Committee recommended the adoption of a protocol to be followed in any future instances involving the execution of search warrants by investigatory or law enforcement bodies at Parliament House.[401]

In December 2009, the Presiding Officers and the Commissioner of ICAC entered into a 'Memorandum of understanding on the execution of Search Warrants in the Parliament

396 In this test, the expression 'for the purposes of' includes 'or predominantly for the purposes of'.

397 Standing Committee on Parliamentary Privilege and Ethics, *Parliamentary Privilege and seizure of documents by ICAC No 2*, Report No 28, March 2004, p 8.

398 Senate Committee of Privileges, Australian Senate, *Status of material seized under warrant; Preliminary Report*, Report No 163, December 2016, p 8; Senate Committee of Privileges, Australian Senate, *Disposition of material seized under warrant*, Report No 172, November 2018, p 5.

399 *Odgers*, 14th ed, (n 5), pp 61-64.

400 *Minutes*, NSW Legislative Council, 6 April 2005, p 1313.

401 Privileges Committee, *Protocol for execution of search warrants on members' offices*, Report No 33, February 2006.

House Offices of Members of the New South Wales Parliament'.[402] The memorandum records the understanding of the Presiding Officers and the Commissioner of ICAC on the processes to be followed where ICAC proposes to execute a search warrant on the Parliament House office of a member of the Parliament of New South Wales, including procedures to be followed where the member makes a claim of privilege.

In November 2010, the Presiding Officers entered into a similar memorandum with the Commissioner of Police.[403] However, the protocol is broader than the protocol with ICAC in that it applies to any premises used or occupied by a member, not just the Parliament House office of a member.[404]

The Presiding Officers have also entered into memoranda of understanding with the Commissioner of Police in relation to police access to the parliamentary precinct and for the provision of security services in and around the parliamentary precinct. Both memoranda reiterate the need for the Presiding Officers to be advised of and to authorise the execution of search warrants within the parliamentary precincts.[405]

---

402 The protocol was adopted following separate reports of the Legislative Council Privileges Committee and the Legislative Assembly Parliamentary Privilege and Ethics Committee. See Privileges Committee, *A memorandum of understanding with the ICAC relating to the execution of search warrants on members' offices*, Report No 47, November 2009; and Parliamentary Privileges and Ethics Committee, NSW Legislative Assembly, *Memorandum of understanding – Execution of search warrants by the Independent Commission Against Corruption on member' offices*, November 2009. The memorandum was tabled in the House on 5 May 2011. See *Minutes*, NSW Legislative Council, 5 May 2011, p 54.

403 'Memorandum of Understanding on the Execution of Search Warrants in the Premises of Members of the New South Wales Parliament between the Commissioner of Police, the President of the Legislative Council and the Speaker of the Legislative Assembly'. This protocol was again adopted following separate reports of the Privileges Committee and the Legislative Assembly Parliamentary Privilege and Ethics Committee. See Privileges Committee, *A memorandum of understanding with the NSW Police Force relating to the execution of search warrants on members' premises*, Report No 53, November 2009; and Parliamentary Privileges and Ethics Committee, NSW Legislative Assembly, *Report on a memorandum of understanding with the NSW Police relating to the execution of search warrants on members' premises*, October 2010. The report of the Privileges Committee included correspondence from the Australian Federal Police committing the Federal Police to follow the provisions of the 2005 Memorandum of Understanding between the Presiding Officers of the Commonwealth Parliament and the Commonwealth Government in the unlikely event of the Federal Police seeking to execute a search warrant on the premises of a member of the Parliament of New South Wales. See Appendix 10. The memorandum was tabled in the House on 5 May 2011. See *Minutes*, NSW Legislative Council, 5 May 2011, p 54.

404 In 2014, the Privileges Committee tabled a report on a revised memorandum of understanding with ICAC, addressing this and other issues. Regrettably, however, the committee was not able to achieve agreement with the commission on the revised memorandum, with the result that the matter has not progressed further. See Privileges Committee, *A revised memorandum of understanding with the ICAC relating to the execution of search warrants on members' premises*, Report No 71, November 2014.

405 'Memorandum of Understanding between the Presiding Officers and the Commissioner of Police', 3 December 2004, para 2.13. 'Memorandum of Agreement: Security Services for the Parliament of New South Wales', October 2009, para 6b.

Statutory protection of the publication and broadcasting of proceedings

Whilst the immunity that attaches to parliamentary action under Article 9 prevents the impeaching or questioning of 'speech and debates or proceedings in Parliament', it does not itself extend absolute privilege to the publication under the authority of the House of the records of debates and proceedings, such as *Hansard* and the *Minutes of Proceedings*. As noted previously, in *Stockdale v Hansard*,[406] the published records of the House of Commons were not deemed to be privileged by virtue of the House's order for printing, enabling the bringing of successful actions against Messrs Hansard for libel. In response, the English Parliament enacted the *Parliamentary Papers Act 1840*, still in force today, to establish absolute privilege for publications under the House's authority.

In New South Wales, the equivalent protection is provided under section 27 of the *Defamation Act 2005*, which provides a defence of absolute privilege to anything published by order or under the authority of the House, including *Hansard*, the *Minutes of Proceedings*,[407] the *Notice Paper* and the *Questions and Answers Paper*, as well as the publication of the records of committees. The publication these records is authorised by the House under standing orders 49 and 51.[408]

Section 27 also provides the protection of absolute privilege to the publication of papers tabled and ordered to be printed in the Legislative Council. Documents tabled in the Council may be authorised to be published under section 4 of the *Parliamentary Papers (Supplementary Provisions) Act 1975*, which gives authority to either House, a joint sitting or a committee to publish any documents laid before it or any evidence given before it. Sections 6 and 7 of *Parliamentary Papers (Supplementary Provisions) Act 1975* further extend immunity from civil and criminal proceedings, other than proceedings for defamation covered under the *Defamation Act 2005*, to the publication of parliamentary papers under the authority of the House or a committee.

In addition, section 27 provides the protection of absolute privilege to the broadcasting by the House of its proceedings. Under section 4 of the Defamation Act 2005, this is defined to include a program, report, advertisement or other thing communicated by means of television, radio, the internet or any other form of electronic communication, such as data, text, images or sound. The broadcasting of proceedings is authorised by the House under a resolution of continuing effect, originally adopted on 11 October 1994,[409] and most recently re-adopted in October 2007.[410]

406 (1839) 112 ER 1112.

407 This extends to the 'proofs' of both *Hansard* and the *Minutes of Proceedings*.

408 For further information, see the discussion in Chapter 11 (Publication of and access to the proceedings of the Legislative Council) under the heading 'The official records of the House'.

409 *Minutes*, NSW Legislative Council, 11 October 1994, pp 279-281.

410 Minutes, NSW Legislative Council, 18 October 2007, pp 279-281. For further information, see the discussion in Chapter 11 (Publication of and access to the proceedings of the Legislative Council) under the heading 'The broadcasting of proceedings by the media'.

The law of defamation and the republication of proceedings

The protection of absolute privilege does not extend to members and others who republish or rebroadcast excerpts of the proceedings of the House. For example, if a member were to publish separately from *Hansard* a speech the member made in the House, that printed or electronic record would become a separate publication, unconnected with parliamentary proceedings, and the member would be legally responsible for any defamatory matter it contained.[411] The same is true of sound or video footage extracts from the House, if not published under the authority of the House or of a committee. Members therefore distribute copies of their speeches or other parliamentary contributions, not being the official records of the House, at their own risk.

However, at common law and under the *Defamation Act 2005*,[412] there are a number of defences to the publication of defamatory material which may apply to the republication or rebroadcasting of defamatory statements made as part of parliamentary proceedings. These may be available, for example, to members republishing extracts of *Hansard* or rebroadcasting excerpts of footage of parliamentary proceedings. Equally they may be available to journalists or other political commentators.

The defences available at common law and under part 4, division 2 of the *Defamation Act 2005* (ss 25–33) include:

- the defence of truth, which applies where the defendant can prove that the defamatory imputations were substantially true;
- the defence of qualified privilege, which applies where the defendant can prove that his or her conduct in publishing the material was 'reasonable in the circumstances' and not motivated by malice or other improper motive;
- the defence of fair report, which applies if the report was published honestly, for the information of the public, or the advancement of education;
- the defence of publication of public documents, being documents published for the information of the public or the advancement of education; and
- the defence of honest opinion, being for the expression of honest opinion relating to a matter of public interest, provided that the statement was based on proper material.

411 Crown Solicitor, 'Publication of speeches of Members of Parliament: Questions relating to liability in defamation on their part and on the part of the Government Printer and the Editor of Debates: *Defamation Act*, 1974, ss 17, 22, 25 & 26', 15 May 1979.

412 The *Defamation Act 2005* was adopted as part of a national scheme of defamation legislation adopted in all States. The act adopts in statute many of the common law defences of defamation, but specifically does not limit the common law where the act is silent.

THE RIGHTS OF THE HOUSE

The Legislative Council may be said to have certain rights: the right to control its proceedings free from outside influence or control, including through the adoption of standing orders; and the right to the attendance and service of its members, from which flow a number of minor immunities for members.

The right of the House to control its proceedings

As indicated previously, central to the struggle for parliamentary privilege in England was the House of Commons' unsuccessful assertion that the *lex et consuetudo parliamenti* was an area of law distinct from the common law of England. Whilst the courts strongly repudiated this assertion, they did accept that there is a sphere of operations, the internal affairs or matters 'within the walls' of the Houses, over which the jurisdiction of the Houses is absolute and exclusive. The Houses in the UK Parliament are said to have 'exclusive cognisance' or 'exclusive jurisdiction' over how their proceedings are conducted.

In New South Wales, as indicated, privilege rests on very different foundations from privilege as it developed in England, notably the common law principle of necessity. However, despite this different foundation, the courts in New South Wales and Australia have adopted the same principle as the courts in the United Kingdom. It is accepted that there is a sphere concerning the internal proceedings of the Houses of the Parliament of New South Wales relating to the conduct of their business where the jurisdiction of the Houses is absolute and exclusive. Within this sphere, each House has the absolute and inherent right to control its own proceedings and determine what it debates free from outside influence or control. As McHugh J stated in the decision of the High Court in *Egan v Willis* in 1998:

> The history of the procedures of the House of Commons and its effect upon our Westminster system makes it clear that it is a matter for the Council as to the way in which it conducts business and the order of its business … Of all the great privileges of the House of Commons, none played a greater role in the Commons achieving influence than its capacity to control its own business and to set its own agenda. The view of the Tudor and Stuart monarchs was that the House of Commons was summoned only to vote on the appropriations asked of them, to approve legislation submitted to them and to express opinions on matters of policy only when asked. The House of Commons would not have become the powerful institution that it is if the views of those monarchs had prevailed. The importance of Parliament under the Westminster system is in no small part due to the seemingly inconsequential right of the House of Commons to control its business. The right of any legislative chamber under the Westminster system to control its business has existed for so long that it must be regarded as an essential part of its procedure which inheres in the very notion of a legislative chamber under that system.[413]

413 *Egan v Willis* (1998) 195 CLR 424 at 478 per McHugh J.

As discussed in Chapter 9 (Meetings of the Legislative Council), the Governor convenes each new session of the Parliament of New South Wales by proclamation published in the *Government Gazette*, acting on the advice of the executive government. The Governor also prorogues the Houses by proclamation, again usually on the advice of the executive government.[414] However, within these parameters, it is for the Council to determine its own proceedings such as sitting times and sitting patterns. Whilst the government releases a proposed sitting pattern for the Parliament in advance of each year which the Council routinely adopts and follows when adjourning from one sitting day to the next, there is no obligation on the Council to do so, and there are many examples of the House being recalled and sitting outside of the government's proposed sitting pattern.[415] Equally, it is for the House to determine the timing and duration of each sitting day, and the conduct of business on each sitting day. For example, whilst the House currently considers government business on Tuesdays and Thursdays and general or private members' business on Wednesdays, these arrangements can be altered, for example through the consideration of items of private members' business on government business days, or the devotion of private members' days to government business towards the end of a sitting period. This is discussed further in Chapter 10 (The conduct of proceedings).[416]

Symbolically, the right of the House to control its own proceedings is expressed at the opening of each session of Parliament through the reading of a 'pro forma' bill. In practice, the most important procedural manifestation of this right is the recall provision by which the majority of members may recall the House.

Standing orders

The principal way in which the Council controls its own proceedings is through the adoption of standing orders pursuant to section 15 of the *Constitution Act 1902*, which provides that the House shall, 'as there may be occasion', prepare and adopt standing rules and orders 'regulating', among other things, the 'orderly conduct' of business,[417] subject to the approval of the Governor.[418]

---

414 Subject to sections 10A(2) and 24B and of the *Constitution Act 1902*.

415 For further information, see the discussion in Chapter 9 (Meetings of the Legislative Council) under the heading 'Recall of the House'.

416 See the discussion under the heading 'Managing business'.

417 *Constitution Act 1902*, s 15(1)(a).

418 Ibid, s 15(2). The role of the Governor in approving the standing orders of the Legislative Council is essentially a vestige of colonial times. It was first adopted in section 27 of the *Australian Constitutions Act (No 1) 1842* (Imp) and continued in section 12 of schedule 1 of the *Constitution Act 1955* before being adopted in section 15(2) of the *Constitution Act 1902*. Potentially, on the assumption that the Governor seeks advice concerning the approval of the standing orders, section 15(2) may give a role to the executive government in the adoption of the standing orders of the House. See *Crick v Harnett* (1907) 7 SR (NSW) 126 at 133 per Darley CJ. In modern times, this is clearly inconsistent with the separation of powers in New South Wales. For this reason, the former Clerk of the Senate, Dr Rosemary Laing, has suggested that provision for external approval of the standing orders of any house is an anachronism and an unnecessary fetter on the freedom of a house to determine its

It is well established that, whilst standing orders are approved by the Governor under the *Constitution Act 1902*, they are for the internal regulation of the proceedings of the House only. In 1858 in the Privy Council decision of *Fenton v Hampton*,[419] Fleming CJ defined the power of the Tasmanian Legislative Council to make standing orders for its 'orderly conduct' as extending 'no further than providing for and regulating the mode of conducting business and forms of procedure, so as to secure method and good order' within the House.[420]

In 1960, in the decision of the High Court in *Clayton v Heffron*[421] concerning the operation of section 5B of the *Constitution Act 1902*, Dixon CJ, McTiernan, Taylor and Windeyer JJ observed that standing orders are not part of the general law.[422] As such, they are not themselves a source of the powers of the House but may regulate the exercise of existing powers.[423]

It is also well established that standing orders are beyond the notice of the courts to the extent that they relate to the 'orderly conduct' of the proceedings of the House. In *Harnett v Crick,*[424] a case concerning the New South Wales Legislative Assembly, the Privy Council observed:

> Two things seem clear: (1) that the House itself is the sole judge whether an 'occasion' has arisen for the preparation and adoption of a Standing Order regulating the orderly conduct of the Assembly, and (2) that no Court of law can question the validity of a Standing Order duly passed and approved, which, in the opinion of the House, was required by the exigency of the occasion, unless, upon a fair view of all circumstances, it is apparent that it does not relate to the orderly conduct of the Assembly.[425]

The Standing Rules and Orders of the Legislative Council are discussed further in Chapter 8 (The basis of Legislative Council procedure).[426]

The right of the House to the attendance and service of its members

The corollary of the right of the House to control its internal proceedings is the inherent right and superior claim of the House to the attendance and service of its members, witnesses and officers. Subject to certain exceptions, those services should not be

---

own standing rules of procedure. See R Laing, 'Exclusive Cognisance: Is it a Relevant Concept in the 21st Century?', *Australasian Parliamentary Review*, (Vol 30, No 2, Spring/Summer 2015), p 63.

419 (1858) 14 ER 727.

420 *Fenton v Hampton* (1858) 14 ER 727 at 731 per Fleming CJ.

421 (1960) 105 CLR 214.

422 *Clayton v Heffron* (1960) 105 CLR 214 at 240 per Dixon CJ, McTiernan, Taylor and Windeyer JJ.

423 For example, in *Egan v Willis and Cahill*, it was held that former standing order 18, concerning orders for papers by the House, did not operate as a source of the power to order papers but rather regulated the House's common law power to call for papers according to necessity. See *Egan v Willis and Cahill* (1996) 40 NSWLR 650 at 664 and 667 per Gleeson CJ.

424 [1908] AC 470.

425 *Harnett v Crick* [1908] AC 470 at 475-476.

426 See the discussion under the heading 'The Standing Rules and Orders'.

impeded by the requirements of legal proceedings before a court. As stated in 1894 by Darley CJ in *Norton v Crick*:

> … this privilege which belongs to the English House of Commons was based to a great extent upon the supposition that 'the personal attendance of members was necessary to Parliament, and that they ought not to be absent for any business wherefore their person should be privileged at the suit of any private person during the time he was busied in the affairs of the King and his realm'.[427]

The right of the House to the attendance and service of its members translates to certain minor immunities of members: ineligibility for jury duty; exemption from attendance by compulsion as a witness in a court or tribunal; exemption from the service of legal process in Parliament on sitting days; and a possible limited exemption from arrest in civil – but not criminal – matters.

Ineligibility of members for jury duty

Members of the Parliament of New South Wales are ineligible for jury duty by section 6 and schedule 1 of the J*ury Act 1977*. Historically, members of the Westminster Parliament have been exempt from jury duty as a matter of ancient law and inherent right.[428] However, in New South Wales, the immunity has been consistently asserted since 1829 by way of statute.[429]

In June 2010, the Attorney General referred to the Legislative Council's Standing Committee on Law and Justice an inquiry into whether the statutory exemption of members of Parliament, not being ministers, from jury duty should be repealed.[430] In its report, the committee recommended that the statutory immunity be maintained, citing in particular the doctrine of the separation of powers and the right of the Houses to the attendance and service of their members.[431]

Prior to 2010, the J*ury Act 1977* also excluded 'officers and other staff of either or both of the Houses of Parliament' from jury service. This exemption was removed in 2010 with the enactment of the J*ury Amendment Act 2010*. Whilst the House may well have

427 *Norton v Crick* (1894) 15 LR (NSW) 172 at 176 per Darley CJ.

428 C Gordon (ed), *Erskine May's Treatise on The Law, Privileges, Proceedings and Usage of Parliament*, 20th ed, (Butterworths, 1983), p 108. *Erskine May* cites Holford's case from 20 February 1826, when the House of Commons stated that it is 'amongst the most ancient and undoubted privileges of Parliament, that no Member shall be withdrawn from his attendance on his duty in Parliament to attend any other court'. See also J Hatsell, *Precedents of proceedings in the House of Commons: with observations,* 4th ed, (n 25), p 112.

429 Prior to the implementation of the J*ury Act 1977*, the immunity was contained in the J*ury Act 1901*, the J*urors and Juries Consolidation Act 1847* (NSW) 11 Vic No 20 and the J*uries for Civil Issues Act 1829* (NSW) 10 Geo IV No 8.

430 *Minutes*, NSW Legislative Council, 22 June 2010, p 1936. This inquiry was referred to the committee in response to a report of the NSW Law Reform Commission entitled J*ury Selection*, September 2007.

431 Standing Committee on Law and Justice, *Inquiry into the eligibility of members of Parliament to serve on juries*, Report No 46, November 2010, p 28.

a superior claim at common law to the attendance and service of its officers and staff called for jury duty, it has never been claimed as a right.[432]

Exemption of members from attendance by compulsion as a witness

Members of the Parliament of New South Wales have an immunity at common law from attendance by compulsion before a court or tribunal when the House or a committee to which the member belongs is meeting.[433] However, the immunity is now codified in New South Wales by section 15(2) of the *Evidence Act 1995*:

> A member of a House of an Australian Parliament is not compellable to give evidence if the member would, if compelled to give evidence, be prevented from attending:
>
> (a) a sitting of that House, or a joint sitting of that Parliament, or
>
> (b) a meeting of a committee of that House or that Parliament, being a committee of which he or she is a member.

Section 15 of the Commonwealth *Evidence Act 1995* is in the same terms, so the immunity applies in federal courts as well as in New South Wales courts.

Section 10(2) of both acts further provides that section 15(2) does not affect, and is in addition to, 'the law relating to the privileges of any Australian Parliament or any House of any Australian Parliament'. This captures the inherent right of the House at common law to the attendance and service of its members.

In the Legislative Council, should a member be issued with a subpoena to give evidence in court on a day of meeting of the House or a committee of the House to which the member belongs, the President may communicate with the court drawing attention to the privilege and asking that the member be excused. A member may, however, voluntarily choose to attend in court in response to a subpoena without any formality, even on a day on which the House is sitting.

The exemption of members from attendance by compulsion as a witness arose in the Legislative Council in June 1994, prior to the codification of the exemption in the *Evidence Act 1995*, when the Hon Stephen Mutch was subpoenaed to attend the Downing Centre Local Court on a given date, and thereafter as required, to give evidence on behalf of the Crown in the case of *Police v Dyers*. On the next sitting day, 13 September 1994, the President informed the House that he had written to the Chief Magistrate advising that, as the Parliament had paramount right to the attendance and service of its members, the Legislative Council claimed exemption of Mr Mutch from attendance as a witness, if required, whenever the House was sitting.[434]

---

432 However, on occasion, the Clerk has written to the Office of the Sheriff requesting that staff engaged with sittings of the House or committee inquiries be excused from jury duty.

433 *Di Nardo v Downer* [1966] VR 351 at 351 per Smith J.

434 *Minutes*, NSW Legislative Council, 13 September 1994, p 227.

The exemption of members from attendance by compulsion as a witness also potentially extends as a matter of inherent right to officers of the House. In September 1998, the President had occasion to write to the Registrar of the District Court of New South Wales to indicate that the Clerk of the Parliaments would be unable to attend before the court to give evidence in the matter of *Nathan James Curtain v The State of New South Wales* on the basis that 'members and officers are exempt from attending as a witness whilst the House is sitting'.[435]

Exemption of members from the service of legal process on sitting days

In the past, the Legislative Council has asserted an exemption of its members from the service of criminal or civil process within the precincts of Parliament. However, it is now unlikely that the House would assert the immunity except where the process was served on a sitting day.

In support of this view, paragraph 6(6) of the Senate Privileges Resolution of 25 February 1988 provides:

> A person shall not serve or execute any criminal or civil process in the precincts of the Senate on a day on which the Senate meets except with the consent of the Senate or a person authorised by the Senate to give such consent.

Similarly, *Erskine May* notes that it would be doubtful whether the service of legal process would be regarded as a breach of privilege, unless it was served within the precincts of Parliament whilst the House was sitting.[436]

The matter arose in the Legislative Council in June 1988, when the Hon Richard Jones was served with legal process on a sitting day in relation to a disputed election return.[437] The House subsequently adopted a resolution finding the service a contempt, whereupon the solicitors withdrew the process and sent a written apology to the House.[438]

The matter arose again in 1992 following the service of a subpoena on the secretary/ research assistant of the Hon Ron Dyer in relation to a defamation action. On this occasion, the service was during a non-sitting period. In the event, the President wrote to the solicitors concerned informing them that the service of legal process within the parliamentary precinct was a contempt, and returning the subpoena. Once again a letter of apology was received.[439] However, as discussed above, it seems unlikely that

435 *Minutes*, NSW Legislative Council, 8 September 1998, p 663. For previous examples, see *Minutes*, NSW Legislative Council, 8 March 1876, p 89; 4 December 1879, p 36. On these occasions, the House granted leave to the Clerk to comply with a subpoena either personally, or by one of the officers of his department.

436 *Erskine May*, 25th ed, (n 23), para 14.10.

437 *Minutes*, NSW Legislative Council, 1 June 1988, p 109; *Hansard*, NSW Legislative Council, 1 June 1988, pp 953-958.

438 *Minutes*, NSW Legislative Council, 14 June 1988, pp 200-201. For further information, see *New South Wales Legislative Council Practice,* 1st ed, (n 57), p 79.

439 *Minutes*, NSW Legislative Council, 30 June 1992, p 198.

the same approach would be adopted were similar circumstances to arise today, as the service was not on a sitting day, and no such blanket immunity is now claimed by other comparable Houses.

Possible limited exemption of members from civil arrest

By longstanding tradition allowed by the courts, members of the UK Parliament enjoy an immunity from arrest in civil matters whilst Parliament is sitting and for 40 days before and after such a sitting.[440] In New South Wales, it is doubtful whether such an immunity exists.[441] In 1894 in *Norton v Crick*,[442] the Supreme Court did not uphold the immunity.[443] However, even if the immunity does exist, it is of no real consequence, as the potential for a person to be arrested and imprisoned in a civil process, as distinct from a criminal process, is now extremely limited.

There is no immunity from arrest in criminal matters.[444]

THE POWERS OF THE HOUSE

The Legislative Council may be said to have certain powers:

- the power to determine its own membership, including expulsion of members;
- the power to maintain order, including suspension of members and removing and excluding visitors who disturb the proceedings;
- the power to order the production of State papers;
- the power to conduct inquiries; and
- the power to call and compel evidence from witnesses.

These powers are primarily inherent powers of the House deriving from the common law principle of necessity. According to the conventional understanding of the line of authority dating back to *Kielley v Carson*,[445] the use of these powers is restricted to 'protective' or 'self defensive' use only.[446] However, certain of these powers are supported by other authorities. The suspension of members under the standing orders is supported by section 15 of the *Constitution Act 1902*, which provides for the adoption of standing orders for the 'orderly conduct' of business of the House. The power to call

440 *Erskine May*, 25th ed, (n 23), para 14.12.
441 Carney, *Members of Parliament: Law and Ethics*, (n 227), p 197.
442 (1894) 15 LR (NSW) 172.
443 *Norton v Crick* (1894) 15 LR (NSW) 172 at 176-178 per Darley CJ.
444 For further information, see the discussion earlier in this chapter under the heading 'Parliamentary privilege and the criminal law'.
445 (1842) 13 ER 225.
446 For further information, see the discussion earlier in this chapter under the heading 'The common law powers of the House as 'protective' or 'self-defensive' only'.

and compel evidence from witnesses is codified in the *Parliamentary Evidence Act 1901*. The *Parliamentary Evidence Act 1901* may also support the power to order the production of State papers, although the House relies on the common law power.

The power of the House to determine its own membership

Traditionally, the Legislative Council had the power to determine its own membership or constitution, in so far as it was not determined by constitutional or statutory law.[447] Of note, the House could deal with disputes concerning the qualification and disqualification of members.[448] However, in 1928 the Parliament transferred exclusive jurisdiction to determine the validity of any 'election or return' to the Court of Disputed Returns.[449] In addition, any 'question respecting the qualification of a Member' or 'a vacancy' in the House may be referred by resolution of the Council to the Court of Disputed Returns.[450] As such, the power of the House to determine its own membership has largely been superseded.

The determination of disqualifications by the Court of Disputed Returns is discussed further in Chapter 5 (Members).[451]

Expulsion of members

There is one area, however, where the power of the House to determine its own membership remains of importance: the House retains the inherent power at common law to expel a member for conduct unworthy of a member of the House, if the power is exercised in a manner that is necessary to the defence of the integrity and high standing of the House.[452] This power is separate from the grounds for disqualification set out under sections 13 to 13C and 14A of the *Constitution Act 1902*. In 2000, the *Constitution Act 1902* was amended to provide expressly that nothing in the disqualification provisions of the act 'affects any power that a House has to expel a member of the House'.[453]

The power of the House to expel a member for conduct unworthy of a member of the House was recognised by the Supreme Court in 1969 in the only case of its kind in the Legislative Council: *Armstrong v Budd*.[454]

---

447 *Holmes v Angwin* (1906) 4 CLR 297 at 305 per Griffith CJ.

448 For further information, see Twomey, (n 103), p 450.

449 *Parliamentary Electorates and Elections (Amendment) Act 1928*.

450 As the jurisdiction is not expressed as exclusive, Twomey suggests that the House still retains the discretion to deal with questions concerning qualification and vacancy, separate from determining election petitions. See Twomey, (n 103), pp 450-451.

451 See the discussion under the heading 'Determination of disqualifications'.

452 *Armstrong v Budd* (1969) 71 SR (NSW) 386 at 391 per Herron CJ, at 403 per Wallace P, and at 408 per Sugerman JA.

453 *Constitution Act 1902*, s 13A(3).

454 (1969) 71 SR (NSW) 386.

By way of background, on 25 February 1969, Mr Armstrong was expelled from the Legislative Council and his seat declared vacant by resolution of the House for 'conduct unworthy of a member', following judicial comments by Street J in *Barton v Armstrong*[455] that Mr Armstrong had been a party to an arrangement to procure false evidence in divorce proceedings and had contemplated bribing a Supreme Court judge.[456]

Mr Armstrong subsequently challenged the validity of the House's actions in the New South Wales Supreme Court.

In dismissing the appeal, Herron CJ indicated that 'a power of expulsion for reasonable cause can be exercised provided that the circumstances are special and its exercise is not a cloak for punishment of the offender'.[457] Such a power may be necessary not only for the self-preservation of the House and the orderly exercise of its functions, but 'to protect the high standing of Parliament' and to ensure that it 'may discharge, with the confidence of the community and the members in each other, the great responsibilities which it bears'.[458] Herron CJ further indicated that a member may be expelled not only for conduct within the chamber but for conduct outside of the House where it is of sufficient gravity to render the member unfit for service.[459]

Wallace P also found that the Legislative Council has an inherent power to expel a member for conduct unworthy of a member of the House, provided it is used defensively to 'preserve and safeguard the dignity and honour of the Council and the proper conduct and exercise of its duties', and that the power extends to conduct outside of the House.[460] A similar approach was adopted by Sugerman JA, who concluded that:

> … the continued presence of an unworthy member is inconsistent with the honour and dignity of the House and thus inimical to its authority and standing and the respect in which it should be held by the community. But the cardinal principle is that the implied grant of powers on the ground of necessity … comprehends not only the orderly conduct of deliberations in the sense of freedom from disturbance and unseemly conduct but also the integrity of those who participate therein which is essential to mutual trust and confidence amongst the members.[461]

There have been two other occasions on which the House has come close to expelling a member. On 11 November 1997, the Attorney General, the Hon Jeff Shaw, moved a motion that the Hon Franca Arena be expelled from the House on the ground that she

455 [1969] 2 NSWR 451.

456 The judgment was laid on the table of the House. See *Minutes,* NSW Legislative Council, 25 February 1969, pp 318-320; *Hansard*, NSW Legislative Council, 25 February 1969, pp 3858-3890. For further information, see the *Annotated Standing Orders of the New South Wales Legislative Council*, (n 340), pp 632-633.

457 *Armstrong v Budd* (1969) 71 SR (NSW) 386 at 396 per Herron CJ.

458 Ibid, at 397 per Herron CJ.

459 Ibid.

460 Ibid, at 403 per Wallace P.

461 Ibid, at 408-409 per Sugerman JA.

had been found 'guilty of conduct unworthy of a member of the Legislative Council' in relation to allegations she made in the House on 17 September 1997.[462] Ultimately, the House accepted a 'statement of regret' from Mrs Arena.[463]

A second instance of near expulsion of a member occurred in 2003 following a report of the Independent Commission Against Corruption which found that the Hon Malcolm Jones had engaged in corrupt conduct in the use of entitlements provided under the *Parliamentary Remuneration Act 1989*.[464] On 4 September 2003, the Leader of the Government in the Legislative Council, the Hon Michael Egan, gave a notice of motion that Mr Jones be adjudged guilty of conduct unworthy of a member and expelled from the House. However, on 16 September, before the House was due to consider the motion, the President informed the House that she had received a communication from Mr Jones indicating that he had tendered his resignation to the Governor as a member of the Council.[465] Mr Jones was subsequently required to repay over $49,000 in claimed allowances to which he was not entitled.

A resolution that a member be expelled from the Legislative Council for conduct unworthy of the House does not prevent the person from being re-elected to the Legislative Council. There are three occasions on which members of the Legislative Assembly expelled from that House were subsequently re-elected at by-elections: Ezekiel Baker in 1884, William Crick in 1890 and Richard Price in 1917.

Standing order 194 specifically provides that nothing in standing orders 190 to 192 dealing with the conduct of members affects any power of the House to proceed against any member for any conduct unworthy of a member of the House.

The power of the House to maintain order

The Legislative Council has the power to maintain order and to ensure that its proceedings are not interfered with or impeded. This power may be exercised in respect of both members and visitors. The House may suspend a member who disrupts proceedings and who refuses to cooperate with the will of the House, both as a matter of necessity under the common law and under the standing orders under the authority of section 15 of the *Constitution Act 1902*. The House may also remove and exclude visitors who disturb the proceedings of the House, both under the common law and the standing orders. The power to maintain order is usually exercised on behalf of the House by the President (SO 83).

462 *Minutes*, NSW Legislative Council, 11 November 1997, pp 159, 161-162.

463 *Minutes*, NSW Legislative Council, 16 September 1998, pp 693-696. For further information, see the discussion later in this chapter under the heading 'The Arena case'.

464 Independent Commission Against Corruption, *Report into an investigation into the conduct of the Hon Malcolm Jones*, July 2003.

465 *Minutes*, NSW Legislative Council, 16 September 2003, p 281. For further information, see *New South Wales Legislative Council Practice,* 1st ed, (n 57), pp 643-644.

Suspension of members

The inherent power at common law to suspend but not punish members

Two 19th century cases decided in the Privy Council, *Doyle v Falconer*[466] and *Barton v Taylor*,[467] make it clear that local legislatures established in former British colonies such as the Legislative Council have the inherent power at common law to suspend a member guilty of disorderly conduct in the House or otherwise obstructing proceedings. Although the status of the Legislative Council has changed considerably since colonial times, the ongoing existence of this power was confirmed by the High Court in 1998 in *Egan v Willis*.[468] The inherent power to suspend a disorderly member has also been found to apply when the House is in a Committee of the whole House.[469]

However, whilst the Council has the common law power to take reasonable measures to prevent disorderly conduct in the chamber, this power can only be used to defend or protect the House; that is to say, to restore order. It cannot be used to punish a member, for example by 'unconditional suspension, for an indefinite time', at least not on a conventional reading of the case law.[470] As was observed by the Privy Council in *Barton v Taylor*:

> A power of unconditional suspension, for an indefinite time, or for a definite time depending only on the irresponsible discretion of the Assembly itself, is more than the necessity of self-defence seems to require, and is dangerously liable, in possible cases, to excess or abuse.[471]

Nor can the House cause a member who has been disorderly in the chamber, and left it in a disorderly manner, to be detained outside the chamber and brought back into it.[472]

---

466 (1866) 16 ER 293 at 298-299 per Sir James Colvile. This case concerned the power of the Legislative Assembly of Dominica to take into custody and commit to gaol one of its members for contempt of the House. It was held that the House did not have such a power.

467 (1886) 11 AC 197 at 204-205 per Lord Selborne. This case concerned a member of the Legislative Assembly of New South Wales who had entered the chamber twice within a week of the House having passed a resolution that he be suspended from the service of the House. The member was removed from the chamber and prevented from re-entering it. The actions of the House in doing so were upheld by the Privy Council.

468 (1998) 195 CLR 424 at 441 per Gaudron, Gummow and Hayne JJ.

469 *Toohey v Melville* (1892) 13 LR (NSW) 132 at 137 per Windeyer J. This case concerned an action brought by a member of the New South Wales Legislative Assembly against the Chairman of Committees for ejecting the member from the chamber for disorderly conduct and wilful interruption and obstruction of the business of the House.

470 But see the discussion earlier in this chapter under the heading 'Has the common law moved beyond 'protective' and 'self-defensive' powers only?'.

471 *Barton v Taylor* (1886) 11 AC 197 at 205 per Lord Selborne. In *Egan v Willis*, the majority indicated that it was not necessary to say whether this is an exhaustive statement of the limits of the powers of the House, but that the House undoubtedly may suspend a member for a limited time. See *Egan v Willis* (1998) 195 CLR 424 at 455 per Gaudron, Gummow and Hayne JJ.

472 *Willis and Christie v Perry* (1912) 13 CLR 592 at 598 per Griffith CJ, at 599 per Barton J, and at 600-601 per Isaacs J.

The period of suspension which would be considered reasonable was considered by the Privy Council in *Barton v Taylor*:

> The principle on which the implied power is given confines it within the limits of what is required by the assumed necessity. That necessity appears to their Lordships to extend as far as the whole duration of the particular meeting or sitting of the Assembly in the course of which the offence may have been committed. It seems to be reasonably necessary that some substantial interval should be interposed between the suspensory resolution and the resumption of his place in the assembly by the offender, in order to give opportunity for the subsidence of heat and passion, and for reflection on his own conduct by the person suspended; nor would anything less be generally sufficient for the vindication of the authority and dignity of the assembly.[473]

Although suspension of a member is usually the result of conduct in the House, it is possible that the conduct of a member outside the House may also cause the House to feel compelled, for its own protection, to take action to suspend a member. This was acknowledged by Herron CJ in *Armstrong v Budd*, citing *Harnett v Crick*:[474]

> … the power of the House to defend the regularity of its proceedings – for example, by suspension – is not confined within any narrow limits such as misconduct committed in the face of the House, but may extend in special circumstances for the protection of the House where bribery and corruption have been charged against a member.[475]

In 1996 in *Egan v Willis and Cahill*[476] the Court of Appeal also found that the power of the House to suspend a member may also be used as a means of inducing a member to comply with an order of the House.[477] On appeal to the High Court, Gaudron, Gummow and Hayne JJ commented in *Egan v Willis*[478] in 1998 that whilst the House could not punish a member, it could 'coerce or induce compliance with its wish'. The justices acknowledged the difficulty involved in distinguishing between 'punishing and merely inducing compliance', but observed that it should not distract attention from more important considerations such as whether the courts may review what has been done in Parliament.[479]

Suspension of members pursuant to standing orders

The House also has the power to suspend members pursuant to the standing orders. As noted earlier, section 15 of the *Constitution Act 1902* provides that the House shall, 'as there may be occasion', prepare and adopt standing rules and orders 'regulating',

473 *Barton v Taylor* (1886) 11 AC 197 at 204 per Lord Selborne; quoted with approval in *Willis and Christie v Perry* (1912) 13 CLR 592 at 597-598 per Griffith CJ.
474 [1908] AC 470.
475 *Armstrong v Budd* (1969) 71 SR (NSW) 386 at 393 per Herron CJ.
476 (1996) 40 NSWLR 650.
477 *Egan v Willis and Cahill* (1996) 40 NSWLR 650 at 682-683 per Mahoney P.
478 (1998) 195 CLR 424.
479 *Egan v Willis* (1998) 195 CLR 424 at 455 per Gaudron, Gummow and Hayne JJ.

amongst other things, the 'orderly conduct' of business, subject to the approval of the Governor. Significantly, section 15(1)(a) seemingly supports the adoption of standing orders of a punitive nature, unlike the inherent power of the House to suspend members under the common law, provided such standing orders are for the 'orderly conduct' of the House.

In 1852, the colonial Legislative Council appointed a Select Committee to prepare a draft Constitution for the Colony. Clause XXXVII of the initial draft dealing with the adoption of standing orders included the following restriction on the power to make standing orders:

> The said Legislative Council and Assembly, at the first sitting of each respectively, and from time to time afterwards as there shall be occasion, shall prepare and adopt such Standing Rules and Orders as shall appear to the said Council and Assembly respectively best adapted for the orderly conduct of such Council and Assembly …: *Provided that no such Rule or Order shall be of force to subject any person not being a Member or Officer of the Council or Assembly to which it relates, to any pain, penalty, or forfeiture*.[480] (emphasis added)

This restriction was maintained in clause XXXV of the 1853 draft of the Constitution.[481] However, it was removed from the Constitution Bill finally passed by the Council by an amendment made during proceedings in committee on 20 December 1853. It is not clear whether the restriction was removed because it was considered superfluous, or because it was considered that the standing orders should be allowed to have a punitive effect in relation to members and officers.[482] The *Sydney Morning Herald* record of the proceedings only records the amendment as a 'trifling verbal amendment'.[483]

Whatever the reason, at the commencement of responsible government in 1856, the Council had the power under section 35 of the *Constitution Act 1855* to adopt standing orders 'as shall appear to the said Council … best adapted for the orderly Conduct of such Council', in respect of both members and non-members, written without any restriction on the adoption of punitive measures. It is notable that in the first set of standing orders adopted by the House on 4 December 1856, standing order 153 provided:

> Any Member, adjudged by the Council to be guilty of Contempt, shall be fined at the discretion of the House in a penalty not exceeding Twenty Pounds; and, in default of immediate payment, be committed, by Order of the President, for a period not exceeding fourteen days, to the custody of the Usher of the Black Rod: - who shall detain the Member in custody for the period directed, unless sooner discharged by Order of the House, or the Fine be sooner paid.[484]

---

480 'Report from the Select Committee appointed to prepare a Constitution for the Colony', *Journals*, NSW Legislative Council, 1852, vol 1, p 502.

481 *Journals*, NSW Legislative Council, 1853, vol 2, p 145.

482 Twomey, (n 103), p 469.

483 Parliamentary reports, *Sydney Morning Herald*, 20 December 1853, p 1.

484 Standing order 92 of the Legislative Assembly was in almost identical terms, except that it was extended in its application to other persons, meaning strangers, as well.

In 1886 in *Barton v Taylor,*[485] the Privy Council confirmed that whilst the Legislative Assembly had no inherent power to punish a member, it may pass a standing order which would have the effect of punishing a member. On behalf of their Lordships, Lord Selborne observed:

> … their Lordships are of opinion that … the express powers given by the Constitution Act are not limited by the principles of common law applicable to those inherent powers which must be implied (without express grant) from mere necessity …[486]

In 1907, this position was cited with approval by Darley CJ in the New South Wales Supreme Court decision of *Crick v Harnett,*[487] a case concerning the Legislative Assembly. However, the Chief Justice noted that whilst the power of the Legislative Assembly to make standing orders of a punitive nature is not restricted to the scope of the inherent powers of the House at common law, the power is restricted to the adoption of standing orders concerning the 'orderly conduct' of the House.[488]

In 1946 in the Queensland decision of *Barnes v Purcell*,[489] the Full Court of the Supreme Court of Queensland considered it beyond doubt that where the power to make standing orders derived from the Constitution, the power may be punitive in nature.[490] In the subsequent Queensland case of *R v Dickson; Ex parte Barnes*[491] in 1947, Macrossan CJ suggested that the deprivation of a member's salary could also be applied through the standing orders.[492]

Accordingly, it seems that the House may adopt standing orders in respect of members which are of punitive effect, but only where they are for the 'orderly conduct' of the House. This arguably encompasses punishment of members for obstructing the House, for example by way of suspension. By contrast, punishment of members for actions outside the chamber would likely be beyond power.

The current standing orders of the House provide that a member may be suspended for a period of time determined by the House on a motion moved without notice (SOs 190 and 191). The President or Chair of Committees may also suspend a member after the member has been called to order three times in any one sitting. The duration of the suspension is decided by the Chair but may not exceed the termination of the sitting (SO 192).[493]

---

485 (1886) 11 AC 197.

486 *Barton v Taylor* (1886) 11 AC 197 at 207 per Lord Selborne.

487 (1907) 7 SR (NSW) 126.

488 *Crick v Harnett* (1907) 7 SR (NSW) 126 at 133 per Darley CJ. For further information, see Twomey, (n 103), pp 469-470, 510-512.

489 [1946] St R Qd 87.

490 *Barnes v Purcell* [1946] St R Qd 87 at 95 per Macrossan ACJ, at 104 per Douglass J, and at 109-110 per Philp J; cited in Twomey, (n 103), p 470.

491 [1947] St R Qd 133.

492 *R v Dickson; Ex parte Barnes* [1947] St R Qd 133 at 137 per Macrossan CJ.

493 For further information, see the discussion in Chapter 13 (Debate) under the heading 'Member called to order and removed from the chamber (SO 192)'.

Consequences of suspension

A member who is suspended from the service of the House is excluded from the chamber and its galleries, and may not serve on or attend any proceedings of a committee during the period of suspension (SO 191(3)).[494] However, the member retains other rights, including the right to remain in the parliamentary precinct and access his or her office.[495]

On 2 May 1996, the Treasurer and Leader of the Government in the Legislative Council, the Hon Michael Egan, was judged guilty of contempt of the House and suspended for the remainder of the sitting day for failing to table certain State papers. The Usher of the Black Rod was directed by the President to escort Mr Egan from the chamber and the parliamentary precincts, which he did, taking Mr Egan from the chamber and the parliament building onto the footpath of Macquarie Street. In the subsequent decision in *Egan v Willis and Cahill*, the New South Wales Court of Appeal upheld the power of the House to suspend and remove Mr Egan, but found that his removal beyond the chamber and onto the footpath of Macquarie Street, the so-called 'footpath point', constituted a trespass.[496]

Removing and excluding visitors who disturb the proceedings[497]

The inherent power to remove and exclude visitors at common law

The House has the inherent power under the common law principle of necessity to remove and exclude visitors for disorderly conduct where they interfere with the proceedings of the House. In 1912 in *Willis and Christie v Perry*, Griffith CJ commented:

> The Speaker undoubtedly has the power when any person who is outside the chamber is conducting himself in such a manner as to interfere with the orderly conduct of proceedings in the chamber to have that person removed, and for that purpose to obtain the aid of the police.[498]

---

494 Standing order 191(3) provides: 'A member who is suspended from the service of the House is excluded from the chamber and galleries, and may not serve on or attend any proceedings of a committee of the House during the period of suspension. If a member enters the chamber during the member's suspension, the President will order the Usher of the Black Rod to remove the member from the chamber'.

495 *Barnes v Purcell* [1946] St R Qd 87 at 113 per Philp J.

496 *Egan v Willis and Cahill* (1996) 40 NSWLR 650 at 672 per Gleeson CJ, at 693 per Priestley JA. At the time, standing order 262 provided: 'When a Member is suspended from the service of, or removed from the House, he shall be excluded from the House and from all the rooms set apart for the use of the Members'. Gleeson CJ commented that the language of standing order 262 'did not justify the forcible exclusion of the plaintiff from more than the Chamber of the Legislative Council and all rooms set apart for the use of members'. For further information, see the *Annotated Standing Orders of the New South Wales Legislative Council*, (n 340), p 628.

497 Under the *Parliamentary Precincts Act 1997*, the President has extensive powers in relation to the control and management of the broader parliamentary precincts, including visitors to the precincts. This is discussed separately later in this chapter under the heading 'The parliamentary precincts'.

498 *Willis and Christie v Perry* (1912) 13 CLR 592 at 598 per Griffith CJ.

However, it is equally clear that this power does not extend to permit the arrest of strangers for disorderly conduct within the chamber or the precincts of Parliament.[499]

Whilst the House has an inherent power to remove and exclude visitors, visitors who disturb the proceedings of the House are invariably dealt with under the standing orders, as discussed below.

Removing and excluding visitors pursuant to the standing orders

Under section 15 of the *Constitution Act 1902*, the House may adopt standing orders concerning the conduct, removal and exclusion of visitors, provided such standing orders do not go beyond those measures necessary for the 'orderly conduct' of the House within the meaning of section 15. Standing orders of a punitive nature concerning visitors are therefore beyond power.

As indicated previously in Chapter 2 (The history of the Legislative Council),[500] visitors were first admitted to the proceedings of the Legislative Council in 1838. Subsequently, on the achievement of responsible government in 1856, the new Legislative Council adopted in its standing orders provision for every member to admit a certain number of 'strangers' each day to the public gallery. Any member could request the President to order strangers to withdraw. The President, at his own discretion, could also order strangers to withdraw.[501] These provisions were re-adopted in the standing orders of 1870.[502]

In January 1894, the Legislative Assembly received and published legal advice that its existing standing order 107, purporting to allow a person disturbing the proceedings of that House to be detained by the Serjeant-at-Arms indefinitely until discharged by an order of the House, was *ultra vires*. Commenting on the application of what was then section 35 of the *Constitution Act 1855*, counsel observed:

> We are of opinion that this section is intended to regulate the mode of transacting the business of Parliament and the conduct of its Members, and that it cannot be extended so as to include the case of strangers, who may be guilty of obstructing or interrupting the business of the House, or of such other misconduct as is mentioned in the order.[503]

The new standing orders adopted by the Legislative Assembly in 1895 reflected this better interpretation of the law. The Council also adopted new standing orders in 1895 which were consistent with this advice.

---

499 *Kielley v Carson* (1842) 13 ER 225.

500 See the discussion under the heading 'Phase one (1823–1855): The early colonial Council'.

501 Standing orders 149 and 150 of 1856.

502 For further information, see the *Annotated Standing Orders of the New South Wales Legislative Council*, (n 340), pp 640-641.

503 J Salomons and C Stephen, Cope and King Solicitors, 'Counsel's Opinion on the Validity of the 107th Standing Order Respecting Punishment of Strangers for Contempt'; *Sessional papers*, NSW Legislative Assembly, Session 1894, pp 487-488.

The matter was subsequently considered again in 1907 by Pring J in *Crick v Harnett*:

> Now in construing s 15 of the Constitution Act it is to be observed that all the matters therein referred to deal with the internal management of the two Houses of Parliament – the section does not profess to confer on either House any power to deal with persons outside the Houses.[504]

Public access to the proceedings of the Legislative Council, and removal of visitors from the public gallery, is discussed further in Chapter 11 (Publication of and access to the proceedings of the Legislative Council).[505]

The power to order the production of State papers

The House has the inherent power under the common law principle of necessity to order the production of State papers. This power may also exist under the *Parliamentary Evidence Act 1901*, although this has only been explored by the House on one occasion.

The inherent power of the House to order the production of State papers was used routinely by the Council between 1856 and the early part of the 20th century, before falling into disuse during the second decade of the 20th century,[506] with the last order for papers in 1932.[507]

The practice was revived in October 1995,[508] when the Council passed a series of resolutions for the production of State papers in relation to three different matters.[509] The revival of the practice at this time reflected the changing party numbers in the House, with the government having lost its majority in the House at the March 1988 election following the reconstitution of the Council in 1978. However, on this occasion, the power of the House to enforce the order was challenged by the government in the courts, precipitating the *Egan* decisions, a series of three decisions between 1996 and 1999 in the New South Wales Court of Appeal and the High Court affirming the inherent power of the Council to order the production of State papers.[510]

---

504 *Crick v Harnett* (1907) 7 SR (NSW) 126 at 139 per Pring J.

505 See the discussion under the heading 'Public access to proceedings in the chamber'.

506 Clune and Griffith, (n 119), pp 276-277.

507 The order related to the amounts of money derived from the State Lottery and paid to hospitals. See *Minutes*, NSW Legislative Council, 6 December 1932, p 165; 13 December 1932, p 174.

508 On a previous occasion in October 1990, the House made an order for the production of a list of unproclaimed legislation, although the order was not complied with. See *Minutes*, NSW Legislative Council, 11 October 1990, pp 462-463. Standing order 160(2) now provides that a list of legislation passed by the Parliament and assented to by the Governor, but not proclaimed to commence within 90 days of assent, is to be tabled by a minister on the second sitting day of each month. For further information on the adoption of standing order 160(2), see *New South Wales Legislative Council Practice,* 1st ed, (n 57), p 486 and the *Annotated Standing Orders of the New South Wales Legislative Council*, (n 340), pp 527-528.

509 For further information, see the discussion in Chapter 19 (Documents tabled in the Legislative Council) under the heading 'The *Egan* decisions'.

510 See the decision of the NSW Court of Appeal in *Egan v Willis and Cahill* (1996) 40 NSWLR 650, the decision of the High Court in *Egan v Willis* (1998) 195 CLR 424 and the decision of the NSW Court of Appeal in *Egan v Chadwick* (1999) 46 NSWLR 563.

In the decision of the New South Wales Court of Appeal in *Egan v Willis and Cahill* in 1996 and the subsequent decision of the High Court in *Egan v Willis* in 1998, both courts found that the power to order the production of State papers is necessary for the performance by the House of its functions, which were identified as being the making of laws in accordance with section 5 of the *Constitution Act 1902* and the scrutiny and review of executive government conduct.[511] In the Court of Appeal, Priestley JA put it in the following terms:

> In my opinion it is well within the boundaries of reasonable necessity that the Legislative Council have power to inform itself of any matter relevant to a subject on which the legislature has power to make laws. … This seems to me to be a necessary implication in light of the very broad reach of the legislative power of the legislature and what seems to me to be the imperative need for both the Legislative Assembly and Legislative Council to have access (and ready access) to all facts and information which may be of help to them in considering three subjects: the way in which existing laws are operating; possible changes to existing laws; and the possible making of new laws. The first of these subjects clearly embraces the way in which the Executive Government is executing the laws.[512]

In the High Court, the majority strongly endorsed this broad view of necessity adopted by Priestley JA in the Court of Appeal:

> The arrangements made for New South Wales for the period following 1855 provided the elements of what now should be identified as a system of responsible government. There was an assumption of a measure of examination of the executive by the legislature as well as legislative control over taxation and appropriation of money. The consideration that the government of the day must retain the confidence of the lower House and that it is there that governments are made and unmade does not deny what follows from the assumption in 1856 by the Legislative Council of a measure of superintendence of the conduct of the executive government by the production to it of State papers.
>
> It is not necessary to consider for the purposes of this appeal the limits involved in that superintendence. What is presently significant is the immediate interrelation between that superintendence and the lawmaking function in which the Legislative Council participates, together with the Legislative Assembly and the Crown.[513]

---

511 *Egan v Willis and Cahill* (1996) 40 NSWLR 650 at 664-665 per Gleeson CJ, at 676-677 per Mahoney P and at 692-693 per Priestley JA; *Egan v Willis* (1998) 195 CLR 424 at 453-454 per Gaudron, Gummow and Hayne JJ, at 500 per Kirby J, at 513-514 per Callinan J, at 467 per McHugh J in dissent.

512 *Egan v Willis and Cahill* (1996) 40 NSWLR 650 at 692-693 per Priestley JA.

513 *Egan v Willis* (1998) 195 CLR 424 at 453 per Gaudron, Gummow and Hayne JJ. Counsel for Mr Egan, the Solicitor General and Mr Leeming had argued in their submission to the High Court that the Legislative Council has a function of advising and consenting to the making of laws under the *Constitution Act 1902*, but that there is no basis for implying the existence of a function of scrutinising the executive government, or that even if it had such a function, it is reasonably necessary for the functions of the Council that it have power to compel the production of documents. This argument was rejected.

Accordingly, the power of the House to order the production of State papers is not restricted to papers concerning a current inquiry, bill or other item of business before the Council. The power is a broader power to watch-over or 'superintend' the executive government.

In the subsequent decision in *Egan v Chadwick* in 1999, the New South Wales Court of Appeal found that it is reasonably necessary for the performance of its functions for the Legislative Council to be able to compel the executive government to produce documents in respect of which a claim of legal professional privilege or public interest immunity can be made, and that the power upheld by the High Court in 1998 extended to such documents. The majority (Spigelman CJ and Meagher JA) found that the power was limited in the case of Cabinet documents, whilst Priestley JA found that there was no limitation on the power.[514]

Egan v Willis and Cahill is also authority for the fact that the standing orders, whilst they may regulate the inherent power of the House to order the production of State papers, are not themselves a source of that power.[515]

Since the *Egan* decisions, orders for State papers have again become a central feature of the work of the Legislative Council. This and the operation of standing order 52, which regulates the power to order the production of State papers, is discussed in more detail in Chapter 19 (Documents tabled in the Legislative Council).[516] The power of committees to order the production of State papers is discussed in more detail in Chapter 20 (Committees).[517]

The House and its committees may also have the power to order the production of State papers under the *Parliamentary Evidence Act 1901*, although this has only been explored by the House on one occasion[518] and by a committee on one occasion.[519]

The power to conduct inquiries

The House has the inherent power under the common law principle of necessity to conduct inquiries, although this power is usually delegated by the House to its committees.

514 For further information, see the discussion in Chapter 19 (Documents tabled in the Legislative Council), under the heading 'Orders for the production of State papers and cabinet documents'.

515 *Egan v Willis and Cahill* (1996) 40 NSWLR 650 at 664 and 667 per Gleeson CJ.

516 See the discussion under the heading 'Orders for the production of State papers'.

517 See the discussion under the heading 'Orders for the production of State papers by committees'.

518 For further information, see the discussion in relation to Greyhound Racing NSW in Chapter 19 (Documents tabled in the Legislative Council) under the heading 'Orders for the production of State papers not in the custody or control of a minister'.

519 For further information, see the discussion in relation to an inquiry by Portfolio Committee No 5 – Industry and Transport into the Windsor Bridge replacement project in Chapter 20 (Committees) under the heading 'Orders for the production of State papers by committees'.

At one level, the inquiry power may be regarded as an extension of the legislative power of the Parliament under section 5 of the *Constitution Act 1902*. As stated in 1927 by the United States Supreme Court in *McGrain v Daugherty*:

> … the power of inquiry – with process to enforce – is an essential and appropriate auxiliary to the legislative function … A legislative body cannot legislate wisely or effectively in the absence of information respecting the conditions which the legislation is intended to affect or change; and where the legislative body does not itself possess the requisite information – which not infrequently is true – recourse must be had to others who do possess it.[520]

However, it is also likely, despite some arguments to the contrary,[521] that the inherent power of the House to conduct inquiries extends beyond the Parliament's legislative power to matters concerning the conduct of the executive government and the implementation of its policies. As far back as 1858 in *Fenton v Hampton*, the Privy Council held that local legislatures in British colonies had the power to inquire into matters of public interest.[522] More recently, the *Egan* decisions provide strong support for the proposition that under the New South Wales system of responsible government, the investigatory powers of a legislative chamber extend to scrutiny of the activities of the executive branch.[523] As McHugh J observed in *Egan v Willis*:

> … it is the function of the Houses of Parliament to obtain information as to the state of affairs in their jurisdiction so that they can, where necessary, criticise the ways in which public affairs are being administered and public money is being spent.[524]

The supervisory function of the Council over the executive government is such an important role that the obtaining and publishing of information about the actions of the executive is quite often an end in itself through the inquiry process.

Where there may possibly be limits on the inquiry power of the House is where the House or its committees purport to inquire into a matter relating exclusively to another jurisdiction with no connection to the State, or where an inquiry relates to a matter of exclusive Commonwealth legislative power. However, there is no issue as to the validity of the power to inquire into a matter that is the subject of concurrent Commonwealth and State power.[525]

---

520 *McGrain v Daugherty* 273 US 135 (1927) at 174-175 per Van Devanter J.

521 See Campbell, *Parliamentary Privilege*, (n 173), p 154; I Greenwood and R Ellicott, *Parliamentary Committees: Powers over and Protection Afforded to Witnesses*, (Australian Government Publishing Service, 1973); and Carney, *Members of Parliament: Law and Ethics*, (n 227), p 182. See also *Attorney-General v MacFarlane* (1971) 18 FLR 150.

522 *Fenton v Hampton* (1858) 14 ER 727 at 745.

523 In *Egan v Willis and Cahill*, Mahoney P described one of the Council's functions as 'oversight of the activities of the Executive Government': (1996) 40 NSWLR 650 at 677. In *Egan v Willis*, Gaudron, Gummow and Hayne JJ went further, speaking of the notion of oversight, or 'superintendence', with no identified limit: (1998) 195 CLR 424 at 453.

524 *Egan v Willis* (1998) 195 CLR 424 at 476 per McHugh J.

525 Twomey, (n 103), p 515.

The power of committees to conduct inquiries is routinely limited by the terms of reference for an inquiry. The power may also be limited by legislation establishing a committee, for example, legislation limiting the jurisdiction of the Committee on the Independent Commission Against Corruption to inquire into operational matters.[526] These and other matters in relation to the power of committees to conduct inquiries are discussed in more detail in Chapter 20 (Committees).

The power to call witnesses and compel evidence

Under the *Parliamentary Evidence Act 1901*, the House and its committees have the statutory power to call witnesses and compel evidence. As discussed previously,[527] the predecessor to the *Parliamentary Evidence Act 1901*, the *Parliamentary Evidence Act 1881*, was enacted following various occasions in 1864, 1870, 1875 and 1881 when the Legislative Assembly and its Committee of Supply were constrained in the taking of evidence from witnesses at the Bar of the House, following the decision of the Privy Council in 1858 in *Fenton v Hampton*.[528]

The *Parliamentary Evidence Act 1901* provides that:

- the House or a committee may, by order, summon persons, not being a member of either House, to appear before it and give evidence (s 4);
- failure to comply with such an order may result in a warrant for the apprehension of the person being issued by a Judge of the Supreme Court, upon certification by the President,[529] for the purposes of bringing the person before the House or committee (ss 7 and 8);
- the person can be held in custody for the purposes of appearing before the House or committee, until discharged by order of the President (s 9).[530]

In relation to the giving of evidence by witnesses, the *Parliamentary Evidence Act 1901* provides that:

- witnesses, including members, are to give evidence under oath, or such other solemn declaration as may be permitted were the witness to be examined before the Supreme Court (s 10);
- refusal to answer a 'lawful question' may result in the witness being held in contempt of Parliament, for which the witness may be committed into the

526 *Independent Commission Against Corruption Act 1988*, s 64(2).

527 See the discussion under the heading 'The *Parliamentary Evidence Acts* of 1881 and 1901'.

528 (1858) 14 ER 727. In *dicta* in *Egan v Willis*, McHugh J indicated that, in the absence of statutory authority, the Legislative Council could not compel non-members to attend and give evidence. See *Egan v Willis* (1998) 195 CLR 424 at 468 per McHugh J.

529 The President must be satisfied that the failure of the person to attend is without just cause or reasonable excuse.

530 For further information, see the discussion in Chapter 21 (Witnesses) under the heading 'Summoning witnesses'.

custody of the Usher of the Black Rod, and, if the House so orders, to gaol, for any period not exceeding one calendar month, by warrant under the hand of the President or Speaker (s 11);

- a witness who wilfully makes a false statement to the House or a committee is liable to a term of imprisonment not exceeding five years (s 13).[531]

The power of the House to find a witness who refuses to answer a 'lawful question' in contempt, and to imprison the witness for a term not exceeding one calendar month, is one of the few examples where the House has, by legislation, a punitive power to punish contempt.[532] The power is exercised upon resolution of the House itself.[533] By contrast, the liability of a witness who wilfully makes a false statement to the House or a committee to a term of imprisonment not exceeding five years is a criminal offence determinable by a court rather than the House.[534]

The power of the House to conduct inquiries and to call witnesses and compel evidence is usually delegated by the House to its committees. However, there is one instance where the House has required a witness to appear before it at the Bar of the House. In 1998, following receipt of a report by the Auditor-General raising concerns regarding non-compliance by government departments with legislative requirements relating to the authorisation of expenditure from the Consolidated Fund, the House resolved that the Auditor-General be summoned under the *Parliamentary Evidence Act 1901* to give evidence at the Bar of the House in relation to the Appropriation (1997-98 Budget Variations) Bill (No 2) 1998.[535] The Auditor-General was subsequently issued with a summons under the hand of the Clerk. This is the only instance since the passage of the *Parliamentary Evidence Act 1901* when a person has been summoned to the Bar of the House. He attended at the Bar in accordance with the summons and was examined by members of the House.[536]

The power of committees to summon witnesses and compel answers to any 'lawful question' is discussed in more detail in Chapter 21 (Witnesses).

---

531 Some of these provisions are reproduced in the *Public Works and Procurement Act 1912*, div 2, establishing the Parliamentary Standing Committee on Public Works. However this committee has not been active since the first session of the 29th Parliament commencing on 25 November 1930.

532 The other example is the *Public Works and Procurement Act 1912*, s 22.

533 However, the House has never sought to use this power, and it may well be argued that, at least as currently drafted, it is out of step with community expectations of the role of Parliament and modern notions of procedural fairness. For further information, see the discussion in B Duffy and S Ohnesorge, 'Out of step? The New South Wales *Parliamentary Evidence Act 1901*', *Parliamentary Law Review*, (Vol 27, 2006), p 37.

534 Twomey, (n 103), p 517.

535 *Minutes*, NSW Legislative Council, 29 October 1998, pp 831-835.

536 *Minutes*, NSW Legislative Council, 10 November 1998, pp 841-842.

CONTEMPTS

The Legislative Council does not have a punitive power to punish contempts *per se*, at least not according to a conventional reading of the common law test of necessity deriving from *Kielley v Carson*. The courts have found that such a power is not necessary to the existence and proper exercise of the functions of local legislatures established in former British colonies.[537] Nevertheless, the House has a long history of dealing with contempts and matters of privilege.

What is a contempt?

A contempt is any act or omission which obstructs or impedes the House or its committees in the performance of their functions, or which obstructs or impedes any member or officer of the House in the discharge of his or her duty, or which has a tendency, directly or indirectly, to produce such a result.[538] A contempt may be committed both by members and non-members, such as committee witnesses and members of the public.

Unlike some other Australian Parliaments, the Parliament of New South Wales has not acted to provide a statutory definition of contempt of Parliament, or a definition in the standing orders.[539] Accordingly, it is a matter for the Council to determine whether or not a particular act or omission constitutes a contempt, and the Council may declare a particular act or omission to be a contempt without any antecedent inquiry into it. As a result, it is not possible to define all the types of conduct which may amount to a contempt. However, further guidance on what constitutes contempt is provided later in this chapter.[540]

The term 'breach of privilege'

In the past, the expression 'breach of privilege' has sometimes been used interchangeably with the term 'contempt of Parliament', as if they are of the same meaning. They are not. A 'breach of privilege', properly conceived in historical terms, refers to a breach of the immunities of the House and its members. A 'contempt of Parliament' occurs where conduct impedes or obstructs the House or a committee, or its members or officers, in the performance of their functions, or has a tendency to produce that result.

---

537 The only exception is that, under the *Parliamentary Evidence Act 1901*, the Parliament of New South Wales enacted a power to punish contempt for failure to answer any 'lawful question'.

538 *Erskine May*, 25th ed, (n 23), para 15.2.

539 See, for example, section 4 of the *Parliamentary Privileges Act 1987* (Cth) and section 37 of the *Parliament of Queensland Act 2001 (Qld)*. The New Zealand Parliament provides an extensive definition of contempts in standing order 410.

540 See the discussion under the heading 'Cases of contempt and matters of privilege in the Council'.

There are certain distinctions between the two. It is well recognised that contempt does not necessarily amount to a breach of privilege.[541] For example, if a person outside the House were to take some action with the intent of intimidating a member and preventing the member from raising a matter in the House, this would clearly be a contempt of Parliament, but there is no breach of the immunities of the House and its members. Equally an individual may publish *in camera* evidence without authority to do so, but it is not clear that any power or immunity has been breached.

In addition, it is for the House, and the House alone, to determine what constitutes contempt and its remedy. By contrast, a breach of privilege may be determined and remedied by the courts.

The absence of a punitive power to punish contempts in New South Wales

The Houses of the Parliament of New South Wales are unusual amongst Houses of Parliament in Australia in not having a punitive power to punish contempts.

As indicated previously in this chapter, at common law the Legislative Council has an inherent power to expel members where it is necessary to the defence of the institution,[542] and to suspend members guilty of disorderly conduct in the House or otherwise obstructing proceedings, or to suspend members as a means of inducing them to comply with an order of the House.[543] The House also has the inherent power to admonish visitors and to order their removal from the chamber for disturbing the proceedings.[544] These inherent powers derive from the common law principle of necessity. As stated in 1912 by Isaacs J in *Willis and Christie v Perry*,[545] referring to the Legislative Assembly, but of equal application to the Council, the House has the right to protect itself 'from all impediments to the due course of its proceeding', and to adopt such measures as are necessary 'to secure the free exercise of [its] legislative functions'.[546]

However, these powers of expulsion and suspension of members and removal of visitors are not a subset of a broader contempt power *per se*. Unlike parliaments which derive their powers from the *lex et consuetudo parliamenti* – the law and custom of Parliament – in England, or which have legislated to enact contempt powers, the Legislative Council does not have a punitive power to punish contempts, for example by fine or imprisonment, at least not on a conventional or traditional reading of the case law dating back to *Kielley v Carson*. At common law, such a power has not been found necessary

541 *Odgers,* 14th ed, (n 5), p 44. See also the discussion in Joint Select Committee on Parliamentary Privilege, Parliament of Australia, *Final Report*, October 1984, pp 28-29.

542 See the discussion under the heading 'Expulsion of members'.

543 See the discussion under the heading 'Suspension of members'.

544 See the discussion under the heading 'Removing and excluding visitors who disturb the proceedings'.

545 (1912) 13 CLR 592.

546 *Willis and Christie v Perry* (1912) 13 CLR 592 at 600 per Isaacs J.

to the existence and proper exercise of the functions of the Houses of the Parliament of New South Wales.[547] As stated by Sugerman JA in *Armstrong v Budd*:

> It has uniformly been held unnecessary to the existence of a local legislature and the proper exercise of its functions, within the principle under discussion, that it should have power to punish for contempts committed beyond its walls or even within them, by strangers or by members …[548]

For this reason, authorities such as Twomey in *The Constitution of New South Wales* do not list the power to punish contempts amongst the powers of the Houses of the Parliament of New South Wales.[549] *New South Wales Legislative Assembly Practice, Procedure and Privilege* cites the power to punish contempts as amongst those privileges not considered necessary for the functioning of the Parliament.[550]

Nevertheless, contempt remains a relevant concept in the Legislative Council, in the sense that contempts still occur against the House, its committees and members, even though the power of the Council to respond is significantly constrained, as is discussed further below.

The only punitive power to punish for contempt held by the House and its committees is the power under the *Parliamentary Evidence Act 1901* to punish a witness who refuses to answer any 'lawful question'. This is examined separately.[551]

Cases of contempt and matters of privilege in the Council

Whilst the Legislative Council does not have a punitive power to punish contempts per se, at least not on a conventional or traditional reading of the case law dating back to *Kielley v Carson*, nevertheless the House has a long history of dealing with contempts and matters of privilege. The following table provides examples of conduct which has been investigated for possible contempt or breaches of privilege by the Council. In some cases, as mentioned above, contempts have overlapped with inherent powers that the House does possess to suspend and expel members, enabling the House to act despite lacking a punitive contempt power.

547 *Doyle v Falconer* (1866) 16 ER 293 at 298 per Sir James Colvile; *Willis and Christie v Perry* (1912) 13 CLR 592 at 598-599 per Barton J.

548 *Armstrong v Budd* (1969) 71 SR (NSW) 386 at 406 per Sugerman JA.

549 Twomey, (n 103), pp 452, 508.

550 Grove, Swinson and Hesford, (n 229), p 310.

551 See the discussion earlier in this chapter under the heading 'The power to call witnesses and compel evidence' and in Chapter 21 (Witnesses) under the heading 'The power to compel an answer to any 'lawful question''.

Table 3.1: Cases of contempt and matters of privilege in the Council

Conduct unworthy of a member of the House	
The Hon Alexander Armstrong (1969)	
	The Hon Alexander Armstrong was expelled by the House on 25 February 1969 following judicial comments by Street J in *Barton v Armstrong*[552] that he had been party to an arrangement to procure false evidence in divorce proceedings and had contemplated bribing a Supreme Court judge. Mr Armstrong was expelled under the inherent power of the House at common law to expel a member for conduct unworthy of a member of the House.[553] Subsequently, Mr Armstrong unsuccessfully challenged the House's actions in the Supreme Court.[554]
The Hon Malcolm Jones (2003)	
	The Hon Malcolm Jones resigned as a member of the Legislative Council on 16 September 2003 following a report of the Independent Commission Against Corruption which found that he had engaged in corrupt conduct in the use of entitlements provided under the *Parliamentary Remuneration Act 1989*.[555] Mr Jones resigned before the moving of a motion that he be expelled.[556]
Abuse of the privilege of freedom of speech[557]	
The Hon John Martin (1936)	
	In November 1936, the Hon John Martin made statements in the House alleging conspiracy and corruption in the election of another member, the Hon Edward Grayndler.[558] The House subsequently established a select committee to inquire into the allegations,[559] which concluded that none of the assertions and imputations was supported by any evidence.[560] The House subsequently adopted the report on the last sitting day in 1936.[561] However, as the House did not sit again for a further seven months, no further action was taken.

552 [1969] 2 NSWR 451.

553 For further information, see the discussion earlier in this chapter under the heading 'Expulsion of members'.

554 *Armstrong v Budd* (1969) 71 SR (NSW) 386.

555 Independent Commission Against Corruption, *Report into an investigation into the conduct of the Hon Malcolm Jones*, July 2003.

556 For further information, see the discussion earlier in this chapter under the heading 'Expulsion of members'. See also *New South Wales Legislative Council Practice,* 1st ed, (n 57), pp 643-644.

557 For discussion of a number of additional cases – those of the Hon Alfred Lutwyche (1859), the Hon Marie Bignold (1989), the Hon Elisabeth Kirkby (1991) and the Hon Michael Costa (2007) – see *New South Wales Legislative Council Practice*, 1st ed, (n 57), Appendix 4.

558 *Hansard*, NSW Legislative Council, 12 November 1936, pp 428-430.

559 *Minutes*, NSW Legislative Council, 25 November 1936, p 50.

560 Report from the Select Committee on charges of corruption made by the Honorable JB Martin MLC, in connection with the election of the Honorable Edward Grayndler to the Legislative Council, December 1936.

561 *Minutes*, NSW Legislative Council, 22 December 1936, p 91.

The Hon Franca Arena (1997)	
	In September 1997, the Hon Franca Arena delivered a speech in the House in which she alleged that the Premier and the Commissioner of the Royal Commission into the New South Wales Police Service, amongst others, had been involved in a 'cover-up' of high-profile paedophiles.[562] The allegations being of such gravity, the Parliament enacted special legislation to enable their investigation by a Special Commission of Inquiry. On the Special Commission reporting that the statements of Mrs Arena were without basis, and following an inquiry into the matter by the Standing Committee on Parliamentary Privilege and Ethics,[563] the House resolved that the conduct of Mrs Arena fell below the standard the House is entitled to expect of a member and brought the House into disrepute, that Mrs Arena submit an apology in respect of the statements, and that, failing this, she be expelled from the service of the House.[564] Subsequently the House agreed to accept a 'statement of regret' from Mrs Arena in place of the apology.[565]
The Hon Michael Gallacher and the Hon John Hannaford (1999)	
	In September 1999, the Leader of the Opposition in the Legislative Council, the Hon Michael Gallacher, and another Opposition member, the Hon John Hannaford, made statements in the House concerning allegations of sexual harassment by the Lord Mayor of Sydney.[566] The statements were referred to the Privileges Committee for inquiry and report as to whether the members' conduct in making the statements constituted an abuse of privilege.[567] In its report, the committee indicated the appropriateness of developing principles to be applied in relation to the exercise of members' freedom of speech, but concluded that the application of such principles retrospectively would be improper. In those circumstances, the committee adjudged that 'any finding of abuse of privilege under present circumstances could be perceived as an unwarranted restriction on members' freedom of speech'.[568]
Mr David Shoebridge (2011)	
	In September 2011, Mr David Shoebridge made a statement in the House concerning the actions of the Commissioner of Police in allegedly seeking to prevent the public release of information about a serial predator in a Sydney park.[569] The statement was referred to the Privileges Committee for inquiry and report as to whether the member's conduct in making the statement constituted an abuse of privilege.[570] In its report, the Privileges Committee found that the statement of Mr Shoebridge did not amount to an abuse of the privilege of freedom of speech, reiterating its observation from 1999 that no guidelines on the exercise of the privilege of freedom of speech had been adopted by the House.[571]

562 *Hansard*, NSW Legislative Council, 17 September 1997, pp 61-68.

563 Standing Committee on Parliamentary Privilege and Ethics, *Inquiry into the conduct of the Honourable Franca Arena MLC*, Report No 6, June 1998.

564 *Minutes*, NSW Legislative Council, 1 July 1998, pp 631-632, 633-635.

565 *Minutes*, NSW Legislative Council, 16 September 1998, pp 693-696. For further information, see the discussion later in this chapter under the heading 'The Arena case'. See also *New South Wales Legislative Council Practice,* 1st ed, (n 57), pp 108-113.

566 *Hansard*, NSW Legislative Council, 8 September 1999, pp 65-66.

567 *Minutes*, NSW Legislative Council, 14 September 1999, pp 52-53.

568 Standing Committee on Parliamentary Privilege and Ethics, *Inquiry into statements made by Mr Gallacher* and *Mr Hannaford*, Report No 11, November 1999.

569 *Hansard*, NSW Legislative Council, 15 September 2011, pp 5750-5751.

570 *Minutes*, NSW Legislative Council, 12 October 2011, pp 478, 479-480.

571 Privileges Committee, *Statements made by Mr David Shoebridge*, Report No 57, November 2011.

Disrupting proceedings in the House	
The Hon James Wilson (various cases, 1915-1922)	
	On various occasions between 1915 and 1922, the Hon James Wilson was adjudged guilty of contempt for interrupting proceedings in the House, resulting in his suspension from the House under the predecessors to standing orders 190 to 192. On the final occasion, following a statement by the President, the acting representative of the government, the Hon Sir Joseph Carruthers, moved that Mr Wilson be adjudged guilty of contempt and suspended from the service of the House for the remainder of the session, to which the House agreed.[572]
Failure to comply with an order of the House for the production of State papers	
The Hon Michael Egan (various cases, 1995-1998)	
	On various occasions in the period 1995-1998, the Treasurer and Leader of the Government in the Legislative Council, the Hon Michael Egan, was adjudged guilty of contempt and suspended from the service of the House for failing to comply with orders for the production of State papers. The complex proceedings in the House surrounding these events are discussed in Chapter 19 (Documents tabled in the Legislative Council).[573]
The Department of Primary Industry (2013)	
	In November 2009, the House ordered the production of State papers in relation to the 2009 Mt Penny mining exploration licence and tender process. A return to order was received from the government later that month. However, in late 2012, following the publication of certain documents by ICAC as part of Operation Jasper, concerns were raised whether the 2009 order of the House had been fully complied with. The House subsequently referred the matter to the Privileges Committee in March 2013. In April and October 2013, the Privileges Committee tabled two reports which found that the former Department of Primary Industry had failed to comply fully with the order, but that this was due to administrative failings within the department rather than a deliberate attempt to deceive the House.[574] Given this, the House took no further action.
The Hon Don Harwin (2018)	
	On 5 June 2018, the Leader of the Government in the Legislative Council, the Hon Don Harwin, was censured by the House for failing to comply with various orders for the production of State papers. At issue was the power of the House to order the production of certain documents regarded by the government as Cabinet information. The proceedings in the House surrounding these events are discussed in Chapter 19 (Documents tabled in the Legislative Council).[575]

572 *Minutes*, NSW Legislative Council, 12 October 1922, p 102.

573 See the discussion under the heading 'The *Egan* decisions'.

574 Privileges Committee, *Possible non-compliance with the 2009 Mt Penny order for papers*, Report No 68, April 2013; Privileges Committee, *The 2009 Mt Penny return to order*, Report No 69, October 2013.

575 See the discussion under the heading 'Orders for the production of State papers and Cabinet documents'.

Failure of a member to comply with the interests disclosure regime	
Mr Edward Obeid (2002)[576]	
	In September 2002, the House referred to the Standing Committee on Parliamentary Privilege and Ethics an inquiry into whether Mr Edward Obeid had 'wilfully contravened' clause 12 of the *Constitution (Disclosures by Members) Regulation 1983* by failing to disclose relevant pecuniary interests in his interests disclosure returns.[577] The committee found that Mr Obeid had indeed failed to disclose certain interests, but that the errors were not wilful.[578] On the tabling of the report in the House, the Chair of the Committee, the Hon Helen Sham-Ho, made a statement by leave in which she disagreed with the majority view of the committee.[579] The motion to take note of the report was subsequently amended to adopt the conclusions in the report. During the debate on the committee's report in the House, Mr Obeid apologised to the House for the errors in his returns.[580]
Unauthorised seizure of members' documents	
The Independent Commission Against Corruption (ICAC) (2003)	
	In 2003, officers of ICAC executed a search warrant on the Parliament House office of the Hon Peter Breen in the course of an investigation concerning Mr Breen's use of parliamentary entitlements. Certain documents and electronic data were seized. The House subsequently referred the matter to the Standing Committee on Parliamentary Privilege and Ethics, which found that the seizure of at least some of the material involved a breach of Article 9 of the *Bill of Rights 1689* but that in the circumstances no contempt had occurred, although any further attempt to use material falling within the scope of 'proceedings in Parliament' would amount to a contempt'.[581]

576 In December 2014, the Governor revoked the right of Mr Obeid to use the title 'The Honourable'.

577 *Minutes*, NSW Legislative Council, 25 September 2002, pp 384-386, 387-391.

578 Standing Committee upon Parliamentary Privilege, *Report on inquiry into the pecuniary interests register*, Report No 20, October 2002.

579 *Minutes*, NSW Legislative Council, 31 October 2002, p 453; *Hansard*, NSW Legislative Council, 31 October 2002, pp 6282-6283.

580 *Minutes*, NSW Legislative Council, 12 November 2002, pp 464-465, 466-468; *Hansard*, NSW Legislative Council, 12 November 2002, p 6438.

581 Standing Committee on Parliamentary Privilege and Ethics, *Parliamentary privilege and seizure of documents by ICAC*, Report No 25, December 2003. For further information, see the discussion earlier in this chapter under the heading 'Members' documents and processes of discovery and seizure'. See also *New South Wales Legislative Council Practice*, 1st ed, (n 57), p 649.

Attempting to influence members	
Cardinal George Pell (2007)	
	In June 2007, it was reported in the Sydney media that the Catholic Archbishop of Sydney, Cardinal George Pell, had made comments concerning possible 'consequences' for members of Parliament who supported the Human Cloning and Other Prohibited Practices Amendment Bill 2007. The President subsequently referred the matter to the Privileges Committee for inquiry and report as to whether the comments constituted a contempt. In its report on the matter, the Privileges Committee had regard to the context in which the comments were made and reported in the media and the intent with which they had been made. It also considered statements made by members in the House concerning the impact of the comments on their voting intentions, the eventual passage of the bill through the House with a sizeable majority and the fact that there had been no reported instances of members having suffered adverse treatment as a result of voting for the bill. In those circumstances, the committee found that no contempt had occurred and recommended that no further action be taken.[582] The House adopted this approach.
Interference with committee witnesses[583]	
The Hon Dr Andrew Refshauge MP (1998)	
	In March 1998, during evidence before General Purpose Standing Committee No 2, a member of the Board of Directors of the New England Health Service claimed that, in a conversation before the hearing, the Minister for Health, the Hon Dr Andrew Refshauge MP, had attempted to persuade him not to attend the hearing and give evidence. General Purpose Standing Committee No 2 raised the matter in a special report to the House, which referred the matter to the Standing Committee on Parliamentary Privilege and Ethics. The committee found that, while Dr Refshauge had made comments critical of General Purpose Standing Committee No 2, he had not attempted to intimidate the witness or coerce him into not attending the hearing, and that therefore no contempt or breach of privilege had occurred. However, the committee advised that 'caution should be exercised by Ministers and Members when in discussion with witnesses before parliamentary committees'.[584]

582 Privileges Committee, *Comments by Cardinal George Pell concerning the Human Cloning and Other Prohibited Practices Amendment Bill 2007*, Report No 38, September 2007.

583 For discussion of a matter concerning the Hon Jeff Shaw in 1995, see *New South Wales Legislative Council Practice,* 1st ed, (n 57), Appendix 4.

584 Standing Committee on Parliamentary Privilege and Ethics, *Report on inquiry on Special Report from General Purpose Standing Committee No 2*, Report No 9, November 1998.

NSW Police Service (2001)	
	In April 2001, during an *in camera* hearing before General Purpose Standing Committee No 3 concerning policing at Cabramatta, four police officers tendered a written submission which included reference to the recruiting of school students by drug criminals in the Cabramatta area. The next day, the *Sydney Morning Herald* published details of the submission. The four officers subsequently received written directions from their commanding officer requiring them to provide details of any information that they had concerning the published allegations. General Purpose Standing Committee No 3 raised the matter in a special report to the House, which referred the matter to the Standing Committee on Parliamentary Privilege and Ethics. The committee concluded that the issuing of the written directions had resulted in the intimidation of the four officers, and that this had the potential to obstruct the committee in the performance of its functions. However, the committee accepted that such a result had not been intended by Police management, which had not set out to penalise the officers for their evidence or deter other officers from giving evidence. In these circumstances, the committee found that a contempt, although unintended, had occurred, but recommended that no action be taken against the senior officers concerned.[585]
Refusal to answer committee questions	
The Financial Controller, Parliament of New South Wales (1996)	
	In June 1996, at an Estimates Committee hearing concerning the budget estimates for the Legislature, the Financial Controller refused to provide direct answers to questions from the committee. This action was taken at the direction of the Speaker of the Legislative Assembly, who claimed that the Financial Controller was an officer of the Assembly, and that accordingly he had directed the Financial Controller to respond to questions either through the President or by taking the questions on notice. The Estimates Committee raised the matter in a special report to the House, which referred the matter to the Standing Committee on Parliamentary Privilege and Ethics. The committee took the view that the Financial Controller is a joint officer of the Council and Assembly, and as such could have been found in contempt of the Council. However, in the circumstances, it recommended that neither the statutory power to enforce answers to lawful questions under the *Parliamentary Evidence Act 1901* be invoked nor a finding of contempt be recorded, as the Financial Controller had acted on an instruction from the Speaker and had indicated his willingness to provide answers indirectly or in writing at a later date. [586]

585 Standing Committee on Parliamentary Privilege and Ethics, *Possible intimidation of witnesses before General Purpose Standing Committee No 3 and unauthorised disclosure of committee evidence*, Report No 13, November 2001.

586 Standing Committee on Parliamentary Privilege and Ethics, *Report on inquiry arising from Special Report of Estimates Committee No 1*, Report No 4, May 1997.

Adverse reflections on committees	
The Revd the Hon Fred Nile (1988)	
	In September 1988, the Revd the Hon Fred Nile circulated correspondence to coordinators of the Call to Australia Citizens' Movement critical of the work of the Select Committee on the Police Regulation (Allegations of Misconduct) Bill 1988 and the Committee Chair, the Hon Marie Bignold, a fellow member of the Call to Australia Group. Mr Nile subsequently indicated in a statement to the House that the letter was intended to be 'private and confidential', and that the intent was not to reflect on members or the committee.[587] Nevertheless the House referred the matter to the Standing Committee upon Parliamentary Privilege. The committee concluded that, although Mr Nile may have been intemperate and unwise in his actions and may have reflected on the motives of members of the select committee, such conduct did not amount to a substantial interference with the performance of the functions of the House and therefore did not constitute a contempt.[588]
Unauthorised disclosure of committee material	
The Sun Herald (1993)	
	In January 1993, the *Sun Herald* newspaper published details of *in camera* evidence given by the former Police Minister in November 1992 to the Joint Select Committee Upon Police Administration. The committee raised the matter in a special report to the House, whereupon the President referred the matter to the Standing Committee upon Parliamentary Privilege. The committee found that a breach of privilege had been committed by the person who originally disclosed the evidence (whose identity had not been discovered), the journalist who wrote the article and the acting editor who approved its publication. However, the committee was not prepared to recommend sanctions against those who gave the disclosure wider publicity, in the absence of any information as to the identity of the original source. The committee also found that, in light of comments contained in the Special Report and in the testimony of the Joint Committee Chair that the publication had not interfered with the work of the Joint Committee or deterred any witnesses from coming before it, no contempt of Parliament had occurred.[589]

587 *Hansard*, NSW Legislative Council, 13 October 1998, p 2201.

588 Standing Committee upon Parliamentary Privilege, *Documents issued by the Reverend the Honourable FJ Nile, MLC*, December 1989. For further information, see *New South Wales Legislative Council Practice,* 1st ed, (n 57), pp 639-640.

589 Standing Committee upon Parliamentary Privilege, *Report concerning the publication of an article appearing in the Sun Herald Newspaper containing details of in camera evidence*, October 1993. For further information, see *New South Wales Legislative Council Practice,* 1st ed, (n 57), pp 644-645.

Sydney Morning Herald (2001)	
	In April 2001, the *Sydney Morning Herald* published details of a confidential submission provided to General Purpose Standing Committee No 3 at an *in camera* hearing concerning policing at Cabramatta. The committee raised the matter in a special report to the House, which referred the matter to the Standing Committee on Parliamentary Privilege and Ethics. The committee took the view that, as it was unlikely the source of the disclosure would be discovered, the most appropriate course of action would be to recommend the referral of an inquiry to the committee for the development of appropriate guidelines to deal with any future cases of unauthorised disclosure of committee proceedings or draft reports.[590] Subsequently, following the referral of such an inquiry by the House, the committee recommended the adoption of certain guidelines by the House concerning the unauthorised disclosure of committee proceedings.[591]
Misuse of committee evidence	
Police Integrity Commission (2003)	
	In January 2003, the Police Integrity Commission published a report concerning 'Operation Malta' which included an extract from and assessment of certain evidence which had been given by the Police Commissioner before General Purpose Standing Committee No 3 in budget estimates hearings in 2000. The President subsequently wrote to the Commissioner of the Police Integrity Commission drawing his attention to the principle of immunity of parliamentary proceedings from impeachment or questioning, and identifying passages of the report that may have breached that immunity and may have constituted a contempt of Parliament. The Commissioner subsequently wrote to the President apologising unreservedly to the House for having breached parliamentary privilege and indicating that appropriate mechanisms would be put in place to prevent any such instance in the future. In light of this response, no further action was taken in relation to the matter.

Guidance on matters that may constitute contempt can also be obtained from other Parliaments. Conduct which has been treated as a contempt by the UK House of Commons includes: disorderly conduct in the presence of the House, the giving of false evidence by a witness, premature publication of committee proceedings, disobeying an order of a committee, intimidation of a member in respect of his or her parliamentary conduct and 'molestation' of or threats against witnesses.[592]

Conduct which has been treated as a contempt by the Senate includes: unauthorised publication of a draft committee report, harassment of a senator, unauthorised publication of committee evidence taken *in camera*, adverse treatment of a witness as a consequence of the witness's evidence, charges laid against a witness as a consequence of the witness's evidence, threats made against a witness by an unknown person, unauthorised disclosure of a submission to a committee by an unknown person, legal

590 Standing Committee on Parliamentary Privilege and Ethics, *Possible intimidation of witnesses before General Purpose Standing Committee No 3 and unauthorized disclosure of committee evidence*, Report No 13, November 2001.

591 Standing Committee on Parliamentary Privilege and Ethics, *Report on guidelines concerning unauthorised disclosure of committee proceedings*, Report No 23, December 2002.

592 *Erskine May*, 25th ed, (n 23), ch 15.

action taken against a person to penalise the person for providing information to a senator, disciplinary action taken by a university against a person in consequence of the person's communication with a senator, unauthorised disclosure of committee documents and disciplinary action taken by a local government body against an employee in consequence of his participation in proceedings of a committee.[593]

Raising a matter of privilege

In modern times, as revealed in Table 3.1 above, the House generally follows a deliberative process of inquiry and report by the Privileges Committee before reaching a conclusion as to whether a contempt has occurred. The same approach is adopted in the Senate. *Odgers* argues that the Privileges Committee is better placed than the House as a whole to undertake an inquiry into a possible contempt or a matter of privilege. In addition, any findings and recommendations made by the Privileges Committee may be reviewed by the House, providing in effect an appeal procedure.[594]

Under standing order 77, unless a matter of privilege arises suddenly in proceedings before the House, it must first be reported in writing to the President (SO 77(1)). The President must then determine whether precedence should be given to the matter in the House (SO 77(2)). If the President decides that the matter should be given precedence over other business, a member may then, at any time when no business is before the House, give notice of a motion to refer the matter to the Privileges Committee for inquiry and report. No other notice of motion can be given. On the day for which notice is given, invariably the next sitting day, the notice of motion is given precedence over all other business. However, if the House is not expected to sit again within one week, the notice of motion may be moved at a later hour of the same sitting day (SO 77(5)).

These procedures under standing order 77 are modelled on Senate procedures under Senate standing order 81. They were first adopted in a slightly different form under the resolution establishing the Privileges Committee at the commencement of the 50th Parliament in October 1991.[595] They were re-adopted in the resolution establishing the Privileges Committee in later years until being incorporated into the standing orders in 2004.

As an example of this procedure, on 14 October 2003, following the execution of a search warrant by ICAC on his parliamentary office, the Hon Peter Breen submitted to the President a letter claiming that the seizure of documents from his office during the execution of the search warrant may have breached the immunities of the House. On the same day, the President announced in the House receipt of the letter and her determination that the giving of a notice of motion to refer the matter to the Standing Committee on Parliamentary Privilege and Ethics should have precedence of other

593 *Odgers,* 14th ed, (n 5), pp 87-88.

594 Ibid, p 96.

595 *Minutes*, NSW Legislative Council, 16 October 1991, pp 184-185.

business.[596] The motion was moved with precedence over all other business and agreed to by the House on the following sitting day.[597]

The language of standing order 77 also contemplates that a member may raise as a matter of privilege a matter suddenly arising in proceedings before the House.[598] Matters of privilege suddenly arising have in the past been raised by leave of the House, by way of a substantive motion moved without notice,[599] or by way of a substantive motion moved according to contingent notice.[600]

Under standing order 74(3), debate on a matter of privilege takes precedence of all other business on the day it is moved.

In addition, the procedure under standing order 77 does not prevent a member from giving a notice of motion concerning a matter of privilege and moving it in the usual way. For example, on 9 June 2005, the Hon Peter Breen gave notice of a motion that all material seized by ICAC from his office and remaining in the possession of the Clerk be returned to him. The matter was listed as an item of private members' business, before being agreed to by the House as formal business on 21 June 2005.[601] Equally, there are many examples of matters of privilege being referred to the Privileges Committee for inquiry and report by the giving of notice and the moving of the motion in the usual way.[602]

The resolution establishing the Privileges Committee also allows the President to refer matters of privilege directly to the committee. This provision was inserted into the resolution establishing the committee in 1991.[603] Prior to that, there was no such

---

596 *Minutes*, NSW Legislative Council, 14 October 2003, p 326.

597 *Minutes*, NSW Legislative Council, 15 October 2003, p 332.

598 Standing order 95 also notes that matters of privilege may arise during the proceedings then before the House. Prior to 2004, former standing order 86 also provided that a member may rise to speak upon a matter of privilege suddenly arising.

599 *Minutes*, NSW Legislative Council, 14 March 2013, pp 1537-1538. The motion related to a statement by the President concerning compliance with the 2009 order of the House for the production of State papers in relation to the Mt Penny mining exploration licence and tender process.

600 There is no equivalent to Legislative Assembly standing order 91, under which a member raising a matter of privilege suddenly arising may have 10 minutes to make a statement to establish a *prima facie* case.

601 *Minutes*, NSW Legislative Council, 21 June 2005, p 1470.

602 In 2002, the House referred to the Privileges Committee an inquiry concerning a member's alleged failure to register pecuniary interests on the motion of a private member following the suspension of standing orders. See *Minutes,* NSW Legislative Council, 25 September 2002, pp 383-386, 387-391. In 2005, the House referred to the Privileges Committee an inquiry into protocols for the execution of search warrants of members' offices on a motion moved by the Chair of the committee, after the committee had resolved to seek a reference from the House. See *Minutes*, NSW Legislative Council, 6 April 2005, p 1313. In 2012, the House referred to the Privileges Committee an inquiry into the right of reply process on a motion moved by the Chair of the committee, again after the committee had resolved to seek a reference from the House. See *Minutes*, NSW Legislative Council, 22 February 2012, pp 716-717.

603 *Minutes*, NSW Legislative Council, 16 October 1991, pp 184-185.

provision. It was inserted as a contingency to cover emergency situations, such as a case of interference with the work of a committee or a witness whilst the House was not sitting. Just such an instance occurred in 1993, when the President referred to the Privileges Committee for inquiry and report the *Special Report of the Joint Select Committee Upon Police Administration on Disclosure of In Camera Evidence*, despite the House being prorogued at the time.[604] However, in more recent times the provision has also been used in more routine circumstances. On 12 June 2007, the President referred public comments of the Catholic Archbishop of Sydney, Cardinal Pell, to the Privileges Committee, following the receipt of correspondence from a member of the House in relation to the matter. The President reported the referral of the inquiry to the House when the House sat again on 19 June 2007.[605] Similarly, on 8 August 2017, the President referred to the Privileges Committee an inquiry into procedures to be observed by Council committees to provide procedural fairness to inquiry participants, responding to a recommendation of the Select Committee on the Legislative Council Committee System. The President reported the referral of the inquiry to the House when the House sat again on 12 September 2017.[606]

Special reports from committees

Where a matter of privilege arises during the course of a committee inquiry, the committee may make a special report to the House, which may include a recommendation that the matter be referred to the Privileges Committee for inquiry and report. There are five instances of such reports being made to the House. On each occasion, the House or the President subsequently referred the matter to the Privileges Committee for inquiry and report:

- On 8 November 1988, the Chair of the Select Committee on the Police Regulation (Allegations of Misconduct) Amendment Bill, the Hon Marie Bignold, tabled in the House a Special Report on a possible contempt of the committee by the Revd the Hon Fred Nile.[607] The House referred the matter to the Privileges Committee the next day.[608]
- On 2 March 1993, the President informed the House that on 2 February 1993, he had referred to the Privileges Committee for inquiry and report a Special Report of the Joint Select Committee upon Police Administration entitled *Disclosure of in camera Evidence*, which had been received by the Clerk whilst the House was prorogued.[609]

604 *Minutes*, NSW Legislative Council, 2 March 1993, p 20.
605 *Minutes*, NSW Legislative Council, 19 June 2007, p 127.
606 *Minutes*, NSW Legislative Council, 12 September 2017, p 1874.
607 *Minutes*, NSW Legislative Council, 8 November 1988, p 201.
608 *Minutes*, NSW Legislative Council, 9 November 1988, pp 211-212. For further information, see the discussion in Table 3.1 under the heading '*The Revd the Hon Fred Nile (1988)*'.
609 *Minutes*, NSW Legislative Council, 2 March 1993, p 20. For further information, see the discussion in Table 3.1 under the heading '*The Sun Herald (1993)*'.

- On 18 June 1996, the Chair of Estimates Committee No 1, the Hon Patricia Staunton, tabled in the House a Special Report on a possible contempt of the committee concerning the actions of the Financial Controller of the Parliament in refusing to directly answer questions of the committee.[610] The House referred the matter to the Privileges Committee the next day.[611]
- On 28 April 1998, the Chair of General Purpose Standing Committee No 2, the Hon Jenny Gardiner, tabled in the House a Special Report on a possible contempt of the committee concerning claims that the Minister for Health, the Hon Dr Andrew Refshauge, had attempted to deter a witness from giving evidence to the committee.[612] The House referred the matter to the Privileges Committee the next day.[613]
- On 21 June 2001, the Chair of General Purpose Standing Committee No 3, the Hon Helen Sham-Ho, tabled in the House a Special Report on possible breaches of privilege arising from the inquiry into Cabramatta policing concerning a possible unauthorised publication of confidential submissions and claims that four police officers had been directed by their commanding officer not to provide certain evidence to the committee.[614] The House referred the matter to the Privileges Committee on 28 June 2001.[615]

The conduct of proceedings before the Privileges Committee

In circumstances where the Privileges Committee is required to conduct an inquiry into a possible contempt or matter of privilege, paragraph 21 of the 'Procedural fairness resolution for inquiry participants' provides:

> **Inquiry participants before the Privileges Committee**
>
> Where the Privileges Committee enquires into a matter which may involve an allegation of contempt, the committee may adopt additional procedures as it sees fit in order to ensure procedural fairness and the protection of inquiry participants.[616]

610 *Minutes*, NSW Legislative Council, 18 June 1996, p 223.

611 *Minutes*, NSW Legislative Council, 19 June 1996, p 228. For further information, see the discussion in Table 3.1 under the heading '*The Financial Controller, Parliament of New South Wales (1996)*'.

612 *Minutes*, NSW Legislative Council, 28 April 1998, p 382.

613 *Minutes*, NSW Legislative Council, 29 April 1998, pp 388-389. For further information, see the discussion in Table 3.1 under the heading '*The Hon Dr Andrew Refshauge MP (1998)*'.

614 *Minutes*, NSW Legislative Council, 21 June 2001, p 1042.

615 *Minutes*, NSW Legislative Council, 28 June 2001, pp 1069, 1070. For further information, see the discussion in Table 3.1 under the heading '*NSW Police Service (2001)*'.

616 *Minutes*, NSW Legislative Council, 25 October 2018, pp 3138-3140. In its 2018 report on the adoption by the House of a procedural fairness resolution for inquiry participants, the Privileges Committee did not recommend the adoption by the House of specific procedures for the protection of witnesses before the Privileges Committee in matters of possible contempt. See Privileges Committee, *Procedural fairness for inquiry participants*, Report No 75, June 2018, p 15.

Unlike the Senate,[617] the Council has not adopted additional procedures to be followed by the Privileges Committee when considering possible contempts or matters of privilege.

However, in a small number of instances, the terms of reference for specific inquiries by the Privileges Committee into possible matters of contempt have provided for particular procedures to be followed. In 1999 the terms of reference for an inquiry into statements made by Mr Gallacher and Mr Hannaford in the House required the committee to agree to any request by a witness that his or her identity be protected or that his or her evidence be taken *in camera*.[618] In 2013 the terms of reference for an inquiry into the 2009 Mt Penny return to order specified that the committee was to observe the procedures laid down in the standing orders and the practices and procedures of the House in order to ensure procedural fairness, natural justice and the protection of witnesses and could adopt and report to the House any additional procedures as the committee saw fit.[619]

In some inquiries the Privileges Committee itself has adopted on its own initiative measures to enhance procedural fairness for inquiry participants. Such measures have included engaging legal advisers to advise on the application of relevant principles of procedural fairness/natural justice,[620] allowing members under investigation to submit to the Chair in writing questions to be asked of other witnesses[621] and inviting a member to respond to material before its inclusion in the report of the committee.[622]

The approach of the Privileges Committee to matters of privilege

As indicated in Table 3.1, the Privileges Committee has a long history of investigating possible contempts or matters of privilege. However, even where it has found that a contempt has occurred, consistent with the common law principles laid down in relation to the powers of the Council, it has been extremely circumspect in its responses.

---

617 'Procedures for the protection of witnesses before the Privileges Committee', resolution 2. The resolution was agreed to by the Senate on 25 February 1988. See *Odgers,* 14th ed, (n 5), Appendix 2, pp 787-788.

618 *Minutes*, NSW Legislative Council, 14 September 1999, pp 52-53. However, in the event, the committee conducted the inquiry on the basis of the documentation to hand without holding hearings. See Standing Committee on Parliamentary Privilege and Ethics, *Report on statements made by Mr Gallacher and Mr Hannaford*, Report No 11, November 1999, p 9; Appendix 2, p 13.

619 *Minutes*, NSW Legislative Council, 7 May 2013, pp 1675-1676. The committee later reported that it had not found it necessary to adopt any additional procedures. See Privileges Committee, *The 2009 Mt Penny return to order*, Report No 69, October 2013, p 7.

620 Standing Committee on Parliamentary Privilege and Ethics, *Report on inquiry into the conduct of the Honourable Franca Arena MLC*, Report No 6, June 1998, vol 1, p 9. Other procedures adopted during this inquiry to protect procedural fairness are described in *Report on inquiry into the conduct of the Honourable Franca Arena MLC*, Report No 6, June 1998, vol 1, pp 9-12 and vol 2, Appendix 4. For further information, see the discussion in Chapter 21 (Witnesses) under the heading 'Legal advisers to witnesses'.

621 Standing Committee on Parliamentary Privilege and Ethics, *Report on statements made by Mr Gallacher and Mr Hannaford*, November 1999, Appendix 2, p 4.

622 Standing Committee on Parliamentary Privilege and Ethics, *Report on inquiry into the pecuniary interests register*, October 2002, p 107.

In 1978, the UK House of Commons adopted recommendations of the 1967 House of Commons Select Committee on Parliamentary Privilege regarding the exercise of that House's contempt power. The recommendations suggested that in general the House of Commons should exercise its contempt power:

- as sparingly as possible, and
- only when the House was satisfied that to do so was essential in order to provide reasonable protection for the House, its members or its officers from improper obstruction or attempt at or threat of obstruction causing, or likely to cause, **substantial** interference with the performance of their respective functions.[623] (emphasis added)

The Legislative Council Privileges Committee has adopted the same principles:

- When dealing with contempt, successive Privileges Committees have determined that, for a contempt to be found, the matter must be of such seriousness that it could have a substantial and detrimental impact on the ability of the House, its committee or the member concerned, to function.[624]
- Equally, successive Privileges Committees have observed that a finding of contempt should be used as sparingly as possible, and only when the House is satisfied that to do so is necessary to provide reasonable protection from improper obstruction or substantial interference with the performance of the functions of the House or a member. A finding of contempt should not be made in respect of matters which appear to be of a trivial nature or unworthy of the attention of the House.[625]

In addition to these principles, the Privileges Committee has applied other principles in deciding cases of possible contempt. These include:

- The exercise of the contempt power must be protective and self-defensive only, not punitive, consistent with a conventional or traditional reading of the powers of the Council dating back to *Kielley v Carson*.[626]
- The use of the contempt power should encompass preserving and safeguarding the dignity and honour of the Parliament, the House and its committees.[627]

---

623 Select Committee on Parliamentary Privilege, House of Commons, *Report*, 1966-1967, p xlix; referred to in *Erskine May*, 25th ed, (n 23), para 15.32.

624 Standing Committee upon Parliamentary Privilege, *Report concerning the publication of an article appearing in the Sun Herald Newspaper containing details of in camera evidence*, October 1993, p 16.

625 See, for example, Standing Committee upon Parliamentary Privilege, *Documents issued by the Reverend the Honourable FJ Nile MLC*, December 1989, p 28; and Standing Committee upon Parliamentary Privilege, *Possible intimidation of witnesses before General Purpose Standing Committee No 3 and unauthorised disclosure of committee evidence*, Report No 13, November 2001, p 6.

626 Standing Committee upon Parliamentary Privilege, *Documents issued by the Reverend the Honourable FJ Nile MLC*, December 1989, p 25.

627 Ibid, pp 28-30.

- For an act to constitute contempt it need not be intentional. A contempt may be intended or unintended.[628]
- Contempt encompasses conduct which has a tendency to obstruct the performance of functions. Where a tendency for substantial interference is found, an intended act of contempt that does not, in fact, produce the intended effect can still constitute a contempt. Equally, a threat that is not acted upon can constitute a contempt for the reason that the original threat may still have a tendency to substantially obstruct or interfere with the performance of functions. In the view of the committee: 'A person who threatens a witness but then does not carry out the threat is guilty of contempt, even where the threat was made idly. The tendency of the act is to interfere with the witness'.[629]
- The use of the power to deal with contempt is discretionary.[630]

Findings of the Privileges Committee and actions of the House

As indicated in Table 3.1, following most of its investigations and reports on possible contempts or matters of privilege, the Privileges Committee has concluded that no contempt or other offence has occurred.

On only two occasions has the Privileges Committee made findings of fault and recommendations for redress. On both of these occasions these findings and recommendations were subsequently adopted by the House:

- In 1997, the report of the Standing Committee on Parliamentary Privilege and Ethics found that the conduct of the Hon Franca Arena in making certain allegations in the House fell below the standards the House is entitled to expect of a member and brought the House into disrepute. The committee therefore recommended that Mrs Arena provide a written apology to the House within five sitting days and, failing that, that Mrs Arena be suspended from the service of the House.[631] The House adopted a resolution to this effect.[632] Subsequently, the House accepted a 'statement of regret' from Mrs Arena.[633]
- In 2003, the Privileges Committee found that the execution of a search warrant by ICAC on the Parliament House office of a member of the House, the Hon Peter Breen, was a breach of the immunities of the House. The committee recommended the adoption of procedures for the return of the seized material

628 Standing Committee on Parliamentary Privilege and Ethics, *Report on special report from General Purpose Standing Committee No 2 concerning a possible contempt*, Report No 9, November 1998, p 35.
629 Ibid, p 23.
630 Ibid, p 19.
631 Standing Committee on Parliamentary Privilege and Ethics, *Inquiry into the conduct of the Honourable Franca Arena MLC*, Report No 6, June 1998, p x.
632 *Minutes*, NSW Legislative Council, 1 July 1998, pp 631-632, 633-635.
633 *Minutes*, NSW Legislative Council, 16 September 1998, pp 693-696. For further information, see the discussion later in this chapter under the heading 'The Arena case'.

to determine which items were subject to parliamentary privilege.[634] The House subsequently adopted these procedures.[635]

In addition, the Privileges Committee has on occasion found an irregularity or unintended contempt, but recommended that the House take no further action.[636]

The Privileges Committee has also at times made recommendations concerning wider issues beyond the particular instance of contempt or matter of privilege referred to it. These have included recommendations concerning the protections available to police officers who give evidence to parliamentary inquiries,[637] the practices relating to the making of orders for papers by the House,[638] and the need for legislation to define the powers and privileges of the House.[639] Some of these recommendations have been adopted by resolution of the House, such as those concerning the protections available to police officers who give evidence to parliamentary inquiries.[640] Others have been implemented in practice without a resolution, such as recommendations in relation to the drafting of orders for papers,[641] whilst others have yet to be considered.[642]

There is one instance where the House has pre-empted a report of the Privileges Committee on a matter of privilege. In 1996, the House suspended the Hon Michael

634 Standing Committee on Parliamentary Privilege and Ethics, *Parliamentary privilege and seizure of documents by ICAC*, Report No 25, December 2003.

635 *Minutes*, NSW Legislative Council, 4 December 2003, pp 494-495.

636 See Standing Committee upon Parliamentary Privilege, *Report concerning the publication of an article appearing in the Sun Herald newspaper containing details of in camera evidence*, October 1993, Recommendation 1; Standing Committee on Parliamentary Privilege and Ethics, *Possible intimidation of witnesses before GPSC No 3 and unauthorised disclosure of committee evidence*, Report No 13, November 2001, pp 32-35.

637 Standing Committee on Parliamentary Privilege and Ethics, *Possible intimidation of witnesses before GPSC No 3 and unauthorised disclosure of committee evidence*, November 2001.

638 Privileges Committee, *The 2009 Mt Penny return to order*, Report No 69, October 2013.

639 Standing Committee upon Parliamentary Privilege, *Report concerning the publication of an article appearing in the Sun Herald newspaper containing details of in camera evidence*, October 1993, Recommendation 5; Standing Committee on Parliamentary Privilege and Ethics, *Report on inquiry into sanctions where a minister fails to table documents*, Report No 1, 10 May 1996, Recommendation 3; Standing Committee on Parliamentary Privilege and Ethics, *Report on inquiry into statements made by Mr Gallacher and Mr Hannaford*, Report No 11, 30 Nov 1999, Resolution 4; Standing Committee on Parliamentary Privilege and Ethics, *Report on sections 13 and 13B of the Constitution Act 1902*, Report No 15, 1 December 2001, Recommendation 2; Standing Committee on Parliamentary Privilege and Ethics, *Parliamentary privilege and seizure of documents by ICAC*, Report No 25, 3 December 2003, Recommendation 3; Privileges Committee, *Review of Members' Code of Conduct and draft Constitution (Disclosures by Members) Amendment Regulation 2006*, Report No 35, October 2006, Recommendation 9.

640 *Minutes*, NSW Legislative Council, 6 December 2001, p 1351, adopting Recommendations 2 to 4 of the Standing Committee on Parliamentary Privilege and Ethics, *Possible intimidation of witnesses before GPSC No 3 and unauthorised disclosure of committee evidence*, November 2001.

641 See Privileges Committee, *The 2009 Mt Penny return to order*, Report No 69, October 2013, Recommendations 2 and 3.

642 For example, the adoption of guidelines in relation to the exercise of members' freedom of speech and the adoption of privileges legislation in New South Wales.

Egan from the House for failing to table documents[643] before the Privileges Committee had reported on its inquiry into what sanctions should be imposed.[644]

Should dealing with contempts be transferred to the courts?

From time to time it has been argued that the contempt power of houses of parliament in Australia generally should be transferred to the ordinary courts, at least where the alleged contempt concerns the acts or omissions of a member of the public, on the grounds that contempt proceedings in parliament depart from fundamental principles of natural justice.[645] In particular, it is suggested that what constitutes contempt of parliament is not fully defined, that parliamentary processes of investigation and review are not subject to clear and transparent processes to guarantee the rights of individuals, that such proceedings entail houses acting as judges in their own cases without any external review, and that houses can in some cases impose very significant penalties. Often cited in this regard, at least in the Australian context, is the House of Representatives' imprisonment of Messrs Fitzpatrick and Browne for 90 days on 10 June 1955. Their subsequent appeal to the High Court for a writ of *habeas corpus* was dismissed in *R v Richards; Ex parte Fitzpatrick and Brown*.[646]

Such arguments are of less relevance to the Houses of the Parliament of New South Wales. As indicated, the Houses in New South Wales do not have a punitive power to punish contempts, except the punitive power under section 11 of the *Parliamentary Evidence Act 1901* to punish a witness who refuses to answer a 'lawful question', which the Legislative Council has never sought to exercise.[647] On a conventional reading of

---

643 *Minutes*, NSW Legislative Council, 2 May 1996, pp 113-114, 114-118.

644 See the report of the Standing Committee on Parliamentary Privilege and Ethics, *Report on inquiry into sanctions where a minister fails to table documents*, Report No 1, May 1996, tabled in the House on 10 May 1996. See *Minutes*, NSW Legislative Council, 14 May 1996, p 128. For further information, see the discussion in Chapter 19 ('Documents tabled in the Legislative Council) under the heading '*Egan v Willis and Cahill* (1996) and *Egan v Willis* (1998): The functions and powers of the Legislative Council'.

645 See, for example, the Hon Wayne Martin AC, Chief Justice of Western Australia, 'Natural justice in the parliamentary sphere: should parliaments retain the power to punish?', Australia and New Zealand Association of Clerks at the Table Conference, Perth, 24 January 2018; and G Lindell and G Carney, 'Review of procedures of the House of Commons relating to the consideration of privilege matters and procedural fairness', Paper prepared for the House of Representatives Standing Committee on Privileges, 23 February 2007.

646 (1955) 92 CLR 157. See in particular the criticism by the former Chief Justice of the High Court, the Hon Sir Anthony Mason, expressed in A Mason, 'A New Perspective on Separation of Powers', *Canberra Bulletin of Public Administration*, (No 82, December 1996), p 5. It is noted that section 4 of the *Parliamentary Privileges Act 1987* (Cth) has now introduced a definition of what constitutes an offence against a House of the Commonwealth Parliament, and section 9 now requires that a resolution and warrant for a person's imprisonment must specify the particulars of an offence. Together, these provisions potentially would permit a court to inquire into and review a decision by a House of the Commonwealth Parliament to commit a citizen to prison.

647 It has been argued that this power, at least as currently drafted, is out of step with community expectations of the role of Parliament and modern notions of procedural fairness. See B Duffy and

the common law, should either House of the Parliament of New South Wales seek to exercise a punitive power in relation to a contempt, that exercise would likely be struck out by the courts.

Reflecting the Legislative Council's lack of punitive powers, the Privileges Committee has been very circumspect in its recommendations to the House in relation to matters of possible contempt and the House has followed these recommendations. As indicated above, findings of contempt have only been made in matters of such seriousness as to have a substantial and detrimental impact on the ability of the House, its committees or members to function. In addition, as noted above, the House and the Privileges Committee have also in the past sought, where necessary, to provide witnesses before the Privileges Committee with additional procedural safeguards for the protection of natural justice.[648]

Nevertheless, should the Houses of the Parliament of New South Wales ever seek to adopt by statute coercive powers to deal with contempt, or should further case law precipitate a re-assessment of the contempt powers of the Houses in New South Wales at common law, this position may need to be re-examined.[649] The adoption or assertion of coercive powers to deal with contempt would potentially need to be safeguarded by clear identification of the circumstances in which such power could be invoked.

COMMON LAW PRIVILEGES GENERALLY ALTERED ONLY BY EXPRESS WORDS

It is well established that the privileges of parliaments generally at common law are not affected by a statutory provision unless the provision alters the common law of privilege by express words or by 'necessary implication', and that the presumption against alteration of the common law of privilege by necessary implication is very strong.

The founding authority for this position is the 1870 decision of the House of Lords in *Duke of Newcastle v Morris*, in which the Lord Chancellor, Lord Hatherley, observed:

> It seems to me that a more sound and reasonable interpretation of such an Act of Parliament would be, that the privilege which had been established by Common Law and recognised on many occasions by Act of Parliament, should be held to be a continuous privilege not abrogated or struck at unless by express words in the statute … [650]

S Ohnesorge, 'Out of step? The New South Wales *Parliamentary Evidence Act 1901*', *Parliamentary Law Review*, (Vol 27, 2016).

648 For further information, see the discussion earlier in this chapter under the heading 'The conduct of proceedings before the Privileges Committee'. See also Privileges Committee, *Procedural fairness for inquiry participants*, Report No 75, June 2018, pp 5-6.

649 The position would also potentially need to be considered again should the House ever seek to punish for contempt under section 11 of the *Parliamentary Evidence Act 1901*.

650 *Duke of Newcastle v Morris* (1870) LR 4 HL 661 at 668 per Lord Hatherley.

In 2000 in the Queensland Supreme Court decision of *Criminal Justice Commission v Dick*,[651] Helman J remarked on the 'implausibility' of 'the proposition that Parliament should have intended by … indirect means to surrender by implication part of the privilege attaching to its proceedings'.[652]

Similarly, in 2002 in the Queensland Supreme Court decision of *Criminal Justice Commission v Parliamentary Criminal Justice Commissioner*,[653] McPherson JA affirmed 'the general interpretive rule that express words (or, as would probably now be said, unmistakable and unambiguous language) are required to abrogate a parliamentary privilege'.[654]

Accordingly, in most instances, a provision intended to affect the common law privileges of the Houses of the Parliament of New South Wales would need to expressly state as much.[655]

In certain circumstances, common law rights may also be altered by 'necessary implication'. In 1983 in the decision of the High Court in *Pyneboard Pty Ltd v Trade Practices Commission; Dunlop Olympic Ltd v Trade Practices Commission,*[656] Mason ACJ, Wilson and Dawson JJ observed:

> … the general principle that a statute will not be construed to take away a common law right unless the legislative intent to do so clearly emerges whether by express word or by necessary implication.[657]

The test of necessary implication is solely one of ascertaining the intention of parliament, having regard to the language of the statute as interpreted in its context.

However, in the absence of express words, for a court to interpret a statute as affecting the law of parliamentary privilege in New South Wales would require very clear and unambiguous evidence of Parliament's intent. As expressed by Carney:

> … the presumption against the abrogation of fundamental rights is particularly strong in relation to parliamentary privileges, given their importance to the effective functioning of parliament. Parliament is unlikely to intend to alter its privileges without making its intentions clear. Accordingly, a court will require

---

651 [2000] QCS 272.

652 *Criminal Justice Commission v Dick* [2000] QCS 272 at [13] per Helman J.

653 [2002] 2 Qd R 8.

654 *Criminal Justice Commission v Parliamentary Criminal Justice Commissioner* [2002] 2 Qd R 8 at [26] per McPherson JA. See also *Aboriginal Legal Service of Western Australia Inc v State of Western Australia* (1993) 113 ALR 87 at 93 per Nicholson J.

655 See, for example, section 122(2) of the *Independent Commission Against Corruption Act 1988*, which waives privilege for the purposes of a commission investigation in relation to the 'Register of Disclosures by Members of the Legislative Council' and the 'Register of Disclosures by Members of the Legislative Assembly'.

656 (1983) 152 CLR 328.

657 *Pyneboard Pty Ltd v Trade Practices Commission; Dunlop Olympic Ltd v Trade Practices Commission* (1983) 152 CLR 328 at 341 per Mason ACJ, Wilson and Dawson JJ.

> very clear evidence of parliament's intention before parliamentary privilege is abrogated by statute.[658]

In Queensland, section 13B of the *Acts Interpretation Act 1954* (Qld), as inserted in 2000, puts these matters in statutory form. It provides as follows:

> **13B Acts not to affect powers, rights or immunities of Legislative Assembly except by express provision**
>
> (1) An Act enacted after the commencement of this section affects the powers, rights or immunities of the Legislative Assembly or of its members or committees only so far as the Act expressly provides.
>
> (2) For subsection (1), an Act affects the powers, rights or immunities mentioned in the subsection if it abolishes any of the powers, rights or immunities or is otherwise wholly or partly inconsistent with their continued existence, enjoyment or exercise.

Should the principle ever be abandoned that the privileges of parliaments generally at common law are only affected by express statutory words or necessary implication where the intent of parliament is abundantly clear, there would be no end to the general statutory provisions which could be interpreted as inhibiting the privileges of the Houses of the Parliament of New South Wales.

Statutory secrecy provisions

The principle that the privileges of the Houses of the Parliament of New South Wales at common law are only affected by express statutory words or necessary implication arises most commonly in relation to so-called statutory secrecy provisions: that is, provisions in statutes which prohibit in general terms the disclosure of certain categories of information. Such provisions have no effect on the law of privilege in New South Wales, unless they do so expressly or by necessary implication.

In particular, such provisions have no effect on the common law power of the Legislative Council and its committees to conduct inquiries and the statutory power under the *Parliamentary Evidence Act 1901* to require an answer to any 'lawful question'. This position has recently been expressly acknowledged by the Solicitor-General and the Crown Solicitor.[659] This is examined in more detail in Chapter 21 (Witnesses).[660] The same position is expressed in *Odgers*.[661]

Nor do such statutory secrecy provisions affect the power of the House to order the production of State papers. This matter arose in the House in late 2019 and early 2020.

---

658 Carney, *Members of Parliament: Law and Ethics*, (n 227), pp 200-205.

659 Crown Solicitor, 'Section 38 of the *Public Finance and Audit Act* and powers of Parliamentary Committees', Advice to the Auditor General, 10 August 2018, published in Audit Office, Report on State Finances, 19 October 2018, Appendix 2, paras 3.10-3.11, 3.19.

660 See the discussion under the heading 'Statutory secrecy provisions and questions'.

661 *Odgers,* 14th ed, (n 5), pp 68-73.

On 21 November 2019, the Hon Daniel Mookhey moved that the House order the production of State papers concerning the investigation undertaken by Revenue NSW into the payroll tax compliance of certain companies.[662] The Leader of the Government in the Legislative Council subsequently took a point of order that the motion would breach certain statutory secrecy provisions under the *Taxation Administration Act 1996*. The President reserved his ruling. Following the receipt of verbal advice from Mr Bret Walker SC, on 25 February 2020, the Deputy President delivered the President's ruling on the President's behalf. The ruling did not uphold the point of order, observing in part:

> Bret Walker noted that the apparent settlement of this question, without recourse to litigation, reflected the maturity of the institution of responsible government in New South Wales. He noted that 'the law is a harmonious whole' and statutory secrecy provisions do not preclude a public servant from co-operating with the Legislative Council's exercise of its power to order the production of State papers. … A public servant responding to an order of the Legislative Council will not be committing an offence and the doctrines around statutory secrecy are not intended to inhibit the actions of those who exercise or execute the orders of the House.[663]

In compliance with the order, an initial return was received by the Clerk on 19 March 2020 and reported to the House on 24 March 2020.[664]

In a previous return to order dated 23 April 2008 in relation to the appointment of Dr Graeme Reeves to the Greater Southern Area Health Service, the Director-General of NSW Health observed:

> … information held by the NSW Department of Health is subject to statutory confidentiality provisions and privacy laws. While an Order to Produce under Standing Order 52 will generally provide a basis to release documents without breaching these provisions, this protection will only apply to documents which actually fall within the terms of the Order to Produce.[665]

The other circumstance in which this matter arises relates to the specific reporting provisions, direct to Parliament, applying to certain independent statutory bodies. It has been argued that by expressly establishing prescriptive reporting provisions, such statutes have by implication proscribed the power of a Legislative Council committee to, for example, require the production of a draft report. This matter is discussed further in Chapter 20 (Committees).[666]

Notwithstanding the principle that the privileges of parliament at common law are only affected by express statutory words or necessary implication, for the avoidance of doubt,

---

662 *Minutes*, NSW Legislative Council, 21 November 2019, pp 768-769.

663 Ruling: Khan (Deputy), *Hansard*, NSW Legislative Council, 25 February 2019, p 14.

664 *Minutes*, NSW Legislative Council, 24 March 2020, p 861.

665 Correspondence from the Director General, NSW Health to the Deputy Director General, Department of Premier and Cabinet in relation to the Appointment of Dr Graeme Reeves dated 18 April 2008. See *Minutes*, NSW Legislative Council, 6 May 2008, p 555.

666 See the discussion under the heading 'Orders for the production of State papers by committees'.

there are various statutes in New South Wales that expressly preserve parliamentary privilege.[667]

Express statutory abrogation of parliamentary privilege

The immunity of freedom of speech, whilst attaching to the parliamentary speeches of individual members, nevertheless belongs to the Legislative Council as a whole. As such, the privilege cannot simply be waived by an individual member. As stated by Lord Browne-Wilkinson in *Prebble v Television New Zealand Ltd*:

> The privilege protected by article 9 is the privilege of Parliament itself. The actions of any individual member of Parliament, even if he has an individual privilege of his own, cannot determine whether or not the privilege of Parliament is to apply.[668]

Whilst it is not open to individual members of the Council to waive privilege over their speeches, it is of course open to the Parliament to legislate to allow the courts or other bodies to consider matters normally precluded from examination by virtue of privilege. There have been two cases where this has occurred: in 1997, the Parliament legislated to waive privilege in relation to serious allegations made in the Council by the Hon Franca Arena; and in 2012, the Parliament legislated to waive privilege attaching to the 'Register of Disclosures by Members of the Legislative Council' and the 'Register of Disclosures by Members of the Legislative Assembly' to allow ICAC to make use of either register for the purposes of any investigation, finding or recommendation. The Hon Franca Arena matter is discussed below. The question of whether privilege attaches to disclosures under the Parliament's interest disclosure regime is discussed earlier in this chapter.[669]

The Arena case

The first edition of *New South Wales Legislative Council Practice* contains a detailed account of the Arena case.[670]

In summary, on 17 September 1997, the Hon Franca Arena delivered a speech in the Legislative Council in which she alleged that the Premier and the Commissioner of the Royal Commission into the New South Wales Police Service, amongst others, had been involved in a 'cover-up' of high-profile paedophiles.[671]

The allegations being of such gravity, the Parliament immediately enacted the *Special Commissions of Inquiry Amendment Act 1997*, assented to on 24 September 1997, to enable either House, by resolution, to authorise the Governor to establish a Special Commission

667 See, for example, the *Independent Commission Against Corruption Act 1988*, s 122; the *Evidence Act 1995*, s 10; and the *Parliamentary Precincts Act 1997*, s 26.

668 *Prebble v Television New Zealand Ltd* [1995] 1 AC 321 at 335 per Lord Browne-Wilkinson. For further information, see Twomey, (n 103), p 524.

669 See the discussion under the heading 'The Register of Disclosures by Members'.

670 *New South Wales Legislative Council Practice,* 1st ed, (n 57), pp 108-113.

671 *Hansard*, NSW Legislative Council, 17 September 1997, pp 61-68.

of Inquiry (similar to a royal commission) to investigate the matter.[672] The act also permitted the House to declare by resolution that parliamentary privilege was waived in connection with the inquiry.[673] However, whilst permitting a collective waiver of privilege by the House, the act preserved the right of any individual member to claim privilege in relation to the inquiry.[674]

On 25 September 1997, only eight days after the speech given by Mrs Arena, the Legislative Council unanimously passed a resolution authorising the establishment of a Special Commission of Inquiry to investigate Mrs Arena's claims and waiving parliamentary privilege in connection with the inquiry.[675] By Letters Patent dated 26 September 1997, the Governor appointed the Hon John Nader RFD QC to conduct the inquiry.

Mrs Arena immediately filed proceedings in the Supreme Court, which were removed to the Court of Appeal, challenging the validity of the *Special Commissions of Inquiry Amendment Act 1997* on several grounds, including that the act was ineffective in waiving privilege because the preserved right of individual members to claim privilege cancelled the waiver.

The Court of Appeal unanimously dismissed the challenge, finding that there was nothing incongruous in a House of Parliament being able to waive the privileges of the House, thereby permitting an external inquiry into statements made inside the House, whilst at the same time allowing members to preserve their individual privileges.[676] The court also rejected the other grounds of the challenge.[677]

Mrs Arena subsequently applied for special leave to appeal to the High Court. The principal attack on the validity of the *Special Commissions of Inquiry Amendment Act 1997* in the special leave application was that it infringed the principle of parliamentary free speech protected by Article 9 of the *Bill of Rights 1689* because it permitted the House to determine that statements made by a member in the House may be 'questioned' in a 'place out of Parliament'.[678] It was also argued that, although the act purported to preserve an individual member's parliamentary privilege in the face of a collective waiver by the House, the effect of permitting an inquiry to proceed and take evidence would be to destroy that individual privilege.[679]

672 *Special Commissions of Inquiry Act 1983*, s 33B(1).

673 Ibid, s 33D(1).

674 Ibid, s 33D(3).

675 Under section 33F of the *Special Commissions of Inquiry Act 1983*, the resolution required the support of at least two-thirds of the members of the House present and voting. In the event, all 29 members present and voting supported the motion. See *Minutes*, NSW Legislative Council, 25 September 1997, pp 93-94.

676 *Arena v Nader* (1997) 42 NSWLR 427 at 437 per the whole court.

677 Ibid, at 434-438 per the whole court. See also *New South Wales Legislative Council Practice,* 1st ed, (n 57), pp 109-110.

678 *Arena v Nader*, High Court transcript, 15 October 1997, at p 10.

679 *Arena v Nader*, High Court transcript, 10 October 1997, at p 3.

Special leave was refused, with a three-member bench of the High Court finding that the Court of Appeal's decision was correct. The court referred to the well-established principle that the plenary legislative power of the Parliament of New South Wales extends to laws which affect the privileges of its Houses, and held that the act did not exceed any limits which may apply to that power.[680]

When the Special Commission of Inquiry resumed on 16 October 1997, Mrs Arena exercised her right to claim privilege. However, all other witnesses gave evidence as required.

The report of the Special Commission of Inquiry was tabled in the House on 11 November 1997.[681] It concluded that Mrs Arena's statements concerning these matters were 'false in all respects'.[682]

The same day, the Attorney General, the Hon Jeff Shaw, moved a motion that the Hon Franca Arena be expelled from the Council on the ground that she had been found 'guilty of conduct unworthy of a member of the Legislative Council'.[683] Ultimately, following an inquiry into the matter by the Privileges Committee,[684] the House accepted a 'statement of regret' from Mrs Arena.[685]

These events, including but not limited to the express statutory waiver of parliamentary privilege brought about by the *Special Commissions of Inquiry Amendment Act 1997*, were unprecedented, at least in New South Wales. Although it is not uncommon for royal commissions and other investigative bodies to investigate matters raised by members of Parliament,[686] the use of such a process to investigate the *bona fides* of a member's statement was unparalleled. It is unlikely to be repeated except in exceptional circumstances.

THE PARLIAMENTARY PRECINCTS

The *Parliamentary Precincts Act 1997* provides that the parliamentary precincts are under the control and management of the Presiding Officers, subject to the power of each House to control its own internal affairs and proceedings.[687] The Presiding Officers

680 *Arena v Nader* (1997) 71 ALJR 1604 at 1605 per Brennan CJ, Gummow and Hayne JJ.

681 *Report of the Special Commission of Inquiry into Allegations made in Parliament by the Honourable Franca Arena, MLC*. See *Minutes*, NSW Legislative Council, 11 November 1997, pp 158-159.

682 The Hon John Nader RFD QC, *Report of the Special Commission of Inquiry into Allegations Made in Parliament by the Honourable Franca Arena MLC*, 7 November 1997, p 40.

683 *Minutes*, NSW Legislative Council, 11 November 1997, pp 159, 161-162.

684 Standing Committee on Parliamentary Privilege and Ethics, *Inquiry into the Conduct of the Honourable Franca Arena MLC*, Report No 6, June 1998. For further information, see the discussion in Chapter 21 (Witnesses) under the heading 'Legal advisers to witnesses'.

685 *Minutes*, NSW Legislative Council, 16 September 1998, pp 693-696.

686 For an example where the Police Integrity Commission investigated issues raised in the House by the Hon Charlie Lynn, see n 381.

687 *Parliamentary Precincts Act 1997*, s 7.

and 'authorised officers', either parliamentary officers or police officers authorised by the Presiding Officers, 'may direct a person to leave or not enter the Parliamentary precincts', and may arrest a person who refuses or fails to leave the parliamentary precincts when lawfully directed to do so. They may also prevent a person from entering the parliamentary precincts.[688] This power does not extend to members. The Presiding Officers are explicitly prevented from issuing directions to members to leave or not enter the parliamentary precincts or the parliamentary zone.[689]

The control and management of the precincts by the Presiding Officers has no impact on the law of parliamentary privilege. The *Parliamentary Precincts Act 1997* explicitly states that nothing in the act derogates from the powers, privileges and immunities of Parliament under any other law.[690] Nor is there any suggestion that parliamentary privilege is in some way stronger or augmented within the precincts. For example, a speech made by a member within the parliamentary precincts, but outside of either House, does not enjoy any special status. Nor is a criminal offence committed within the parliamentary precincts treated any differently to a criminal offence committed outside the precincts.[691]

Police powers in the parliamentary precincts

The *Parliamentary Precincts Act 1997* provides that the Presiding Officers may enter into a memorandum of understanding with the Commissioner of Police to regulate the exercise of police functions in the parliamentary precincts and parliamentary zone.[692] A police officer acting in conformity with a memorandum of understanding or acting in conformity with a specific authorisation given by a Presiding Officer is an 'authorised officer' for the purposes of the act.[693]

The Presiding Officers and the Commissioner of Police entered into such a memorandum of understanding for police access to the parliamentary precincts on 23 June 1998. A revised memorandum was adopted on 3 December 2004. Under this memorandum, police may only act within the parliamentary precincts under the specific authorisation of the Presiding Officers, unless in pursuit of a person to effect an arrest, or in cases of utmost urgency in which there is a clear and unmistakable threat to the lives of persons within the parliamentary precincts and only when it is absolutely necessary to do so.[694]

688 Ibid, ss 18, 19 and 20. This power is entirely distinct from the common law power of the Houses to remove and exclude strangers.

689 Ibid, ss 25 and 26(2).

690 Ibid, s 26(1).

691 For further information, see the discussion earlier in this chapter under the heading 'Parliamentary privilege and the criminal law'.

692 *Parliamentary Precincts Act 1997*, s 27.

693 Ibid, s 5.

694 'Memorandum of Understanding between the Presiding Officers and the Commissioner of Police', 3 December 2004.

On 1 January 2020, the Presiding Officers entered into a separate memorandum of agreement with the Commissioner of Police for the provision of a contingent of special constables to provide a continuous security service in and around the parliamentary precincts and parliamentary zone. This agreement replaced a previous agreement from 2009, and superseded all previous arrangements affecting special constables at Parliament House, except the memorandum of understanding of December 2004, cited above. The January 2020 memorandum of agreement once again provides that nothing in the memorandum shall be taken to affect the rights and privileges of Parliament in relation to the freedom of speech, debates and proceedings in Parliament.[695]

THE APPLICATION OF OTHER LEGISLATION TO PARLIAMENT

There is no general exemption of the Parliament from the operation of the law in New South Wales, such as employment law. However, the question of whether a particular act applies to or binds the Parliament is a matter of construction to be determined in relation to the provisions of that act.

In the UK, the situation has been clouded by the 1935 decision in *R v Graham-Campbell; Ex parte Herbert*,[696] in which the Lord Chief Justice of England, no doubt motivated by a desire not to trespass on matters perceived as belonging to the UK Parliament, ruled that the courts would not hear a complaint regarding the sale of alcohol in the precincts of the Parliament without the necessary licence because the matter fell within the internal affairs of the House of Commons. Subsequent legislation in the UK, notably in the field of employment, has accordingly been drafted or treated as not binding on the Houses of the UK Parliament, on the basis that *Herbert* was correctly decided. It seems extremely doubtful that it was. The decision was significantly criticised by the UK Parliament's 1999 Joint Committee on Parliamentary Privilege, which stated that the 'practical consequences of this decision are not satisfactory', and recommended the enactment of legislation to remedy the matter.[697] In *R v Chaytor* in 2010, the UK Supreme Court also cast doubt on the apparent legal implications of *Herbert*.[698] However, in 2013, the UK Parliament's Joint Committee on Parliamentary Privilege was forced to the reluctant conclusion that '[i]n the absence of legislation, the safest way forward, however undesirable it may be as a statement of principle, is to reiterate and formalise the current presumption that legislation does not apply to Parliament unless it expressly provides otherwise'.[699]

695 'Memorandum of Agreement between Parliament of New South Wales and New South Wales Police Force', January 2020, para 5a.

696 [1935] 1 KB 594.

697 Joint Committee on Parliamentary Privilege, UK Parliament, *Report: Volume I – Report and Proceedings of the Committee*, Session 1998-1999, p 77.

698 *R v Chaytor* [2010] UKSC 52 at [78] per Lord Phillips.

699 Joint Committee on Parliamentary Privilege, UK Parliament, *Parliamentary Privilege: Report of Session 2013-2014*, 3 July 2013, pp 54-57. See also the discussion in G Griffith, 'Parliamentary Privilege: Major Developments and Current Issues', NSW Parliamentary Library Background Paper No 1/07, pp 75-76.

In Australia, the courts have adopted the opposite position to that reached in *Herbert*, avoiding any such problems. In 1975 in *Rees v McCay*,[700] a decision of the Full Court of the Supreme Court of the Australian Capital Territory dealing with the application of traffic ordinances to the precincts of Federal Parliament, Fox J (Blackburn and Woodward JJ concurring on this point) observed:

> The fact is that there is no general abrogation of the ordinary law. It is not necessary for the effective performance by parliament of its functions that there be any such abrogation. On the contrary, it must be very much in the interests of members, in their corporate and individual capacities, that the ordinary law should operate.[701]

In 1981 in *Bear v State of South Australia*,[702] a decision of the South Australian Industrial Court, Russell J found that a member of the catering staff of the Parliament of South Australia was entitled to compensation for injury suffered at work, noting that '[the applicant's] relationship with Parliament is not part of the internal business of Parliament'.[703]

Various legal advices to the Parliament of New South Wales by the Crown Solicitor and others have adopted the same position.[704] Of note is the following statement by the Crown Solicitor:

> In my view, as Parliament was not expressly excluded from the terms of the PD Act[705] I think it would be difficult to argue that Parliament is not bound by the terms of the PD Act. There is authority which indicates that unless there is a clear indication to the contrary, Acts are to have application (to Parliament), for there is no general abrogation of the ordinary law in the case of activities conducted in Parliament House under the authority of Parliament or by Members of Parliament.[706]

---

700 (1975) 26 FLR 228.

701 *Rees v McCay* (1975) 26 FLR 228 at 232 per Fox J.

702 (1981) 48 SAIR 604.

703 *Bear v State of South Australia* (1981) 48 SAIR 604 at 623 per Russell J. See also the Canadian case of *Canada (House of Commons) v Vaid* [2005] 1 SCR 667.

704 Crown Solicitor, 'Liability under Occupational Health and Safety Act to Legislative Staff', 16 December 1993, paras 4.4-4.5; Crown Solicitor, 'Application of Protected Disclosures Act 1994 to the staff of the Legislature', 4 December 1995, para 3.26; Crown Solicitor, 'Advice Regarding Discrimination on Ground of Carers' Responsibilities in Relinquishing Substantive Position', 6 June 2001, paras 3.1 and 4.4; J Shaw QC, 'Legislative Council of New South Wales, Obligations under the Anti-Discrimination Act 1997 (NSW)', 5 September 2001, pp 1-3; Crown Solicitor, 'Application of Privacy and Personal Information Protection Act 1998', 19 February 2002, paras 4.2-4.3; and Crown Solicitor, 'Application of State Records Act to Houses of Parliament', 22 March 2002, para 3.1.

705 *Protected Disclosures Act 1994.*

706 Crown Solicitor, 'Application of Protected Disclosures Act 1994 to the staff of the Legislature', 4 December 1995, para 3.26. This advice was cited again in Crown Solicitor, 'Application of Privacy and Personal Information Protection Act 1998', 19 February 2002, paras 4.2-4.3; and Crown Solicitor, 'Application of State Records Act to Houses of Parliament', 22 March 2002, para 3.1.

Accordingly, there is no general abrogation of the law in force in New South Wales within the precincts of the Parliament. However, it must be emphasised once again that such laws do not override the law of parliamentary privilege, unless they do so by express provision or necessary intendment, where the intention of the Parliament to override privilege is abundantly clear.[707] It is possible that circumstances may arise in the future where statutes, or specific provisions of statutes in force in New South Wales, are interpreted as not applying to the Parliament because to do so would impinge on the immunities, rights and powers of the Houses, their committees and members.

707 Crown Solicitor, 'Application of State Records Act to Houses of Parliament', 22 March 2002, para 3.1. See also the discussion earlier in this chapter under the heading 'Common law privileges generally altered only by express words'.

CHAPTER 4

ELECTIONS FOR THE LEGISLATIVE COUNCIL

The *Constitution Act 1902* provides for a Legislative Council consisting of 42 members elected for two terms of the Legislative Assembly (eight years) and a Legislative Assembly consisting of 93 members elected for a term of four years, subject to early dissolution in special circumstances. The Council is constituted in such a way that the term of one-half of its members (21) expires at the end of each term of the Assembly. An election for 21 Council members, known as a periodic Council election, is held in conjunction with a general election for the members of the Assembly every four years.[1]

Periodic Council elections are conducted in accordance with the Sixth Schedule to the *Constitution Act 1902*[2] and the *Electoral Act 2017*. Under the Sixth Schedule, the method of electing the Legislative Council is a form of proportional representation. The Sixth Schedule is 'entrenched' in the *Constitution Act 1902*, in the sense that it cannot be amended or repealed without approval at a referendum.[3]

THE TERM OF SERVICE OF MEMBERS OF THE COUNCIL

The term of service of a member of the Legislative Council expires on the day of the termination, generally by expiry,[4] of the second Assembly following his or her election.[5] The expiry or dissolution of the Legislative Assembly is discussed in Appendix 2

1 The historical development of the Legislative Council electoral arrangements is discussed in Chapter 2 (The history of the Legislative Council).

2 *Constitution Act 1902*, s 22A(1).

3 *Constitution Act 1902*, s 7A(1)(b). For further information, see the discussion in Chapter 15 (Legislation) under the heading ''Manner and form' restrictions on bills to amend the *Constitution Act 1902*'. See also A Twomey, *The Constitution of New South Wales*, (Federation Press, 2004), pp 310-312.

4 It is also possible for the term of service of members to end as a result of the early dissolution of the Assembly. However since 1995, with the entrenchment of fixed four-year terms for the Legislative Assembly by sections 24(1) and 24B of the *Constitution Act 190*2, this scenario will only occur in the very unlikely event of the early dissolution of the Assembly under section 24B of the *Constitution Act 1902* or the even more unlikely event that the Governor exercises his or her reserve power to dismiss the Premier and dissolve the Parliament.

5 *Constitution Act 1902*, s 22B(2).

(Expiry or dissolution of a Parliament). The term of service of a member elected to fill a casual vacancy expires on the day the seat of the member would have become vacant had the casual vacancy not occurred.[6]

PERIODIC COUNCIL ELECTIONS

The Legislative Council, unlike the Legislative Assembly, is a continuing body. Section 3 of the *Constitution Act 1902* defines a 'periodic Council election' as 'an election held for the return of 21 Members of the Legislative Council'. Accordingly, only half the members of the Legislative Council are elected at each periodic Council election. The remaining members continue to hold their seats until the following election.

Under sections 22A(3) and 22B(2) of the *Constitution Act 1902* and section 74(2) of the *Electoral Act 2017*, periodic Council elections are tied to the date of general elections for the Legislative Assembly. By virtue of section 24A of the *Constitution Act 1902*, when the Assembly expires at the end of its normal four-year term, the date of the general election for the Assembly is the fourth Saturday in March.[7]

Under section 22A(1) of the *Constitution Act 1902*, periodic Council elections are conducted in accordance with the Sixth Schedule to the *Constitution Act 1902*. This is supplemented by the *Electoral Act 2017*, which is the other key legislative provision governing the conduct of elections.[8]

Unlike Legislative Assembly elections, where a single member is returned for each electoral district,[9] clause 1 of the Sixth Schedule provides that '[a]t a periodic Council election, the whole of the State of New South Wales shall be a single electoral district for the return of 21 Members of the Legislative Council.'

The most recent periodic Council election held on 23 March 2019 was the twelfth periodic Council election since the reconstitution of the Legislative Council in 1978.

The key events in a periodic Council election when the Assembly expires following a normal four-year term are set out below.

---

6 Ibid, s 22B(4).

7 In cases where the Assembly is dissolved prior to its expiration, section 24A of the *Constitution Act 1902* provides that the polling date for the general election is to be a day not later than the 40th day from the date of the issue of the writs. In turn, section 74 of the *Electoral Act 2017* provides that the writs must be issued within four clear days after the day the proclamation dissolving the Assembly is published in the *Government Gazette*.

8 By virtue of section 22A(5) of the *Constitution Act 1902*, the Parliament has power to make further laws with respect to the conduct of periodic Council elections, provided they do not expressly or impliedly repeal or amend any provision of the Sixth Schedule, and are not inconsistent with the Sixth Schedule.

9 An electoral district means a district for the election of a member to serve in the Legislative Assembly. See *Electoral Act 2017*, s 4.

The Council is prorogued

Prior to a periodic Council election at the end of a normal four-year term, it has been practice for the Governor, on the advice of the Executive Council, to prorogue the Council to a specified date.[10] In recent times, this date has been on or after the anticipated date on which the Parliament will meet again after the election.[11]

For a discussion of the impact of prorogation, see Chapter 9 (Meetings of the Legislative Council)[12] and Chapter 20 (Committees).[13]

The Assembly expires and the business of the Council is suspended

By section 24(1) of the *Constitution Act 1902*, unless dissolved sooner by the Governor under section 24B, the Legislative Assembly expires every four years on the Friday before the first Saturday in March in the fourth calendar year after the calendar year in which the return of the writs for choosing that Assembly occurred.

Under section 22F of the *Constitution Act 1902*, the Legislative Council is not competent to dispatch any business during the period commencing on the day of expiry (or dissolution) of the Legislative Assembly and ending on the day fixed for the return of the writ for the periodic Council election.

Issue of the writ for the periodic Council election

Periodic Council elections, and general elections for the Assembly, are held according to writs issued by the Governor[14] – one writ for the periodic Council election and 93 writs for the Assembly general election. The writs must be issued on the Monday following the Friday on which the Legislative Assembly expires.[15] The writ for a periodic Council

10 Section 10A(1) of the *Constitution Act 1902* provides that 'the Governor may prorogue the Legislative Council and Legislative Assembly by proclamation or otherwise whenever the Governor deems it expedient', subject to sections 10A(2) and 24B. Section 10A(2) provides that 'The Premier or Executive Council may not advise the Governor to prorogue the Legislative Council and Assembly on a date that is before 26 January in the calendar year in which the Legislative Assembly is due to expire and that is after the fourth Saturday in the preceding September'. For further information, see the discussion in Chapter 9 (Meetings of the Legislative Council) under the heading 'The restriction on prorogation prior to an election'. Section 24B deals with the early dissolution of the Legislative Assembly by the Governor during a four-year term. As such, it is not directly relevant here.

11 See the *Government Gazette*, No 9, Special Supplement, 15 January 2007, p 157; No 139, Special Supplement, 22 December 2010, p 6109; No 14, 25 February 2015, p 507; No 15, 20 February 2019, p 373.

12 See the discussion under the heading 'Prorogation'.

13 See the discussion under the heading 'The effect of prorogation on committees'.

14 *Constitution Act 1902*, s 11A.

15 *Electoral Act 2017*, s 74(1)(a). In the event that the Assembly is dissolved by the Governor, the writs must be issued within four clear days after the day the proclamation dissolving the Assembly is published in the *Government Gazette*. See the *Electoral Act 2017*, s 74(1)(b).

election is to be issued on the same day as the writs for the concurrent Assembly general election are issued.[16]

In turn, the writs for an Assembly general election that follows the expiry of an Assembly must specify the Wednesday following the Friday of that expiry as the election nomination day, meaning the day by which nominations for election must be received.[17] The writ for the concurrent periodic Council election is to specify the same day as nomination day.[18]

The writ for a periodic Council election also specifies the day for the taking of the poll,[19] which must be the same as the day of the general election for the Assembly,[20] and the date by which the writ must be returned to the Governor.[21] The date by which the writ must be returned is a day not later than the 60th clear day after the writ was issued, or such later day as the Governor may direct.[22]

The writ for a periodic Council election must be directed to the Electoral Commissioner.[23]

The Electoral Information Register

The Electoral Commissioner keeps and maintains the Electoral Information Register which records all persons enrolled under the *Electoral Act 2017*.[24] The register includes amongst other things the surname, given names, date of birth, sex, residence and electoral district of each enrolled person in New South Wales.[25] The register is kept in electronic form.[26]

A person is entitled to be enrolled in respect of an address in New South Wales if the person has attained 16 years of age,[27] is an Australian citizen, and resides at that address and has resided at that address for at least one month before the enrolment.[28] A person is not entitled to be enrolled where the person falls under certain categories under Commonwealth laws (for example, enrolled voters leaving Australia or itinerant electors),[29] or if the person has been convicted of an offence, whether in New South Wales or elsewhere, and has been sentenced in respect of that offence to imprisonment

16 Ibid, s 74(2). Section 22A(3) of the *Constitution Act 1902* further provides that a writ for a periodic Council election is not to be issued until after the issue of the writs for the relevant Assembly general election.
17 Ibid, s 75(2).
18 Ibid, s 75(3).
19 Ibid, s 75(1)(b)(iii).
20 *Constitution Act 1902*, s 22A(3).
21 *Electoral Act 2017*, s 75(1)(b)(iv).
22 Ibid, s 75(3)(b).
23 Ibid, s 75(1)(a).
24 Ibid, ss 41(1) and 42(1).
25 Ibid, s 41(2).
26 Ibid, s 41(3).
27 But note that a person who will not attain 18 years of age on or by an election day is not entitled to be included on an authorised roll for an election.
28 *Electoral Act 2017*, s 30(1).
29 Ibid, s 30(2).

for 12 months or more and is in prison serving that sentence.[30] Enrolment is compulsory for all eligible persons over the age of 18.[31]

Authorised rolls

As soon as practicable after the issue of the writs for an election, the Electoral Commissioner prepares an authorised roll of electors for each Legislative Assembly electoral district for use at the election.[32] Persons who are enrolled for a district for the Assembly general election,[33] and only those persons, are also entitled to vote at the concurrent periodic Council election.[34] A person who will not attain 18 years of age on or by the election day is not entitled to be included on an authorised roll for an election.[35]

The Electoral Commissioner makes available a copy of the authorised roll for an electoral district for public inspection during ordinary office hours without fee at the office of the Electoral Commission and such other place or places as the Electoral Commissioner determines. It remains available for public inspection until 40 days after the return of the writs for the election. The Electoral Commission may also make a copy of an authorised roll available in other ways.[36]

In certain circumstances the Electoral Commissioner must provide a list of electors and their particulars to each registered party,[37] member of Parliament[38] and candidate for election.[39] Such information may also be provided to other persons on request, if the Electoral Commissioner determines that the public interest in providing the information outweighs the public interest in protecting the privacy of the information.[40]

Nomination for election

Eligibility

Under section 83(1) of the *Electoral Act 2017*, every person enrolled as at 6 pm on the date of issue of the writ for a periodic Council election is qualified to be nominated as a

30 Ibid, s 30(4).
31 Ibid, s 32(1).
32 Ibid, s 46(1)-(2).
33 Ibid, s 31(1).
34 *Constitution Act 1902*, s 22. However, notwithstanding the provisions of the Constitution Act 1902, a person who is not enrolled for any district in New South Wales may still be permitted to vote, provided the person meets the requirements of section 137(3) of the Electoral Act 2017.
35 *Electoral Act 2017*, ss 31(2) and 46(3).
36 Ibid, s 47(1)-(3).
37 Ibid, s 49(1).
38 Ibid, s 49(2)-(3).
39 Ibid, s 49(6)-(7).
40 Ibid, s 50(1). In such cases, under section 50(3), the person must provide an undertaking to use the information for the purposes for which the Electoral Commissioner agreed to provide it. Offences for misuse of the information apply under section 52.

candidate for the election,[41] unless disqualified from sitting or voting in the Legislative Council under the *Constitution Act 1902* or the *Electoral Act 2017*.[42]

Nomination procedure

The writ for a periodic Council election specifies the nomination day for the election, being the Wednesday following the day of the expiry of the Assembly.[43] Nominations for election to the Legislative Council must be submitted to the Electoral Commissioner after the issue of the writ and before noon on nomination day.[44]

A candidate for a periodic Council election may be nominated either by a registered officer of a registered party, or by a minimum of 25 persons, each of whom is enrolled as at 6 pm on the date of issue of the writ for the election.[45]

A nomination must be accompanied by a deposit of $500, except for candidates forming part of a group of more than 10 candidates, in which case the deposit is $5,000 divided by the number of candidates in the group.[46] The deposit is returned if a candidate or at least one candidate in a group is elected, or if the candidate or group receives at least four per cent of first preference votes.[47]

The nomination of a candidate must also be accompanied by a child protection declaration.[48] A false declaration is punishable by imprisonment of up to five years.[49] The Electoral Commissioner is to make public all declarations received, and to provide a copy of all such declarations received to the Children's Guardian.[50] The Children's Guardian is to investigate the accuracy of the declarations of candidates who are elected, and to report on the findings to the Presiding Officers, who are required to lay the report before their respective Houses.[51]

Two or more nominated candidates may lodge a claim with the Electoral Commissioner to have their names included in a group on the ballot paper in the order specified in

41 Twomey notes that it would appear possible for a person to be validly enrolled in New South Wales and then move residence from the electoral district (or perhaps even the State), thus losing the entitlement to vote at an election, yet remaining qualified to be elected as a member of the Parliament as long as the person's enrolment is not challenged and the person remains enrolled. See Twomey, (n 3), pp 400-401.

42 For further information, see the discussion in Chapter 5 (Members) under the heading 'Disqualifications from membership of the Council'.

43 *Electoral Act 2017*, s 75(1)(b)(ii), (2) and (3).

44 Ibid, s 84(3)(b).

45 Ibid, *s* 83(2).

46 Ibid, s 88(1)(b) and 88(2).

47 Ibid, s 88(4).

48 Ibid, s 95.

49 Ibid, s 95(4). Conviction of an offence punishable by imprisonment for a term of five years (or more) will result in a member's seat becoming vacant under section 13A(1)(e) of the *Constitution Act 1902*, unless the conviction is overturned on appeal.

50 Ibid, *s* 96.

51 Ibid, *s* 97.

that claim.[52] If there are at least 15 candidates in a group, the nomination may include a request for a 'group voting square' on the ballot paper.

Declaration of the candidates

If at 12 noon on the nomination day there are more than 21 candidates for election at a periodic Council election, a poll is required to take place.[53] If a poll is required to take place, on the day after nomination day (or as soon as is reasonably practicable after that day), the Electoral Commissioner must announce the names of the candidates, the names of candidates who are included in a group, and the suburb, town or other locality of the enrolled address of each candidate.[54] The Electoral Commissioner must also give public notice of the information.[55]

The ballot paper

The *Electoral Act 2017* includes detailed provisions in relation to the printing of the ballot paper for a periodic Council election, the listing of groups and candidates and the overall layout of the paper.[56]

In brief, the ballot paper for a periodic Council election has two parts, referred to on the ballot paper as 'above the line' and 'below the line', in the form set out in schedule 5 to the *Electoral Act 2017*,[57] reproduced in Appendix 3 (Legislative Council sample ballot paper).

The section of the ballot paper 'above the line' consists of a series of 'group voting squares',[58] each representing a particular group or party. To be entitled to a group voting square, a group must have at least 15 candidates.[59] The individual candidates to which each group voting square relates are listed underneath the square in the section of the ballot paper 'below the line'. The order in which candidates within a particular group are listed 'below the line' is determined by the order in which they appear in the claim made with the Electoral Commissioner.[60]

If all the candidates to which a group voting square relates have been endorsed by the same registered party, the registered name of the party is printed adjacent to the square.[61]

52 Ibid, s 86(1).
53 Ibid, s 93(1).
54 Ibid, s 93(2).
55 Ibid, s 93(3).
56 Ibid, ss 102, 106 and 107.
57 Ibid, s 100(3).
58 Ibid, ss 86(2), (3) and 102(6).
59 Ibid, s 86(2).
60 Ibid, ss 86(4) and 102(3)(d).
61 Ibid, s 106(2)(b).

Candidates may also be shown 'below the line' individually. A candidate who is not included in any group may request that the word 'Independent' be printed adjacent to the candidate's name on the ballot paper.[62]

The Electoral Commissioner may determine the order in which groups and candidates are to be listed on the ballot paper for a periodic Council election by any method of random selection as seems appropriate to the Electoral Commissioner.[63]

The poll for the election

Polling takes place on the date specified in the writ for the election at voting centres across the State between the hours of 8.00 am and 6.00 pm.[64] The Electoral Commissioner is to ensure that each voting centre and its manager is provided with sufficient materials and equipment to enable electors to vote.[65]

The Electoral Commissioner may also approve days and hours of operation of early voting centres for an election.[66]

Voting

Voting is compulsory for all eligible voters.[67] The penalty for failing to vote without sufficient reason is a maximum of $55,[68] or one penalty unit if the matter is dealt with by a court.[69]

Electors may vote at any voting centre which has been appointed as a voting centre for the electoral district for which they are enrolled.[70] Under certain circumstances electors may also vote as an absent voter at a voting centre that is not designated for their electoral district,[71] by early voting[72] or by postal voting.[73] Since 2010, provision has also been made to allow for technology assisted voting for eligible electors, including those with impaired vision or a disability, and those living more than 20 kilometres from a polling place.[74]

---

62 Ibid, ss 102(5)(f), 105(1) and 106(3).
63 Ibid, s 102(2).
64 Ibid, s 109.
65 Ibid, s 112.
66 Ibid, s 114. At the 2019 State election, early votes constituted 21.7 per cent of the overall vote. Absent votes and postal votes constituted a further 6.9 per cent and 2.9 per cent respectively. See A Green, 'NSW Legislative Assembly election 2019: Two-party preferred results by polling place', NSW Parliamentary Library Research Service Briefing Paper 1/2020, p 14.
67 *Constitution Act 1902*, s 11B.
68 *Electoral Act 2017*, s 259(3)(b).
69 Ibid, s 259(4) and (5).
70 Ibid, s 126.
71 Ibid, pt 7, div 9.
72 Ibid, pt 7, div 6, sub-div 2.
73 Ibid, pt 7, div 10.
74 Ibid, pt 7, div 11.

At a poll for a periodic Council election, an elector must vote either 'above the line' or 'below the line' on the ballot paper.[75]

To vote 'above the line', an elector must write '1' in one of the group voting squares. If this is done, the ballot paper is taken to have recorded on it a first preference for the first candidate listed in the group and subsequent preferences for all the other candidates in that group in the order in which they are listed below the line. A voter may choose to record additional preferences for other parties or groups in the order of his or her choice, by consecutively numbering other group voting squares above the line. This will record further preferences for all the candidates listed in those groups.[76]

Alternatively, an elector may vote 'below the line' by numbering at least 15 candidates in the order of his or her preference, although the elector may continue to number beyond 15 if he or she wishes.[77]

The *Electoral Act 2017* establishes various offences with respect to electoral bribery, treating and selling of votes,[78] interference with the right to vote,[79] impersonation and multiple voting,[80] and forging electoral papers,[81] amongst others.

Counting the votes

The procedures for the counting of votes in a periodic Council election are set out in the Sixth Schedule to the *Constitution Act 1902*. In summary, the total number of valid (unspoilt) first preference votes across the State for all candidates is counted. This number is then divided by 22 and the result increased by one to obtain a quota of votes for election to the Council. The formula for reaching the quota is shown below:

$$\left(\frac{Total\ Valid\ Poll}{(Seats + 1)}\right) + 1$$

Where seats = 21

The quota of votes a candidate requires for election to the Council obtained using the above formula is approximately 4.55 per cent of the total number of valid (unspoilt) first preference votes cast. The quota figure obtained through the above formula is the

75 Ibid, s 132(3) and (4).

76 Ibid, ss 132(4) and 167. Prior to 1999, a vote 'above the line' was deemed to be a vote for the candidates listed in a 'group voting ticket' lodged by the relevant party with the Electoral Commissioner. Only one vote 'above the line' could be recorded by each voter. This system of group voting tickets was abolished in 1999. For further information on the rationale for and consequence of this change, see the discussion in Chapter 2 (The history of the Legislative Council) under the heading '1999: The abolition of group voting tickets'.

77 Ibid, s 132(3).

78 Ibid, s 209.

79 Ibid, s 210.

80 Ibid, s 212.

81 Ibid, s 218.

smallest number that guarantees that no more candidates can reach the quota than the number of seats available to be filled.

The counting process is as follows. Initially, candidates who receive a quota on first preference votes are declared elected. All ballot papers for those candidates are then counted out to the next available preference, and random sampling used to transfer ballot papers equal to the surplus of votes to continuing candidates, that is, any candidate not already elected or excluded. Ballot papers not distributed, and those with no further preferences, are set aside as the elected candidate's quota. As the overwhelming majority of votes are cast for the lead candidate in each ballot paper group, the early stages of the count consist of the successive election of candidates from groups with more than a quota of votes, and surplus distributions where ballot papers effectively flow down a group's list of candidates.

Once no remaining candidate has a quota, the process of exclusion begins. The lowest polling candidate is excluded and that candidate's ballot papers distributed to continuing candidates. If in this process of exclusion a continuing candidate reaches a quota, the count proceeds to deal with any surplus ballot papers held by that candidate. Preferences are counted out to other continuing candidates, but only the ballot papers received that put the candidate over quota are examined for preferences. If no further candidates reach a quota at this point, the process of exclusion resumes.

If after the exclusion of a candidate the number of continuing candidates is equal to the number of vacancies still to be filled, then the distribution of the excluded candidate's preferences does not take place, and all remaining candidates are declared elected. Candidates elected by this step will usually have less than a quota of votes. That the final candidates may not reach a quota is a consequence of using optional preferential voting.

Whilst the Legislative Council's electoral system is related to systems used in other jurisdictions in Australia, there are several important differences. New South Wales is the only State in Australia that uses random sampling to distribute preferences, whereas other jurisdictions distribute every ballot paper but at a reduced value determined by the size of the surplus. New South Wales along with Tasmania and the ACT uses the Gregory or 'last bundle' method to deal with surplus to quota votes, where other jurisdictions use variants of the 'Inclusive Gregory' method examining all ballot papers held by a candidate. New South Wales also excludes ballot papers with no further preferences when distributing a surplus, a feature shared only with the ACT.[82] These electoral arrangements for the Legislative Council are difficult to change as all are entrenched in the Sixth Schedule to the *Constitution Act 1902*.[83]

The Electoral Commissioner is responsible for determining the result of periodic Council elections in the manner described above in accordance with the Sixth Schedule

82 For further information, see A Green, 'Prospects for the 2003 Legislative Council Election', NSW Parliamentary Library Research Service Background Paper No 6/2003, pp 11-24.

83 For further information, see the discussion in Chapter 15 (Legislation) under the heading ''Manner and form' restrictions on bills to amend the *Constitution Act 1902*'.

to the *Constitution Act 1902*.[84] The count is conducted using the Electoral Commission's computer system, developed specifically for the purpose.

Recount

At any time before the declaration of the result of an election, the Electoral Commissioner may recount the ballot papers contained in any parcel, at the request of any candidate or on the Electoral Commissioner's own initiative.[85]

Declaration of the poll

As soon as practicable after the count has been completed, the Electoral Commissioner must announce the result of an Assembly general election and a periodic Council election by notice, which must be published in a newspaper circulating in the State or displayed on the Electoral Commission's website. This is the official announcement of the results of the election.[86]

The official declaration of the polls for the Assembly usually takes place in the second week after the election. The declaration of the poll for the Council usually takes several weeks longer.[87]

Before the declaration of the poll, ongoing information about the course of the count can be obtained from the Electoral Commissioner or on the Electoral Commission's website.

Return of the writ

After the declaration of the result of a periodic Council election, the Electoral Commissioner endorses on the writ for the election the names of the candidates elected and returns the writ to the Governor by the date specified in the writ.[88] The Governor then transmits the writ to the Clerk for announcement of the names of the candidates elected when the House first meets following the election.

Proclamation summoning the Council

As indicated previously, during the conduct of Assembly and Council elections, it has been the practice of the Governor to prorogue the Council.

Once the outcome of the election is known, the Governor summons the Council and the Assembly to meet at a time and place specified by the Governor by proclamation

84 Ibid, s 171(1).
85 Ibid, s 172(1).
86 Ibid, s 173(1) and (2).
87 Under s 22A(4) of the *Constitution Act 1902*, if a general election for the Assembly fails, including by reason of it being declared void, that does not affect the validity of the periodic Council election.
88 *Electoral Act 2017*, s 173(3).

published in the *Government Gazette*.[89] The day of the first meeting of the Parliament must be not later than the seventh clear day after the day appointed for the return of the writs.[90]

Disputed elections or returns

The validity of any election or return of a member of the Legislative Council may be disputed by a petition to the Court of Disputed Returns.[91] This is the only means by which an election or return may be disputed. The Supreme Court of New South Wales acts as the Court of Disputed Returns for the purposes of the *Election Act 2017*. Its jurisdiction may be exercised by a single judge.[92]

A petition disputing an election or return must be filed with the Prothonotary of the Supreme Court within 40 days of the return of the writ,[93] and be accompanied by the sum of $250 as security for costs.[94] The petition must set out the facts relied on to invalidate the election or return, and the relief claimed by the petitioner and the order sought from the court. It must be signed by a candidate at the election in dispute, a person who was qualified to vote at the election, or the Electoral Commissioner, and be attested by two witnesses whose occupations and addresses are stated.[95]

The Prothonotary must provide a copy of a petition disputing a periodic Council election or the return of a member of the Legislative Council to the Clerk as soon as practicable after the filing of the petition.[96] The President subsequently informs the House of the receipt of the petition.[97]

The Court of Disputed Returns has various powers in relation to a petition disputing an election or return, including the power to compel the attendance of witnesses and the production of documents and the power to examine witnesses on oath.[98] The court sits as an open court.[99]

---

89 See, for example, the *Government Gazette*, No 42, Special Supplement, 29 April 2011, p 2733; No 38, 1 May 2015, p 1082; No 40, 1 May 2019, p 1290.

90 *Electoral Act 2017*, s 78.

91 Ibid, s 233. Traditionally, it was the right of the Houses to determine the qualifications and disqualifications of their members. However, in 1928 the Parliament transferred the power to determine the validity of any 'election or return' to the Court of Disputed Returns under section 155 of the *Parliamentary Electorates and Elections Act 1912*. This is continued by section 233 of the *Electoral Act 2017*.

92 *Electoral Act 2017,* s 224.

93 Ibid, s 234(1)(d).

94 Ibid, s 234(2).

95 Ibid, s 234(1).

96 Ibid, s 241(2).

97 See, for example, *Minutes*, NSW Legislative Council, 7 June 1988, pp 151-152; 5 May 2011, p 57.

98 *Electoral Act 2017*, s 225(1).

99 Ibid, s 226.

Where the Court finds that illegal practices were committed in connection with the election, it may declare that any person who was returned as elected was not duly elected, or declare an election absolutely void.[100]

If the court declares that a person declared elected was not elected, the person ceases to be a member of the House from the date determined by the court.[101] Conversely, if the court declares that a person not declared elected was elected, the person may take his or her seat in the House from the date determined by the court.[102] If an election is declared void, a new election must be held,[103] the writ for which, in the case of a periodic Council election, may be issued by the Governor.[104] All decisions of the court are final and without appeal.[105] The denial of a right of appeal is designed to avoid protracted litigation leaving constituents unrepresented.[106]

If the court finds that a successful candidate has committed or has attempted to commit one of a number of specified offences (electoral bribery, treating and selling of votes, or interference with the right to vote), his or her election is to be declared void.[107] However, the court shall not declare that any person returned as elected was not duly elected or declare any election void on the grounds of illegal practice by another person without the candidate's knowledge, or on any other grounds other than bribery, treating, or corruption or attempted bribery, treating, or corruption, unless the court is satisfied that the result of the election was likely to be affected, and that it is just that the candidate should be declared not to be duly elected or that the election should be declared void.[108]

No election is to be declared void on account of any delay in the declaration of nominations, the voting, or return of the writ, or on account of the absence or error of, or omission by, any officer which did not affect the result of the election.[109]

In conducting its proceedings, the court is to be guided by 'the substantial merits and good conscience of each case without regard to legal forms or technicalities or whether the evidence before it is in accordance with the law of evidence or not'.[110]

---

100 Ibid, s 225(3).
101 Ibid, s 229(1).
102 Ibid, s 229(2).
103 Ibid, s 229(3).
104 Ibid, s 229(5).
105 Ibid, s 228(1) and (2).
106 See G Carney, *Members of Parliament: Law and Ethics*, (Prospect Media, 2000), p 151. Carney suggests that the lack of appeal right does not prevent the Court of Disputed Returns from seeking clarification on questions of law by case stated to an appellate court. However, it has been argued that the right to appeal from the Court of Disputed Returns to the High Court of Australia in respect of errors of law is guaranteed by section 73 of the Commonwealth Constitution. See G Orr and G Williams, 'Electoral challenges: judicial review of parliamentary elections in Australia', *Sydney Law Review*, (Vol 23, No 53, 2001), pp 81-87. For further information, see Twomey, (n 3), p 451.
107 *Electoral Act 2017*, s 237(1).
108 Ibid, s 237(2).
109 Ibid, s 239(1).
110 Ibid, s 227.

A copy of the order of the court advising the outcome of the trial of the petition must be provided by the Prothonotary to the Clerk.[111] The President subsequently informs the House of the receipt of the order of the court.[112]

Since 1978, there have been three occasions on which the return of a member of the Council or the outcome of a periodic Council election has been disputed. In 1988, two petitioners, Mr Ian Yates and Mr Joseph Bryant, filed with the Prothonotary of the Supreme Court a petition seeking a declaration that the outcome of the periodic Council election held on 19 March 1988 was void, or alternatively that the Hon Richard Jones had not been duly elected at the election. In support, the petition alleged a range of electoral irregularities to the extent that the result of the election was affected.[113] The petition was dismissed by the Court of Disputed Returns with costs.[114]

In 2011, Ms Pauline Hanson filed with the Prothonotary a petition disputing the election of the Hon Sarah Johnston and Mr Jeremy Buckingham at the periodic Council election held on 26 March 2011. In support, the petition cited a failure to properly count the formal vote, including an allegation of the sorting of votes for Ms Hanson into an informal pile.[115] The petition was dismissed by consent.[116]

In 2015, Mr Peter Jones, a candidate for the No Land Tax Campaign Party at the periodic Council election held on 28 March 2015, and the last candidate excluded during the counting of the votes, filed with the Prothonotary a petition in relation to the election of the Hon Mark Pearson at the election.[117] Mr Jones was later granted leave to discontinue the petition.[118]

Any question respecting the qualification of a member already in the Council, or respecting a vacancy in the Council, may also be referred by resolution of the House to the Court of Disputed Returns.[119]

CASUAL VACANCIES IN THE LEGISLATIVE COUNCIL

A casual vacancy in the Legislative Council is a vacant seat amongst the 42 seats in the House which occurs during a Parliament.

111 Ibid, s 241(2).
112 See, for example, *Minutes*, NSW Legislative Council, 2 August 1988, p 239.
113 *Minutes*, NSW Legislative Council, 7 June 1988, pp 151-152.
114 *Minutes*, NSW Legislative Council, 2 August 1988, p 239.
115 *Minutes*, NSW Legislative Council, 5 May 2011, p 57.
116 *Hanson v Johnston* [2011] NSWSC 621.
117 *Minutes*, NSW Legislative Council, 2 June 2015, p 156.
118 *Jones v Pearson* [2015] NSWSC 1324. See *Minutes*, NSW Legislative Council, 15 September 2015, p 394.
119 *Electoral Act 2017*, s 246(2) and (3). For further information, see the discussion in Chapter 5 (Members) under the heading 'Determination of disqualifications'.

Causes of casual vacancies in the Legislative Council

A casual vacancy occurs when the seat of a member becomes vacant before the expiration of the member's term of office through resignation, death, expulsion from the House, or disqualification under the provisions of the *Constitution Act 1902* or the *Electoral Act 2017*.

Resignation

The most common means by which a seat in the Council becomes vacant is by a member's resignation.

Members may resign their seat by letter of resignation sent to the Governor. An announcement in the House is not sufficient. Section 22J of the *Constitution Act 1902* provides:

> Any Member of the Legislative Council may, by writing under his hand, addressed to the Governor, resign his seat therein, and upon the receipt of the resignation by the Governor, the seat of that Member shall become vacant.

A member may not resign effective on a future date. A member's seat becomes vacant on receipt by the Governor of the member's letter of resignation. The Governor subsequently informs the President that the member has resigned, and the President reports that fact to the House at the next sitting. The President also informs the House that he or she has acknowledged the Governor's communication, and that an entry recording the resignation of the member has been made in the Register of Members of the Legislative Council.

Death

Section 22B(1)(a) of the *Constitution Act 1902* provides that a member of the Legislative Council ceases to be a member on the day of his or her death.

Under the provisions of section 22G(8) of the *Constitution Act 1902*, the President notifies the Governor that the seat of a member has become vacant through the member's death following the obtaining of a death certificate from the Registry of Births Deaths and Marriages.[120]

Expulsion

The Council has the inherent power at common law to expel a member for conduct unworthy of a member of the House.[121]

120 See, for example, *Minutes*, NSW Legislative Council, 31 August 2010, p 1977.

121 For further information, see the discussion in Chapter 3 (Parliamentary privilege in New South Wales) under the heading 'Expulsion of members'.

The Council has only ever expelled one member, Mr Alexander Armstrong, in 1969.[122] At the time, the President announced to the House that he had notified the Governor that the seat of Mr Armstrong had become vacant in accordance with the provisions of section 8 of the *Constitution (Legislative Council Elections) Act 1932*.[123] The relevant section is now section 22G(8) of the *Constitution Act 1902*.

Disqualification

The grounds for disqualification from sitting or voting in the Legislative Council under sections 13 to 13C and 14A of the *Constitution Act 1902* and sections 30(4), 91 and 237 of the *Electoral Act 2017* are discussed in detail in Chapter 5 (Members).[124]

Should a member be disqualified from the Council, it is presumed that the President may notify the Governor that the seat of the member had become vacant under the provisions of section 22G(8) of the *Constitution Act 1902*.

Eligibility to fill a casual vacancy in the Legislative Council

A person is not eligible to be nominated to fill a casual vacancy in the Legislative Council unless the person meets the requirements of sections 22D(3) and (4) of the *Constitution Act 1902*,[125] as discussed below.

Section 22D(3): Not disqualified from sitting or voting

Section 22D(3) of the *Constitution Act 1902* provides that a person is not eligible to be nominated to fill a casual vacancy 'if, were he a member of the Legislative Council, he would be disqualified from sitting or voting as such a member'.

As noted above, the grounds for disqualification from sitting or voting in the Legislative Council are discussed in detail in Chapter 5 (Members).[126]

Candidates not enrolled

Section 22D(3) is peculiar in that it applies disqualification provisions to the nomination of persons to fill a casual vacancy in the Legislative Council, but does not apply qualification requirements to nominees. Unlike nominations for a periodic Council election under section 83(1) of the *Electoral Act 2017*, there is no requirement to be enrolled in order to be nominated to fill a casual vacancy in the Council.

122 *Minutes*, NSW Legislative Council, 25 February 1969, pp 318-320; *Hansard*, NSW Legislative Council, 25 February 1969, pp 3858-3890.
123 *Minutes,* NSW Legislative Council, 26 February 1969, p 328.
124 See the discussion under the heading 'Disqualifications from membership of the Council'.
125 *Constitution Act 1902*, s 22D(2).
126 See the discussion under the heading 'Disqualifications from membership of the Council'.

This leads to the anomaly that a person could be elected to fill a casual vacancy in the Council even though that person is not enrolled in New South Wales.[127]

In 2000, it was suggested that a long-time Queensland resident, Mr John Bradford, would be nominated to fill a casual vacancy expected to arise in the seat of the Hon Elaine Nile, following Mrs Nile's announcement of her intention to retire. Questions were raised as to whether Mr Bradford was validly enrolled as an elector in New South Wales, and in particular whether he was living at the relevant enrolment address at the time of his enrolment and had so lived for one month before enrolment.[128] Subsequently, it was reported that the Electoral Commissioner had investigated the matter and confirmed the validity of Mr Bradford's enrolment. However, it appears that even if Mr Bradford had not been enrolled in New South Wales, he would not for that reason have been ineligible to be nominated to fill the casual vacancy.[129] As events transpired, Mrs Nile did not retire as she had announced. When she did retire approximately two years later before the end of her term, another candidate was nominated and elected to fill the vacancy.

Section 22D(4): A representative of the same political party

Section 22D(4) of the *Constitution Act 1902* provides:

> Where:
>
> (a) a Member of the Legislative Council was elected at a periodic Council election and was, at the time of his election, publicly recognised by a particular political party as being an endorsed candidate of that party and publicly represented himself to be such a candidate, and
>
> (b) the vacancy … to be filled is in the seat of that Member or of the successor (whether immediate, intermediate or ultimate) of that Member, a person is not eligible to be so nominated unless he is a member of that party, except where there is no member of that party available to be so nominated.

The effect of this section is that, if a member is elected to the Council as a representative of a particular political party and a casual vacancy arises in the member's seat, the vacancy must be filled by a person who is a member of the same political party. This is the case even if, by the time the vacancy arises, the member has resigned from or been

127 Twomey, (n 3), p 391. Prior to 1978, when separate provision was made for periodic Council elections and the filling of casual vacancies, this anomaly did not exist. Twomey suggests that the anomaly has not been corrected out of concern that addressing the matter would require legislation agreed to at a referendum in accordance with the manner and form requirements of section 7A of the *Constitution Act 1902*. For further information, see the discussion in Chapter 15 (Legislation) under the heading ''Manner and form' restrictions on bills to amend the *Constitution Act 1902*'.

128 At the time this requirement was in section 22(1)(b) of the *Parliamentary Electorates and Elections Act 1912*, now replicated in section 30(1)(c) of the *Electoral Act 2017*.

129 Crown Solicitor, 'Eligibility for nomination for election to fill a casual vacancy in the Legislative Council - Mr John Bradford', 24 August 2000.

dis-endorsed by the party and is sitting in the House as an independent or as a member of another political party.

If a member was elected as an 'Independent', the member has no right to nominate his or her successor to the seat. In such a case, a joint sitting may decide to fill the casual vacancy with another 'Independent'. This situation arose in the Legislative Council of South Australia on 21 November 2007, when Mr John Darley, an independent, was elected at a joint sitting to fill the vacancy caused by the resignation of the Hon Nick Xenophon, who had resigned in order to contest a seat in the Senate for South Australia. Mr Darley had been listed in the same group on the ballot paper as Mr Xenophon when Mr Xenophon was elected.[130]

Issues also arise in relation to what is meant by a 'political party' in section 22D(4). There is no definition of 'political party' in the *Constitution Act 1902*. However, the Crown Solicitor has advised that the party membership requirement imposed by section 22D(4) continues to apply even if the relevant party has ceased to be registered,[131] provided the organisation still exists,[132] or if the party has changed its name since the member being replaced was elected to the House.[133]

A member who resigns to contest either a federal election or a by-election for a seat in the Legislative Assembly and is unsuccessful is eligible to nominate to fill his or her own vacant seat in the Council. However, this can only occur if there is sufficient delay in the filling of the casual vacancy. This occurred in 2004 when the Revd the Hon Fred Nile resigned to contest a seat in the Senate, for which he was unsuccessful. He was subsequently re-elected by a joint sitting of the two Houses to fill the seat he had vacated in the Council.[134] It occurred again in 2019 when the Hon Ben Franklin resigned to contest a seat in the Lower House, for which he was unsuccessful. He was subsequently re-elected by a joint sitting of the two Houses to fill the seat he had vacated.[135]

---

130 This matter has arisen once in the Council, although the example is no longer directly relevant. On 5 December 1984, the Hon Marie Bignold, an independent, was appointed by the Governor to replace the Hon James Cameron, who had been elected as an independent in 1984. Both Mr Cameron and Ms Bignold had stood at the 1984 election on a group ticket for the Call to Australia Group, however it was not an official party. On Mr Cameron's resignation, Ms Bignold was appointed by the Governor under former section 22C of the *Constitution Act 1902*, which provided for the appointment of the next available person listed in the group on the ballot paper to which the resigned member had belonged. Section 22C has now been repealed.

131 The Crown Solicitor's advice related to the *Parliamentary Electorates and Elections Act 1912*, which was the predecessor to the current *Electoral Act 2017*.

132 Crown Solicitor, 'Filling of casual vacancy in a member's seat where the registration of the party which endorsed the member has been cancelled or changed', 13 March 2001.

133 Ibid. A precedent involving a change of party name occurred in 2002 in relation to the seat of the Hon Elaine Nile. Mrs Nile was elected at the periodic Council election in 1995 as a member of the Call to Australia (Fred Nile Group). Subsequently, the party changed its name to the Christian Democratic Party (Fred Nile) Group. In 2002, a casual vacancy in Mrs Nile's seat was filled by a member of the Christian Democratic Party (Fred Nile) Group.

134 *Minutes*, NSW Legislative Council, 31 August 2004, p 940; 21 October 2004, p 1061.

135 *Minutes*, NSW Legislative Council, 8 May 2019, pp 76-77.

Procedures for the filling of casual vacancies in the Legislative Council

Section 22D(1) of the *Constitution Act 1902* provides that where a casual vacancy in the seat of a member of the Legislative Council occurs, the Governor, by message to both Houses of the Parliament, shall convene a joint sitting of the members of the Legislative Assembly and Legislative Council at a place and time specified in the message for the purpose of electing a person to fill the vacant seat.[136] More than one vacancy may be filled at a joint sitting.[137]

On a casual vacancy arising in the Council, the Premier writes to the political party of the member who formerly held the seat asking for the nomination of a replacement.[138] An officer of the party subsequently informs the Premier of the name and address of the person selected by the party to fill the casual vacancy.

The Governor on the advice of the Executive Council subsequently sends messages to both Houses of the Parliament convening a joint sitting of the Houses in accordance with section 22D(1).[139] The message specifies the time and place for holding the joint sitting. In practice the time for the joint sitting is determined by the Leader of the Government in the Legislative Council and the Department of Premier and Cabinet. The place for the joint sitting is the Council chamber.

Whilst the joint sitting is held in the Council chamber, it is not a sitting of the House. At the appointed time the President leaves the Chair and the sitting of the House is suspended until the conclusion of the joint sitting.

The rules for the conduct of joint sittings for the purposes of filling a casual vacancy in the Legislative Council were formerly set out in clause 12 of schedule 4 to the *Constitution and Parliamentary Electorates and Elections (Amendment) Act 1978*. Clause 12 was expressed to have effect until standing orders governing the proceedings at joint sittings under section 22D of the *Constitution Act 1902* were adopted by both Houses and approved by the Governor. Whilst the *Constitution and Parliamentary Electorates and Elections (Amendment) Act 1978* was repealed in 2007[140] without the Houses having adopted alternate standing orders, clause 12 of schedule 4 remains in force under section 30(2)(d) of the *Interpretation Act 1987*, which provides that the repeal of an act does not affect the operation of any transitional provision contained in the act.

---

136 Prior to 1991, section 22C of the *Constitution Act 1902* provided for a casual vacancy to be filled by the appointment of the next available person listed in the group on the ballot paper to which the resigned member had belonged. If no such person was available, the vacancy would then be filled by a joint sitting in accordance with section 22D.

137 *Constitution Act 1902*, s 22E(3). See, for example, *Minutes*, NSW Legislative Council, 3 September 2002, p 329; 7 September 2010, p 2028.

138 Ibid, s 22D(4).

139 In January 1996, two casual vacancies arose whilst both Houses stood adjourned for the summer long adjournment. See *Minutes*, NSW Legislative Council, 16 April 1996, p 4. The Governor did not send a message convening the joint sitting until after the sittings of both Houses had resumed. See *Minutes*, NSW Legislative Council, 17 April 1996, p 22.

140 See the *Statute Law (Miscellaneous Provisions) Act (No 2) 2007*.

Clause 12 provides:

- At a joint sitting the President or, in the absence of the President, the Speaker presides.
- For the purpose of filling more than one vacant seat, each vacant seat will be filled separately, by the votes of members present.
- The motion that a person be elected as a member of the Council to fill a casual vacancy must be seconded.
- A member proposing or seconding an eligible person to fill a vacant seat may speak on the proposal for 10 minutes and no other person may speak at that time.
- If only one eligible person is proposed, the person is elected to fill the vacant seat without the question being put.
- If two or more eligible persons are proposed, the motion is put in respect of each of those persons in the order in which they have been proposed, and any member may speak to the motion.
- The motion that a person be elected is decided by open voting, with the presiding person having only a casting vote.

At the commencement of the joint sitting, the presiding officer (usually the President) takes the Chair. In normal circumstances the Speaker takes a seat to the right of the President on the dais. Members of the Legislative Assembly sit alongside members of the Legislative Council on the benches. The President declares the joint sitting open and calls on the Clerk to read the message from the Governor convening the joint sitting. The President then receives proposals to fill the vacant seat or seats.

In the usual circumstance where there is only one vacant seat to be filled, if only one person is proposed to fill the vacant seat, the President declares the person elected. The President then declares the joint sitting closed. If more than one person is proposed, the motion that a person be elected is decided by open voting, with the President having only a casting vote. The President then declares the joint sitting closed.[141]

When the House resumes following the joint sitting, the President announces the name of the person elected to fill the vacant seat, and tables the minutes of the joint sitting. The President also notifies the Governor in writing of the person elected.

The person chosen at the joint sitting to fill the casual vacancy may not be sworn in as a member of the Legislative Council until two days after his or her election.[142] If during that time, the member ceases to be a member of the political party, membership of which was necessary for the member to be nominated under section 22D(4) of the *Constitution*

141 For further information, see the Legislative Council 'Manual on Joint Sittings to Fill a Casual Vacancy in the Legislative Council and the Senate', January 2016.

142 *Constitution Act 1902*, s 22E(1).

Act 1902, then he or she is deemed not to have been elected, and the seat shall again be vacant.[143] This delay allows the party concerned to expel any member who may have been elected by a hostile majority at the joint sitting, thereby voiding the election.

The validity of an election to fill a casual vacancy may be disputed by petition addressed to the Court of Disputed Returns.[144] The procedures governing such disputes are similar to those applying to disputed elections or returns following a periodic Council election, discussed previously.[145]

A list of casual vacancies in the Council since 1978 is at Appendix 4 (Casual Vacancies in the Legislative Council since 1978).

SWEARING IN

The procedures for swearing in new members of the Council, both after a periodic Council election and to fill a casual vacancy, are governed by the *Constitution Act 1902* and the standing orders.

Section 12(1) of the *Constitution Act 1902* provides that members of the Council or Assembly may not sit or vote in their elected House until they have taken the pledge of loyalty or oath of allegiance, or made an affirmation of allegiance, before the Governor or other person authorised by the Governor.[146]

Section 12(2) provides that the pledge of loyalty is to be in the following form:

> Under God, I pledge my loyalty to Australia and to the people of New South Wales.

A member may omit the words 'Under God' when taking the pledge of loyalty.

Section 12(4) provides that the oath of allegiance is to be in the following form (with the name of the reigning Sovereign substituted, where appropriate):

> I swear that I will be faithful and bear true allegiance to Her Majesty Queen Elizabeth II, Her heirs and successors according to law. So help me God.

A member may, instead of taking an oath of allegiance, make an affirmation to the same effect.[147]

---

143 Ibid, s 22E.

144 *Electoral Act 2017*, pt 8, div 4.

145 See the discussion under the heading 'Disputed elections or returns'.

146 The procedure for the swearing in of members has changed twice in recent years. Prior to 2006, members were required under section 12 of the *Constitution Act 1902* to take the oath of allegiance prescribed by the *Oaths Act 1900*. In 2006, the *Constitution Act 1902* was changed to require members to take the pledge of loyalty to Australia and to the people of New South Wales. In 2012, members were given the option of taking either the pledge of loyalty or oath of allegiance, or making an affirmation of allegiance.

147 *Constitution Act 1902*, s 12(4A).

The pledge of loyalty or oath or affirmation of allegiance must be taken or made by all members on election, whether elected for the first time to the Council, or on being re-elected.

It is not necessary for a member who has taken or made an oath or affirmation of allegiance to do so again after the demise of the Crown, including by or on abdication.[148]

The Governor routinely issues Commissions under the Public Seal of the State authorising the President, the Deputy President and Chair of Committees and the Assistant President, as occasion may require, to administer to new members of the Council the pledge of loyalty or oath or affirmation of allegiance under section 12 of the *Constitution Act 1902*.

Where members are elected at a periodic Council election, either for the first time or having stood for re-election, they take the pledge of loyalty or oath of allegiance, or make an affirmation of allegiance, on the first sitting day of the new Parliament. The swearing in takes place immediately the Legislative Council meets, at which time the Clerk announces the names of the members of the Council elected, and the names of the Commissioners appointed by the Governor to swear them in. The members present then take the pledge of loyalty or oath of allegiance, or make an affirmation of allegiance, before the Commissioners.[149]

A member filling a casual vacancy is usually sworn in before the President. The swearing in usually occurs in the House immediately after prayers, although it can occur at any time during the sitting of the House when there is no business then under consideration (SO 10). However, a member filling a casual vacancy may also be sworn in directly before the Governor.[150]

On taking the pledge of loyalty or oath of allegiance, or making an affirmation of allegiance, either before the Governor, the President or Commissioners, a new member is required to sign the Roll of Members of the Legislative Council (SOs 6(j), 10 and 61(2)). New members are also given an official Council badge, which they retain for the duration of their term.[151]

---

148 Ibid, s 12(4B).

149 For further information, see the discussion in Chapter 9 (Meetings of the Legislative Council) under the heading 'Swearing in of newly elected members'.

150 The Hon Dr Arthur Chesterfield-Evans made an affirmation of allegiance before the Governor on the 29 June 1998. See *Minutes*, NSW Legislative Council, 29 June 1998, p 610. This step was taken in the absence of a President following the resignation of President Willis. The Hon Cate Faehrmann, the Hon Sophie Cotsis, the Hon Robert Borsak and Mr David Shoebridge took the pledge of loyalty before the Governor on 10 September 2010; Mr Justin Field took the pledge of loyalty before the Governor on 29 August 2016; and the Hon Wes Fang made an affirmation of allegiance before the Governor on 22 August 2017. See *Minutes*, NSW Legislative Council, 21 September 2010, p 2057; 13 September 2016, p 1109; 12 September 2017, p 1866. On these three occasions, this was done to allow the members to participate in upcoming budget estimates hearings. The House stood adjourned on all three occasions.

151 On ceasing to be a member, members return their official Council badge and are issued with an official badge for former members.

THE ROLL OF MEMBERS AND THE REGISTER OF MEMBERS OF THE LEGISLATIVE COUNCIL

The Roll of Members of the Legislative Council records the name and the corresponding signature of all members elected to the Legislative Council. Members sign the Roll of Members of the Legislative Council following their swearing in as a member (SOs 6(j), 10 and 61(2)).

A separate Register of Members of the Legislative Council records the name of each member of the Council, the member's date of election, the member's term of service, the member's date of swearing in, the member's expiry of term of service, the member's date of ceasing to be a member and the cause of ceasing to be a member (SO 61(1)).

Both the Roll of Members of the Legislative Council and the Register of Members of the Legislative Council are kept by the Clerk.

CHAPTER 5

MEMBERS

This chapter describes the grounds for disqualification from election to and membership of the Legislative Council. The chapter also examines the regime for regulating the conduct of members, specifically the interest disclosure regime, relevant standing orders, the Code of Conduct for Members, the *Independent Commission Against Corruption Act 1988*, and the common law powers of the House to discipline members. Finally, the chapter also examines remuneration, superannuation and entitlements of members.

DISQUALIFICATIONS FROM MEMBERSHIP OF THE COUNCIL

Members may be disqualified from membership of, and from sitting in, the Legislative Council. Primarily disqualification is designed to uphold the integrity of members by ensuring that they perform their parliamentary functions in the interests of their constituents and the broader public interest. In turn, this supports the independence and integrity of Parliament.[1]

Certain grounds for disqualification from the Legislative Council are set out in sections 13 to 13C and 14A of the *Constitution Act 1902*. They are:

- holding an office of profit under the Crown or a pension from the Crown (s 13B);
- holding a contract or agreement for or on account of the Public Service of New South Wales (s 13);
- failure to attend the House for one whole session unless excused by the House (s 13A(1)(a));
- allegiance to a foreign power (s 13A(1)(b));
- bankruptcy, or taking the benefit of any law for the relief of bankrupt or insolvent debtors (s 13A(1)(c));
- becoming a public defaulter (s 13A(1)(d));

1 G Carney, *Members of Parliament: Law and Ethics*, (Prospect Media, 2000), p 15.

- conviction of certain crimes (s 13A(1)(e));
- membership of the Legislative Assembly (s 13C); and
- wilful contravention of any regulation for the disclosure by members of their pecuniary and other interests (s 14A(2)).

In addition, certain provisions of the *Electoral Act 2017* prevent persons from being nominated as a candidate for the Legislative Council. A member of the Commonwealth Parliament is incapable of being nominated as a candidate for, or being elected as a member of, the Legislative Council (s 91 of the *Electoral Act 2017*). In addition, a person is not entitled to be enrolled if the person has been convicted of an offence, whether in New South Wales or elsewhere, and has been sentenced in respect of that offence to imprisonment for 12 months or more and is in prison serving that sentence (s 30(4) of the *Electoral Act 2017*). This indirectly prevents a person from being nominated for election at a periodic Council election as a person must be enrolled as at 6 pm on the date of issue of the writ for the election in order to be nominated.[2]

A finding by the Court of Disputed Returns of illegal practices during an election, as defined by section 237 of the *Electoral Act 2017*, will also prevent a successful candidate from being declared an elected member of the Council.

The disqualifications under sections 91 and 30(4) of the *Electoral Act 2017* apply to candidates for election only. The disqualifications under sections 13, 13B and 13C of the *Constitution Act 1902* and section 237 of the *Electoral Act 2017* apply to both candidates for election to the Council and to sitting members. The disqualifications under sections 13A and 14A(2) of the *Constitution Act 1902* apply to sitting members only.

The Council also retains an inherent right to expel a member for conduct unworthy of a member of the House. This is discussed further in Chapter 3 (Parliamentary privilege in New South Wales).[3]

Any person considering standing for election, or any member considering an issue which may affect his or her qualification to remain a member of the Legislative Council, should obtain legal advice.

Holding an office of profit under the Crown or a pension from the Crown

Section 13B(1) and (2) of the *Constitution Act 1902* provides:

> (1) A person:
>
> (a) holding an office of profit under the Crown, or
>
> (b) having a pension from the Crown during pleasure or for a term of years,

2 *Electoral Act 2017*, s 83(1).

3 See the discussion under the heading 'Expulsion of members'.

> shall not, if he is elected as a Member of either House of Parliament, be capable of sitting and voting as a Member of the House to which he is elected, and his seat as a Member shall become vacant, after the expiration of the period commencing with his election and ending on the expiration of 7 sitting days of that House after notice of his holding that office or having that pension has been given to that House in accordance with its Standing Rules and Orders, unless that House has previously passed a resolution indicating that it is satisfied that that person has ceased to hold that office or, as the case may be, that the right of that person to that pension has ceased or is suspended while he is a Member of that House.
>
> (2) If a Member of either House of Parliament accepts any office of profit under the Crown or pension from the Crown during pleasure or for a term of years, his seat as a Member of that House shall become vacant upon the expiration of the period commencing with his acceptance of the office or the pension and ending on the expiration of 7 sitting days of that House after notice of his accepting that office or pension has been given to that House in accordance with its Standing Rules and Orders, unless that House has previously passed a resolution indicating that it is satisfied that that Member has ceased to hold that office or, as the case may be, that the right of that Member to that pension has ceased or is suspended while he is a Member of that House.

This is the most significant of the disqualifications from election to and membership of the Council. It is designed to ensure that members can carry out their duties and responsibilities free from influence or undue pressure from the executive government. The reasons for disqualification from Parliament of those who hold an office of profit under the Crown include:

- To reduce the influence of the executive in the Parliament. This may be seen as an aspect of the doctrine of the separation of powers.
- To avoid any conflict of interest which might arise between parliamentary duties and those of any other public office. This includes the inability to adequately perform the duties of both positions given the modern full-time role of members of Parliament.
- To maintain the principle of ministerial responsibility whereby those who determine and execute government policy remain accountable to Parliament through the appropriate minister. This role may be hindered if officers attached to the minister are members of Parliament.[4]

The disqualification of a person who holds an office of profit under the Crown has its origins in Britain in the 18th century, when a series of legislative reforms were introduced in an attempt to reduce the extent of Crown influence over members of the House of Commons.[5]

---

4 Carney, (n 1), pp 57-58. See also *Sykes v Cleary* (1992) 109 ALR 577 at 581 per Mason CJ, Toohey and McHugh JJ.

5 For a more detailed history, see Carney, (n 1), pp 58-60 and A Twomey, *The Constitution of New South Wales*, (Federation Press, 2004), pp 432-433.

In New South Wales, the constitutional provisions relating to offices of profit developed in several stages.[6] They were only formally extended to members of the Legislative Council in 1933 with the insertion of section 17B(3) into the *Constitution Act 1902*.[7] This section was inserted to accompany the introduction of a system for the election of members of the Council by vote of both Houses. Section 17B(3) was subsequently repealed and replaced by the current section 13B in 1978, again to accompany reforms to the election of the Council. Section 13B applies to members of both the Council and the Assembly.

Office of profit restrictions have arisen in the Council on two occasions. On 6 October 1948, the Hon James Maloney resigned from the Council to avoid disqualification for accepting an office of profit.[8] The Governor had appointed Mr Maloney to the Library Board of New South Wales on 23 February 1948, for a term of four years.[9] When Mr Maloney realised that he held an office of profit,[10] he resigned from the Council and was subsequently re-elected to fill his own vacancy one month later on 19 November 1948.[11] Through resignation and re-election, Mr Maloney was able to circumvent the then disqualification provisions for a sitting member accepting an office of profit, because when re-elected as a member he already held an existing office of profit.[12] Mr Maloney resigned from the Library Board in December 1948.[13]

In June 1956, the Hon Harold Ahern resigned as an employee of the Electric Light and Power Supply Corporation Ltd, in view of the impending transfer by legislation of all employees of the Corporation to the Electricity Commission. A position in the Electricity Commission would have constituted an office of profit under the Crown.[14]

---

6 Twomey, (n 5), pp 432-434.

7 Prior to 1933, certain restrictions applied to members of the Council holding an 'office of emolument under the Crown'.

8 *Minutes*, NSW Legislative Council, 19 October 1948, p 6.

9 *Government Gazette*, No 20, 20 February 1948, p 412. The Report of the Library Board of New South Wales for the year ended 30 June 1948 shows that Mr Maloney attended three meetings of the board following his appointment. See *Journals*, NSW Legislative Council, 1948-1949, vol 1, p 505.

10 *Sydney Morning Herald*, 8 October 1948, p 3. Under then section 3(18) of the *Library Act 1939*, members of the Library Board were entitled to fees for attending meetings and travelling expenses, thus creating an office of profit for Mr Maloney, as a member of the Council.

11 *Minutes*, NSW Legislative Council, 30 November 1948, p 30.

12 Report of Trustees of the Museum of Technology and Applied Sciences for years 1946 and 1947. See *Journals*, NSW Legislative Council, 1947, vol 1, p 45; 1947-1948, vol 1, p 157.

13 *Government Gazette*, 3 December 1948, p 3244.

14 *Minutes*, NSW Legislative Council, 13 June 1956, p 42 (personal explanation). See also *Hansard*, NSW Legislative Council, 13 June 1956, pp 460-461. See also Crown Solicitor, 'Electricity Commission (Balmain Electric Light Company Purchase) Act, 1950 – Position of Hon Harold Daniel Ahern, MLC. Applicability of section 17B of the Constitution Act 1902', 12 January 1951.

The meaning of 'an office of profit under the Crown'

In 1992 in *Sykes v Cleary*[15] the High Court considered the situation of a school teacher, Mr Cleary, who was elected to the Commonwealth Parliament whilst on leave without pay from the Victorian Teaching Service.[16] In their joint decision, Mason CJ, Toohey and McHugh JJ acknowledged that the meaning of the expression 'office of profit under the Crown' is 'obscure'.[17] However, some guidance is available, as discussed below.

'An office'

In *Sykes v Cleary*, Mason CJ, Toohey and McHugh JJ interpreted an 'office' broadly as meaning 'at least those persons who are permanently employed by government'.[18] Some form of appointment, tenure, duties and salary or remuneration could all be used by the courts to determine the existence of an 'office'.[19]

Mason CJ, Toohey and McHugh JJ rejected arguments that an 'office' of profit under the Crown should be confined to those who hold important or senior positions in government.[20] They also rejected argument that 'office' signifies 'a subsisting permanent substantive position which exists independently of the person who fills it from time to time'.[21]

'Of profit'

An office is an office 'of profit' under the Crown where there is a salary or fees beyond expenses attached to the position, even though the salary or fees may be temporarily suspended. In *Sykes v Cleary*, Mason CJ, Toohey and McHugh JJ held that the taking of leave without pay by Mr Cleary from the Victorian Teaching Service did not alter the character of the office as an office 'of profit'.[22] Equally it has been held that the refusal of a salary or fee does not alter the character of an office of profit.[23]

There is also judicial authority that an office of profit is an office of profit under the Crown where the position holder is appointed by the Crown, even though the 'profit' attached to the position comes from the private sector.[24]

---

15 (1992) 109 ALR 577.

16 The case was decided under the disqualification provisions relating to 'office of profit' in section 44(iv) of the Commonwealth Constitution. However, the case is useful to illustrate the meanings given to 'office of profit' and Carney suggests the same interpretation of an office of profit under the Crown adopted in *Sykes* is likely to be adopted at State level. For further information, see Carney, (n 1), p 22.

17 *Sykes v Cleary* (1992) 109 ALR 577 at 581 per Mason CJ, Toohey and McHugh JJ.

18 Ibid, at 582 per Mason CJ, Toohey and McHugh JJ.

19 Twomey, (n 5), p 435.

20 *Sykes v Cleary* (1992) 109 ALR 577 at 582 per Mason CJ, Toohey and McHugh JJ.

21 Ibid, at 583 per Mason CJ, Toohey and McHugh JJ.

22 Ibid.

23 *Bowman v Wood* (1899) 9 QLR 272 at 278 per Real J.

24 For further information, see Twomey, (n 5), pp 435-436.

'Under the Crown'

In determining whether an office of profit is 'under the Crown', the courts would likely consider who appoints, controls and dismisses the occupant of the office and the nature of the duties of the occupant. Generally speaking, an office of profit 'under the Crown' would include an office to which a person is appointed and removed by the Governor, a minister of the Crown or an officer of the Crown.

All officers appointed to the Public Service of New South Wales would likely hold an office 'under the Crown'.[25] Equally, all officers of the broader government sector would likely hold an office 'under the Crown'.[26]

'Special temporary employees', such as ministerial staff who work for 'political office holders',[27] would also appear to hold an office 'under the Crown'.

It is not clear whether employees of statutory state-owned corporations in New South Wales hold a position 'under the Crown'. Although staff are employed by the corporation under the *State Owned Corporations Act 1989*, the corporations do not represent the State unless by express agreement of the voting shareholders,[28] and ministers have limited power to direct such corporations.[29]

Complex questions also arise in the case of officers or employees of semi-government or partly privatised entities.[30]

The office of a judge or royal commissioner is unlikely to be 'under the Crown'. Whilst 'under the Crown' to the extent that the office holder is appointed by the Governor, the office holder is required to act independently and is not subject to any direction or supervision by the executive.[31]

---

25 The Public Service of New South Wales is established under part 4, division 1 and schedule 1 of the *Government Sector Employment Act 2013*. It has three divisions: departments such as the Department of Premier and Cabinet; public service executive agencies such as the Crown Solicitor's Office, and separate agencies such as the Ombudsman's Office.

26 The 'government sector' is defined in section 3 of the *Government Sector Employment Act 2013*. Beyond the Public Service, it includes the Teaching Service, the NSW Police Force, the NSW Health Service, the Transport Service, and any other service of the Crown.

27 See sections 3 and 4 of the *Members of Parliament Staff Act 2013*. Under section 5 staff are employed by their minister or political office holder on behalf of the State.

28 *State Owned Corporations Act 1989*, s 20F. In *Townsville Hospitals Board v Townsville City Council* (1982) 149 CLR 282 at 291, Gibbs CJ (with whom the other members of the court agreed) stated that the legal authorities display 'a strong tendency to regard a statutory corporation formed to carry on public functions as distinct from the Crown unless Parliament has by express provision given it the character of a servant of the Crown'.

29 *State Owned Corporations Act 1989*, s 20P.

30 Senate Standing Committee on Constitutional and Legal Affairs, *The Constitutional Qualifications of Members of Parliament*, 1981, pp 39-40; K Cole, '"Office of Profit under the Crown" and membership of the Commonwealth Parliament', Parliamentary Library, Parliament of Australia, 30 April 1993, pp 12-15.

31 Twomey, (n 5), p 437; Carney, (n 1), p 64. It would be highly unlikely in modern times for a judge or royal commissioner to sit in or be seeking election to the Legislative Council.

In addition, it is doubtful that an office with a university would be regarded as being 'under the Crown'.[32] However, a position with a TAFE college may amount to 'an office of profit under the Crown'.[33]

The question of whether local government councillors hold an office of profit 'under the Crown' is unlikely to arise in the future.[34] Under an amendment to the *Local Government Act 1993* in 2012,[35] a person is now prohibited from holding the dual roles of a member of Parliament and a councillor for any significant period of time:

- A person who is elected as a member of Parliament may continue to hold the office of councillor for the balance of the person's term of office as a councillor or for a period of two years (whichever is the shorter period).
- A member of Parliament may nominate for and be elected as a councillor without first resigning from Parliament. If elected, the person is disqualified from the office of councillor unless the person has ceased to be a member of Parliament before the first meeting of the council after the election.[36]

The positions of President, Deputy President and Chair of Committees and Assistant President are not offices of profit 'under the Crown' as they are elected by the House.

Occasionally the Clerk, on behalf of the President, has sought advice from the Crown Solicitor on whether a particular position is an office of profit under the Crown. In some cases positions have been regarded as 'under the Crown', such as the position of President of the Ku-ring-gai Chase Trust under the *Crown Lands Consolidation Act 1913* (now repealed),[37] a government-appointed trustee under the *McGarvie Smith Institute Incorporation Act 1928*, or a Fellow in Anaesthesia at a public hospital.[38] Other positions have not been regarded as 'under the Crown', such as a position on the Board of Management of the Road Safety Council of New South Wales (now disbanded).[39]

---

32 Particular issues arise in relation to membership by members of university senates. See Crown Solicitor, 'Inquiry concerning sections 13 and 13B of the *Constitution Act 1902*', 6 December 2000, paras 3.3, 3.7 and 3.8, but note also this advice was prior to the *University Legislation Amendment Act 2004*.

33 Ibid, para 3.3.

34 In the past there have been many instances where local government councillors have been elected to the Council or the Assembly and continued to sit in Parliament without relinquishing their positions as councillors. At the Commonwealth level, the matter was most recently considered by the High Court in *Re Lambie* (2018) 263 CLR 601.

35 *Local Government Amendment (Members of Parliament) Act 2012*.

36 *Local Government Act 1993*, s 275.

37 Crown Solicitor, '*Constitution Act, 1902*, s 17B(3): Question whether the office of President of the Ku-ring-gai Chase Trust is an 'office of profit under the Crown'', 29 June 1954.

38 Crown Solicitor, 'Office of Profit', 28 April 1995.

39 Crown Solicitor, 'Whether membership of the Board of Management of the Road Safety Council of the New South Wales, in respect of which an honorarium is paid, constitutes an office of profit under the Crown', 9 October 1968.

Exemptions from disqualification under section 13B

Section 13B(3) of the *Constitution Act 1902* exempts a number of office holders from the operation of section 13B(1) and (2) so that they are entitled to be elected to sit and vote in either House despite holding an office of profit under the Crown:[40]

- Section 13B(3)(a)(i), (b) and (c) exempts ministers of the Crown, the Vice-President of the Executive Council and parliamentary secretaries.
- Section 13B(3)(a)(ii) exempts persons who hold an office of profit that involves no remuneration except meeting fees or an allowance for reasonable expenses incurred in carrying out the duties of office.
- Section 13B(3)(a)(iii) excludes offices of profit under the Crown in right of the Commonwealth or another State,[41] except an office as a member of a legislature of a 'country' other than New South Wales.[42]

The Parliament may also legislate to declare that a particular office is not an office of profit under the Crown for the purposes of section 13B.[43]

Resignation from office between nomination and election

It is unclear whether a person who holds 'an office of profit under the Crown' at the time of nomination for election to the Council, but subsequently resigns from the office before he or she is elected, is subject to the operation of section 13B. However, there is case law to suggest that the disqualification applies from the date of nomination:

- Federally, the High Court in *Sykes v Cleary*[44] and *Re Canavan*[45] held in relation to section 44 of the Commonwealth Constitution that the office of profit must not be held at the time of nomination.

40 As with section 13B(1) and (2), section 13B(3) was also first enacted in 1978 by the *Constitution and Parliamentary Electorates and Elections (Amendment) Act 1978*, but was significantly amended in 1980 by the *Constitution (Amendment) Act 1980*.

41 *Hansard*, NSW Legislative Council, 19 March 1980, p 5440. Prior to 1980, section 13B applied to any office under the Crown in any jurisdiction. The change was made in 1980 on the basis that the disqualification should only apply in the same jurisdiction.

42 *Hansard*, NSW Legislative Council, 25 March 1980, p 5703. It was explained during debate on the Constitution (Amendment) Bill that the term 'country' was used in an international law sense, in that country is the whole of a territory subject to one body of law such as each State of Australia, and that the exclusion should not extend to membership of subsidiary political entities such as local government bodies.

43 See, for example, the *Sydney Cricket and Sports Ground Act 1978*, sch 1, cl 5.

44 *Sykes v Cleary* (1992) 176 CLR 77 at 99-101 per Mason CJ, Toohey and McHugh JJ.

45 *Re Canavan* (2017) 349 ALR 534 at 537 per the whole court.

- In New South Wales, in *McDonald v Keats*,[46] the Supreme Court held that 'election' extends to all the steps in the election process from the issue of writs to the declaration of the polls.[47]

The situation of certain public servants who hold an office of profit under the Crown is regulated by statute. Section 71 of the *Government Sector Employment Act 2013* provides:

> (1) If a person who is employed in any public sector service is nominated for election to the Legislative Assembly or Legislative Council, the person is to be granted leave of absence until the day on which the result of the election is declared.
>
> (2) If the person is elected, the person is required to resign from the public sector service concerned.
>
> (3) Unless the person is entitled to leave with pay (and duly applies for such leave), any leave of absence under this section is to be leave without pay.

Section 71 does not expressly apply to section 13B. However, Twomey argues that the provision impliedly amends section 13B by excluding public servants from its operation up until such time as they may be elected.[48] In support of this, former section 2 of the *Constitution (Public Service) Amendment Act 1916*, which was replaced by section 102 of the *Public Sector Employment and Management Act 2002* and subsequently section 71 of the *Government Sector Employment Act 2013*, expressly excluded public servants from the application of the predecessor to section 13B.

Whilst section 71 makes allowance for public servants to be granted leave of absence pending the outcome of a periodic Council election, the wording of section 102 made no mention of similar arrangements being adopted in relation to the filling of a casual vacancy in the Council. Consequently, to avoid any challenge to an election to fill a casual vacancy, public servants would be prudent to resign their position before being nominated to fill a casual vacancy in the Council.

Pensions from the Crown

Section 13B(1) and (2) also operate to disqualify any person 'having a pension from the Crown during pleasure or for a term of years' from sitting or voting as a member of either House of the Parliament.

---

46 (1981) 2 NSWLR 268.

47 *McDonald v Keats* (1981) 2 NSWLR 268 at 274. In 1870, a member of the Legislative Assembly, Mr Horace Dean, had his seat declared vacant after he resigned from the position of post-master one day after his nomination for the seat and 12 days before the poll. By contrast, in 1875, Mr George Dibbs' seat was not declared vacant despite holding an office of profit as a member of the Marine Board of New South Wales at the time of his nomination. See Twomey, (n 5), p 439.

48 Twomey, (n 5), p 437. The NSW Public Service Commission Personnel Handbook advises that 'employees who are intending to nominate as candidates should be advised to consider appropriate leave arrangements to cover the election period'.

Section 13D of the *Constitution Act 1902*[49] further provides for the abatement of the salary of any member in receipt or a pension or superannuation from any period working as a public servant.

For many years, it had been thought that the disqualification under section 13B(1) and (2) attaching to receipt of a pension from the Crown had little, if any, modern application.[50] However, following the March 2011 general election, concerns arose whether a medically retired former school teacher, Mr John Flowers, who was newly elected to the Legislative Assembly, could be sworn in and sit and vote as a member of the Assembly due to his receipt of a 'breakdown' pension for a term of five years from the SAS Trustee Corporation under the *Superannuation Act 1916*.

In response to these concerns, the Government introduced changes to the *Superannuation Regulation 2006* through the *Superannuation Amendment (Breakdown Pensions) Regulation 2011*. This regulation enabled a person to apply for the cancellation of a pension during the person's term of office as a member, and so avoid the disqualification under section 13B(1) and (2).

The disqualification under section 13B(1) and (2) attaching to receipt of a pension from the Crown does not appear to apply to members in receipt of parliamentary superannuation.[51] It is also likely that where a pension from the Crown cannot be suspended, cancelled or reduced at the discretion of the executive government, such a pension does not meet the test of a pension from the Crown 'during pleasure' within the meaning of section 13B(1) of the *Constitution Act 1902*.

In addition, by section 13B(3)(iv) it is possible for a person to receive a military or other Commonwealth pension and still be capable of being elected to and sitting and voting in the Council.

Parliamentary discretion in disqualification under section 13B

As cited above, section 13B(1) and (2) provide that a member's seat becomes vacant seven sitting days[52] after notice of the member holding an office of profit under the Crown or a pension from the Crown has been given to the House in accordance with the

49 Section 13D was inserted into the *Constitution Act 1902* in 1978, and replaced the previous section 29(2), in force from 1902.

50 *Hansard*, NSW Legislative Council, 19 March 1980, p 5441; Carney, (n 1), p 93; Twomey, (n 5), p 442.

51 Twomey, (n 5), p 442. Former members elected before the 2007 election who are in receipt of superannuation payments under the defined benefits scheme established by the *Parliamentary Contributory Superannuation Act 1971* are subject to section 25 which provides that if they again become a member, their right to a pension is suspended whilst they continue to be a member.

52 For the purposes of section 13B(1) and (2), 'sitting days' are counted whether or not they occur during the same session of Parliament. See also the definition of sitting days in the *Interpretation Act 1987*, s 18. In the case of section 13B(1), it appears that the seven sitting days are to be counted from the date the disqualification comes to the notice of the House, rather than the date of the person's election to the House.

standing orders, provided that the House does not pass a resolution indicating that it is satisfied that the person has ceased to hold the office or the right of that person to that pension has ceased or is suspended whilst he or she is a member of that House.

It follows that the seat of a member holding an office of profit under the Crown or a pension from the Crown does not become vacant if notice is not given of the member accepting that office or pension.

It also follows that, even in circumstances where notice is given of a member accepting an office of profit under the Crown or a pension from the Crown, the relevant House has discretion to nevertheless pass a resolution within seven sitting days indicating that it is satisfied that the member has ceased to hold the office or pension. In such circumstances, the seat of the member does not become vacant. However, even where a member has ceased to hold an office or pension, it remains at the discretion of the House whether to pass such a resolution. According to Twomey:

> The House may choose, on political grounds, not to pass the resolution, so that the member's seat becomes vacant. If it were intended that mere resignation of the office were enough to avoid the vacation of a seat, then this could have been provided for without the need for a resolution of the House.[53]

As originally enacted in 1978, section 13B(1) and (2) of the *Constitution Act 1902* did not incorporate such a provision. As a result, a person elected holding an office of profit under the Crown or pension from the Crown, or a sitting member accepting an office of profit or pension automatically lost his or her seat. The change was made in 1980 with the passage of the *Constitution (Amendment) Act 1980*. The intention of the change was to avoid cases of inadvertent disqualification of a member acting in good faith.[54]

When the Constitution (Amendment) Bill 1980 was introduced, it was envisaged that each House would adopt standing rules and orders regarding the giving of notice of the holding or acceptance of a disqualifying office of profit under the Crown and pension from the Crown.[55] Whilst no specific rules or orders have since been adopted, the current standing orders provide that a notice of motion concerning the qualification of a member is placed on the *Notice Paper* as business of the House (SO 39(b)). That means such notices take precedence over government and general business.

Holding a contract or agreement for or on account of the public service

Section 13(1), (2) and (3) of the *Constitution Act 1902* provides for the disqualification from membership of the Legislative Council of any person who holds a contract or agreement with the public service of New South Wales. Section 13(1) states that a person who holds such a contract or agreement is incapable of being elected, or sitting or voting as a member, for the duration of the contract or agreement. Section 13(2) provides that if a member enters into or continues to hold such a contract or agreement, his or her

53 Twomey, (n 5), p 440.
54 *Hansard*, NSW Legislative Council, 19 March 1980, pp 5440-5441.
55 *Hansard*, NSW Legislative Council, 19 March 1980, p 5441.

seat shall be declared vacant by the Legislative Council. Section 13(3) provides that the disqualifications in section 13(1) and 13(2) do not extend to any contract with an incorporated company, or trading company consisting of more than 20 persons, where the contract or agreement is made for the general benefit of the company.

Under section 14(1) of the *Constitution Act 1902*, if any person who is 'incapable to sit or vote' under the act, except under section 13B, is nevertheless elected or returned as a member of the Council, the House must declare his or her election void. Under section 14(2), any person who seeks to sit or vote in the Council whilst disqualified under section 13 shall forfeit $1,000 to be recovered by any person who sues for the same in the Supreme Court.

The rationale for the disqualification in section 13 is to prevent the executive government from seeking unduly to influence members of Parliament through the offer of government contracts. It also helps maintain the integrity of contracting for the public service by ensuring that the public service is not compromised in the interests of benefiting members of Parliament.

The disqualification for contracts or agreements with the public service originated in Britain in the *House of Commons (Disqualification) Act 1782* (Imp), the objective of which was 'further securing the Freedom and Independence of Parliament'.[56] In New South Wales, section 28 of the *Constitution Act 1855* closely resembled the provisions of the *House of Commons (Disqualification) Act 1782* (Imp). Subsequently, the *Constitution Act 1902* included section 13(1), (2) and (3) in largely the same terms as they stand today.[57]

The meaning of a 'contract or agreement for or on account of the Public Service of New South Wales'

The existence of a 'contract or agreement' is a necessary prerequisite for the disqualification under section 13(1) or (2) to apply. Further, the contract or agreement in question may need to be one which is valid and enforceable at law.[58] If the benefit of the contract is assigned to others, then the disqualification does not apply.[59]

The New South Wales Supreme Court has also held that the government must be one of the parties to the contract contemplated in section 13. Further issues arise where a member may become indirectly interested in a contract.[60]

56 Carney, (n 1), pp 95-96.

57 For further information and historical background to section 13, see Twomey, (n 5), pp 405-406; Carney, (n 1), pp 95-97; Standing Committee on Privilege and Ethics, *Report on sections 13 and 13B of the Constitution Act 1902*, Report No 15, March 2002, pp 5-6.

58 See *Miles v McIlwraith* (1883) 48 LT 689. This matter was also examined by the High Court in 2017 in *Re Day (No 2)* (2017) 343 ALR 181 in relation to the operation of section 44(v) of the Commonwealth Constitution.

59 Twomey, (n 5), p 410.

60 Ibid, p 414.

In addition, a contract or agreement must be 'for or on account of the public service *of New South Wales*' (emphasis added). Reference to 'New South Wales' was inserted in 1962 to clarify that the provision does not extend to other public services, notably the Commonwealth public service.[61] In a case in 1956, advice of the Crown Solicitor suggested that a member's ownership of a printing and publishing company which published a local newspaper and which accepted State government advertisements might constitute grounds for disqualification under section 13, whilst accepting advertisements from local councils would not.[62]

Similarly, in 2013 the Crown Solicitor advised that a contract to provide goods or services to a local council to enable the council to exercise its functions is not a contract or agreement 'for or on account of the Public Service of New South Wales'.[63]

In the past there were various proposals to implement schemes for the provision of motor vehicles to members which failed owing to the disqualification provisions of section 13. However, this issue has now been resolved.[64]

In 2017 the High Court in *Re Day (No 2)*[65] had occasion to examine the application of the equivalent section 44(v) of the Commonwealth Constitution. In that case a company indirectly associated with Mr Day, who had been elected to the Senate in 2013, owned premises which were leased by the Commonwealth for use as his electorate office and had directed that rental payments be made to a bank account owned by Mr Day. The High Court found that Mr Day had had an 'indirect pecuniary interest in [an] agreement with the public service of the Commonwealth' within the meaning of section 44(v) and had therefore been incapable of being chosen as a senator in 2016.[66]

Exemptions

As indicated above, section 13(3) of the *Constitution Act 1902* provides that the disqualifications in section 13(1) and 13(2) do not extend to any contract or agreement with an incorporated company, or trading company consisting of more than 20 persons, where the contract or agreement is made for the general benefit of the company.[67]

In addition to section 13(3), section 13(4) of the *Constitution Act 1902* lists six exemptions where candidates for election to Parliament and members of Parliament may enter into contracts or agreements with the Government of New South Wales. The exemptions are:

61 For a more detailed discussion, see Twomey, (n 5), pp 413-414.

62 Crown Solicitor, 'Effect of sections 13 and 17B(3) of the Constitution Act', May 1956.

63 Crown Solicitor, 'Contracts with Local Government and vacation of seat by a member of the Legislative Council', April 2013.

64 See the discussion below under the heading 'Exemptions'. For further information, see L Lovelock and J Evans, *New South Wales Legislative Council Practice*, 1st ed, (Federation Press, 2008), pp 153-154.

65 (2017) 343 ALR 181.

66 *Re Day (No 2)* (2017) 343 ALR 181.

67 For further information, see Crown Solicitor, 'Section 13(3) of the *Constitution Act 1902*', June 2013.

- investment in government bonds;
- contractual interests arising under a deceased estate or trust;
- compensation agreements (to be notified in the *Government Gazette*);
- real property contracts, including leases, together with gifts of land;[68]
- contracts for the sale to or from the Crown of goods, merchandise or services if supplied on ordinary public terms; and
- secured loans by the Crown to members on ordinary terms.

The intention behind section 13(4) is to avoid the situation whereby a member could be disqualified for undertaking ordinary transactions with the government in keeping with arrangements that may be entered into by any member of the public.

In 1980, section 13(4A) and (4B) were added to section 13 to remove doubt that a contract or agreement with the Crown under section 13(1) and (2) does not apply to disqualify a person from sitting and voting or holding office as a member of either House by reason of holding or accepting an office of profit, thus leaving it to section 13B to define the circumstances in which a disqualification for any such reason takes place.[69]

In 2009, the *Parliamentary Remuneration Act 1989* was amended[70] to provide members of Parliament with access to salary packaging arrangements similar to those available to public sector employees.[71] At the same time, section 13(4C) was inserted into the *Constitution Act 1902* to provide that nothing in section 13(1) and (2) prevents a person from being elected or sitting or voting as a member, or requires or permits the seat of a member to be declared vacant, on the ground that he or she elects or agrees to be provided with, or receives, employment benefits (including salary sacrifice contributions for superannuation) under the *Parliamentary Remuneration Act 1989* or any other act.[72]

Failure to attend the House for one whole session

Section 13A(1)(a) of the *Constitution Act 1902* provides that a member's seat will become vacant if the member fails to attend for one whole session of the Legislative Council, unless excused by the House.

---

68 In 1966 the Crown Solicitor advised that a lease of privately owned land by a member to the Totalizator Agency Board was exempt from the operation of section 13(1) and (2). See Crown Solicitor, 'Office of Profit', 31 August 1966. However, this issue may need to be reconsidered in light of the High Court decision in *Re Day (No 2)* (2017) 343 ALR 181.

69 *Constitution (Amendment) Act 1980*, sch 1(1). See *Hansard*, NSW Legislative Council, 19 March 1980, p 5441.

70 *Parliamentary Remuneration Amendment (Salary Packaging) Act 2009*.

71 *Parliamentary Remuneration Act 1989*, pt 2A.

72 For discussion of previous proposals to implement schemes for the provision of motor vehicles to members which failed on the basis of concerns as to the possible application of section 13, see *New South Wales Legislative Council Practice,* 1st ed, (n 64), pp 153-154.

Members may obtain leave of absence under standing order 63. This is discussed later in this chapter.[73]

Section 13A(a), in the same form as the current section 13A(1)(a), was inserted into the *Constitution Act 1902* in 1978, accompanying reforms to the election of the Council. Prior to 1978, section 19(a) of the *Constitution Act 1902* (in force between 1902 and 1978), and section 5 of the *Constitution Act 1855* (in force between 1855 and 1902) provided for the vacation of a member's seat upon failure to attend for two successive sessions of the Legislature, unless excused by the Monarch or the Governor.

Between 1856 and 1925 there were 15 cases of members of the Council being disqualified on the ground of failure to attend the House for one whole session.[74] All the cases occurred during the period in which members of the Council were appointed by the Governor, rather than elected.[75] There have been no cases since 1925.

Allegiance to a foreign power

Section 13A(1)(b) of the *Constitution Act 1902* provides that a member's seat will become vacant if the member takes any oath or makes any declaration or acknowledgment of allegiance, obedience or adherence to any foreign prince or power. Examples include an application for a foreign passport or citizenship, or possibly serving in the armed forces of a foreign country.

Section 13A(1)(b) only applies to a person who is already a member who takes action to express allegiance to a foreign power. Unlike section 44(i) of the Commonwealth Constitution, which was examined in some detail by the High Court in 2017,[76] section 13A(1)(b) does not prevent persons with a pre-existing foreign citizenship from becoming a member. Thus, having dual citizenship in itself does not activate the

73 See the discussion under the heading 'Leave of absence'.

74 *Minutes*, NSW Legislative Council, 8 December 1858, p 2 (Riddell); 11 January 1861, p 7 (A'Beckett); 24 October 1865, p 3 (Macarthur, Merewether and Russell); 22 August 1882, p 2 (Macarthur); 8 September 1885, p 2 (Joseph); 27 February 1889, p 3 (Grahame and Ogilvie); 29 April 1890, p 4 (Watt); 19 January 1893, p 107 (Lord); 12 May 1896, p 3 (Tarrant); 10 March 1908, p 2 (Wise); 24 June 1925, p 3 (Mackellar). In one case, although the member failed to attend for two sessions and his seat became vacant, the member died during the long adjournment before the vacancy was reported at the next sitting of the House. See *Minutes*, NSW Legislative Council, 23 October 1888, p 2 (Campbell). Before 1856 there was at least one case of a member being disqualified for failing to attend for two sessions. See *Votes and Proceedings*, NSW Legislative Council, 22 March 1848, p 7 (Lang).

75 A discussion of a notable instance in 1865 when the House considered the absence of three members for two sessions is provided in *New South Wales Legislative Council Practice*, 1st ed, (n 64), pp 155-157.

76 *Re Canavan; Re Ludlam; Re Waters; Re Roberts; Re Joyce; Re Nash; Re Xenophon* (2017) 349 ALR 534, sometimes referred to as the 'Citizenship Seven case'. See also *Re Gallacher* (2018) 355 ALR 1.

provision, but taking action to express allegiance to a foreign power, such as applying for a passport of another country, could cause a member's seat to become vacant.[77]

Bankruptcy

Section 13A(1)(c) of the *Constitution Act 1902* provides that a member's seat will become vacant if the member becomes bankrupt or takes the benefit of any law for the relief of bankrupt or insolvent debtors.

Bankruptcy as a ground for disqualification from membership dates from at least 1842,[78] a time when it was considered that bankruptcy and insolvency involved moral turpitude and rendered a person unsuitable for public office. It was also a time when property qualifications applied to the franchise. In modern times, with changing community attitudes, the need for such a ground for disqualification has been questioned,[79] although given the perceived or actual vulnerability of bankrupt members to financial pressure, it has also been argued that there is a case for retaining such a disqualification.[80]

As with the disqualification for allegiance to a foreign power, the disqualification only applies if a sitting member becomes bankrupt or takes the benefit of a relevant law. The disqualification has no application to candidates for election to Parliament. Accordingly, a candidate who is bankrupt is not disqualified from becoming a member.[81]

There has been one instance of the seat of a member of the Council becoming vacant by reason of bankruptcy. On 11 May 1932 the President advised the House that the Hon Hugh McIntosh had become bankrupt and his seat was vacant.[82]

In 2017 a senator became subject to the equivalent disqualification provisions of the Commonwealth Constitution, sections 44(iii) and 45. However, the bankruptcy disqualification was somewhat academic as the Court of Disputed Returns found that the senator had been incapable of being chosen as a senator under section 44(ii) due to his conviction for a disqualifying offence.[83]

77 *Hansard*, NSW Legislative Council, 26 November 1992, pp 9998-9999. See also Twomey, (n 5), p 424.

78 *Australian Constitutions Act (No 1) 1842*, 5 & 6 Vic, c 76 (Imp).

79 Committee on the Independent Commission Against Corruption, *Inquiry into section 13A of the Constitution Act 1902*, December 1998, pp 29-30; and Senate Standing Committee on Constitutional and Legal Affairs, *The Constitutional Qualifications of Members of Parliament*, 1981, pp 34-37.

80 Carney, (n 1), p 55.

81 The most notable case in New South Wales is that of Sir Henry Parkes who was twice declared bankrupt whilst a member of the Assembly. On each occasion he resigned his seat and was subsequently re-elected.

82 *Minutes*, NSW Legislative Council, 11 May 1932, p 534. A more detailed discussion is provided in *New South Wales Legislative Council Practice*, 1st ed, (n 64), pp 159-160.

83 Statement by the President of the Senate: *Hansard*, Australian Senate, 7 February 2017, pp 2-3.

Public defaulter

Section 13A(1)(d) of the *Constitution Act 1902* provides that a member's seat will become vacant if the member becomes a public defaulter.

The meaning of 'public defaulter' is unclear. Advice from the Crown Solicitor in 1995 noted that extensive research had failed to yield any clear indication as to the meaning of the term.[84] In earlier advice dated 1947, the Crown Solicitor suggested that the term has the meaning given in the Imperial Dictionary:

> One who fails to perform a public duty, particularly one who fails to account to public money entrusted to his care.[85]

It has also been suggested that the term relates to the non-payment of debts,[86] or to a person who has escaped the law, or defaulted in the payment of a tax, or defaulted on a government contract.[87]

Conviction of certain crimes

Section 13A(1)(e) of the *Constitution Act 1902* provides that a member's seat will become vacant if the member is convicted of an infamous crime, or of an offence punishable by imprisonment for life or for a term of five years or more,[88] provided that under section 13A(2):

> (a) the Member has not lodged an appeal against the conviction within the prescribed period,[89] or

84 Advice from the Crown Solicitor cited in Committee on the Independent Commission Against Corruption, *Inquiry into section 13A of the Constitution Act 1902*, December 1998, para 6.8.

85 Crown Solicitor, 'Section 34 of the Constitution Act – position of RC Dewley', 27 May 1947, p 2. The advice concluded that Mr Robert Dewley, recently elected to the seat of Drummoyne, was not a 'public defaulter' for the making of a false income return. However, the Crown Solicitor did suggest that Mr Dewley was guilty of an 'infamous crime'.

86 Committee on the Independent Commission Against Corruption, *Inquiry into section 13A of the Constitution Act 1902*, December 1998, para 6.8.

87 Carney, (n 1), p 55.

88 Disqualification from membership of the Council for an offence punishable by imprisonment for life or for a term of five years or more applies regardless of whether or not the maximum penalty of five years or more is actually applied by the court in that particular instance. Even where the actual sentence is less than five years' imprisonment, or none at all, the seat of the member would still become vacant. In a case involving the equivalent provision of the Commonwealth Constitution, section 44(ii), the High Court found that a person had been subject to be sentenced for a disqualifying offence even though no sentence had been imposed on him. See *Re Culleton (No 2)* (2017) 341 ALR 1.

89 'Prescribed period', in relation to an appeal, means the period within which the appeal may be lodged, but does not include any extension of a period which a court may grant.

(b) the conviction has not been quashed on the determination of an appeal or appeals lodged within the prescribed period,[90] or

(c) such an appeal has been lodged within the prescribed period but has been withdrawn, or has lapsed, without being determined, and no other appeal lodged within the prescribed period is pending.

It follows that a member's seat does not become vacant for the purposes of section 13A(1)(e) if he or she is convicted of an infamous crime or an offence punishable by imprisonment for life or for a term of five years or more, but appeals the conviction and the conviction is set aside.

Section 13A(2), along with section 13A(3) to (5), was inserted into section 13A in June 2000, which as a consequence involved the renumbering of former section 13A(e) as 13A(1)(e). At the time, the change was cited as a measure to ensure fairness in the operation of what was then section 13A(e).[91] As it stood, a member could be convicted of a crime prescribed under section 13A(e) and potentially lose his or her seat immediately, regardless of whether that conviction was later overturned and the member found to be not guilty of the offence.[92]

As a consequence of the enactment of section 13A(2), where a member is convicted of an infamous crime or of an offence punishable by imprisonment for life or for a term of five years or more, there is a delay before it is known whether or not the member's seat will become vacant, until either the prescribed period for lodging an appeal has expired, or any appeal process has concluded.

However, in the intervening period the House retains the inherent power to expel the member from the House, where such action is deemed by the House as reasonably necessary for the defence of the institution. Section 13A(3) specifically provides: 'Nothing in this section affects any power that a House has to expel a Member of the House'. Other options available to the House are to suspend the member or to grant the member leave of absence until the outcome of an appeal is known.[93]

---

90 In 2017 a question arose as to the impact of the annulment of a conviction for the purposes of the equivalent disqualification provision of the Commonwealth Constitution, section 44(ii). See the decision of the High Court in *Re Culleton (No 2)* (2017) 341 ALR 1.

91 This reform was introduced in response to recommendations of the Independent Commission Against Corruption and the Joint Committee on the Independent Commission Against Corruption. See Independent Commission Against Corruption, *Investigation into Circumstances Surrounding the Payment of a Parliamentary Pension to Mr PM Smiles*, Second report, April 1996; and Committee on the Independent Commission Against Corruption, *Inquiry into section 13A of the Constitution Act 1902*, December 1998.

92 There was also considerable uncertainty as to the precise moment at which a conviction was said to have occurred for the purposes of section 13A(e). The impact of the lodging of an appeal against a conviction, and a finding by a court on appeal that there had not been a valid conviction, was unclear. See Independent Commission Against Corruption, *Investigation into Circumstances Surrounding the Payment of a Parliamentary Pension to Mr PM Smiles*, Second report, April 1996, p 3.

93 *Hansard*, NSW Legislative Council, 7 June 2000, p 6689.

As with other provisions under section 13A, section 13A(1)(e) only applies to a sitting member of Parliament.[94] It does not prevent a person who has been convicted of such an offence from being elected to Parliament (although under section 30(4) of the *Electoral Act 2017*, a person sentenced to imprisonment for 12 months or more and in prison serving that sentence is not eligible to be enrolled and therefore cannot be nominated and elected at a periodic Council election).

Prior to 1 January 2000, section 13A(e), as it then was, also provided that a member's seat became vacant if a member was 'attainted of treason or convicted of felony[95] or any infamous crime'. Section 13A(e) was changed in 1999[96] to delete the reference to 'treason' and 'felony' and to adopt the current ground for disqualification: conviction of an infamous crime or an offence punishable by imprisonment for life or for a term of five years or more.[97]

The meaning of an 'infamous crime'

There is no definition in the *Constitution Act 1902* of the meaning of an 'infamous crime' as used in section 13A(1)(e), and the precise meaning of the expression is uncertain. However, the term derives from offences which would disqualify a person from giving evidence before a court or being a juror, such as fraud, forgery, bribery and attempts to pervert the course of justice, rather than from crimes of violence.[98]

The meaning of the term 'infamous crime' has been considered several times in relation to members of the Parliament of New South Wales. The leading case is *In re Trautwein* in 1940.[99] On 16 April 1940, Mr Theodore Trautwein, a member of the Legislative Council, was convicted and sentenced to one year's hard labour for making a false statement about a document to a Commonwealth Officer in order that New South Wales and

94 By contrast the equivalent disqualification provisions of the Commonwealth Constitution, sections 44(ii) and 45(i), apply to both candidates and sitting members.

95 For a discussion of the meaning of the terms 'felony', see Solicitor General, 'Mr AC (Tony) Packard MP – Section 13A Constitution Act 1902', 18 July 1992. There was one instance of a member vacating his seat on conviction of a felony under the former section 19 of the *Constitution Act 1902*. On 13 June 1905 the President informed the House that he had received a communication from the Chief Secretary that the seat of the Hon Thomas Slattery was vacant. See *Minutes*, NSW Legislative Council, 13 June 1905, p 4. The letter from the Chief Secretary included a certificate of the Prothonotary of the Supreme Court indicating that Mr Slattery was convicted on 3 April 1905 for stealing £6,958.18s 10d and was sentenced to imprisonment for three years and six months with hard labour. The certificate further certified that the offence was a felony within the meaning of the *Crimes Act 1900*.

96 *Crimes Legislation Amendment (Sentencing) Act 1999*, sch 4.90.

97 This change was made as part of a broader package of reform to sentencing law in response to recommendations of the Law Reform Commission in 1996. See NSW Law Reform Commission, *Review of Sentencing Laws*, (Report No 79, December 1996). See also *Hansard,* NSW Legislative Council, 30 November 1999, p 3809.

98 *In re Reference by the Legislative Council (NSW); In re Trautwein* (1940) 40 SR (NSW) 371 at 374-378 per Maxwell J. See also Twomey, (n 5), p 428.

99 *In re Reference by the Legislative Council (NSW); In re Trautwein* (1940) 40 SR (NSW) 371.

Commonwealth Taxation Commissioners should refrain from instituting bankruptcy proceedings against him, together with other steps to enforce immediate payment of certain moneys. An appeal against the conviction was dismissed on 20 May 1940. On 23 May 1940, the last sitting day of the session, the House asked the Court of Disputed Returns to determine whether the seat of Mr Trautwein had become vacant by reason of Mr Trautwein being convicted of an 'infamous crime' under what was then section 19 of the *Constitution Act 1902* (now section 13A(1)(e)).[100] On 19 June 1940, Maxwell J in the Court of Disputed Returns found that the making of a false statement about a document in order to avoid tax was analogous to forgery and was therefore an 'infamous crime'. According to Maxwell J, forgery, perjury and attempts to pervert the course of justice also fell within the meaning of 'infamous crime'.[101]

In three subsequent cases various legal advices were received on the meaning of 'infamous crime' in relation to a false income tax return;[102] the use by a member of a listening device to eavesdrop on customers in a car sales business;[103] and certain offences by a member under Commonwealth law.[104] None of these cases, involving members of the Assembly, required the matter to be determined by the courts.

Membership of the Legislative Assembly

Section 13C of the *Constitution Act 1902* provides that a member of either House of the Parliament is not capable of being elected or of sitting or voting as a member of the other House.

The rationale for this disqualification lies in the impossibility of adequately performing the roles of a member of both Houses, and the conflict of interest likely to arise between the responsibilities of each role. The parameters of the phrase 'capable of being elected' are not defined, but it would be prudent for a member to resign as a member of one House before nominating as a candidate for election to the other.[105]

Membership of the Commonwealth Parliament

Section 91 of the *Electoral Act 2017* provides that a member of the Commonwealth Parliament is incapable of being nominated as a candidate for, or being elected as a member of, the Legislative Council.

---

100 *Minutes*, NSW Legislative Council, 23 May 1940, pp 383-384.

101 *In re Reference by the Legislative Council (NSW); In re Trautwein* (1940) 40 SR (NSW) 371 at 379 per Maxwell J.

102 Crown Solicitor, 'Section 34 of the Constitution Act – position of RC Dewley', 27 May 1947.

103 Solicitor General, 'Mr AC (Tony) Packard MP - Section 13A Constitution Act 1902', 18 September 1992.

104 Independent Commission Against Corruption, *Investigation into the circumstances surrounding the payment of a parliamentary pension to Mr PM Smiles*, Second report, April 1996, p 5.

105 Aside from ensuring compliance with section 13C, a member elected prior to 2007 who is contemplating seeking election to the Legislative Assembly also needs to consider the impact on his or her superannuation entitlements.

The rationale for this disqualification is similar to the rationale for section 13C outlined above: the avoidance of any conflicts of interest arising from the performance of the dual roles as a member of two Houses of Parliament, and the impossibility of adequately performing both roles.[106]

It appears that whilst a member of the Parliament of New South Wales must resign before nominating for election to the Commonwealth Parliament, there is no Commonwealth requirement to resign at any earlier time (such as on being pre-selected by a political party).[107]

It is possible for a member of the Legislative Council to resign to stand for election to the Commonwealth Parliament, then seek to return to the Council if unsuccessful. This occurred in 2004 when the Revd the Hon Fred Nile successfully nominated for and was elected to fill the casual vacancy in the Council caused by his own resignation to contest, unsuccessfully, a Senate seat.[108]

Contravention of the interests disclosure regime

Section 14A(2) of the *Constitution Act 1902* provides that if a member of either House wilfully contravenes any regulation made under section 14A(1) of the *Constitution Act 1902*, currently only the *Constitution (Disclosures by Members) Regulation 1983*, the House may declare the member's seat vacant.

Contravention of the interests disclosure regime is discussed in more detail later in this chapter.[109]

Statutory electoral disqualifications

Prisoners in custody

By section 30(4) of the *Electoral Act 2017*, a person is not entitled to be enrolled to vote if the person has been convicted of an offence, whether in New South Wales or elsewhere, and has been sentenced in respect of that offence to imprisonment for 12 months or more and is in prison serving that sentence. This provision indirectly prevents a person from being nominated for election at a periodic Council election as a person must be enrolled as at 6 pm on the date of issue of the writ for the election in order to be nominated.[110]

This disqualification only applies to prevent the nomination of a person for a periodic Council election. A member convicted of a crime and sentenced to imprisonment for

106 Carney, (n 1), p 28.
107 Clerk's advice, 'Procedure for a Member of the Legislative Council standing for election to the Commonwealth Parliament', 2003.
108 For further information, see the discussion in Chapter 4 (Elections for the Legislative Council) under the heading 'Section 22D(4): A representative of the same political party'.
109 See the discussion under the heading 'Contravention of the interests disclosure regime'.
110 *Electoral Act 2017*, s 83(1).

12 months or more may nevertheless remain a member, provided that: the crime was not an 'infamous crime', or an offence punishable by imprisonment for life or for a term of five years or more within the meaning of section 13A(1)(e) of the *Constitution Act 1902*; and that the member does not fail to attend the House for one whole session of the Parliament without the permission of the House within the meaning of section 13A(1)(a) of the *Constitution Act 1902*.

Electoral offences

Section 237 of the *Electoral Act 2017* provides that if the Court of Disputed Returns finds that a successful candidate for election to Parliament has committed or has attempted to commit the offence of bribery, treating and selling of votes, or interfering with the right to vote, his or her election is to be declared void.

In 1988 the election of a person to the Assembly was declared void[111] under the equivalent provisions of former section 164 of the *Parliamentary Electorates and Elections Act 1912*.

DETERMINATION OF DISQUALIFICATIONS

Traditionally, it was a matter for the Houses of the Parliament to determine their membership.[112] However, in 1928 the Parliament transferred exclusive jurisdiction to determine the validity of any 'election or return' to the Court of Disputed Returns under section 155 of the *Parliamentary Electorates and Elections Act 1912*, now section 233 of the *Electoral Act 2017*.

Any question respecting 'the qualification of a member' or 'a vacancy in the Council' may also be referred by resolution of the Council to the Court of Disputed Returns.[113]

Where any question is referred, the President transmits to the court a statement of the question on which the determination of the court is desired, together with any relevant papers relating to the question in the possession of the Council.[114]

The court may allow any person who, in its opinion, is interested in the determination of the question referred to be heard before it, or may direct notice of the reference to be

111 In September 1988, in the Court of Disputed Returns in *Scott v Martin* (1988) 14 NSWLR 663, Needham J held that the election of Mr Bob Martin to the seat of Port Stephens at the March 1988 general election was void following breaches by Mr Martin of the bribery provisions in section 147 of the *Parliamentary Electorates and Elections Act 1912*. Mr Martin had handed out cheques drawn on government departments to community groups during the election period which he claimed was an attempt to get voters to the polls, but without seeking to influence the nature of their votes. This submission was rejected by Needham J, who accepted that the actions were aimed at influencing voters in the exercise of their voting rights.

112 For further information, see the discussion in Chapter 3 (Parliamentary privilege in New South Wales) under the heading 'The power of the House to determine its own membership'.

113 *Electoral Act 2017*, s 246(2).

114 Ibid, s 247.

served on any person. Any person allowed to be heard, or on whom notice has been served, is deemed a party to the reference.[115]

The court has the power to declare that any person was not qualified to be a member of the Council, to declare that any person was not capable of sitting as a member of the Council, and to declare that there is a vacancy in the Council.[116] There is no appeal from the court's decision.[117]

There has been only one case in which the Council has referred a question respecting a vacancy in the seat of a member to the Court of Disputed Returns: the 1940 case of Mr Theodore Trautwein cited earlier in relation to the meaning of 'infamous crime'.[118] On 24 September 1940, the judgment of the court was reported to the House.[119] The court found that Mr Trautwein had committed an 'infamous crime' and that the member's seat had become vacant.[120] Following receipt of the determination of the court, the President informed the House that the Governor had been notified that the member's seat had become vacant on 16 April 1940, the date of the member's conviction.[121]

ATTENDANCE AND LEAVE OF ABSENCE

Attendance

Section 13A(1)(a) of the *Constitution Act 1902* provides that a member's seat becomes vacant if the member fails to attend the House for one whole session of the Council unless excused by permission of the House. There is no specific rule or order of the House which requires a member to attend an individual sitting of the House.[122]

In practical terms, the political parties ensure that their members are present for important divisions, or arrange for absent members to be 'paired'.

Absent members are recorded in the *Minutes of Proceedings* each sitting day (SO 62), and a record of the number of days on which each member has attended is published in the *Journals*.[123]

---

115 Ibid, s 248.

116 Ibid, s 249.

117 Ibid, s 228. However, the question arises whether an appeal may be made to the High Court. For further information, see Twomey, (n 5), p 451.

118 See the discussion under the heading 'The meaning of an 'infamous crime''.

119 *Minutes*, NSW Legislative Council, 24 September 1940, pp 7-11.

120 Ibid, p 10.

121 Ibid, p 11.

122 This contrasts with Legislative Assembly standing order 27 which provides: 'Every Member is bound to attend the service of the House and any committee to which they are appointed unless granted leave of absence by the House'. However, there are records of the Council ordering the attendance of all members not on leave for debate on particular bills. See *Consolidated Index to the Minutes of Proceedings and Printed Papers*, NSW Legislative Council, 1856-1874, vol 2, p 158.

123 From 1856 until 2002 the *Minutes of Proceedings* recorded the members present each day on the first page. Since 2003 the final entry in the *Minutes* lists only those members absent. For a statement of

Leave of absence

Subject to the requirements of section 13A(1)(a) of the *Constitution Act 1902* noted above, it is not mandatory for a member to seek leave of absence from the House. However, in the past, members have sought leave for extended absences due to illness,[124] maternity leave[125] and military service.[126]

The seeking of leave of absence is governed by standing order 63, which provides that the House may by motion on notice give leave of absence to a member. A notice of motion for leave of absence takes precedence as business of the House (SO 39(a)). Such motions may be debated, but have usually been dealt with as formal business.

On 24 March 2020, in view of the impact of the COVID-19 pandemic, the House adopted a resolution granting leave of absence to every member of the Legislative Council from the rising of the House that day to the next sitting day, scheduled for 15 September 2020.[127] Although not strictly necessary, this resolution was adopted to be consistent with a similar resolution adopted by the Legislative Assembly.[128]

ETHICS AND MEMBERS OF PARLIAMENT

The discharge by members of their duties is 'necessarily left to [a] member's conscience and the judgment of his electors'.[129] However, in doing so, members have an overriding obligation to act in the public interest. This obligation is articulated in the *Code of Conduct for Members*, which is adopted for the purposes of section 9 of the *Independent Commission Against Corruption Act 1988*. The Preamble to the *Code of Conduct for Members* states:

> Members of Parliament acknowledge their responsibility to maintain the public trust placed in them by performing their duties with honesty and integrity, respecting the law and the institution and conventions of Parliament, and using their influence to advance the common good of the people of New South Wales.[130]

this position by the President, see *Hansard,* NSW Legislative Council, 30 April 2003, p 54.

124 See, for example, leave granted to the Hon Elaine Nile, *Minutes*, NSW Legislative Council, 18 November 1999, p 244.

125 See, for example, leave granted to the Hon Carmel Tebbutt, *Minutes*, NSW Legislative Council, 23 November 2000, p 742.

126 See, for example, leave granted to the Hon Dr Brian Pezzutti, *Minutes*, NSW Legislative Council, 10 November 1999, p 197; 28 March 2001, p 902; 18 June 2002, p 233.

127 *Minutes*, NSW Legislative Council, 24 March 2020, p 880.

128 *Hansard*, NSW Legislative Council, 24 March 2020, p 64. In the event the House was recalled on 12 May 2020.

129 *R v Boston* (1923) 33 CLR 386 at 402 per Isaacs and Rich JJ.

130 *Minutes*, NSW Legislative Council, 24 March 2020, p 883.

THE INTEREST DISCLOSURE REGIME

Members of the Legislative Council are required to disclose their pecuniary and other interests through regular returns. The returns are recorded in the 'Register of Disclosures by Members of the Legislative Council'. The Register is open to public inspection, and compilations of members' returns are published online on the Parliament's website.

The disclosure by members of their interests is designed to provide transparency regarding members' private interests. In the second reading speech to introduce the Constitution (Disclosures by Members) Amendment Bill 1981, the then Premier, the Hon Neville Wran, stated:

> The establishment of a scheme whereby members of Parliament can be seen to be above reproach not only enhances the prestige of our parliamentary system but also protects the members themselves against scurrilous attacks, which in the past they found difficult to rebut.[131]

The interest disclosure regime for members of both Houses of the Parliament is established under section 14A of the *Constitution Act 1902*. Section 14A(1) provides that the Governor may, subject to certain qualifications, make regulations for or with respect to the disclosure by members of either House of all or any of a number of pecuniary interests and other matters. Pursuant to section 14A(1), the *Constitution (Disclosures by Members) Regulation 1983* was gazetted on 6 May 1983, establishing the details of the interest disclosure regime. It has been amended several times since.

Types of interest returns lodged by members

Part 2 of the *Constitution (Disclosures by Members) Regulation 1983* stipulates four types of returns for the disclosure of members' interests: primary returns, ordinary returns, supplementary ordinary returns and discretionary returns:

- Primary returns are returns lodged by new members (not being re-elected members) disclosing their interests as at the date on which they took the pledge of loyalty (or were otherwise sworn in) under section 12 of the *Constitution Act 1902* (the primary return date).[132] New members must lodge a primary return with the Clerk within three months of their primary return date.[133]
- Ordinary returns are returns lodged by continuing members each year disclosing their interests held during the previous 12 months. Continuing members must lodge an ordinary return with the Clerk before 1 October each year for the

131 *Hansard*, NSW Legislative Assembly, 13 April 1981, p 5710.

132 Exceptions to this are provided in clauses 9(1)(a) and 15A of the *Constitution (Disclosures by Members) Regulation 1983* which deal with income and secondary employment, both of which require consideration of future interests.

133 *Constitution (Disclosures by Members) Regulation 1983*, cl 4.

12 months ending 30 June that year. Different arrangements apply to the first ordinary return lodged by members following their primary return.[134]

- Supplementary ordinary returns are returns lodged by continuing members each year disclosing their interests held during the six-month period from 1 July to 31 December. Continuing members must lodge a supplementary ordinary return with the Clerk before 31 March each year. In effect, by the lodging of ordinary and supplementary ordinary returns, members are required to disclose their pecuniary interests every six months. As with ordinary returns, different arrangements apply where members are required to lodge a supplementary return following their primary return.[135]
- Discretionary returns are returns lodged by members with the Clerk at any time before the date on which the member is next required to lodge an ordinary return or supplementary ordinary return. A discretionary return may contain such disclosures as the member wishes to make concerning any or all of the matters that are required or permitted to be disclosed in an ordinary return.[136]

Members must lodge a primary, ordinary or supplementary ordinary return by the relevant return date even if they do not have any interests to disclose.[137] Members must also lodge a return even if their interests have not changed since their last return.

Detailed guidance for members in completing individual return forms is available on the Members section of the Parliament's intranet, and through the Legislative Council *Member's Guide*.

Interests to be disclosed by members

The interests members are required to disclose in their primary, ordinary and supplementary ordinary returns (and may disclose in discretionary returns) are defined in part 3 of the *Constitution (Disclosures by Members) Regulation 1983*. Further guidance is provided in the 'Guidance Notes and Examples' in each return form, which are provided in schedule 1 to the regulation. A summary is provided below.

Real property

Members must disclose the address or title particulars of each parcel of real property in which they have an 'interest', together with the nature of the 'interest'. An 'interest' is defined to mean any estate, interest, right or power whatever, whether at law or in equity, in or over the property. Accordingly, an interest to be disclosed will generally include not only an ownership interest but also leasehold or other legal or equity interests. Thus, any lease of real property (whether by or from a member) will, on the face of it, fall

134 Ibid, cls 3, 6.
135 Ibid, cl 6A.
136 Ibid, cl 6B.
137 Ibid, cl 22.

within the disclosure requirements. Interests held by family trusts also, on the face of it, fall within the disclosure requirements. Mortgages or other security interests may also amount to interests in real property and as such may be required to be disclosed.[138]

An interest held in common property vested in an owners corporation as part of a strata scheme under the *Strata Schemes Development Act 2015* must be disclosed separately from an interest in a lot established under the scheme.[139]

A water licence issued under the *Water Act 1912* is also required to be disclosed. A water access licence granted under the *Water Management Act 2000* may also be required to be disclosed, although this may depend on the terms of the licence.

Where a member is required to disclose an interest in a property which is used by the member for residential purposes, the member may as an alternative to disclosing the address or title particulars of the property state that the property is the member's principal place of residence or a secondary place of residence and specify the location of the property by suburb or area only. This is to protect the privacy of the member and others living in the property.[140]

In listing the address or title particulars of a property, or the location of a property by suburb or area where the property is a member's place of residence, a member must indicate the nature of his or her 'interest' as discussed above. For example, an interest may be as a sole owner, lease holder or holder of a property jointly or in common with others. A member is not required to indicate the monetary value of the property, or the name or names of any other party or parties with whom the property is held, either jointly or in common.

A member is not required to disclose property where the member's interest is limited to acting as executor or administrator of the estate of a deceased person, unless the member is a beneficiary, or where the member is a trustee of a property and the member became a trustee in the ordinary course of the member's occupation which is not related to the member's duties as a member.[141]

A member is also not required to disclose under 'real property' membership of an owners corporation or the strata committee of the owners corporation formed under the *Strata Schemes Management Act 2015*. However, membership of a strata committee is required to be disclosed under 'interests and positions in corporations'.[142]

---

138 Crown Solicitor, 'Constitution (Disclosures by Members) Regulation 1983', July 2008, paras 6.1-6.5, 9.2-9.3.

139 Crown Solicitor, 'Whether Members of the LC must disclose membership of Strata Owners Corporation', March 2018, pp 4-5.

140 *Constitution (Disclosures by Members) Regulation 1983*, cl 8(1A).

141 Ibid, cl 8(2).

142 Crown Solicitor, 'Whether Members of the LC must disclose membership of Strata Owners Corporation', March 2018, p 5.

Sources of income

Members must disclose:

- in a primary return each source of income the member received, or reasonably expects to receive, in the period commencing on the primary return date and ending on the next 30 June;
- in an ordinary or supplementary ordinary return each source of income received by the member at any time during the return period.[143]

Sources of income are defined in clause 7 and clause 9(2) of the regulation. Income means assessable income within the meaning of the *Income Tax Assessment Act 1936* (Cth) or the *Income Tax Assessment Act 1997* (Cth), but does not include salary of office or any of the benefits and allowances determined by the Parliamentary Remuneration Tribunal under the *Parliamentary Remuneration Tribunal Act 1975*.[144] Income includes income from being an employee, from being the holder of another office, including an office holder in a corporation or body, from a partnership or trust, from shares, and for a service provided under a contract, agreement or arrangement. It also includes income from a water access licence granted under the *Water Management Act 2000*, or a licence under the *Water Act 1912*, provided the income received is assessable income under income tax laws.

The source of any income need not be disclosed if the amount of the income received, or reasonably expected to be received, by the member from that source did not exceed or is not reasonably expected to exceed $500, as the case may be.[145]

Gifts

Members must disclose all gifts over $500 in value, including a description of each gift and the name and address of the donor of each gift.[146] A gift means any disposition of property, whether in money or in some other form.[147] This includes wedding gifts or other such gifts.

Whilst gifts under $500 do not need to be disclosed, if a member receives more than one gift from the same source, and the value of those gifts in aggregate exceeds $500, each gift must be disclosed. It is not necessary to disclose the actual value of each individual gift.

143 *Constitution (Disclosures by Members) Regulation 1983*, cl 9(1).
144 Ibid, cl 7.
145 Ibid, cl 9(3).
146 Ibid, cl 10(1).
147 Ibid, cl 7.

Gifts also do not need to be disclosed where the gift was a political contribution disclosed, or required to be disclosed, under part 6 of the *Election Funding and Disclosures Act 1981*, or the donor was a relative of the member.[148]

Contributions to travel

Members must disclose any financial or other contributions to travel, whether within Australia or overseas, together with the name and address of each person making the contribution and the date on which the travel was undertaken.[149] However, there are a number of exceptions.

Contributions to travel under $250 do not need to be disclosed. Members are not required to disclose contributions to travel where the contribution was made by a relative of the member or from New South Wales public funds,[150] such as use of members' travel entitlements, gold passes or travel in a government vehicle. Nor are they required to disclose contributions to travel from Commonwealth Parliamentary Association funds, although many members choose voluntarily to disclose Commonwealth Parliamentary Association funded travel. However contributions to travel funded from 'public funds' not from New South Wales must be disclosed.[151]

Members are also not required to disclose contributions to travel which are made in the ordinary course of employment outside of their duties as a member. Nor are political contributions to travel required to be disclosed if they are required to be disclosed under part 6 of the *Election Funding, Expenditure and Disclosures Act 1981*. Finally, members do not need to disclose contributions made by their political party for travel undertaken for the purposes of that party.[152]

The Crown Solicitor has advised that flight upgrades for members, for example from economy class to business class, constitute a contribution to travel, and should be disclosed if valued at more than $250.[153] Accommodation upgrades should be declared on the same basis. Whilst advice is not definitive on whether membership of the Chairman's Lounge at airports constitutes a 'contribution to travel',[154] members should consider declaring membership of the Chairman's Lounge or similar travel or transport loyalty programs in their returns.

148 Ibid, cl 10(2).
149 Ibid, cl 11(1).
150 Ibid, cl 11(2).
151 Crown Solicitor, 'Interpretation of cls 11(2)(a) and (c) Constitution (Disclosures by Members) Regulation 1983', October 2009.
152 *Constitution (Disclosures by Members) Regulation 1983*, cl 11(2).
153 Crown Solicitor, 'Constitution (Disclosures by Members) Regulation: Upgrades and Chairman's Lounge', Advice to the Clerk of the Legislative Assembly, 2 June 2010.
154 Ibid.

Interest and positions in corporations

Members must disclose the name and address of each corporation in which they had an interest or held any position during the return period or at their primary return date. They must also disclose the nature of the interest, or a description of the position held, and a description of the principal objects of each such corporation, except in the case of a listed public company. Members should disclose any positions held in a corporation, even if the position is honorary (that is, not remunerated).[155]

The disclosure of interests in corporations will in most circumstances relate to stocks, shares, debentures and the like.

Members are not required to disclose an interest or position held in a corporation if:

- the purpose of the corporation is to provide recreation or amusement, promote commerce, industry, art, science, religion or charity or any other community purpose;
- the corporation is required to apply its profits or other income in promoting its objects; and
- the corporation is prohibited from paying any dividend to its members.

All three conditions must be met for a member not to be required to disclose the interest or position in the corporation.[156]

Members are not required to disclose membership of an owners corporation of a strata scheme formed under the *Strata Schemes Management Act 2015*. However, members are required to disclose membership of a strata committee appointed by an owners corporation.[157]

Positions in trade unions and professional or business associations

Members must disclose the name of each trade union and each professional or business association in which they held any position during the return period or at their primary return date, and a description of the position held.[158] Professional and business associations include organisations, whether incorporated or unincorporated, which have as one of their objects or activities the promotion of the economic interests of its members.[159]

155 *Constitution (Disclosures by Members) Regulation 1983*, cl 12(1).
156 Crown Solicitor, 'Constitution (Disclosure by Members) Regulation 1983', 3 July 2008, paras 9.7-9.8.
157 Crown Solicitor, 'Whether Members of the LC must disclose membership of Strata Owners Corporation', 21 March 2018, pp 5-7.
158 *Constitution (Disclosures by Members) Regulation 1983*, cl 13.
159 Ibid, cl 7.

The term 'position' includes honorary positions which attract no remuneration. However, it has been taken to imply more than mere membership of a union, professional or business association.

Debts

Members must disclose the name and address of each person to whom they are liable to pay any debt, whether or not the debt was due and payable on the primary return date or during the return period.[160]

However, members are not required to disclose a debt where the debt is owed to a relative, or where the amount to be paid does not exceed $500. The same rule of aggregation applies to debts as applies to gifts. Members are also not required to disclose a debt to a bank, building society, credit union or other person whose ordinary business includes the lending of money where the loan was made in the ordinary course of business of the lender.[161]

Members are also not required to disclose debt where the debt arises from the supply of goods or services if:

- the goods or services were supplied in the period of 12 months immediately preceding the primary return date or were supplied during the ordinary return period, as the case may be, or
- the goods or services were supplied in the ordinary course of any occupation of the member which is not related to his or her duties as a member.[162]

Dispositions of property

Members must disclose particulars of each disposition of real property during a return period, but only where they retained, either wholly or in part, the use and benefit of the property or the right to reacquire the property at a later time.[163] The term 'disposition of property' is intended to capture a broad range of transactions,[164] including grants of leases.[165]

However members are also required to disclose particulars of each disposition of real property by any other person under arrangements they made during the return period, but only where they obtained, either wholly or in part, the use and benefit of the property.[166]

---

160 Ibid, cl 14(1) and (2).

161 Ibid, cl 14(3).

162 Ibid. See also Crown Solicitor, 'Constitution (Disclosure by Members) Regulation 1983', 3 July 2008, paras 1.1-1.3, 5.1-5.4.

163 *Constitution (Disclosures by Members) Regulation 1983*, cl 15.

164 See the definition of 'disposition of property' in cl 7 of the *Constitution (Disclosures by Members) Regulation 1983*.

165 Crown Solicitor, 'Constitution (Disclosures by Members) Regulation 1983', 3 July 2008, para 7.2.

166 *Constitution (Disclosures by Members) Regulation 1983*, cl 15.

Provision of client services

Members must disclose any client service provided by them where the service involves the use of their parliamentary position. They must also disclose the names and addresses of the persons who receive the benefit of the client service, and the nature of the business carried on by those persons. A client service may be provided by a member under an employment contract, as an officer of a principal (such as a corporation), or by any other contract or agreement for monetary consideration.[167]

Services that involve a member's position include, but are not limited to, the provision of public policy advice, the development of strategies or the provision of advice on the conduct of relations with the government or members, and lobbying the government or other members on a matter of concern to the person to whom the service is provided.[168]

Discretionary disclosures generally

Members may disclose in any return any direct or indirect benefits, advantages or liabilities, whether pecuniary or not, which are not required to be disclosed by the *Constitution (Disclosures by Members) Regulation 1983*, and which they consider might appear to raise a conflict between their private interests and their public duty or which they otherwise desire to disclose.[169]

The 'Register of Disclosures by Members of the Legislative Council'

The *Constitution (Disclosures by Members) Regulation 1983* requires the Clerk to compile and maintain a 'Register of Disclosures by Members of the Legislative Council'.[170] The register comprises the returns lodged by members within the previous eight years, divided into separate parts according to the type of return and filed alphabetically according to the surname of members.[171]

The register is open to public inspection at the Office of the Clerk between 10.00 am and 4.00 pm on any day except Saturday, Sunday or any New South Wales public holiday. The register is also open to members at any time the Council is sitting.[172]

Clause 21 of the *Constitution (Disclosures by Members) Regulation 1983* provides that within 21 sitting days after the last day for lodgment of returns, the Clerk will provide a copy of the register to the President for tabling. This captures both the primary returns

167 Ibid, cl 15A; sch 1, form 1, s 1, pt 6; sch 1, form 2, s 1, pt 9.

168 Ibid, cl 7A.

169 Ibid, cl 16. In 2013, separate from any House processes, the Leader of the Opposition introduced requirements for all shadow ministers to disclose additional interests to those required under the *Constitution (Disclosures by Members) Regulation 1983*. These are therefore disclosed as discretionary disclosures.

170 Ibid, cl 17.

171 Ibid, cl 19.

172 Ibid, cl 20.

(made under clause 4) and ordinary returns (made under clause 6) of members of the Legislative Council that have not been previously tabled in the Legislative Council.[173]

Following a periodic Council election, two separate documents, the 'Register of Disclosures by Members of the Legislative Council: Primary Returns' and the 'Register of Disclosures by Members of the Legislative Council: Ordinary Returns', are tabled, printed and made public, including on the Parliament's website, in the weeks after 1 October, being the date by which members must lodge their ordinary returns. In subsequent years, when there are few if any primary returns received, the two documents are collated into one and are tabled, printed and made public in the same manner. Supplementary ordinary returns are tabled, printed and made public in the weeks after 31 March each year, being the date by which members must lodge their supplementary ordinary returns. Discretionary returns are included in the tabled copies of primary/ordinary and supplementary ordinary returns.

Contravention of the interests disclosure regime

Section 14A(2) of the *Constitution Act 1902* provides that if a member of the Legislative Council wilfully contravenes any regulation made under section 14A(1) of the *Constitution Act 1902*, currently only the *Constitution (Disclosures by Members) Regulation 1983*, the House may declare the member's seat vacant. Under section 14A(3), such a declaration shall:

> (a) specify the circumstances that constitute the contravention,
>
> (b) declare that the House is of the opinion that the contravention is of such a nature as to warrant the seat of the Member being declared vacant, and
>
> (c) be made in accordance with such Standing Rules and Orders of the House as may regulate the making of the declaration.[174]

The determination as to whether a contravention of the disclosure regime warrants the seat of a member being declared vacant is a matter for the House alone to consider, and is unlikely to be considered justiciable by a court. However, Professor Twomey has argued that the prior determination of whether a member has wilfully contravened the regulation is a question of fact, which independent fact-finding bodies such as a court, commission of inquiry or the Independent Commission Against Corruption may play a role in determining, including whether the contravention was wilful.[175] Alternatively, a parliamentary committee may undertake such a role, as was suggested during the second reading of the Constitution (Disclosures by Members) Amendment Bill 1981.[176]

---

173 Ibid, cl 21.

174 To date, the Council has not adopted a standing order regulating the making of a declaration under section 14A(3).

175 Twomey, (n 5), p 446.

176 Ibid, p 446; *Hansard*, NSW Legislative Assembly, 13 April 1981, p 5710.

There has not been a case in the Council in which a member's seat has been declared vacant under these provisions. However, on 25 September 2002 the House resolved that the Standing Committee on Parliamentary Privilege and Ethics investigate and report on whether Mr Edward Obeid[177] had 'wilfully contravened' clause 12 of the *Constitution (Disclosures by Members) Regulation 1983* by failing to disclose relevant pecuniary interests as required under the regulation.[178] The committee found that Mr Obeid had failed to disclose certain interests under the interest disclosure regime, but that the errors were not wilful.[179] On the tabling of the report in the House, the Chair of the committee, the Hon Helen Sham-Ho, made a statement by leave in which she disagreed with the majority view of the committee.[180] The motion to take note of the report was subsequently amended to adopt the conclusions in the report. During the debate on the committee's report in the House, Mr Obeid apologised to the House for the errors in his returns.[181]

STANDING ORDER 113(2): VOTING AND PARTICIPATING IN DEBATE IN THE HOUSE

Standing order 113(2) provides that a member may not vote in any division on a question in which the member has a direct pecuniary interest, unless it is an interest in common with the general public or it is on a matter of State policy.[182] If a member does vote, the vote of that member is to be disallowed.[183]

The standing order only prevents a member from voting on a question in which the member has a direct pecuniary interest. It does not prevent a member from participating in debate on the question.

For a pecuniary interest to prevent a member from voting in a division, it must be directly and personally related to the member. The standing order does not apply to the interests of third parties such as a spouse or relative, although there is nothing to prevent a member from declaring an interest of a related third party during debate.

---

177 In December 2014, the Governor revoked the right of Mr Obeid to use the title 'The Honourable'.

178 *Minutes*, NSW Legislative Council, 25 September 2002, pp 384-386, 387-391.

179 Standing Committee on Parliamentary Privilege and Ethics, *Report on inquiry into the Pecuniary Interests Register*, Report No 20, October 2002.

180 *Minutes*, NSW Legislative Council, 31 October 2002, p 453; *Hansard*, NSW Legislative Council, 31 October 2002, pp 6282-6283.

181 *Minutes*, NSW Legislative Council, 12 November 2002, pp 464-465, 466-468; *Hansard*, NSW Legislative Council, 12 November 2002, p 6438.

182 'State policy' may be equated with 'public policy'. See D Natzler KCB and M Hutton (eds), *Erskine May's Treatise on The Law, Privileges, Proceedings and Usage of Parliament*, 25th ed, (LexisNexis, 2019), para 5.16.

183 The standing order derives from the practices and conventions of the House of Commons. On 17 July 1811, the rule was explained thus by Speaker Abbot: 'This interest must be a direct pecuniary interest, and separately belonging to the persons whose votes were questioned, and not in common with the rest of Her Majesty's subjects, or on a matter of state policy'. See *Erskine May*, 25th ed, (n 182), para 5.17.

A discussion of 19th century cases where members declared a direct pecuniary interest in a question and did not vote in a division in the House is provided in the first edition of *New South Wales Legislative Council Practice*.[184]

STANDING ORDER 210(10): VOTING AND PARTICIPATING IN COMMITTEES

Standing order 210(10), as amended by sessional order, provides that no member may take part in a committee inquiry where the member has a pecuniary interest in the inquiry of the committee, unless it is an interest in common with the general public, or a class of persons within the general public, or is on a matter of state policy.

The issue of pecuniary interests and membership of committees is discussed in more detail in Chapter 20 (Committees).[185]

THE CODE OF CONDUCT FOR MEMBERS

As indicated in Chapter 3 (Parliamentary privilege in New South Wales), the House has an inherent power at common law to discipline members adjudged guilty of conduct unworthy of a member of the House. This power was confirmed by the decision of the New South Wales Supreme Court in 1969 in *Armstrong v Budd*.[186]

Since 1998, the conduct of members of both Houses has also been regulated by the *Code of Conduct for Members*.[187] The Code was first adopted by the Council on 1 July 1998.[188] It was readopted on 26 May 1999, with continuing effect.[189] An expanded version was adopted on 21 June 2007, again with continuing effect.[190] Finally, a revised Code, incorporating a number of substantial changes, was adopted by the Council on 24 March 2020, again with continuing effect.[191]

A copy of the *Code of Conduct for Members* is provided at Appendix 5 (The Code of Conduct for Members). A summary of the provisions of the nine clauses of the Code is provided below.

---

184 *New South Wales Legislative Council Practice*, 1st ed, (n 64), pp 180-181.

185 See the discussion under the heading 'Pecuniary interests and conflicts of interest'.

186 (1969) 71 SR (NSW) 386.

187 For further information on the development of the Code, see *New South Wales Legislative Council Practice*, 1st ed, (n 64), pp 168-172.

188 *Minutes*, NSW Legislative Council, 1 July 1998, pp 629-630. The Code was first adopted by the Assembly on 5 May 1998. See *Votes and Proceedings*, NSW Legislative Assembly, 5 May 1998, pp 544-548.

189 *Minutes*, NSW Legislative Council, 26 May 1999, pp 91-92.

190 *Minutes*, NSW Legislative Council, 21 June 2007, pp 148-152.

191 *Minutes*, NSW Legislative Council, 24 March 2020, pp 883-886. The revised Code was adopted by the Legislative Assembly on 5 March 2020. See *Votes and Proceedings*, NSW Legislative Assembly, 5 March 2020, pp 594-599.

Provisions of the Code

Clause 1: Purpose of the Code

The purpose of the Code is to assist members in the discharge of their parliamentary duties and obligations to the House, their electorates and the people of New South Wales. The Code applies to members in all aspects of their public life.

In complying with the Code members must base their conduct on a consideration of the public interest and avoid conflict between their personal interest and their duties as a member. The Code does not apply to members in their purely private and personal lives.

Members must not act dishonestly for their own personal gain or that of another person.

Members may participate in the activities of organised political parties as part of their activities as members of Parliament. Clause 1 acknowledges that many members are elected to represent political parties and have a role in representing the interests of their party:

> It is recognised that some members are non-aligned and others belong to political parties. Organised political parties are a fundamental part of the democratic process. Participation in the activities of organised political parties is within the legitimate activities of members of Parliament.

Section 3 of the *Parliamentary Remuneration Act 1989* also recognises that the duties of members and recognised office holders include participation in the activities of recognised political parties.

Clauses 2 and 5: Improper influence

By clause 2 of the Code, members must not act as paid advocates in any proceeding of the House or its committees.

A member must also not knowingly and improperly promote any matter, vote on any bill or resolution or ask any question in Parliament or its committees in return for any remuneration, payment or private benefit to:

- the member;
- a member of the member's family;
- a business associate of the member; or
- any other person or entity from whom the member expects to receive a financial benefit.

In addition, a member must not knowingly and improperly use his or her influence as a member to seek to affect a decision by a public official to further the private interests of the member, a member of the member's family or a business associate of the member.

However, by clause 5 of the Code, the Code is not breached by reason of a benefit or interest received by a person set out in clause 2 where the person is a member of the public or a member of a broad class.

Clause 3: Use of public resources

By clause 3 of the Code, the use of public resources should not knowingly confer any undue private benefit on a member or any other person or entity. Members must apply the public resources to which they are granted access, for example, allowances, entitlements, equipment and facilities provided to members, according to any guidelines or rules about the use of those resources.

Clause 4: Use of confidential information

By clause 4 of the Code, information received by members in confidence in the course of their parliamentary duties should only be used in connection with those duties. It must never be knowingly and improperly used for the private benefit of members or any other person.

Clause 6: Disclosure of interests

By clause 6 of the Code, members must fulfil conscientiously the requirements of the House in respect of the Register of Disclosure by Members.

Clause 7: Conflicts of interest

By clause 7 of the Code, members must avoid, resolve or disclose any conflict between their private interests and the public interest. The public interest must always be favoured over any private interests of members.

Members must draw attention to any conflicts between their private interests and the public interest in any proceeding in the House or its committees and in any communications with ministers, members or other public officials.

A conflict of interest does not exist where a member is only affected as a member of the public or a member of a broad class.

Clause 8: Gifts

By clause 8 of the Code, members must disclose all gifts and benefits received in connection with their official duties in accordance with the requirements for the disclosure of pecuniary interests. Members must not knowingly accept gifts that could reasonably be expected to give rise to a conflict of interest or could reasonably be perceived as an attempt to improperly influence them in the exercise of their duties. The Code does not preclude the giving or accepting of political donations in accordance with the *Electoral Funding Act 2018*.

Clause 9: Upholding the Code

By clause 9 of the Code, members must cooperate fully with any processes established under the authority of the House concerning compliance with the Code.

Breaches of the Code may result in actions being taken by the House in relation to a member. A substantial breach of the Code may constitute corrupt conduct for the purposes of the *Independent Commission Against Corruption Act 1988.*

This is discussed further below.

CORRUPT CONDUCT

The Independent Commission Against Corruption (ICAC) has been given legislative authority to use the Code of Conduct for Members as part of its criteria to establish whether a member has acted corruptly. Corrupt conduct is defined in sections 7, 8 and 9 of the *Independent Commission Against Corruption Act 1988*.

Section 7 defines 'corrupt conduct' as any conduct which falls within the description of corrupt conduct contained in section 8, but which is not excluded by section 9.

Section 8(1) defines corrupt conduct as:

> (a) any conduct of any person (whether or not a public official) that adversely affects, or that could adversely affect, either directly or indirectly, the honest or impartial exercise of official functions by any public official, any group or body of public officials or any public authority, or
>
> (b) any conduct of a public official that constitutes or involves the dishonest or partial exercise of any of his or her official functions, or
>
> (c) any conduct of a public official or former public official that constitutes or involves a breach of public trust, or
>
> (d) any conduct of a public official or former public official that involves the misuse of information or material that he or she has acquired in the course of his or her official functions, whether or not for his or her benefit or for the benefit of any other person.

Section 8(2) specifies that corrupt conduct also includes conduct of any person that adversely affects, or could adversely affect, the exercise of official functions by any public official and which could involve matters such as official misconduct, bribery, blackmail, fraud, theft, embezzlement and perverting the course of justice.

Section 8(2A) further specifies that corrupt conduct also includes conduct of any person that impairs, or could impair, public confidence in public administration and could involve matters such as collusive tendering, fraud in relation to applications for licences or permits, dishonestly obtaining the payment of public funds for private advantage,

defrauding the public revenue and fraudulently obtaining employment as a public official.[192]

In turn, section 9(1) provides that conduct which falls within section 8 does not amount to corrupt conduct unless it could also constitute or involve:

(a) a criminal offence, or

(b) a disciplinary offence, or

(c) reasonable grounds for dismissing, dispensing with the services of or otherwise terminating the services of a public official, or

(d) *in the case of conduct of a minister of the Crown or a member of a House of Parliament – a substantial breach of an applicable code of conduct*. (emphasis added)

Under section 9(3), an 'applicable code' means, in relation to members of Parliament, 'a code of conduct adopted for the purposes of this section by resolution of the House concerned'.

Subsections (1)(d) and (3) of section 9 were inserted into the *Independent Commission Against Corruption Act 1988* in 1994 with the aim of ensuring that ICAC's investigatory jurisdiction extends to the conduct of members of Parliament. The Council has adopted the *Code of Conduct for Members* as an applicable code for the purposes of section 9(1)(d).[193]

The meaning of the term 'substantial breach' used in section 9(1)(d) was considered in a report by ICAC in September 2003, referring to an earlier version of the *Code of Conduct for Members* in force at the time:

> The ICAC's assessment of what constitutes a 'substantial' breach of the Code will depend on the facts and circumstances of each particular case. The word 'substantial' is given its natural and ordinary meaning. The Shorter Oxford English Dictionary defines 'substantial' inter alia 'as being of ample or considerable amount, quantity or dimensions; having weight or force or effect, not of imaginary, unreal or apparent only'. Similarly the Butterworths Australian Legal Dictionary defines the term as 'being real or of substance, as distinct from ephemeral or nominal; in a relative sense, considerable.'

192 Section 8(2A) was inserted into the *Independent Commission Against Corruption Amendment Act* 1988 by the *Independent Commission Against Corruption Amendment Act 2015* following an independent review of the jurisdiction of ICAC commissioned by the government in light of the High Court decision in *ICAC v Cunneen* (2015) 256 CLR 1. The provision ensures that ICAC can continue to investigate conduct such as collusive tendering for government contracts, fraudulently obtaining government mining leases and fraudulently obtaining or retaining employment or appointment as a public official, even if such conduct involves no wrongdoing or potential wrongdoing on the part of any public official, where such conduct could seriously undermine confidence in public administration. See *Hansard*, NSW Legislative Council, 16 September 2015, pp 3698-3699.

193 *Minutes*, NSW Legislative Council, 1 July 1998, pp 629-630; 26 May 1999, pp 91-92; 21 June 2007, pp 148-152; 24 March 2020, pp 883–886.

> The ICAC is of the view that the meaning should also be considered in the overall context in which the term is used. The Preamble to the Code refers to the responsibility of MPs to perform their duties with honesty and integrity, respecting the law and the institution of Parliament. What constitutes a 'substantial' breach will also be influenced by which clause of the Code a Member is alleged to have breached. For example a single instance of a breach of clause 2 (which deals with bribery) may amount to a 'substantial' breach, whereas a single instance of a breach of clause 4 (dealing with the use of public resources) may not be regarded as a 'substantial' breach. Other factors to consider may include the amount of money or value of gifts involved, whether the conduct could also amount to a criminal offence, the nature and extent of a failure to declare a conflicting interest and the assessment of that conduct by other Members.[194]

Under section 9(4) and (5) of the *Independent Commission Against Corruption Act 1988*, 'corrupt conduct' also includes conduct of a minister or member which falls within the definition of corrupt conduct in section 8 and which would cause a reasonable person to believe that it would bring the integrity of the office or the Parliament into serious disrepute, and which also constitutes a 'breach of a law' apart from the act. In this context, a 'breach of a law' is construed as meaning a breach of a civil, and not a criminal, law.[195]

Reporting possible corrupt conduct to ICAC

Under section 73(1) of the *Independent Commission Against Corruption Act 1988*, both Houses of the Parliament may, by resolution of each House, refer a matter to ICAC for inquiry and report. The two Houses have referred two matters to ICAC under this provision, once on the initiative of the Legislative Council[196] and once on the initiative of the Legislative Assembly.[197] Under section 73(2) it is then the duty of ICAC to fully investigate the matter.

There has also been two occasions on which the Council has adopted a resolution seeking the concurrence of the Assembly in the referral of a matter to ICAC under section 73(1), but the Assembly has not responded.[198]

---

194 Independent Commission Against Corruption, *Regulation of secondary employment for Members of the NSW Legislative Assembly*, Report to the Speaker of the Legislative Assembly, September 2003, p 25.

195 Independent Commission Against Corruption, *Report on investigation into conduct of the Hon J Richard Face*, June 2004, p 45.

196 *Minutes*, NSW Legislative Council, 29 October 2013, pp 2117-2118, 2120.

197 *Minutes*, NSW Legislative Council, 22 November 2011, pp 590-591; 23 November 2011, pp 612-613.

198 On the first occasion, the resolution of the House provided that, in the event that the Assembly did not adopt a similar resolution and inform the Council within two sitting days, the Clerk be authorised to forward the resolution of the House to ICAC independently. See *Minutes*, NSW Legislative Council, 14 November 2013, pp 2205-2206. On the second occasion, the resolution of the House did not include such a provision. See *Minutes*, NSW Legislative Council, 18 September 2019, pp 419-420.

There are also examples where motions moved in the Council to refer a matter to ICAC under section 73(1) have been negatived or amended to remove the reference to ICAC.[199]

There have also been various instances where the Council or the Assembly have referred or 'requested' that ICAC investigate certain matters, but without invoking section 73(1).[200]

Section 11 places a duty on certain individuals, including ministers and the 'principal officer' of a 'public authority' to report to ICAC any matter that the person suspects on reasonable grounds concerns or may concern corrupt conduct.[201]

Section 10 provides that any person may make a complaint to ICAC about a matter that concerns or may concern corrupt conduct.

Investigations by ICAC into corrupt conduct

One of the principal functions of ICAC is conducting investigations into corrupt conduct. Section 13(1) of the *Independent Commission Against Corruption Act 1988* provides in part:

> (1) The principal functions of the Commission are as follows:
>
> (a) to investigate any allegation or complaint that, or any circumstances which in the Commission's opinion imply that:
>
> (i) corrupt conduct, or
>
> (ii) conduct liable to allow, encourage or cause the occurrence of corrupt conduct, or
>
> (iii) conduct connected with corrupt conduct,
>
> may have occurred, may be occurring or may be about to occur,
>
> (b) to investigate any matter referred to the Commission by both Houses of Parliament,
>
> (c) to communicate to appropriate authorities the results of its investigations,
>
> (d) to examine the laws governing, and the practices and procedures of, public authorities and public officials, in order to facilitate the discovery of corrupt conduct and to secure the revision of methods of work or procedures which, in the opinion of the Commission, may be conducive to corrupt conduct, …

199 See *Minutes*, NSW Legislative Council, 19 March 1991, pp 84-88; 28 May 1998, pp 483-486.

200 *Votes and Proceedings*, NSW Legislative Assembly, 28 April 1992, pp 245-247; *Minutes*, NSW Legislative Council, 28 April 1992, pp 114-116; *Votes and Proceedings*, NSW Legislative Assembly, 15 September 1993, pp 380-382; *Minutes*, NSW Legislative Council, 28 August 2002, p 312; *Votes and Proceedings*, NSW Legislative Assembly, 21 November 2002, pp 648-649.

201 It is unclear whether the Legislative Council is a 'public authority' within the meaning of section 3(1) of the *Independent Commission Against Corruption Act 1988*. Accordingly, it is not clear whether the Clerk is the 'principal officer' of a 'public authority' within the meaning of section 11(5) of the act with a responsibility to report to ICAC matters concerning suspected corrupt conduct. See Crown Solicitor, 'Application of ICAC Act to Parliament', 21 December 2009.

Section 13(3) further provides that ICAC may make findings and form opinions on the basis of the results of its investigations, and may formulate recommendations for the taking of action in relation to its findings. However, under section 13(3A), ICAC may only make a finding that a person has engaged in corrupt conduct if it is satisfied that a person has engaged in or is engaging in conduct that constitutes or involves conduct of the kind described in section 9(1)(a), (b), (c) or (d), as cited earlier. In addition, under section 74BA, ICAC is not authorised to include in a report on a matter that has been the subject of an investigation a finding or opinion that conduct of a specified person is corrupt conduct unless the conduct is serious corrupt conduct.

ICAC's investigative powers

In conducting investigations, ICAC has wide statutory powers to obtain information. Under section 21 of the *Independent Commission Against Corruption Act 1988*, ICAC has power, by notice in writing, to require a 'statement of information' from a public authority or public official. Under section 22, it has similar power to require the production of documents or other things. Under sections 82 and 83, it is an offence to fail to comply with a written notice issued by ICAC. Under section 23, ICAC has power to enter and inspect premises used or occupied by a public authority or public official, and to take copies of any document found at the premises. No prior notice or warrant is required. In addition to these provisions, ICAC also has power to obtain information by summons (requiring a person to give evidence and/or produce documents or things), arrest warrant (for failure to obey a summons) and search warrant. Under other legislation, ICAC may also apply for use of surveillance devices, telephone intercepts, controlled operations and assumed identities.

ICAC's investigative powers and parliamentary privilege

Whilst ICAC has wide investigatory powers, under section 122 of the *Independent Commission Against Corruption Act 1988,* nothing in the act shall be taken to affect the rights and privileges of Parliament in relation to the freedom of speech, and debates and proceedings, in Parliament.

This limitation on ICAC's jurisdiction to investigate the conduct of members under section 122 has been recognised on a number of occasions. In 2002, the Legislative Assembly requested ICAC to 'look into' issues raised in the House concerning the conduct of a member of the Assembly and, having regard to those issues, to investigate matters concerning the regulation of members' secondary employment.[202] ICAC subsequently advised that it had no authority to investigate matters where parliamentary privilege applies,[203] but that it was able to investigate the broader issue of secondary employment.

---

202 *Votes and Proceedings*, NSW Legislative Assembly, 21 November 2002, pp 649-650.

203 Specifically, ICAC advised that it had no power to investigate matters which involve the motivation of members asking questions in Parliament. See Independent Commission Against Corruption, *Regulation of secondary employment for Members of the NSW Legislative Assembly*, Report to the Speaker of the Legislative Assembly, September 2003, p 17.

In 2004, following the execution of a search warrant at the Parliament House office of the Hon Peter Breen during which material protected by parliamentary privilege was wrongly seized, ICAC was obliged to return the privileged material in accordance with a resolution of the House.[204]

Options for addressing the limitation on the ability of ICAC to investigate members have been considered on a number of occasions.[205] Of note, in 2014, following the tabling of a report by ICAC in relation, amongst other things, to aspects of the *Code of Conduct for Members*, the interest disclosure regime and a parliamentary investigator,[206] the Privileges Committees of both Houses tabled reports recommending the adoption either of a Parliamentary Commissioner for Standards, following the model in jurisdictions such as the UK House of Commons,[207] or an Integrity Commissioner, based on Canadian models.[208] The occupant of such a position would have jurisdiction to investigate matters covered by parliamentary privilege. In addition, such a position would fill the jurisdictional gap between 'the ICAC and nothing' and provide a mechanism for the timely resolution of complaints about misconduct which are less serious than corrupt conduct.[209] This proposal was subsequently the subject of further correspondence between the Presiding Officers and the Premier.[210] However, to date this proposal is yet to be implemented.

There is one exception to this limitation. In 2012, Parliament waived any privilege attaching to the 'Register of Disclosures by Members of the Legislative Council' and the 'Register of Disclosures by Members of the Legislative Assembly' to allow ICAC to make use of either register for the purposes of any investigation or for the purposes of any finding or recommendation concerning the disclosure or non-disclosure of interests.[211]

---

204 For further information, see the discussion in Chapter 3 (Parliamentary privilege in New South Wales) under the heading 'Members' documents and processes of discovery and seizure'.

205 For earlier instances, see Independent Commission Against Corruption, *Regulation of secondary employment for Members of the NSW Legislative Assembly*, Report to the Speaker of the Legislative Assembly, September 2003; Legislative Assembly Standing Committee on Parliamentary Privilege and Ethics, *Regulation of Secondary Employment for Members of the NSW Legislative Assembly*, September 2004; and B McClintock, *Independent review of the Independent Commission Against Corruption Act 1988*, Final Report, January 2005.

206 Independent Commission Against Corruption, *Reducing the opportunities and incentives for corruption in the State's management of coal resources*, October 2013. See in particular recommendations 23, 24 and 25.

207 Privileges Committee, *Recommendations of the ICAC regarding aspects of the Code of Conduct for Members, the interest disclosure regime and a parliamentary investigator*, Report No 70, June 2014.

208 Parliamentary Privilege and Ethics, Legislative Assembly, *Inquiry into matters arising from the ICAC report entitled 'Reducing the opportunities and incentives for corruption in the State's management of coal resources'*, Report No 2/55, July 2014.

209 D Blunt, 'A Parliamentary Commissioner for Standards for New South Wales?', Paper presented to the 44th Presiding Officers and Clerks' Conference, Canberra, 1-4 July 2013.

210 *Minutes*, NSW Legislative Council, 22 June 2016, p 966.

211 For further information, see the discussion in Chapter 3 (Parliamentary privilege in New South Wales) under the heading 'The Register of Disclosures by Members'.

Responsibility of the Council to discipline members

Where ICAC finds that a member of Parliament has engaged in 'corrupt conduct', including a substantial breach of the *Code of Conduct for Members*, it may report that finding to the Parliament. ICAC does not have the power to attach penalties to a finding but can include a statement in its report that consideration should be given to obtaining the advice of the Director of Public Prosecutions with respect to laying charges for a criminal offence.[212]

Rather, enforcement of the *Code of Conduct for Members* is the responsibility of the House. As noted previously, the Council has an inherent power at common law to expel a member adjudged guilty of conduct unworthy of a member of the House.

There is only one case in which ICAC has made a finding of corrupt conduct against a member of the Council, namely the Hon Malcolm Jones in 2003 for misuse of parliamentary entitlements provided under the *Parliamentary Remuneration Act 1989*.[213] On 4 September 2003, the Leader of the Government in the Legislative Council, the Hon Michael Egan, gave notice of a motion that Mr Jones be adjudged guilty of conduct unworthy of a member and expelled from the House. However, on 16 September 2003, before the House was due to consider the expulsion motion, the President informed the House that she had received a communication from Mr Jones indicating that he had tendered his resignation to the Governor as a member of the Council.[214]

In the only other instance of note, in 2003 and 2004, ICAC conducted an investigation into the conduct of the Hon Peter Breen in relation to his use of public resources. ICAC found that the evidence did not justify a finding that Mr Breen had acted dishonestly such as to engage in corrupt conduct.[215]

THE COUNCIL'S DESIGNATED ETHICS COMMITTEE

Section 72B of the *Independent Commission Against Corruption Act 1988* provides that a committee of the Legislative Council is to be established at the commencement of the first session of each Parliament with the following functions:

212 *Independent Commission Against Corruption Act 1988*, s 74A(2). For further information on the application of criminal law to the conduct of members, see the discussion in Chapter 3 (Parliamentary privilege in New South Wales) under the heading 'Parliamentary privilege and the criminal law'.

213 Independent Commission Against Corruption, *Report into an investigation into the conduct of the Hon Malcolm Jones*, July 2003.

214 *Minutes*, NSW Legislative Council, 16 September 2003, p 281. For further information, see *New South Wales Legislative Council Practice*, 1st ed, (n 64), pp 643-644.

215 Independent Commission Against Corruption, *Report on investigation into the conduct of the Hon Peter Breen,* December 2004, p 5. Since 2011, new members of the Council have been provided with a document summarising investigations by ICAC into members as guidance as to the types of issues that have arisen in relation to members' conduct in the past.

- to prepare draft codes of conduct for members of the House and draft amendments to codes already adopted (s 72C(1)(a));
- to carry out educative work relating to ethical standards applying to members of the House (s 72C(1)(b));
- to give advice in relation to such ethical standards in response to requests for advice by the House but not in relation to actual or alleged conduct of any particular person (s 72C(1)(c)); and
- to review any code of conduct adopted by the Council at least once every four years (s 72C(5)).

On 24 May 1995, the House designated the Standing Committee on Parliamentary Privilege and Ethics as the Council's committee for the purposes of section 72B of the *Independent Commission Against Corruption Act 1988*.[216] The House has continued to designate the Privileges Committee for this purpose in each subsequent Parliament.[217]

Section 72DA of the *Independent Commission Against Corruption Act 1988* provides for the appointment of a similar committee by the Legislative Assembly.

THE PARLIAMENTARY ETHICS ADVISER

Following the adoption by both Houses of the *Code of Conduct for Members* in 1998, the Council and Assembly agreed to the appointment of a Parliamentary Ethics Adviser.[218] The position has been continuously appointed since.[219]

The position is part time, and its occupant is appointed by the President and Speaker on a renewable contract with the Clerks of the two Houses.

The functions of the Parliamentary Ethics Adviser include advising members, upon their request, on ethical issues concerning the exercise of their role as members, including the use of entitlements and potential conflicts of interest. In 2006, the functions of the Parliamentary Ethics Adviser were expanded to include the provision of advice, on request, to ministers and former ministers, on post-separation employment.[220] The role excludes the giving of legal advice.

In providing advice, the Parliamentary Ethics Adviser is guided by the *Code of Conduct for Members* and the *Code of Conduct for Ministers of the Crown*, determinations of the Parliamentary Remuneration Tribunal and resources such as past reports of ICAC.

---

216 *Minutes*, NSW Legislative Council, 24 May 1995, p 42.

217 *Minutes*, NSW Legislative Council, 25 May 1999, pp 82-85; 1 June 2004, pp 809-810; 10 May 2007, pp 53-54; 10 May 2011, pp 84-85; 12 May 2015, p 89; 8 May 2019, pp 89-91.

218 *Minutes*, NSW Legislative Council, 24 September 1998, p 728.

219 *Minutes*, NSW Legislative Council, 28 June 2007, pp 207-209; 18 June 2014, pp 2597-2600.

220 *Minutes*, NSW Legislative Council, 27 September 2006, pp 235-240. For further information, see the discussion in Chapter 7 (Parties, the Government and the Legislative Council) under the heading 'Post-separation employment of ministers'.

Under the resolution establishing the position, the Parliamentary Ethics Adviser is required to keep records of advice given and the factual information upon which it is based. Subject to one exception, the Parliamentary Ethics Adviser is under a duty to maintain the confidentiality of information, unless the member who requested the advice has given permission for it to be made public.[221] The House can call for the production of records of the Parliamentary Ethics Adviser, but only if the member to which the records relate has sought to rely on the advice or has given permission for the records to be produced to the House.

The resolution establishing the position also requires the Parliamentary Ethics Adviser to meet annually with the Privileges Committee, as the Council's designated ethics committee under the *Independent Commission Against Corruption Act 1988*, and to report to the Parliament each year on the number of ethical matters raised, the number of members who sought advice, the amount of time spent in the course of his or her duties and the number of times advice was given. The Parliamentary Ethics Adviser may also report to the Parliament from time to time on any problems arising from the determinations of the Parliamentary Remuneration Tribunal that have given rise to requests for ethics advice and proposals to address these problems.[222]

REMUNERATION AND ENTITLEMENTS

The remuneration and entitlements of members are provided for under the *Parliamentary Remuneration Act 1989*. The purpose of the act, as outlined in section 2A, is to provide a system under which:

- all members are provided with statutory salaries (basic salary) that are paid as personal income or received as employment benefits for the performance of their parliamentary duties;
- recognised office holders may be provided with additional salaries for the performance of their parliamentary duties as office holders;
- recognised office holders may be provided with statutory expense allowances for facilitating the performance of their parliamentary duties as recognised office holders; and
- members and recognised office holders may be provided with additional allowances and other entitlements for facilitating their parliamentary duties as members or recognised office holders.

221 The exception is where the Adviser becomes aware that a minister or former minister has accepted a position, or has commenced the provision of services, in respect of which the Adviser has provided advice. In such circumstances the Adviser must provide a copy of that advice to the Presiding Officer of the House to which the minister belongs or to which the former minister belonged. See for example, *Minutes*, NSW Legislative Council, 6 September 2011, p 390; 12 September 2017, p 1871.

222 *Minutes*, NSW Legislative Council, 28 June 2007, pp 209-210.

Remuneration

Under section 4(2) of the *Parliamentary Remuneration Act 1989*, the Parliamentary Remuneration Tribunal is required to determine the basic salary of members.

Under section 4(3), in making a determination of basic salary, the tribunal is required to give effect to the same policies on increases in remuneration as those that the Industrial Relations Commission is required to give effect to under section 146C of the *Industrial Relations Act 1996* when making or varying awards or orders relating to the conditions of employment of public sector employees.

Section 4 of the *Parliamentary Remuneration Act 1989* in its current form was inserted into the act in 2011.[223] Prior to this change, section 4 of the act provided that the basic salary for all members was fixed at the salary payable under the law of the Commonwealth to a member of the House of Representatives who is not entitled to any additional salary, less $500.

Under section 6(1)(b) and (c) of the *Parliamentary Remuneration Act 1989*, recognised office holders may also be entitled to an additional salary and an expense allowance at an annual rate calculated as a percentage of the basic salary.

Under part 2A of the *Parliamentary Remuneration Act 1989*, introduced in 2009,[224] members also have access to salary packaging arrangements similar to those available to public sector employees.

The historical development of the system of remuneration of members of Parliament is discussed in detail in the first edition of *New South Wales Legislative Council Practice*.[225]

Entitlements

Section 9 of the *Parliamentary Remuneration Act 1989* provides that the Parliamentary Remuneration Tribunal may make determinations of additional entitlements for a member or recognised office holder.

Section 10 sets out general provisions to be followed by the tribunal in the determination of additional entitlements. Determinations of additional entitlements can provide for:

- the payment of additional allowances, fees and other emoluments, including, for example, electoral allowances, travel allowances, travel expenses and committee allowances; and
- the provision of services, facilities and equipment, including, for example, electorate services, electorate staff, electorate offices, office equipment, travel and communication equipment.

---

223 *Parliamentary, Local Council and Public Sector Executives Remuneration Legislation Amendment Act 2011*, sch 1.

224 *Parliamentary Remuneration Amendment (Salary Packaging) Act 2009*, sch 1.

225 *New South Wales Legislative Council Practice*, 1st ed, (n 64), pp 185-188.

Under section 11, the tribunal is required to make an annual determination of additional entitlements on or before 1 June each year which takes effect from 1 July.

In performing its functions, the tribunal may inform itself as it thinks fit, including by conducting inquiries and receiving submissions from recognised office holders, members and officers of the Legislature, amongst others.[226]

In making a determination concerning entitlements, the tribunal is required to have regard to the financial implications of the determination for the State.[227]

The nature of the determinations of additional entitlements provided to members and office holders, including conditions of use and substantiation required, are set out in each annual determination of the tribunal. The determinations are published in the *Government Gazette* and tabled in both Houses, and are available on the tribunal's website.[228]

The President or the Speaker may request the tribunal to give a ruling on the interpretation or application of a determination.[229]

The *Parliamentary Remuneration Act 1989* does not prevent members or office holders from being provided with certain other entitlements, such as offices and facilities at Parliament House, offices and facilities elsewhere for ministers, and travel by ministers.[230]

Members of the Council are provided with a detailed 'Members' Guide' on the use of entitlements, and receive a range of administrative and support services within Parliament House to assist in the performance of their parliamentary duties. Decisions regarding the provision of these services are determined by the President and sometimes jointly with the Speaker.

The historical development of the system of entitlements for members of Parliament is discussed in detail in the first edition of *New South Wales Legislative Council Practice*.[231]

SUPERANNUATION

There are two superannuation schemes in operation for members of the Legislative Council: a defined benefits scheme for continuing members first elected before the 2007

226 *Parliamentary Remuneration Act 1989*, s 14I.
227 Ibid, s 12A.
228 Ibid, s 14H.
229 Ibid, s 17A.
230 Ibid, s 15A.
231 *New South Wales Legislative Council Practice*, 1st ed, (n 64), pp 188-190.

periodic Council election,[232] and an accumulation scheme for those elected at or after the 2007 periodic Council election.[233] This is discussed below.

Members elected before the 2007 periodic Council election

Under the *Parliamentary Contributory Superannuation Act 1971*, members elected before the 2007 periodic Council election are required to contribute 12.5 per cent of their salary[234] to the Parliamentary Contributory Superannuation Fund.[235] Having served seven years, a member is entitled to a pension at the rate calculated in accordance with section 19 of the act. The calculation includes a weighting for any additional salary received by office holders during the course of their contributions.

Former members who were elected after 1999 are not entitled to a pension until age 55.[236]

A member may convert his or her pension into a lump sum.[237]

A member may cease to contribute after the age of 65 years if he or she has 20 years of service.[238] On the death of a member or former member, the former member's spouse or *de facto* partner is entitled to a pension at the rate calculated in section 23 of the act.[239] Benefits may also be available to a member on the grounds of ill health or incapacity.[240]

The effect of disqualification under section 13A and criminal charges

Where the seat of a member becomes vacant by the operation of section 13A of the *Constitution Act 1902*, the member is not entitled to a pension under the *Parliamentary Contributory Superannuation Act 1971*, but is entitled to a refund of his or her contributions.[241]

Restrictions on access to superannuation also apply to former members charged with or convicted of a criminal offence. Section 19AA of the *Parliamentary Contributory Superannuation Act 1971* provides that where a person ceases to be a member whilst

232 A member does not cease to be a member of the scheme because of a break of three months or less as a member of Parliament. See *Parliamentary Contributory Superannuation Act 1971*, s 4A. Accordingly, a member may resign from one House to contest a seat in the other House and remain in the scheme, provided he or she is re-elected within three months.

233 The historical development of the superannuation system for members of Parliament is discussed in detail in *New South Wales Legislative Council Practice*, 1st ed, (n 64), pp 191-192.

234 As defined in section 3 of the *Parliamentary Contributory Superannuation Act 1971*.

235 *Parliamentary Contributory Superannuation Act 1971*, ss 3 and 18.

236 Ibid, s 19B.

237 Ibid, s 20.

238 Ibid, s 18B.

239 Ibid, s 23.

240 Ibid, s 19E.

241 *Parliamentary Contributory Superannuation Act 1971*, s 19(8).

proceedings for a 'serious offence'[242] are pending, the person's entitlement to a pension is suspended.[243] In effect, a member charged with an offence is prevented from drawing the pension through the expediency of early resignation. Equally, where proceedings are commenced against a former member for a 'serious offence' committed whilst the person was a member, the person's entitlement to a pension is also suspended. In either case, if the person is not convicted, the suspension is lifted and the entitlement to the pension reinstated. If the person is convicted, his or her right to the pension ceases (although net superannuation contributions are refunded), any election the person has made to convert a pension to a lump sum is taken never to have been made, and any pension or lump sum payments which have been made to the person are to be repaid to the fund.[244]

Criminal proceedings are not considered finalised for the purposes of these arrangements until the end of the appeal period and until any appeal against conviction or acquittal, lodged within the appeal period, has been determined or has lapsed or been withdrawn.[245]

In sentencing an offender who is a member or former member of Parliament, a court must not take into account as a mitigating factor the loss of the offender's entitlement to a pension because of the conviction for the offence.[246]

Members elected at or after the 2007 periodic Council election

Under section 14D of the *Parliamentary Remuneration Act 1989*, members, other than continuing members under the *Parliamentary Contributory Superannuation Act 1971*, are required to contribute 9 per cent (or such other percentage as may be prescribed by regulation) of their salary[247] to the First State Superannuation Fund or another complying superannuation fund, complying approved deposit fund or retirement savings account nominated by the member. Members can make additional superannuation contributions by way of salary sacrifice.[248]

---

242 Section 19AA(10) of the *Parliamentary Contributory Superannuation Act 1971* defines serious offence as (a) an offence committed in New South Wales that is punishable by imprisonment for life or for a term of five years or more or an offence committed elsewhere that, if committed in New South Wales, would be an offence so punishable, or (b) an infamous crime.

243 The trustees may lift the suspension and reinstate the person's entitlement to a pension pending the finalisation of the proceedings if satisfied that the suspension is not in the public interest. See *Parliamentary Contributory Superannuation Act 1971*, s 19AA(2).

244 Section 19AA was inserted in 2006 following the resignation of a member of the Assembly, Mr Milton Orkopoulos, who had been charged with certain offences. As originally enacted, section 19AA only applied to members who resign after being charged. In 2017 the section was extended to cover former members following the charging and prosecution of two former members of the Council for offences committed whilst they were members.

245 *Parliamentary Contributory Superannuation Act 1971*, s 19AA(8). The appeal period is (a) the period within which an appeal may be lodged (but excluding any extension to that period that a court may grant), or (b) the period of 12 months after the conviction or acquittal, whichever is the earlier.

246 *Crimes (Sentencing Procedure) Act 1999*, s 24C.

247 As defined in section 14C of the *Parliamentary Remuneration Act 1989*.

248 *Parliamentary Remuneration Act 1989*, ss 14C-14F.

The First State Superannuation Fund is an accumulation-style superannuation fund which pays benefits to members in accordance with Commonwealth superannuation legislation.

TITLES OF 'THE HONOURABLE' AND 'MLC'

Members of the Council are entitled to the titular designation of 'The Honourable'. The right to use the title was conferred by Queen Victoria in 1856.[249] The title has also been conferred on the Speaker of the Legislative Assembly, members of the Executive Council, ministers and judges.

In recent years some members have requested that the title not be used with reference to them.[250] Other members of the House have generally respected that preference, referring to the members concerned as 'Mr', 'Ms' or 'Mrs'. It has been ruled that a member cannot be compelled to refer to another member as 'the Honourable',[251] and that the use of 'Mr', 'Ms' or 'Mrs' is not disorderly.[252]

Where a member of the Council has chosen not to use the title 'The Honourable', the titles 'Mr', 'Ms' or 'Dr' have also been used when referring to that member in documents of the House, including the *Minutes of Proceedings* and other business papers, committee reports, and official correspondence.

Former members of the Council are entitled to apply for lifetime retention of the title 'The Honourable' on retirement or resignation after continuous service of not less than 10 years.[253] Applications must be made in writing to the Premier within six months of leaving office. If granted, retention of the title is notified in the *Government Gazette*. Ministers and Presiding Officers are entitled to apply for lifetime retention of the title on leaving office after three years' service in their respective offices.

---

249 See 'Despatches in reference to Colonial title of 'Honourable'', No 128, H Labouchere to Governor Denison, 30 October 1856. The Queen agreed to the conferring of this right in response to correspondence from the Governor, Sir William Denison, who suggested that the title be given in order to attract eminent colonialists to accept nomination to the Council.

250 The first such member was Ms Lee Rhiannon, who referred to the issue in her inaugural speech. See *Hansard*, NSW Legislative Council, 26 May 1999, pp 447-448.

251 Ruling: Burgmann, *Hansard*, NSW Legislative Council, 13 November 2002, p 6567. This ruling superseded an earlier ruling to the contrary. See Ruling: Burgmann, *Hansard*, NSW Legislative Council, 10 November 1999, p 2564.

252 Ruling: Burgmann, *Hansard*, NSW Legislative Council, 1 March 2001, p 12153.

253 Letter from the Secretary of State for the Colonies, J Chamberlain, to His Excellency the Governor, Viscount Hampden, 15 April 1897. In 1991 the Queen delegated to State Governors the power to approve the retention of the title. See letter from Sir Robin Janvrin, Buckingham Palace, to His Excellency the Governor, 25 July 1991. See also Twomey, (n 5), pp 153, 396.

In December 2014, the Governor revoked forthwith the right of two former members, including one former member of the Council, Mr Edward Obeid, to use the title 'The Honourable'.[254] This is believed to be the first time the right to use the title had been revoked.

254 *Government Gazette*, No 126, 19 December 2014, p 4706.

CHAPTER 6

OFFICE HOLDERS AND ADMINISTRATION OF THE LEGISLATIVE COUNCIL

The Legislative Council relies on a number of office holders who perform specific functions to enable the orderly and regular conduct of proceedings. They include the President, the Deputy President and Chair of Committees, the Assistant President, the Clerk of the Parliaments and the Usher of the Black Rod.

THE PRESIDENT

Section 22G(1) of the *Constitution Act 1902* provides:

> There shall be a President of the Legislative Council, who is the Presiding Officer of the Legislative Council and is recognised as its independent and impartial representative.[1]

There have been 21 Presidents of the Legislative Council since the establishment of responsible government in 1856.[2] A list of Presidents of the Legislative Council is provided in Appendix 6 (Presidents of the Legislative Council).

Role and functions

The principal role of the President is to preside in the House in accordance with section 22G(5) of the *Constitution Act 1902*.

When presiding in the House, the President is responsible for ensuring that proceedings are conducted in accordance with the standing orders and the practices and procedures of the House, relying on relevant precedents, rulings of past Presidents and other procedural authorities. The President calls members to speak in debate, puts all questions for determination by the House and maintains order, including ruling on points of order, drawing on the various sources of authority for guidance.

---

1 Section 22G(1) was inserted into the *Constitution Act 1902* in 1992 by the *Constitution (Amendment) Act 1992*, sch 1(1).

2 Not including the Hon Ernest Wright who acted in the role from 23 May 1956 to 5 December 1956.

The President's decisions are subject to the will of the House and may be challenged on a motion of dissent (SO 96).[3]

The President does not have a deliberative vote in the House, but exercises a casting vote where there is an equality of votes.[4] The President may vote in a Committee of the whole House.

The President is also the spokesperson of the House, and is the primary representative of the House in its relations with the Governor, the Legislative Assembly, the executive government and other persons and organisations outside of Parliament. The President communicates messages from the House to the Governor and to the Legislative Assembly, and reports messages to the House from the Governor and the Legislative Assembly.

The President also petitions the Governor at the start of each Parliament for the 'usual rights and privileges' of the House, particularly freedom of speech in debates, and is responsible for protecting those privileges, including, where necessary, intervening in litigation where issues of privilege arise.[5]

The President also presides during joint sittings of the two Houses to fill casual vacancies in the Legislative Council[6] and is invariably elected to preside over joint sittings to fill casual vacancies in the representation of New South Wales in the Australian Senate.[7] The President also presides during joint sittings of the two Houses under section 5B(6) of the *Constitution Act 1902* where there is disagreement between the two Houses on the provisions of a bill. This has only happened on one occasion.[8]

When occupying the Chair in the House, the President is referred to as 'Mr/Madam President'.[9]

---

3 Motions of dissent are rare in the Legislative Council. For further information, see the discussion in Chapter 13 (Debate) under the heading 'Dissent from a ruling of the President'. See also S Want and J Moore, edited by D Blunt, *Annotated Standing Orders of the New South Wales Legislative Council*, (Federation Press, 2018), pp 318-320.

4 *Constitution Act 1902*, s 22I. See also standing order 102(7). For further information, see the discussion in Chapter 12 (Motions and decision of the House) under the heading 'Casting vote of the Chair'. See also the *Annotated Standing Orders of the New South Wales Legislative Council*, (n 3), pp 376-379.

5 For further information, see the discussion in Chapter 3 (Parliamentary privilege in New South Wales) under the heading 'The petition to the Governor for the 'usual rights and privileges''.

6 For further information, see the discussion in Chapter 4 (Elections for the Legislative Council) under the heading 'Procedures for the filling of casual vacancies in the Legislative Council'.

7 For further information, see the discussion in Chapter 24 (Casual vacancies in the Australian Senate) under the heading 'Procedure for the filling of casual vacancies in the Australian Senate'.

8 On 20 April 1960 a joint sitting was held pursuant to section 5B(6) to deliberate on the Constitution Amendment (Legislative Council Abolition) Bill 1960. For further information, see the discussion in Chapter 2 (The history of the Legislative Council) under the heading '1934–1961: Labor's further attempts to abolish the Council'.

9 The titles of all occupants of the Chair used in the House are listed in Appendix 7 (The title of occupants of the Chair in the chamber).

The President is an *ex officio* member of the Procedure Committee (SO 205(3)). By convention the President takes the chair of the Procedure Committee at its first meeting each Parliament. The President may not be elected to a committee other than one of which he or she is an *ex officio* member (SO 210(8)).[10]

The President is also responsible on behalf of the House for the receipt and tabling of various reports from agencies which report directly to Parliament.[11]

The ceremonial duties performed by the President include those related to the opening of Parliament, visits by foreign Heads of State and delegations, receiving consuls presenting their credentials upon appointment, and representing the Legislative Council in its dealings with other Houses of Parliament.

In addition, the President has extensive administrative functions within the parliamentary precincts. The President is responsible, with the Speaker, for the control and management of the parliamentary precincts under the *Parliamentary Precincts Act 1997* and for the overall operation of Parliament.[12]

The President is also the parliamentary head of the Legislative Council and is responsible to the House for the operation of the Department of the Legislative Council under the Clerk. As such, the role of the President is similar to that of a minister in a government department. This role incorporates various responsibilities, including representing the department in budget negotiations with the Treasurer and representing the Legislative Council in budget estimates hearings.

The President is entitled to use the title 'The Honourable' and when leaving office after three years of service the title may be retained if authorised by the Governor.[13] The President is ranked 10th in the New South Wales Table of Precedence.[14]

Election and vacation of office

Under section 22G(2) of the *Constitution Act 1902*, a person shall be chosen as President of the Legislative Council before the Council proceeds to the dispatch of any other business at its first meeting following a periodic Council election and at any other time when the office becomes vacant.[15] The President is chosen from amongst the members of the Legislative Council.

---

10 Following the election of President Fazio in November 2009, part-way through the 54th Parliament, she was replaced as a member of all committees of which she had been a member, except the Procedure Committee. See *Minutes*, NSW Legislative Council, 2 December 2009, pp 1605-1606.

11 For further information, see the discussion in Chapter 19 (Documents tabled in the Legislative Council) under the heading 'Tabling of documents by the President'.

12 For further information, see the discussion in Chapter 3 (Parliamentary privilege in New South Wales) under the heading 'The parliamentary precincts'.

13 Letter from Secretary of State for the Colonies to Governor Duff, 22 March 1894.

14 The Table of Precedence lists in order the formal and ceremonial status of members of Parliament, government and the judiciary at ceremonial events.

15 This provision was inserted into the *Constitution Act 1902* in 1991 by the *Constitution (Legislative Council) Further Amendment Act 1991*, sch 1(1). For further information, see the discussion below under the heading 'History of the method of appointing or electing the President'.

The Office of President becomes vacant:

- immediately before the Council assembles for the dispatch of business at its first meeting following a periodic Council election;[16]
- if the President ceases to be a member of the Council,[17] unless temporarily continued in office during an election period under section 22G(6A)(a) of the *Constitution Act 1902* (see below);
- if the President is removed from office by a vote of the House;[18] or
- if the President resigns from office in writing addressed to the Governor.[19]

In circumstances where the President ceases to be a member of the Council through the expiry of his or her term of service as a member,[20] the President nevertheless continues to hold office as President under section 22G(6A)(a) of the *Constitution Act 1902* until the Council assembles for the dispatch of business at its first meeting following the periodic Council election, when an election for a new President must be held. This arrangement ensures that the administrative duties of the office[21] can continue to be performed during the election period even if the incumbent's term of service as a member has expired.[22]

The election of the President is governed by standing orders 12 and 13.

---

16 *Constitution Act 1902,* s 22G(3). This provision is replicated in standing order 11(a).

17 Ibid, s 22G(3)(a). This provision is replicated in standing order 11(b).

18 Ibid, s 22G(3)(b). This provision is replicated in standing order 11(c). On 3 July 1991, President Johnson was removed from office by a vote of the House. See *Minutes*, NSW Legislative Council, 3 July 1991, pp 32-34. For further information, see the discussion later in this chapter under the heading 'Removal from office'.

19 Ibid, s 22G(3)(c). This provision is replicated in standing order 11(d). Since the Presidency became an elected office in 1934, there have been three occasions on which the President has resigned from office. For further information, see Appendix 6 (Presidents of the Legislative Council).

20 Under section 22B(2) of the *Constitution Act 1902*, the term of service of a member of the Council expires on the termination, either by dissolution or expiry, of the second Legislative Assembly following his or her election.

21 The administrative duties of the President include approval of the appointment and termination of staff, management and control of the parliamentary buildings and precincts together with the Speaker of the Legislative Assembly and approval of administrative matters concerning the Department of the Legislative Council and the Department of Parliamentary Services.

22 Before the insertion of section 22G(6A) into the *Constitution Act 1902* in 2014, the President ceased holding office as President immediately on the expiry of his or her term of service as a member. Where this occurred the Council was without a President from early March before a periodic Council election until the House met again after the election, which could be as late as early May. For example, the Council was without a President following the expiry of President Chadwick's term of service on 5 March 1999 until the election of President Burgmann on 11 May 1999, and following the expiry of President Burgmann's term of service on 2 March 2007 until the election of President Primrose on 8 May 2007. For further information, see the *Annotated Standing Orders of the New South Wales Legislative Council*, (n 3), pp 27-28.

Whenever the office of President becomes vacant the Clerk acts as Chair of the House for the election of the President, and exercises the powers of the President under the standing orders whilst acting in the role (SO 12(1)).[23]

When conducting the election, the Clerk calls for nominations for the Office of President. A member, addressing the Clerk, may propose to the House and move: 'that [name of the member] do take the Chair of this House as President'. The member proposed as President must be present in the House (SO 12(2)).[24] The member proposing the motion and any other member may speak to the motion for not more than 15 minutes (SO 12(2)). The extent of debate on the motion has varied in the past.[25] By convention, candidates accept the nomination by stating: 'I submit myself to the will of the House'.[26]

If only one member is proposed as President, the Clerk declares the member elected without any question being put. The newly elected President is conducted to the Chair,[27] usually by a party colleague.[28] On being conducted to the Chair, the newly elected President stands on the upper step of the dais and returns acknowledgments to the House.[29] The President then takes the Chair (SO 14(1)).

If two or more members are proposed as President, each expresses a sense of the honour proposed to be conferred and may address the House (SO 12(4)), although once again, by convention, candidates generally simply accept the nomination by stating: 'I submit myself to the will of the House.'[30] A secret ballot is then conducted under standing order 13.[31]

---

23 For instances where the Clerk has exercised the powers of the President whilst acting as the Chair of the House for the election of the President, see the *Annotated Standing Orders of the New South Wales Legislative Council*, (n 3), p 32.

24 For further information, see the *Annotated Standing Orders of the New South Wales Legislative Council*, (n 3), p 33.

25 Ibid, pp 32-33.

26 There are no records of a member objecting to being proposed as President, although in 1946, a member proposed as Chairman of Committees (today known as the Deputy President and Chair of Committees) asked that his name be withdrawn. For further information, see the *Annotated Standing Orders of the New South Wales Legislative Council*, (n 3), p 33.

27 Traditionally, the elected President feigned reluctance to be conducted to the Chair. This derives from traditions in the UK House of Commons, where the Speaker, as the representative of the House to a sometimes hostile Monarch, potentially occupied a very difficult position. In modern times, the tradition has been criticised as outmoded. See, for example, H Evans, 'The Traditional, the Quaint and the Useful: Pitfalls of Reforming Parliamentary Procedures', Paper presented to the 35th Conference of Presiding Officers and Clerks, Melbourne, 2004; published in Department of the Senate, *Harry Evans: Selected Writings,* Papers on Parliament No 52, December 2009, p 145.

28 Often this is the member who nominated the newly elected President.

29 In recent years, the acknowledgment has tended to be brief, usually including reference to the honour conferred and thanks for the confidence that the House has reposed. For further information, see the *Annotated Standing Orders of the New South Wales Legislative Council*, (n 3), pp 41-42.

30 For further information, see the *Annotated Standing Orders of the New South Wales Legislative Council*, (n 3), p 34.

31 Although standing order 13 does not expressly mandate a *secret* ballot, the terms of the standing order amount to a secret ballot.

When a ballot for the election of the President is required, the bells are rung for five minutes following which the doors are locked, as in a division (SO 13(1)). Ballot papers are then distributed by the Clerks to all members in their places.[32] Each member writes on the ballot paper the name of the candidate for whom he or she wishes to vote, then places the ballot paper in the ballot box (SO 13(2)).

When all members present have cast their votes, the Clerk asks the nominator of each candidate to act as a scrutineer during the counting of the votes. The Clerk opens the ballot box at his or her place at the table of the House and counts the votes, witnessed by the scrutineers. The member with the greatest number of votes is declared elected as President, provided that that member also has a majority of the votes of the members present (SO 13(3)). When there are more than two nominees and no candidate gains a majority of the vote of the members present on the first ballot, the Clerk withdraws the name of the candidate with the smallest number of votes and conducts a further ballot (SO 13(4)). This continues until one member achieves a majority.

If there is an equality of votes between two remaining candidates, the vote is taken again. If there is again an equality of votes, the Clerk determines by lot which of the candidates will be withdrawn, as if that candidate had obtained the lesser number of votes (SO 13(5)). When conducting the lot, the names of the two candidates are placed in a hat and the Clerk draws out one name. The name drawn out by the Clerk is the unsuccessful candidate and the member whose name is remaining in the hat is declared elected President.

There have been four contested ballots for election as President of the Legislative Council: on 29 June 1998, 11 May 1999, 29 April 2003 and 8 May 2007.[33] On each of those four occasions, the necessary majority was obtained at the first round of voting without invoking the deadlock procedures or the need for a second ballot.

Following a contested election for President, the same processes and conventions for the President taking the Chair described earlier in relation to a non-contested election are followed.

Following the election of the President and the President taking the Chair, some members, such as party leaders, may then make speeches of congratulation to the newly elected President (SO 14(2)), who expresses gratitude for the congratulatory remarks.

Following the election of the President, a minister, usually the Leader of the Government in the Legislative Council, informs the House of the date and time at which the Governor would be pleased to receive the House for the purpose of presenting the President

32 Ballot papers are printed in advance, on different coloured paper for second and successive ballots, if required.

33 *Minutes*, NSW Legislative Council, 29 June 1998, pp 611-612; 11 May 1999, pp 6-7; 29 April 2003, pp 7-8; 8 May 2007, pp 6-7. The first three of these ballots were conducted under the standing orders for the election of the President of the Senate prior to the adoption of the current standing orders 12 and 13 in 2004, although the differences were not marked. For further information, see the *Annotated Standing Orders of the New South Wales Legislative Council*, (n 3), pp 39-41.

(SO 14(2)).[34] The presentation of the President to the Governor under the current arrangements for the opening of a new Parliament is discussed in Chapter 9 (Meetings of the Legislative Council).[35]

History of the method of appointing or electing the President

The method of appointing or electing the President (and at one time Speaker) of the Legislative Council has changed several times during the history of the Council.

As indicated in Chapter 2 (The history of the Legislative Council), the first colonial Legislative Council of New South Wales was presided over by the Governor.

In 1842 the *Australian Constitutions Act (No 1) 1842* (Imp)[36] replaced the Governor with an elected Speaker[37] to preside over meetings of the colonial Council. Following the passage of the *Australian Constitutions Act (No 1) 1842* (Imp),[38] the Hon Alexander Macleay was elected as the first Speaker of the Council on 1 August 1843.[39]

From the advent of responsible government in 1856 until the reconstitution of the Council in 1933, the Council was a nominee House with the President appointed by the Governor by Instrument under the Great Seal of the Colony. Section 7 of the *Constitution Act 1855* provided:

> The Governor of the Colony shall have Power and Authority from Time to Time, by an Instrument under the Great Seal of the said Colony, to appoint One Member of the said Legislative Council to be President thereof, and to remove him and appoint another in his Stead; and it shall be at all Times lawful for the said President to take part in any Debate or Discussion which may arise in the said Legislative Council.

In 1902, section 7 was replaced by section 21 of the *Constitution Act 1902*, which similarly provided that 'The Governor may, by an Instrument under the Great Seal, appoint one Member of the Legislative Council to be President thereof.'

In 1933, following reconstitution of the Council as an indirectly elected House by the *Constitution Amendment (Legislative Council) Act 1932* (No 2 of 1933), section 21 of the *Constitution Act 1902* was omitted and a new section 21 inserted to enable the Council to 'choose one of their number to be President', and to elect a new President 'as often as the office of the President becomes vacant'.[40] Under section 21(1), the President ceased

34 For further information, see the *Annotated Standing Orders of the New South Wales Legislative Council*, (n 3), pp 41-46.

35 See the discussion under the heading 'Attendance of the Governor and presentation of the President'.

36 5 & 6 Vic, c 76 (Imp).

37 Subject to disallowance by the Governor. See the *Australian Constitutions Act (No 1) 1842*, 5 & 6 Vic, c 76 (Imp), s 23.

38 5 & 6 Vic, c 76 (Imp).

39 *Votes and Proceedings*, NSW Legislative Council, 1 August 1843, p 1.

40 *Constitution Amendment (Legislative Council) Act 1932*, s 4(7).

to hold office on ceasing to be a member of the Council. The President could also be removed from office by a vote of the Council, and could resign from office in writing addressed to the Governor.[41]

In 1946, the House adopted standing order 8A, which provided that when a vacancy occurred in the Office of President during a session, any new members of the House were to be sworn before commissioners appointed by the Governor before the House proceeded to elect a new President.[42]

Between 1933 and 1978, the period when the House was indirectly elected, there were only four Presidents of the Council:[43] President Peden (1929–1946),[44] President Farrar (1946–1952), President Dickson (1952–1966) and President Budd (1966–1978). There was only one occasion, in 1934, on which the position was contested.

Following the 1978 reconstitution of the Council to a directly elected House, section 21 of the *Constitution Act 1902* was replaced by section 22G.[45] The rules for choosing the President were largely unchanged, as provided in clause 11 of schedule 4 to the *Constitution and Parliamentary Electorates and Elections (Amendment) Act 1978.* Standing order 8A was amended in 1985 to reflect the rules outlined in schedule 4.[46]

In 1991, the procedure for the election of the President under schedule 4 to the *Constitution and Parliamentary Electorates and Elections (Amendment) Act 1978* was repealed and section 22G(1) and (2) of the *Constitution Act 1902* amended to provide for the office of President to become vacant before the Council's first meeting following a periodic Council election.[47] A new section 22G(2A) also provided:

> Until Standing Rules and Orders of the Legislative Council otherwise provide, the President of the Legislative Council shall be chosen in accordance with the procedure for the time being for choosing the President of the Senate of the Parliament of the Commonwealth.

Subsections 22G(1), (2) and (2A) of the *Constitution Act 1902* were renumbered subsections 22G(2), (3) and (4) in 1992.[48]

---

41 The rules for the conduct of proceedings in choosing the President were provided under sections 40, 41 and 42 of the *Constitution Further Amendment (Legislative Council Elections) Act 1932*.

42 *Minutes*, NSW Legislative Council, 3 April 1946, pp 140-141. At the time standing order 8A was adopted, the Council was facing the return of 15 new members at the election held on 14 March 1946 and the impending expiry of the term of President Peden on 22 April 1946.

43 Not including the Hon Ernest Wright who acted in the role from 23 May 1956 to 5 December 1956.

44 President Peden was appointed by the Governor in 1929, before being elected President in 1934.

45 *Constitution and Parliamentary Electorates and Elections (Amendment) Act 1978*, sch 1(9).

46 *Minutes*, NSW Legislative Council, 21 November 1985, p 934.

47 *Constitution (Legislative Council) Further Amendment Act 1991*, ss 3 and 4, sch 1. This followed a previous attempt by the Government to ensure that there was an election for President after each periodic Council election. For further information, see the discussion below under the heading 'Removal from office'.

48 *Constitution (Amendment) Act 1992*, sch 1(1).

In 2004, the House adopted the current standing orders 12 and 13 for the election of the President for the purposes of section 22G(4).[49]

Removal from office

There has been one instance where the House has removed a President from office. On 3 July 1991, on the second sitting day of the 50th Parliament, the House removed President Johnson from office and elected President Willis to the position.

By way of background, the Hon John Johnson, a member of the Labor Party, was first elected President at the commencement of the 46th Parliament (1978–1981).[50] At that time, there was no provision in the *Constitution Act 1902* or standing orders for the Office of President to become vacant following a periodic Council election. Accordingly, President Johnson continued as President for the remainder of his term of service as a member, being the 46th and 47th Parliaments.

Mr Johnson was re-elected President at the commencement of the 48th Parliament following his re-election as a member.[51]

Consistent with practice, at the commencement of the 49th Parliament, he again took the Chair as President. However, on 28 April 1988, the second day of the 49th Parliament, the Leader of the new Coalition Government in the Legislative Council, the Hon Ted Pickering, moved that President Johnson be removed from office. In moving the motion, Mr Pickering argued that the House should have the opportunity to vote on its President following the change of government and that the Government had the 'right not only to govern but also to fill the senior positions of the Parliament'.[52] The Leader of the Opposition, the Hon Jack Hallam, successfully amended the motion to express the House's highest respect for the President and the impartial manner in which he discharged the duties of his Office. As a result, President Johnson remained in office.[53]

On 18 April 1991, near the end of the 49th Parliament, the Government introduced in the Council the Constitution (Legislative Council) Further Amendment Bill 1991 which provided for the Office of President to become vacant before the Council's first meeting following a periodic Council election. The bill did not progress beyond the minister's second reading speech before the House was prorogued.

Accordingly, at the commencement of the 50th Parliament, President Johnson again took the Chair as President.[54] However, on this occasion, on 3 July 1991, the second day of the 50th Parliament, Mr Pickering successfully moved that he be removed from office. An amendment moved by the Leader of the Opposition, the Hon Michael Egan,

---

49 For further information on the history of the method of appointing or electing the President, see the *Annotated Standing Orders of the New South Wales Legislative Council*, (n 3), pp 34-37.

50 *Minutes*, NSW Legislative Council, 7 November 1978, p 5.

51 *Minutes*, NSW Legislative Council, 1 May 1984, p 7.

52 *Hansard*, NSW Legislative Council, 28 April 1988, pp 75-84.

53 *Minutes*, NSW Legislative Council, 28 April 1988, pp 22-23.

54 At that time, the term of service of members of the Council was three terms of the Assembly.

to substitute an alternative proposition expressing the highest respect for President Johnson was further amended so that, whilst the House expressed its highest respect for the President and the impartial manner in which he had discharged his duties, he was nonetheless removed from office 'to allow the House to elect a new President following the recent general election'.[55] President Willis, a member of the Liberal Party, was elected President instead.[56]

The Government subsequently secured the passage of the Constitution (Legislative Council) Further Amendment Bill 1991 to provide for the office of President to become vacant before the Council's first meeting following every periodic Council election.[57]

Since 1991 the President has been elected from amongst the members of the party or parties in government.

The independence of the President

There is a long-standing tradition in the Legislative Council that the President should be independent and impartial when presiding in the House. This tradition continued throughout the 19th century and into the 20th century, and through the change to an elected President in 1933 and the change to elect the President after each periodic Council election in 1991.

In 1992, in recognition of the independence and impartiality expected of the President, the Government steered through the Parliament the *Constitution (Amendment) Act 1992* to insert into section 22G of the *Constitution Act 1902* a new section 22G(1) which recognises the President as the 'independent and impartial representative' of the Council. This step was taken in response to a requirement in the memorandum of understanding, commonly known as the Charter of Reform, which was signed on 31 October 1991 by Premier Greiner and three non-aligned independents in the Assembly.[58] The memorandum required '[c]onstitutional recognition of the independence of the two presiding officers and their roles as the voice of the Parliament to Executive Government'.

---

55 *Minutes*, NSW Legislative Council, 3 July 1991, pp 32-34.

56 *Minutes*, NSW Legislative Council, 3 July 1991, pp 34-35. For a more detailed discussion, see D Clune and G Griffith, *Decision and Deliberation: The Parliament of New South Wales 1856–2003*, (Federation Press, 2006), pp 589-594. See also the *Annotated Standing Orders of the New South Wales Legislative Council*, (n 3), pp 30-31.

57 For further information, see the *Annotated Standing Orders of the New South Wales Legislative Council*, (n 3), pp 30-31.

58 'Memorandum of Understanding between the Hon Nick Greiner MP, Premier, For and on behalf of the Liberal/National Party Government and Mr John Hatton MP, Ms Clover Moore MP, and Dr Peter Macdonald MP', 1991. A copy of the Memorandum is at *Hansard,* NSW Legislative Assembly, 31 October 1991, pp 4004-4033. Under the memorandum, in return for implementation of the Charter of Reform, the independents would support the government on motions regarding supply and confidence.

It is, however, accepted that outside the House, the President may play a role in party politics, including attending and voting in the party room and campaigning in elections on behalf of his or her party.[59]

Participation of the President in debate

Under section 22G(6) of the *Constitution Act 1902*, the President may take part in any debate or discussion in the House. When the President takes part in debate, he or she does so from the floor of the House (SO 86).

The right of the President to take part in debate is a long standing one. It was originally incorporated in section 7 of the *Constitution Act 1855* and subsequently section 21 of the *Constitution Act 1902*.

The practice of the President participating in debate in the House was common until the commencement of the Presidency of President Flowers (1915–1928).[60] Subsequently, however, it became rare. On 2 June 1988, President Johnson took part in debate on a motion concerning abortion, and on 10 May 1989 he took part in debate on the Industrial and Commercial Training Bill and cognate bills.[61] On both occasions he did so from a lectern placed beside the dais, the chair remaining vacant during his speech. However, since then there have been no further occasions on which the President has spoken in debate in the House.

The President may also take part in debate in a Committee of the whole House like any other member. The last time the President participated in debate in committee was on 19 June 2013, when President Harwin spoke twice in debate on the Members of Parliament Staff Bill 2013.[62] Prior to that, on 10 November 2010, President Fazio spoke in debate on the Election Funding and Disclosures Amendment Bill 2010,[63] and on 16 April 1991, President Johnson spoke in debate on the Nurses Bill 1991.[64]

Power of the President to move motions constrained

It is not clear whether the President has the right to initiate business by the moving of a motion in the House, however it is generally thought to be inconsistent with the provisions of the *Constitution Act 1902.*

---

59 This contrasts with the traditions of the House of Commons where the Speaker is expected to resign from his or her political party on election to the position. It is also notable that in the United Kingdom, at election time, the Speaker of the House of Commons contests his or her seat as 'the Speaker seeking re-election', rather than as a candidate of a political party. In addition, the House of Commons always re-elects an incumbent Speaker even if his or her former party is no longer in government. See D Natzler KCB and M Hutton (eds), *Erskine May's Treatise on The Law, Privileges, Proceedings and Usage of Parliament*, 25th ed, (LexisNexis, 2019), para 4.23.

60 For further information, see the *Annotated Standing Orders of the New South Wales Legislative Council*, (n 3), p 293.

61 *Hansard*, NSW Legislative Council, 2 June 1988, pp 1333-1335; 10 May 1989, pp 7884-7885.

62 *Hansard*, NSW Legislative Council, 19 June 2013, pp 21568-21569, 21573.

63 *Hansard*, NSW Legislative Council, 10 November 2010, p 27503.

64 *Hansard*, NSW Legislative Council, 16 April 1991, pp 2091-2092, 2096-2097.

The matter arose in 1870, when President Murray moved a motion of general business from the Chair. A point of order was taken as to the right of the President to initiate business, and the matter was referred to the Standing Orders Committee for inquiry and report.[65] The committee took evidence from the Chief Justice and first President of the Council from 1856 to 1867, Sir Alfred Stephen, and from the Clerk of the Parliaments, Mr Richard O'Connor. Sir Alfred Stephen had personally moved the consideration of a number of bills and motions from the Chair during his short time as President.

In his evidence to the committee, Sir Alfred Stephen indicated that the right of the President to initiate motions never explicitly arose during his time as President, but that in his view, the President retained all the privileges of membership of the House except those expressly taken away by statute, including the power to initiate business, as was the practice of the Lord Chancellor in the House of Lords.[66]

The Clerk, by contrast, considered that the President did not have the right to initiate business. The Clerk observed that, whilst ordinary members participated in debate as an inherent part of their membership of the House, the *Constitution Act 1855* included certain special and exclusive provisions in relation to the role of the President, for example concerning quorum arrangements and casting votes, which both defined but also limited the rights of the President. In this regard, the Clerk noted in particular that section 7 of the *Constitution Act 1855* provided in part that 'it shall be at all Times lawful for the said President to take part in any Debate or Discussion which may arise in the said Legislative Council'. The Clerk continued:

> Now this statutory power given to the President at all times to take part in debate, as I have said, is not thought necessary in the case of any other Member. All other Members exercise the rights I have spoken of – that is, the right of initiation, the right of debate, and the right of voting – as rights inherent in membership; and I conceive that this special and exclusive legislation for the President is to define, and within that definition to limit, his rights as Presiding Member, and to prevent him from acting in the dual capacity of ordinary Member and Presiding Member.[67]

The legislative construction of section 7 of the *Constitution Act 1855* remains almost unchanged today in section 22G(6) of the *Constitution Act 1902*.

The Clerk also distinguished the Parliament in Westminster, which largely operates under unwritten law, from the Legislative Council, which is 'confined within the four corners of the Constitution Act', and noted American authority which affirmed that to retain the confidence of an assembly a presiding officer should devote himself to his official duties and not submit propositions.[68]

---

65 *Minutes*, NSW Legislative Council, 24 August 1870, p 12.

66 Standing Orders Committee, *Minutes* of evidence, 9 September 1870, in *Journals*, NSW Legislative Council, 1870-1871, vol 19, pt 1, pp 301-303.

67 Ibid, p 302.

68 Ibid, pp 304 and 308.

Ultimately, the Standing Orders Committee concluded, based on the evidence of Sir Alfred Stephen, that the President possesses all the rights and privilege of any other member of the House, excepting only such as are deprived by express enactment, and that the constitutional provision concerning the President's right to participate in debate was a declaratory enactment to place the President on the same footing as the Lord Chancellor in the House of Lords.[69] Subsequently, however, a motion for the House to adopt the Committee's report was negatived on division.[70] Members opposing the motion acknowledged the arguments of the Clerk and noted that the three Presidents after President Stephen prior to President Murray had not initiated motions. It was also argued that the distinguishing feature of the functions of a presiding officer should be impartiality, and that there are differences between the Council and the House of Lords where the Lord Chancellor could initiate business.[71]

Since 1870 no President of the Council has initiated a motion in the House.

THE DEPUTY PRESIDENT AND CHAIR OF COMMITTEES

The Deputy President and Chair of Committees[72] is the President's deputy, available to take the Chair in the House when the President is unavailable or absent, or when requested to do so. The Deputy President and Chair of Committees also presides over proceedings when the House is in a Committee of the whole House.

There have been 20 Deputy Presidents of the Legislative Council since the establishment of responsible government in 1856. A list of Deputy Presidents of the Legislative Council is provided in Appendix 8 (Deputy Presidents and Chairs of Committees of the Legislative Council).

Role and functions

Section 22G(7) of the *Constitution Act 1902* provides:

> Subject to subsection (5),[73] the Deputy President and Chair of Committees of the Legislative Council:

69 Standing Orders Committee, *The power of the President to make any motion*, October 1870, in *Journals*, NSW Legislative Council, 1870-1871, vol 19, pt 1, p 297.

70 *Minutes*, NSW Legislative Council, 17 November 1870, p 71.

71 *Sydney Morning Herald*, 18 November 1870, p 2.

72 Historically the standing orders referred to the position of 'Chairman of Committees'. However, the standing orders of 2004 adopted the gender neutral term 'Deputy President and Chair of Committees'. The *Constitution Act 1902* was subsequently changed in 2007 to refer to the position of 'Chair of Committees' and again in 2014 to refer to the position of 'Deputy President and Chair of Committees'. See the *Statute Law (Miscellaneous Provisions) Act 2007* and the *Constitution Amendment (Parliamentary Presiding Officers) Act 2014*.

73 Section 22G(5) of the *Constitution Act 1902* provides: 'The President shall preside at all meetings of the Legislative Council except as may be provided by the Standing Rules and Orders of the Legislative Council'.

(a) acts as the President of the Legislative Council when the President is unavailable, and

(b) when so acting, has and may exercise and perform all the powers, authorities, duties and functions of the President.

For the purposes of this provision the President is 'unavailable' if there is a vacancy in the office of the President or if the President is absent from the State or otherwise unavailable to exercise and perform the powers, authorities, duties and functions of the President.[74]

Under the standing orders, the Deputy President and Chair of Committees also performs the duties and exercises the authority of the President in the absence (as opposed to the unavailability) of the President. For example, if the President is absent at the time appointed for the commencement of a sitting of the House, the Deputy President and Chair of Committees takes the chair (SO 20).[75] The Deputy President and Chair of Committees may also take the chair in the House when requested by the President to do so, without any announcement to the House (SO 22(1)). However, the Deputy President and Chair of Committees must give place to the President whenever the President arrives in the House (SO 17(1)).

The Deputy President and Chair of Committees also presides over proceedings when the House is in a Committee of the whole House (SO 17(2)).[76] Whenever a committee is constituted, the President leaves the President's Chair and the Deputy President and Chair of Committees takes the chair between the Clerk and Deputy Clerk at the table of the House. As with the President in the House, the Chair exercises a casting vote only in committee.[77]

When presiding in the House, the Deputy President and Chair of Committees exercises the same authority and has the same duties and powers as the President (SO 17(1)). By contrast, the powers of the Deputy President and Chair of Committees when presiding in committee are limited in certain respects in relation to disorder in committee.[78]

The Deputy President and Chair of Committees may also be commissioned by the Governor, in the absence of the President, to swear in new members of the Council.[79]

---

74 *Constitution Act 1902*, s 22G(7A).

75 For further information, see the *Annotated Standing Orders of the New South Wales Legislative Council*, (n 3), pp 61-63.

76 Although standing order 17(2) refers to the Deputy President and Chair of Committees taking the chair at the table in *all* Committees of the whole House, as a matter of practice, it is common for a Temporary Chair to take the chair of a Committee of the whole House.

77 For further information, see the discussion in Chapter 16 (Committee of the whole House) under the heading 'Determination of questions'.

78 For further information, see the discussion in Chapter 16 (Committee of the whole House) under the heading 'Disorder'.

79 See, for example, *Minutes*, NSW Legislative Council, 3 December 2009, p 1630; 23 August 2012, pp 1169-1170.

The Deputy President and Chair of Committees is referred to in the House as follows:

- 'Mr/Madam Deputy President' when presiding over the House in the absence of the President from the chamber.
- 'Mr/Madam Acting President' when presiding over the House when the President is unavailable, for example due to illness or travel outside the State.
- 'Chairperson', 'Chairman' or 'Chairwoman' when presiding in a Committee of the whole House (SO 19). By convention, the Chair of Committees may also be referred to as 'Mr/Madam Chair'.[80]

When not acting as President or presiding over proceedings in a Committee of the whole House, the Deputy President and Chair of Committees may take part in any debate or discussion in the House. In doing so, he or she does so from the floor of the House in the usual way (SO 86).[81]

If the President is unavailable, the Deputy President and Chair of Committees acts as the parliamentary head of the Legislative Council.

The Deputy President and Chair of Committees is an *ex officio* member of the Procedure Committee (SO 205(3)). If the Deputy President and Chair of Committees is elected to serve on another committee and declines to do so, another member is to be elected (SO 210(9)).

It has become established practice that, as far as possible, during periods when the President is unavailable, the Deputy President and Chair of Committees will seek to be substituted out of committee hearings and meetings, in case a matter arises for escalation to the Acting President, for example a matter of privilege.

Election and vacation of office

Unlike the election of the President, there is no reference in the *Constitution Act 1902* to the election of the Deputy President and Chair of Committees. Accordingly, the matter falls back on the standing orders.

Under standing order 15(1), at the commencement of sittings following a periodic Council election, or whenever a vacancy occurs, the House is to elect a member of the House to be Deputy President and Chair of Committees by motion without notice.

Under standing order 15(2), the Deputy President and Chair of Committees is elected in a similar manner as the President, except that the President rather than the Clerk conducts the election, and where there is an equality of votes, exercises a casting vote. As with election of the President, if there is only one candidate for election as Deputy President and Chair of Committees, the member is declared elected without any question being

80 The titles of all occupants of the Chair used in the House are listed in Appendix 7 (The title of occupants of the Chair in the chamber).

81 See also Ruling: Ajaka, *Hansard*, NSW Legislative Council, 19 September 2019, p 2.

put to the House. If the election is contested, a ballot is held in accordance with standing order 13, as discussed above in relation to the election of the President.[82]

Background to the election of the Deputy President and Chair of Committees is provided in the *Annotated Standing Orders of the New South Wales Legislative Council*.[83]

The Deputy President holds office for the life of the Parliament in which he or she is elected and until a successor is elected (SO 16).

The position of Deputy President and Chair of Committees may become vacant if the occupant resigns from office,[84] is elected as President,[85] ceases to be a member of the Council (unless temporarily continued in office during an election period under section 22B(2) of the *Constitution Act 1902*, as discussed below), or is removed from office.

In circumstances where the Deputy President and Chair of Committees ceases to be a member of the Council through the expiry of his or her term of service as a member,[86] he or she nevertheless continues to hold office as Deputy President under section 22G(6A)(b) of the *Constitution Act 1902* until the Council assembles for the dispatch of business at its first meeting following the periodic Council election, when an election for a new Deputy President must be held. As with the continuation of the President in Office over the same period, this ensures that the administrative duties of the office can still be performed.[87]

Removal from office

There has been one instance where the House has removed a Chairman of Committees from office. On 6 March 1969, the Hon Reg Downing, Leader of the Opposition in the Council, moved a motion on notice for the removal from office of the Hon Stanley Eskell, Chairman of Committees. Following a lengthy debate, the motion was carried.[88] The reason given by Mr Downing was that 'the Honourable member no longer holds the confidence of other members of this chamber'.[89] Mr Eskell at the time was facing possible criminal charges concerning allegations of giving false evidence in his divorce case.

---

82 See, for example, *Minutes*, NSW Legislative Council, 8 May 2007, p 7; 24 November 2009, p 1532.

83 *Annotated Standing Orders of the New South Wales Legislative Council*, (n 3), pp 49-51.

84 See, for example, *Minutes*, NSW Legislative Council, 15 January 1873, p 36; 9 February 1875, pp 15-16; 24 July 1912, p 11.

85 On 24 November 2009, the Deputy President and Chair of Committees, the Hon Amanda Fazio, was elected President, necessitating the election of a new Deputy President and Chair of Committees. See *Minutes*, NSW Legislative Council, 24 November 2009, pp 1532-1533.

86 Under section 22B(2) of the *Constitution Act 1902*, the term of service of a member of the Council expires on the termination, either by dissolution or expiry, of the second Legislative Assembly following his or her election.

87 For further information, see the *Annotated Standing Orders of the New South Wales Legislative Council*, (n 3), p 52.

88 *Minutes*, NSW Legislative Council, 6 March 1969, p 369.

89 *Hansard*, NSW Legislative Council, 6 March 1969, p 4262.

On 20 June 2001, a motion to remove the Hon Tony Kelly as Chairman of Committees, following his action the previous day in leaving the Chair in the absence of a minister in the House, was defeated on division.[90]

THE ASSISTANT PRESIDENT

In 2007, the Council adopted a sessional order with continuing effect for the House to elect a member to be Assistant President to hold office during the life of the Parliament in which elected.[91]

The Assistant President is elected in a similar manner as the President. By resolution of the House of continuing effect, in the absence of the President and the Deputy President and Chair of Committees on a day the House is sitting, the Assistant President will perform the duties of the President, and exercises the same authority and has the same powers as the President during sittings of the House.[92]

When occupying the Chair in the House, the Assistant President is referred to as 'Mr/Madam Assistant President'.[93]

When not acting as President, the Assistant President may take part in any debate or discussion in the House.[94]

TEMPORARY CHAIRS

At the beginning of each session, and at other times as required, the President nominates a panel of not less than three members of the House to be Temporary Chairs of Committees (SO 18). Temporary Chairs act for the President, the Deputy President and Chair of Committees and the Assistant President in the House or in a Committee of the whole House on a temporary basis whenever required (SO 21(1)). In doing so, they exercise the same authority and have the same duties and powers as the President. Any one of the Temporary Chairs may be called upon to take the Chair in the absence of the President, Deputy President and Assistant President.[95]

---

90 *Minutes*, NSW Legislative Council, 20 June 2001, pp 1033, 1036-1037.

91 *Minutes*, NSW Legislative Council, 28 June 2007, p 197. The sessional order originally referred to the position of Assistant Deputy President rather than Assistant President. On 28 November 2007, following the gazettal of the *Parliamentary Remuneration Amendment (Miscellaneous Offices) Regulation 2007*, which referred to the Assistant President rather than Assistant Deputy President, the House passed a motion to change the name of the Assistant Deputy President to Assistant President. See *Minutes*, NSW Legislative Council, 28 November 2007, p 376.

92 *Minutes*, NSW Legislative Council, 28 June 2007, p 197; 28 November 2007, p 376.

93 The titles of all occupants of the Chair used in the House are listed in Appendix 7 (The title of occupants of the Chair in the chamber).

94 Ruling: Ajaka, *Hansard*, NSW Legislative Council, 19 September 2019, p 2.

95 For further information, see the *Annotated Standing Orders of the New South Wales Legislative Council*, (n 3), pp 57-59.

When presiding over the House or a Committee of the whole House, a Temporary Chair is referred to as 'Mr/Madam Deputy President' or 'Mr/Madam Deputy Chair' respectively.[96]

THE CLERK

The Clerk of the Parliaments, also known as the Clerk of the Legislative Council, is responsible for providing expert advice on the proceedings of the Council to the President, Deputy President and Chair of Committees, ministers and members of the Council on parliamentary law, practice and procedure.

When the House is sitting, the Clerk sits at the eastern end of the table of the House below and to the right of the President's chair on the dais. At the direction of the President, the Clerk calls over certain items of business as they are reached and tables certain documents. In addition, the Clerk provides procedural advice to the President and other members as required, records the proceedings of the House (SO 49(1)) and keeps an attendance list (SO 62). Other roles of the Clerk in connection with the sittings of the House are:

- The preparation and publication of the *Minutes of Proceedings*, *Notice Paper* and *Questions and Answers Paper* (SO 49). The standing orders further require the Clerk to ensure that a *Hansard* record is kept of debates in the House (SO 51).[97]
- The certification of Council bills transmitted to the Assembly for concurrence (SO 151(1) and (2)), or Assembly bills returned to the Assembly, with or without amendment (SO 155(1) and (2)). A bill originating in the Council which has passed both Houses is certified by the Clerk before presentation to the Governor for assent (SO 160(1)). The Clerk also numbers and dates all public acts assented to (SO 162).[98]
- The communication of all orders for the production of State papers (SO 52) and Addresses for Documents to the Governor (SO 53).

Whenever the Office of President becomes vacant, the Clerk acts as Chair of the House for the election of the President and has the powers of the President under the standing orders when so acting (SO 12(1)).[99]

96 The titles of all occupants of the Chair used in the House are listed in Appendix 7 (The title of occupants of the Chair in the chamber).

97 For further information, see the discussion in Chapter 11 (Publication of and access to the proceedings of the Legislative Council) under the heading 'The official records of the House'.

98 For further information, see the discussion in Chapter 15 (Legislation) under the heading 'Assent to bills'.

99 For further information, see the discussion earlier in the chapter under the heading 'Election and vacation of office'.

The Clerk has authority under the standing orders and certain legislation to receive and make public reports and other documents on behalf of the House.[100] The Clerk also maintains the Register of Disclosures by Members of the Legislative Council and keeps the Roll of the House and the Register of Members of the Legislative Council (SOs 6(j), 10 and 61(1)).

The Clerk also has custody of all documents tabled in the House which may only be taken from the office of the Clerk by resolution of the House, or if the House is adjourned for more than two weeks, by approval of the President (SO 50(1)).[101]

The Clerk is the departmental head of the Department of the Legislative Council, and is responsible to the President for the budget, staffing and operations of the department. The Clerk is also responsible to the joint Presiding Officers, together with the Clerk of the Legislative Assembly and the Chief Executive of the Department of Parliamentary Services, for the management and administration of the Parliament generally.

The Clerk is appointed by the Governor by Commission under the Public Seal of the State with the advice of the Executive Council on the recommendation of the President to the Premier.[102] There is no set term of office; the Clerk holds office during the pleasure of the Governor.

The title 'Clerk of the Parliaments' was first conferred on the Clerk of the Legislative Council by the Governor on 15 February 1864. The *Government Gazette* the following day announced:

> His Excellency the Governor, with the Advice of the Executive Council, has been pleased to direct that the Clerk of the Legislative Council shall henceforth be also officially styled and use the designation of 'Clerk of the Parliaments'.

The title itself derives from the English Parliament, where it appears that the title was originally adopted for the Clerk of the House of Lords on the basis that that House was a continuing House, not subject to dissolution from time to time, and that the office holder was permanently appointed from one Parliament to the next. This accounts for the use of the plural in the title 'Clerk of the Parliaments'. By contrast, it appears in early days, the Clerk of the House of Commons was styled the 'Under Clerk of Parliament', and was re-appointed each Parliament.[103] Of course, such circumstances are no longer applicable in New South Wales. Nevertheless, the designation 'Clerk of the Parliaments' has been retained.[104]

---

100 For further information, see the discussion in Chapter 19 (Documents tabled in the Legislative Council) under the heading 'Tabling of documents when the House is not sitting'.

101 For further information, see the discussion in Chapter 19 (Documents tabled in the Legislative Council) under the heading 'Custody and availability of tabled documents'.

102 See, for example, *Minutes*, NSW Legislative Council, 11 October 2011, pp 466-467.

103 JR Stevenson, 'The office of Clerk of the Parliaments in New South Wales', *APSA News*, (Vol 5, No 3, August 1960), p 4.

104 Council records show that there have been a number of unsuccessful attempts, initiated by various Speakers of the Legislative Assembly, to have the title abolished, although to do so would require the amendment of various statutes.

There have been 12 Clerks of the Legislative Council since 1856. A list of Clerks of the Legislative Council and Clerks of the Parliament is provided in Appendix 9 (Clerks of the Legislative Council and Clerks of the Parliaments).

The Clerk is assisted by the Deputy Clerk. The Deputy Clerk performs the duties of the Clerk in the House in the Clerk's absence (SO 24). Both the Clerk and the Deputy Clerk are statutory office holders.[105]

THE USHER OF THE BLACK ROD

The Usher of the Black Rod is the most senior protocol position in the Legislative Council. Upon the commencement of responsible government in 1856, the position was adopted from the Westminster Parliament. The name Usher of the Black Rod comes from the ebony cane carried by the Usher of the Black Rod as the symbol of authority of the office.[106] On important ceremonial occasions, such as the opening of a Parliament, the Usher of the Black Rod directs all protocol, logistical and administrative details and undertakes important ceremonial duties. During a normal sitting day, the Usher's main responsibility in the chamber under the standing orders is to respond to directions from the President to maintain order in the House. The Usher also announces the President to the Council chamber at the beginning of each sitting day.

Outside the chamber, the Usher of the Black Rod has ceremonial responsibilities in relation to visits by the Governor and other officials, dignitaries and delegations. The Usher also has responsibilities relating to security, the use of the public areas at Parliament House and other protocol and administrative duties.

THE DEPARTMENT OF THE LEGISLATIVE COUNCIL

The Department of the Legislative Council provides procedural, administrative and other support services to assist the members of the Council in performing their parliamentary duties, including their work in the House, on committees and within the community.

The President is the head of the Department of the Legislative Council, and is responsible to the Council for its operation. The Clerk is responsible to the President for the administration of the department.

The staffing of the department

The Clerk of the Parliaments and Clerk of the Legislative Council and the Usher of the Black Rod are directly appointed by the Governor under the Public Seal of the State in

105 As statutory officers the remuneration and conditions of the two officers are determined under the *Statutory and Other Offices Remuneration Act 1975*.

106 For further information, see the discussion in Chapter 25 (The Parliament buildings and the Legislative Council chamber) under the heading 'The Black Rod'.

accordance with section 47 of the *Constitution Act 1902*, on the advice of the Executive Council following the recommendation of the President.[107] Other officers of the Council are appointed under section 47B of the *Constitution Act 1902*.

Staff of members of the Legislative Council are employed under the *Members of Parliament Staff Act 2013*.

The funding of the department and the Parliament

The Parliament of New South Wales is funded by the Treasury through the annual Appropriation (Parliament) Bill. This bill provides separate appropriations for the Parliament for the 'recurrent services' and the 'capital works and services' of the Parliament.

Since 1995 (with the exception of 2011)[108], the annual Appropriation (Parliament) Bill has been passed as a separate cognate bill to the Appropriation Bill for that year. This step was taken in response to a requirement in the memorandum of understanding, commonly known as the Charter of Reform, which was signed on 31 October 1991 by Premier Greiner and three non-aligned independents in the Assembly.[109] The memorandum included a commitment to make the annual appropriation for the Legislature a separate bill.

Whilst a separate appropriation bill for Parliament is important, in practice the amount contained in the bill is still determined each year by the executive government.[110]

In late 2019 and early 2020, the Public Accountability Committee conducted an inquiry into the budget process for independent oversight bodies and the Parliament of New South Wales.[111] The committee's report, tabled in the House on 24 March 2020, found that the current arrangements for the funding of the Parliament are not appropriate, and recommended adoption of various measures to increase the autonomy of the Parliament in the setting of its budget, including the designation of an appropriate committee or

107 *Constitution Act 1902*, s 47.

108 The Appropriation (Parliament) Bill was discontinued in 2011 but reinstated in 2012 following representations to the executive government by the Presiding Officers.

109 'Memorandum of Understanding between the Hon Nick Greiner MP, Premier, For and on behalf of the Liberal/National Party Government and Mr John Hatton MP, Ms Clover Moore MP, and Dr Peter Macdonald MP', 1991. A copy of the Memorandum is at *Hansard,* NSW Legislative Assembly, 31 October 1991, pp 4004-4033. Under the memorandum, in return for implementation of the Charter of Reform, the independents would support the government on motions regarding supply and confidence.

110 For further information, including on the provisions of section 24B(3) of the *Constitution Act 1902* relating to parliamentary appropriations, see the discussion in Chapter 17 (Financial legislation) under the heading 'Parliamentary appropriations'.

111 *Minutes*, NSW Legislative Council, 15 October 2019, p 504. See also Public Accountability Committee, Inquiry into the budget process for independent oversight bodies and the Parliament of New South Wales, Evidence, 12 and 13 December 2019.

committees to review the annual budget submissions of the parliamentary departments and to give direction as to the funding priorities of the Parliament.[112]

Financial reporting

The *Public Finance and Audit Act 1983* provides the Auditor-General with wide-ranging powers to scrutinise the financial records and administration of public authorities in New South Wales.

There is no legislative authority or requirement in the *Public Finance and Audit Act 1983* for the Auditor-General to audit the accounts of the parliamentary departments.[113] However, at the end of each financial year, it is current practice for the Presiding Officers to invite the Auditor-General to audit the Parliament's accounts, including members' use of additional entitlements determined by the Parliamentary Remuneration Tribunal. The audited accounts are published in the Department's Annual Report tabled each year by the President.

Although not required under the *Public Finance and Audit Act 1983* or the *Annual Reports (Departments) Act 1985*, the Legislative Council voluntarily publishes an Annual Report which is submitted to the President and subsequently tabled by the President in the House.[114]

OTHER PARLIAMENTARY DEPARTMENTS

The Department of the Legislative Council is one of four departments which provide services to members of the Parliament. The other three departments are:

- The Department of the Legislative Assembly, which provides procedural, administrative and other support services to members of the Legislative Assembly. The Department of the Legislative Assembly is managed by the Clerk of the Legislative Assembly, who is accountable to the Speaker of the Legislative Assembly.
- The Department of Parliamentary Services, which provides support services to members of both Houses and the House departments. Those services include the Parliamentary Library, the Parliamentary Reporting Staff (*Hansard*), building services, security, food and beverage services, information technology services,

112 Public Accountability Committee, *Budget process for independent oversight bodies and the Parliament of New South Wales*, First Report, Report No 5, March 2020, pp 51-54.

113 The statutory authorities and departments covered by the *Public Finance and Audit Act 1983* and required to be audited by the Auditor-General are listed in schedules 2 and 3 of the act. The four parliamentary departments are not listed in those schedules.

114 At the time of publication, the *Annual Reports (Departments) Act 1985* was scheduled to be repealed under schedule 1 to the *Government Sector Finance Legislation (Repeal and Amendment) Act 2018*. In future, annual reporting requirements will fall under division 7.3 of the *Government Sector Finance Act 2018*.

archives, accounts and education services. The Department of Parliamentary Services is managed by the Chief Executive who is accountable to the President and Speaker jointly.[115]

- The Parliamentary Budget Office, which was established in 2010 by the *Parliamentary Budget Officer Act 2010* to provide costings of the budget impact of policy proposals of the major political parties in the lead up to an election.

115 The Department of Parliamentary Services was established in 2008. A previous attempt in the early 1990s to form a Parliamentary Management Board responsible for the management of parliamentary services and the funding and finances of the Parliament failed. For further information, see the discussion in L Lovelock and J Evans, *New South Wales Legislative Council Practice*, 1st ed, (Federation Press, 2008), pp 212-213.

CHAPTER 7

PARTIES, THE GOVERNMENT AND THE LEGISLATIVE COUNCIL

This chapter examines the role that political parties play in the system of government in New South Wales, together with the formation of the government and the ministry, ministerial responsibility in the Legislative Council and the various party roles undertaken by members in the House.

POLITICAL PARTIES IN NEW SOUTH WALES

Political parties play a crucial role in the New South Wales system of government, and have done so for over a century since the development of the 'party system' of government in the late 19th century.[1]

The government of the day is effectively determined by the representation of the various political parties in Parliament. By convention, the party or coalition of parties with the majority of members in the Legislative Assembly forms the government. The party or coalition of parties having the next greatest number of members in the Legislative Assembly forms the opposition, with other parties forming the cross-bench.[2] The parties forming government, opposition and the cross-bench in the Legislative Assembly automatically and by necessity assume those same roles in the Legislative Council, regardless of the number of seats those parties actually hold in the Legislative Council.[3]

Between elections, the interaction between political parties is fundamental to an understanding of the operation of the Parliament and its relationship with the executive government.

---

1 For a discussion of the evolution of the party system in New South Wales, including in the early years of responsible government, see D Clune and G Griffith, *Decision and Deliberation: The Parliament of New South Wales 1856-2003*, (Federation Press, 2006), pp 17-20.

2 This is discussed further below under the heading 'The Government'.

3 For example, at the commencement of the 49th Parliament in 1988, the Coalition Government held fewer seats in the Legislative Council than the Labor Opposition (19 seats compared to 21 seats). Similarly, at the commencement of the 51st Parliament in 1995, the Labor Government held fewer seats in the Legislative Council than the Coalition Opposition (17 seats compared to 18 seats).

Despite their leading role in the New South Wales system of government, the *Constitution Act 1902*, as originally enacted, contained no mention of political parties. Even today, it makes only oblique reference to political parties in relation to the filling of casual vacancies in the Council.[4] However, political parties are defined in more detail in other statutes for administrative and electoral purposes. In particular, the *Electoral Act 2017* provides for the registration of political parties in New South Wales.[5] Registration entitles a party to funding under the *Electoral Funding Act 2018*,[6] the right to nominate candidates for elections,[7] printing of the party name on the ballot paper[8] and the right to distribute electoral material complying with electoral laws at elections.[9]

Party representation in the Legislative Council since 1978

Table 7.1 below shows seats won by parties in the Legislative Council since the reconstitution of the Council in 1978 to become a fully elected House, alongside overall party representation in the Council by Parliament since 1978. The two records differ as members of the Council are elected for two terms of the Assembly, meaning that the representation of parties in the Council reflects the outcome of the previous two elections, not just the last election in the case of the Assembly.[10] As shown in the table, no party or coalition of parties in government has held an absolute majority in the Legislative Council since the commencement of the 49th Parliament in 1988, a period of over three decades. The fact that the government typically does not have an absolute majority of seats in the Council is crucial to the Council's role as a House of Review in scrutinising the actions of the executive and holding it to account.[11]

The rows in Table 7.1 should be read across facing pages.

4 *Constitution Act 1902*, ss 22D and 22E.
5 *Electoral Act 2017*, pt 6.
6 *Electoral Funding Act 2018*, pt 4.
7 *Electoral Act 2017*, s 83(2)(a).
8 Ibid, ss 104-107.
9 Ibid, ss 180-181.
10 Between 1978 and 1991, members of the Council were elected for three terms of the Assembly, meaning that the representation of parties in the Council reflected the electoral outcomes at the three previous elections.
11 *Egan v Willis* (1998) 195 CLR 424 at 453 per Gaudron, Gummow and Hayne JJ.

Table 7.1: Party representation in the Legislative Council since 1978

Parliament	Periodic election	Total seats	Seats won at election		
			ALP	Liberal/ National	Minor parties
46th	(1978)	**43**[2]	**9**	**6** (4 Lib/2 Nat)	**0**
47th	**2nd** (1981)	**44**	**8**	**5** (3 Lib/2 Nat)	**2** 1 x Call to Australia (Fred Nile) 1 x Australian Democrats (Elisabeth Kirkby)
48th	**3rd** (1984)	**45**	**7**	**7** (4 Lib/3 Nat)	**1** 1 x Call to Australia (James Cameron)
49th	**4th** (1988)	**45**	**6**	**7** (5 Lib/2 Nat)	**2** 1 x Call to Australia (Elaine Nile) 1 x Australian Democrats (Richard Jones)
50th	**5th** (1991)	**42**[8]	**6**	**7** (4 Lib/3 Nat)	**2** 1 x Call to Australia (Fred Nile) 1 x Australian Democrats (Elisabeth Kirkby)
51st	**6th** (1995)	**42**[9]	**8**	**8** (6 Lib/2 Nat)	**5** 1 x Call to Australia[10] (Elaine Nile) 1 x The Greens (Ian Cohen) 1 x Australian Democrats (Richard Jones) 1 x The Shooters Party (John Tingle) 1 x A Better Future For Our Children (Alan Corbett)

Composition of the Council			Votes needed by the Govt for a majority
ALP	**Liberal/ National**	**Minor parties and Independents**	
23	**20** (14 Lib/ 6 Nat)	**0**	**ALP** **0**
24	**18** (12 Lib/6 Nat)	**2** 1 x Call to Australia (Fred Nile) 1 x Australian Democrats (Elisabeth Kirkby)	**ALP** **0**
24	**17**[3] (11 Lib/6 Nat)	**4**[4] 2 x Call to Australia (Fred Nile, James Cameron/Marie Bignold)[5] 1 x Australian Democrats (Elisabeth Kirkby) 1 x Independent (Finlay MacDiarmid)	**ALP** **0**
21	**19** (12 Lib/7 Nat)	**5** 2 x Call to Australia (Fred Nile, Elaine Nile) 2 x Australian Democrats (Elisabeth Kirkby, Richard Jones) 1 x Independent (Marie Bignold)[6]	**Coalition** **4**[7]
18	**20** (13 Lib/7 Nat)	**4** 2 x Australian Democrats (Richard Jones, Elisabeth Kirkby) 2 x Call to Australia (Elaine Nile, Fred Nile)	**Coalition** **2**
17[11]	**18** (12 Lib[12]/6 Nat)	**7**[13] 2 x Call to Australia[14] (Fred Nile, Elaine Nile) 1 x Australian Democrats (Elisabeth Kirkby/Arthur Chesterfield-Evans)[15] 1 x The Greens (Ian Cohen) 1 x The Shooters (John Tingle) 1 x A Better Future For Our Children (Alan Corbett) 1 x Independent (Richard Jones)[16]	**ALP** **4**[17]

Parliament	Periodic election	Total seats	Seats won at election		
			ALP	Liberal/ National	Minor parties
52nd	**7th** (1999)	**42**	**8**	**6** (4 Lib/2 Nat)	**7** 1 x Christian Democratic Party (Fred Nile) 1 x The Greens (Lee Rhiannon) 1 x Australian Democrats (Arthur Chesterfield-Evans) 1 x Outdoor Recreation Party (Malcolm Jones) 1 x Pauline Hanson's One Nation (David Oldfield) 1 x Reform the Legal System (Peter Breen) 1 x Unity (Peter Wong)
53rd	**8th** (2003)	**42**	**10**	**7** (5 Lib/2 Nat)	**4** 1 x Christian Democratic Party (Gordon Moyes) 2 x The Greens (Ian Cohen, Sylvia Hale) 1 x The Shooters Party (John Tingle)
54th	**9th** (2007)	**42**	**9**	**8** (5 Lib/3 Nat)	**4** 2 x The Greens (Lee Rhiannon, John Kaye) 1 x Christian Democratic Party (Fred Nile) 1 x The Shooters Party (Roy Smith)

Composition of the Council			Votes needed by the Govt for a majority
ALP	**Liberal/ National**	**Minor parties and Independents**	
16	**13** (9 Lib[18]/ 4 Nat)	**13** 2 x Christian Democratic Party (Elaine Nile/Gordon Moyes,[19] Fred Nile) 2 x The Greens (Ian Cohen, Lee Rhiannon) 1 x Australian Democrats (Arthur Chesterfield-Evans) 1 x A Better Future For Our Children (Alan Corbett) 1 x Outdoor Recreation Party (Malcolm Jones) 1 x Pauline Hanson's One Nation (David Oldfield)[20] 1 x Reform the Legal System (Peter Breen) 1 x The Shooters (John Tingle) 1 x Unity (Peter Wong) 2 x Independent (Helen Sham-Ho, Richard Jones)	**ALP** **6**
18	**13** (9 Lib/4 Nat)	**11** 3 x The Greens (Lee Rhiannon, Ian Cohen, Sylvia Hale) 2 x Christian Democratic Party (Fred Nile, Gordon Moyes) 1 x Australian Democrats (Arthur Chesterfield-Evans) 1 x The Shooters Party (John Tingle/Robert Brown)[21] 1 x Outdoor Recreation Party (Malcolm Jones/Jon Jenkins)[22] 1 x Reform the Legal System (Peter Breen)[23] 1 x Unity (Peter Wong) 1 x Independent/One Nation New South Wales (David Oldfield)	**ALP** **4**
14	**19** (12 Lib/7 Nat)	**9** 5 x The Greens (Cate Faehrmann/Mehreen Faruqi,[28] John Kaye, David Shoebridge, Jan Barham, Jeremy Buckingham) 2 x Christian Democratic Party (Fred Nile, Paul Green) 2 x The Shooters and Fishers (Robert Borsak, Robert Brown)	**Coalition** **3**

Parliament	Periodic election	Total seats	Seats won at election		
			ALP	Liberal/ National	Minor parties
55th	**10th** (2011)	**42**	**5**	**11** (7 Lib/4 Nat)	**5** 3 x The Greens (David Shoebridge, Jan Barham, Jeremy Buckingham) 1 x Christian Democratic Party (Paul Green) 1 x The Shooters and Fishers Party (Robert Brown)
56th	**11th** (2015)	**42**	**7**	**9** (6 Lib/3 Nat)	**5** 2 x The Greens (John Kaye, Mehreen Faruqi) 1 x Christian Democratic Party (Fred Nile) 1 x The Shooters and Fishers Party (Robert Borsak) 1 x Animal Justice Party (Mark Pearson)
57th	**12th (2019)**	**42**	**7**	**8** (5 Lib/3 Nat)	**6** 2 x The Greens (David Shoebridge, Abigail Boyd) 2 x Pauline Hanson's One Nation (Mark Latham, Rod Roberts) 1 x The Shooters, Fishers and Farmers Party (Mark Banasiak) 1 x Animal Justice Party (Emma Hurst)

Composition of the Council			Votes needed by the Govt for a majority
ALP	**Liberal/ National**	**Minor parties and Independents**	
14	**19** (12 Lib/7 Nat)	**9** 5 x The Greens (Cate Faehrmann/Mehreen Faruqi,[28] John Kaye, David Shoebridge, Jan Barham, Jeremy Buckingham) 2 x Christian Democratic Party (Fred Nile, Paul Green) 2 x The Shooters and Fishers (Robert Borsak, Robert Brown)	**Coalition 3**
12	**20** (13 Lib/7 Nat)	**10** 5 x The Greens (David Shoebridge, Jan Barham/Dawn Walker,[29] Jeremy Buckingham, John Kaye/Justin Field,[30] Mehreen Faruqi/Cate Faehrmann[31]) 2 x Christian Democratic Party (Paul Green, Fred Nile) 2 x The Shooters, Fishers and Farmers Party[32] (Robert Brown, Robert Borsak) 1 x Animal Justice Party (Mark Pearson)	**Coalition 2**
14	**17** (11 Lib/6 Nat)	**11** 3 x The Greens (Cate Faehrmann, David Shoebridge, Abigail Boyd)[33] 2 x Pauline Hanson's One Nation (Mark Latham, Rod Roberts) 2 x The Shooters, Fishers and Farmers Party (Robert Borsak, Mark Banasiak) 2 x Animal Justice Party (Mark Pearson, Emma Hurst) 1 x Christian Democratic Party (Fred Nile) 1 x Independent (Justin Field)	**Coalition 5**

Notes:

1 The President has a casting vote but not a deliberative vote. Therefore the number of votes needed by the government for a majority depends on the party from which the President is chosen.

2 As discussed in Chapter 2 (The history of the Legislative Council), the reconstitution of the Council as a directly elected House of 45 members took place in three stages. The first stage was a House of 43 members in 1978, then 44 members in 1981, and finally 45 members in 1984.

3 The Coalition was reduced to 17 members for much of the 48th Parliament after Finlay MacDiarmid of the National Party resigned from the party to be an independent in April 1985. Mr MacDiarmid ceased to be a member of the House at the conclusion of the 48th Parliament.

4 As noted above, the three elected cross-bench members were joined by Finlay MacDiarmid as an Independent in April 1985.

5 In December 1984, Marie Bignold was elected to fill the casual vacancy caused by the resignation of James Cameron.

6 Marie Bignold was elected to the Council as a member of Call to Australia, however from late 1988 onwards, her affiliation with the Call to Australia Group became tenuous, although she did not formally leave the Call to Australia Group to become an independent until March 1991. See see D Clune and G Griffith, *Decision and Deliberation: The Parliament of New South Wales 1856-2003*, (The Federation Press, 2006), p 571. She continued as an independent member until the end of the 49th Parliament, when she was one of three sitting members whose seats were abolished when the Council was reconstituted to a chamber of 42 members in 1991.

7 During the 49th Parliament, John Johnson, a member of the Labor Party, continued as President, despite the change of government at the 1988 election. Because the Coalition did not supply the President, it needed only four additional votes in addition to its existing 19 for a majority in the 45 member House.

8 The Council was reconstituted to a chamber of 42 members at the start of the 50th Parliament in 1991. To facilitate the reduction from 45 to 42 members, the last three members elected at the 3rd periodic Council election in 1984 lost their seats: Gordon Ibbett (Labor), Judith Jakins (Nationals) and Marie Bignold (replacing James Cameron), by then an independent.

9 With the reconstituted to a chamber of 42 members in 1991, only the first six members elected at the 4th periodic Council election in 1988 continued as members in the 51st Parliament. They were three Labor members (Dorothy Isaksen who filled the casual vacancy caused by the resignation of Deirdre Grusovin in May 1990, Ian Macdonald and James Kaldis), two Liberal members (Virginia Chadwick and Marlene Goldsmith) and one Nationals member (Robert Smith).

10 The Call to Australia Party was renamed the Christian Democratic Party (Fred Nile Group) in 1997.

11 Franca Arena was expelled from the Labor Party in November 1997, reducing the ALP to 16 members for the remainder of the Parliament.

12 Helen Sham-Ho resigned from the Liberal Party to be an independent in June 1998, reducing the Liberal Party to 11 members for the remainder of the Parliament.

13 As noted above, the seven-member cross-bench at the commencement of the 51st Parliament joined by two additional members during the course of the Parliament: Franca Arena was expelled from the Labor Party in November 1997, after which she sat as an independent, and Helen Sham-Ho resigned from the Liberal Party in June 1998, after which she sat as an independent. Franca Arena ceased to be a member of the House at the end of the 51st Parliament. However, Helen Sham-Ho continued as an independent until the end of the 52nd Parliament in 1999.

14 The Call to Australia Party was renamed the Christian Democratic Party (Fred Nile Group) in 1997.

15 In June 1998, Arthur Chesterfield-Evans was elected to fill the casual vacancy caused by the resignation of Elisabeth Kirkby.

16 Richard Jones was elected to the Council as a member of the Australian Democrats, but resigned from the party soon after the commencement of the 51st Parliament in March 1996. He continued as an independent until the end of the 52nd Parliament in 2003.

17 After Franca Arena was expelled from the Labor Party in November 1997, the Labor Government required five votes for a majority.

[18] As noted above, Helen Sham-Ho, elected as a member of the Liberal Party in the 51st Parliament, continued as an independent during the 52nd Parliament.

[19] In September 2002, Gordon Moyes was elected to fill the casual vacancy caused by the resignation of Elaine Nile.

[20] David Oldfield was expelled from Pauline Hanson's One Nation party in October 2000. He subsequently sat as an independent and later formed One Nation New South Wales.

[21] In May 2006, Robert Brown was elected to fill the casual vacancy caused by the resignation of John Tingle.

[22] In October 2003, Jon Jenkins was elected to fill the casual vacancy caused by the resignation of Malcolm Jones.

[23] Peter Breen joined the Labor Party in May 2006, but resigned in July to form the Human Rights Party.

[24] In September 2010, David Shoebridge was elected to fill the casual vacancy caused by the resignation of Sylvia Hale.

[25] In September 2010, Cate Faehrmann was elected to fill the casual vacancy caused by the resignation of Lee Rhiannon.

[26] Gordon Moyes was expelled from the Christian Democratic Party in May 2009. He continued to sit as an independent member before joining the Family First Party in November 2009.

[27] In September 2010, Robert Borsak was elected to fill the casual vacancy caused by the death of Roy Smith. In July 2009, the Shooters Party changed its name to the Shooters and Fishers Party.

[28] In June 2013, Mehreen Faruqi was elected to fill the casual vacancy caused by the resignation of Cate Faehrmann.

[29] In February 2017, Dawn Walker was elected to fill the casual vacancy caused by the resignation of Jan Barham.

[30] In August 2016, Justin Field was elected to fill the casual vacancy caused by the death of John Kaye.

[31] In August 2018, Cate Faehrmann was elected to fill the casual vacancy caused by the resignation of Mehreen Faruqi.

[32] In April 2016, the Shooters and Fishers Party changed its name to the Shooters, Fishers and Farmers Party.

[33] In April 2019, Justin Field resigned from The Greens to be an independent, reducing The Greens to three members for the 57th Parliament.

THE GOVERNMENT

The formation of the Government in New South Wales is determined by a number of constitutional arrangements, conventions and practices which may be summarised as follows:

- Members of the Legislative Assembly are individually elected at a general election every four years to represent constituents within 93 electoral divisions according to an optional preferential system of voting. In most cases, although not all, members are elected to the Legislative Assembly as recognised members and representatives of a political party.

- Following each general election, as soon as the election result is clear, the Premier resigns as Premier and as a Member of the Executive Council, which action involves the resignation of the entire ministry. According to the conventions of responsible government, the Governor then asks the leader of the party, or coalition of parties, who has the support of the majority of members in the Legislative Assembly if a government can be formed. On being assured that a government can be formed, the Governor appoints that person as Premier and a member of the Executive Council,[12] and commissions him or her to form a new ministry. In determining who to approach to form a new government, the Governor may act on the advice of the outgoing Premier.[13]

  In the event that an incumbent government is defeated at the election, as soon as the election result is clear, the outgoing Premier, by convention, declares to the Governor his or her intention to resign. However, the Governor usually asks the outgoing Premier to remain in office, with his or her ministers, until the new Premier is ready to form a ministry. The outgoing ministry continues in office in a caretaker capacity until that time. Whilst the interval is usually very short, there cannot be an interval between administrations.[14]

  In the event that no party or coalition of parties has the clear support of a majority of members in the Legislative Assembly after an election, the Governor appoints as Premier the person who, in his or her opinion, is most likely to be able to form a government with the confidence of the Legislative Assembly.[15]

---

12 *Constitution Act 1902*, ss 35C(1) and 35E(1). For further information on the membership, role and operation of the Executive Council, see the discussion in Chapter 1 (The New South Wales system of government) under the heading 'The Executive Council'.

13 A Twomey, *The Constitution of New South Wales*, (Federation Press, 2004), p 636. See also Proceedings of the Australian Constitutional Convention, Brisbane, 29 July–1 August 1985, Structure of Government Sub-Committee.

14 Twomey, (n 13), p 684.

15 For further information, see Twomey, (n 13), pp 636-637. See also Proceedings of the Australian Constitutional Convention, Brisbane, 29 July–1 August 1985, Structure of Government Sub-Committee.

- The Governor subsequently appoints further members of the Executive Council and ministers of the Crown on the advice of the newly-appointed Premier. The new ministers are appointed in the order determined by the Premier, first as members of the Executive Council and then as ministers of their respective portfolios. By convention, ministers are appointed from amongst the members of both the Legislative Assembly and the Legislative Council.[16]
- The same principles are followed when the Premier resigns from office during the term of a parliament,[17] dies in office[18] or is dismissed:[19] the ministry is dissolved, the Governor commissions a new Premier to form a new administration, and a new ministry is appointed by the Governor on the advice of the new Premier.[20]
- The party, or coalition of parties, having the support of the next greatest number of members in the Legislative Assembly after the government, forms the opposition. As noted previously, the parties forming government, opposition and the cross-bench in the Legislative Assembly automatically and by necessity assume those same roles in the Legislative Council, regardless of the number of seats those parties actually hold in the Legislative Council.

The ministry

The ministry comprises the Premier and other ministers of the Crown appointed by the Governor from amongst the members of the Executive Council under section 35E(1) of the *Constitution Act 1902*.

The Leader of the Government in the Legislative Council informs the House of the make-up of the ministry after each general election and at the earliest opportunity on any occasion on which the ministry changes.[21]

---

16 For further information, see Twomey, (n 13), pp 694-696.

17 In December 1878, in highly unusual circumstances, the Hon James Farnell tendered his resignation as Prime Minister (as the leader of the Government was then commonly styled) to the Governor, who invited Sir John Robertson to form an administration. However, on Sir John Robertson relinquishing the task of forming an Administration, the Governor requested Mr Farnell to withdraw his resignation and that of his colleagues, to which Mr Farnell acceded. Sir Henry Parkes subsequently succeeded in forming a new Administration two days later, with Sir John Robertson appointed Vice-President of the Executive Council. See *Minutes*, NSW Legislative Council, 11 December 1878, p 73; 12 December 1878, p 75; 18 December 1878, p 77; 20 December 1878, p 81.

18 For information on the difficulties that may arise in determining the new Premier where a Premier dies in office, see Twomey, (n 13), p 637.

19 There has been only one instance of the dismissal of a Premier in New South Wales. On 13 May 1932, Premier Lang was dismissed by the Governor, Sir Philip Game, after Lang sought to prevent the Commonwealth Government from seizing New South Wales revenues for interest owed by the New South Wales Government to foreign bondholders. For further information, see Twomey, (n 13), pp 642-645.

20 For further information, see Twomey, (n 13), p 684.

21 For further information, see S Want and J Moore, edited by D Blunt, *Annotated Standing Orders of the New South Wales Legislative Council*, (Federation Press, 2018), p 74.

The Premier[22]

The Premier is appointed by the Governor under section 35E(1) of the *Constitution Act 1902* following each general election and whenever the office becomes vacant, including through resignation, death or dismissal.[23] By convention, the Premier resigns following a general election, which action involves the resignation of the entire ministry. The Premier may also resign at other times during the term of a parliament, including potentially on the passing in the Legislative Assembly of a vote of no confidence, either in the Premier directly or 'in the Government'.[24] In extraordinary circumstances, the Premier may also be dismissed by the Governor under section 35E(2) of the *Constitution Act 1902*, which provides that the Premier and other ministers of the Crown shall hold office during the Governor's pleasure. The dismissal of the Premier entails the dismissal of all ministers, and effectively, the government.[25]

The Premier is the head of the ministry and is ultimately responsible for the policy and decisions of the government. In addition to advising the Governor on the appointment and removal of ministers, as discussed above, the Premier determines the agenda of Cabinet and chairs Cabinet meetings, and decides the administrative responsibilities of each portfolio, including the allocation of the administration of the acts.[26] The Premier also advises the Governor on matters such as the dissolution of Parliament, and advises the Queen with respect to State matters under section 7(5) of the *Australia Acts* of 1986, such as the appointment of a new Governor.

By convention inherited from the Westminster Parliament, the Premier is a member of the Legislative Assembly, on the basis that, as the leader of the government, he or she should reside in and have the support of the House in which government is formed.[27] However, since 1995, this convention may also find legal expression in section 24B of the *Constitution Act 1902*, which provides for the dissolution of the Legislative Assembly in certain circumstances following a motion of no confidence in the government.[28]

Nevertheless, since responsible government in 1856 there have been three instances of the Premier or leader of the government sitting in the Council for a short period of time. The first was in 1884 when the Hon William Dalley, Attorney General in the Council, was also appointed as Acting Colonial Secretary (as the leader of the government was then

22 For background to the title 'Premier', and the use of earlier titles such as 'Colonial Secretary', 'Chief Secretary' and 'Prime Minister', see Twomey, (n 13), pp 690-691.

23 Concurrent with the Premier's appointment as Premier under section 35E(1) of the *Constitution Act 1902*, the Premier is appointed as a member of the Executive Council under section 35C(1) of the *Constitution Act 1902*.

24 Twomey, (n 13), pp 651-653.

25 The circumstances in which the Governor could consider exercising the reserve powers to dismiss the Premier are discussed in Twomey, (n 13), pp 637-646.

26 For further information, see the discussion later in this chapter under the heading 'Ministers'.

27 However, there have been Prime Ministers of the United Kingdom who have sat in the House of Lords. The last two were Lord Salisbury who was Prime Minister between 1895 and 1902, and Lord Home, who was Prime Minister between October 1963 and October 1964.

28 For further information, see Twomey, (n 13), pp 651-653.

commonly styled) from 7 October 1884 to 11 May 1885 during the illness of the Colonial Secretary. For two brief periods in 1904 the Hon Bernhard Wise was Acting Premier in the Council. More recently, on 4 July 1986, following the resignation of the Hon Neville Wran as Premier, the Hon Barry Unsworth, the then Leader of the Government in the Legislative Council, was appointed as Premier. He resigned as a member of the Council on 15 July 1986 and successfully sought election to the Assembly at a by-election for the seat of Rockdale in August that same year. Consequently he was temporarily not a member of either House.

The Legislative Council standing orders make no reference to the Premier.

Ministers

As with the Premier, ministers are appointed by the Governor under section 35E(1) of the *Constitution Act 1902*.[29] They are appointed by the Governor to particular portfolios[30] on the advice of the Premier,[31] and hold office during the Governor's pleasure. They may resign by letter of resignation to the Governor or may be removed from office by the Governor on the advice of the Premier.[32] They are accorded seniority according to the order of their appointment, rather than according to the portfolio they hold.[33]

Ministers hold an office of profit under the Crown within the meaning of section 13B of the *Constitution Act 1902*. In 1906, the *Constitution Act 1902* was amended to provide that the Premier and a specified number of other ministers listed in the Second Schedule to the act were capable of being elected, and of sitting and voting, as members of Parliament, notwithstanding that they held an office of profit. In 1987, the *Constitution Act 1902* was further amended[34] to remove the Second Schedule and to amend section 13B to provide that any person who holds or accepts the 'office of Minister of the Crown' is capable of being elected and sitting and voting as a member.[35] At the same time, section 35F was also inserted into the *Constitution Act 1902,* which provided that '[t]he number of

29 They are also appointed as Members of the Executive Council under section 35C(1) of the *Constitution Act 1902*. By convention, the Leader of the Government in the Legislative Council is appointed Vice-President of the Executive Council.

30 If the number of administrative responsibilities that the government wishes to recognise with a specific portfolio is greater than the number of ministers, some ministers may be given more than one portfolio.

31 For further information, see Twomey, (n 13), pp 637-638.

32 *Constitution Act 1902*, s 35E(2). For further information, see Twomey, (n 13), pp 683-684.

33 *Constitution Act* 1902, s 35D(4). The previous authority for this was clause IV of Queen Victoria's Instructions to the Governor of 29 August 1900, which provide in part for 'the seniority of the members of the said [Executive] Council being regulated according to the order of their respective appointments as members thereof'. See Instructions to the Governor, 29 October 1900, cited in LJ Rose, *The Framework of Government in New South Wales*, (NSW Government Printer, 1972), p 74 and Appendix 6. By the *Constitution (Amendment) Act 1987*, the Letters Patent and Instructions to the Governor dated 29 October 1900, as amended, ceased to have effect, and the provision concerning the seniority of ministers was incorporated into the *Constitution Act 1902*.

34 See the *Constitution (Amendment) Act 1987*.

35 *Constitution Act 1902*, s 13B(3)(a)(i).

persons who may hold office as Ministers of the Crown shall not exceed 20 at any one time'. Section 35F was repealed in 1997,[36] since when there has been no restriction on the number of ministers.[37]

There is no requirement under the *Constitution Act 1902* for a minister to be a member of Parliament, although, to date, no minister has been appointed who has not been a member of either the Legislative Assembly or the Legislative Council.[38] In 1996 in the New South Wales Court of Appeal decision in *Egan v Willis and Cahill*, Gleeson CJ noted that it is a 'conventional requirement' that ministers be chosen from amongst the members of one or other of the Houses of Parliament.[39]

There is also no requirement under the *Constitution Act 1902* for a minister to be appointed from the Legislative Council. However, since the advent of responsible government in New South Wales in 1856, there has always been a representative of the executive government in the Council. Of note, since 17 August 1877 the Vice-President of the Executive Council has always been appointed from the amongst the members of the Legislative Council,[40] although there have been a few occasions when there have been no ministers appointed from the House. In more recent times, a significant number of ministers have been appointed from amongst the members of the Legislative Council,[41] including on three occasions the Treasurer. Standing order 34, adopted in 2004, now provides that the House will not meet unless a minister is present in the House.[42]

The role of ministers includes administering their portfolios, including any department or agency for which they are responsible, participation in the decision-making processes of Cabinet, acting on behalf of other ministers in certain circumstances,[43] advising the Governor as members of the Executive Council and performing parliamentary duties.

In the Legislative Council, the parliamentary duties of ministers include, amongst other things, guiding the passage of government bills through the House, tabling papers,

---

36 See the *Constitution and Parliamentary Electorates and Elections Amendment Act 1997*.

37 For further information, see Twomey, (n 13), pp 440, 684-685. The ministry peaked at 24 ministers in the Berejiklian-Barilaro Ministry sworn in on 2 April 2019.

38 For further information, see Twomey, (n 13), pp 694-696. However, there have been instances where ministers have continued in office despite ceasing to be a member of Parliament. The case of the Hon Barry Unsworth is cited above. As another example, the Hon Carmel Tebbutt continued as Minister for Education and Training following her resignation as a member of the Legislative Council on 26 August 2005. She subsequently became a member of the Legislative Assembly on 17 September 2005.

39 *Egan v Willis and Cahill* (1996) 40 NSWLR 650 at 660 per Gleeson CJ.

40 For further information, see the discussion in Chapter 1 (The New South Wales system of government) under the heading 'The Vice-President of the Executive Council'.

41 The number of ministers in the Council reached a high of seven (of a total of 21 ministers including the Premier) in 2003 at the commencement of the 53rd Parliament on 29 April 2003. See *Minutes*, NSW Legislative Council, 29 April 2003, pp 15-17. During the 55th and 56th Parliaments from 2011 to 2019, there were three Coalition ministers in the Council. At the commencement of the 57th Parliament in 2019, the number of Coalition ministers in the Council increased from three to four.

42 For further information, see the discussion in Chapter 9 (Meetings of the Legislative Council) under the heading 'Presence of a minister in the House'.

43 See sections 35, 36, 37 and 37A of the *Constitution Act 1902*. See also Twomey, (n 13), pp 687-689.

answering questions without notice during Question Time in the House and answering questions on notice published in the *Questions and Answers Paper* of the House. The Leader of the Government in the Legislative Council also has specific responsibilities in relation to the tabling of State papers ordered to be produced by the Legislative Council.

The standing and sessional orders give ministers certain exclusive rights concerning the management of government business in the Council. A minister may:

- move a motion connected with the conduct of government business at any time without notice (SO 37, as amended by sessional order);
- arrange the order of government notices of motions and orders of the day on the *Notice Paper* (SO 43); and
- declare bills urgent (SO 138(1) and the sessional order stipulating cut-off dates on government bills).

The standing orders also give ministers certain rights regarding business generally in the Council. A minister may:

- make a ministerial statement at any time when there is no other business before the House (SO 48(1));
- table documents at any time when there is no other business before the House (SO 54(1));
- move without notice a motion of appreciation, thanks or condolence of the House (SO 74(4)(b));
- move the adjournment of the House at any time and speak at the conclusion of the adjournment debate for an unlimited time (SO 31(2) and (4)(a));
- reply to matters raised on the adjournment at a previous sitting (SO 33); and
- move without notice a motion for the special adjournment of the House (SO 74(4)(a)).

As discussed in Chapter 15 (Legislation), although not prescribed in the standing orders, there is also a general expectation that ministers will take a Council bill which relates specifically to their portfolio through the House, although in some instances this role is undertaken by a parliamentary secretary on the minister's behalf.[44]

The standing orders also provide mechanisms for members to seek information from ministers in the Council. These include:

---

44 Between 2 March 1977 and 16 March 1978, there were a number of instances where the Deputy Leader of the Government in the House, the Hon Edna Roper, who was not herself a minister (or parliamentary secretary), was nevertheless granted leave of the House to read the second reading speech relating to various bills. On each occasion, the motion was moved by the Hon Paul (DP) Landa, the only minister in the House.

- questions may be put to ministers relating to public affairs with which the minister is officially connected, to proceedings pending in the House, or to any matter of administration for which the minister is responsible (SO 64(1)) and the answer a minister provides must be directly relevant to the question (SO 65(4), as amended by sessional order);
- ministers must provide, within 21 calendar days, answers to questions taken on notice, questions referred to a minister in the Legislative Assembly and written questions (SOs 66 and 67, as amended by sessional order);
- on the second sitting day of each month, a minister must table a list of all legislation which has not been proclaimed to commence within 90 days of assent (SO 160(2)); and
- if ordered by the House, a minister must table a document relating to public affairs quoted by the minister, unless the minister states that the document is of a confidential nature or should more properly be obtained by order (SO 56).[45]

Ministers in the Council represent one or more ministers in the Assembly for the purposes of answering questions without notice, tabling documents and taking charge of bills. These ministerial arrangements are notified to the House by the Leader of the Government in the Legislative Council at the earliest possible opportunity.

Where legislation refers to 'the minister' and confers on him or her a power or function, the relevant minister is determined by reference to the *Allocation of the Administration of Acts*, an instrument issued by the Governor on the advice of the Executive Council, and published in the *Government Gazette* and on the NSW legislation website.[46]

Assistant ministers

Although there is no reference to assistant ministers in the *Constitution Act 1902*, the Governor may on the advice of the Premier appoint a minister or ministers to assist a minister with primary responsibility for a particular portfolio.

Assistant ministers have on occasion been appointed from amongst the members of the Council.[47] Although there is no reference to assistant ministers in the standing orders, for all intents and purposes they are treated in the same way as ministers, especially

45 For further information, see the discussion in Chapter 19 (Documents tabled in the Legislative Council) under the heading 'The motion for the tabling of a document quoted by a minister in debate'.

46 For further information, see Twomey, (n 13), pp 686-687.

47 The earliest record is the appointment of the Hon John Fitzgerald as Assistant Minister of Public Instruction from 4 April 1916 to 18 July 1916. The Hon Robert Cruickshank served as Assistant Colonial Treasurer from 19 September 1927 to 18 October 1927, and the Hon Francis Buckley served as Assistant Minister in the Legislative Council from 19 November 1952 to 23 February 1953. In more recent times, the Hon John Della Bosca served as Assistant Treasurer for almost seven years from 8 April 1999 to 17 February 2006, whilst the Hon Sarah Mitchell served as Assistant Minister for Education from 30 January 2017 to 2 April 2019.

since they invariably combine their role as assistant minister for a particular portfolio with full responsibility as minister for other portfolios.

Parliamentary secretaries

Unlike the Premier and ministers, who are appointed by the Governor, parliamentary secretaries are appointed by the Premier from amongst the members of either House of the Parliament, provided that they are not already ministers and members of the Executive Council.[48] As such, parliamentary secretaries are not part of the ministry, although they may be regarded as part of the executive government.[49] As with the appointment of the ministry, the Leader of the Government in the Legislative Council informs the House of the appointment of parliamentary secretaries after each general election and at the earliest opportunity on any occasion on which the appointment of parliamentary secretaries is varied.

As parliamentary secretaries are appointed by the Premier, they cease to hold office if they are removed from office by the Premier or if the Premier ceases to hold office.[50] They also cease to hold office on the day appointed for the taking of the next poll for the Legislative Assembly following their appointment.[51] They may resign their appointment by letter of resignation addressed to the Premier.[52]

Prior to 1988, parliamentary secretaries could only be appointed from the Legislative Assembly. This was changed with the passing of the *Constitution (Parliamentary Secretaries) Amendment Act 1988*. In 1991 the first parliamentary secretaries appointed from amongst the members of the Council were the Hon Richard Bull and the Hon James Samios.[53] In modern times, a significant number of parliamentary secretaries are routinely appointed from amongst the members of the Council.[54]

The role of parliamentary secretaries in the Legislative Council is regulated by standing order 25, as amended by sessional order adopted at the commencement of the 57th Parliament on 8 May 2019.[55] Standing order 25 provides that a parliamentary secretary

48 *Constitution Act 1902*, s 38E(1). The requirement that a parliamentary secretary be appointed from amongst the members of either House of the Parliament contrasts with the absence of such a requirement in the *Constitution Act 1902* in respect of ministers.

49 For further information, see Twomey, (n 13), pp 709-711.

50 *Constitution Act 1902*, s 38D(1)(b) and (2).

51 Ibid, s 38D(1)(f).

52 Ibid, s 38D(1)(c).

53 *Minutes*, NSW Legislative Council, 21 August 1991, p 63.

54 At the commencement of the 57th Parliament in May 2019, four parliamentary secretaries were appointed from amongst the members of the Council. See *Minutes*, NSW Legislative Council, 7 May 2019, pp 11-12. A fifth parliamentary secretary, the Hon Ben Franklin, was subsequently appointed from amongst the members of the Council shortly after. See *Minutes*, NSW Legislative Council, 28 May 2019, p 126. At the commencement of the 56th Parliament in May 2015, five parliamentary secretaries were appointed from amongst the members of the Council. See *Minutes*, NSW Legislative Council, 5 May 2015, pp 9-10.

55 *Minutes*, NSW Legislative Council, 8 May 2019, p 77.

may act as a minister in the House in all respects. However, the sessional order amending the standing order further provides that a parliamentary secretary:

- may not ask questions without notice or written questions;
- may not make a private member's statement;[56]
- may not be a chair or deputy chair of a standing committee or portfolio committee;[57] and
- may be required to attend and give evidence and answer questions at a budget estimates hearing, but may not substitute for a minister.

In addition, whilst standing order 25 provides that a parliamentary secretary may not answer questions with or without notice, this exclusion is not included in the sessional order amending standing order 25. Rather, by sessional order adopted at the commencement of the 57th Parliament amending standing order 64, questions may be put to parliamentary secretaries relating to public affairs with which the parliamentary secretary is officially connected, to public affairs connected with the portfolio of the minister to whom the parliamentary secretary is connected, to proceedings pending in the House, or to any other matter of administration for which the parliamentary secretary is responsible.[58]

The functions of parliamentary secretaries in the House most commonly include the tabling of papers, managing the passage of bills through the House and moving the adjournment of the House.[59]

Outside of their role in the House, parliamentary secretaries perform such functions as the Premier determines, but not functions reserved for a minister or member of the Executive Council under any act, instrument or other law.[60] In practice, parliamentary secretaries provide assistance to the Premier and ministers in certain administrative and official functions.

MINISTERIAL RESPONSIBILITY

As discussed previously in Chapter 1 (The New South Wales system of government), under the system of responsible government in New South Wales, the executive

56 For further information, see the discussion in Chapter 10 (The conduct of proceedings) under the heading 'Private members' statements'.

57 The resolution of the House of 8 May 2019 appointing the Selection of Bills Committee specifically adopted an exception to this rule to allow the Government Whip and Parliamentary Secretary for Health, the Hon Natasha Maclaren-Jones, to be appointed as Chair of the committee. See *Minutes*, NSW Legislative Council, 8 May 2019, pp 97-99.

58 *Minutes*, NSW Legislative Council, 8 May 2019, p 78. See also Ruling: Ajaka, *Hansard*, NSW Legislative Council, 30 May 2019, p 29.

59 For further information, see the *Annotated Standing Orders of the New South Wales Legislative Council*, (n 21), pp 70-73.

60 *Constitution Act 1902*, s 38C.

government is responsible to Parliament, and through Parliament, to the people of New South Wales. The responsibility of ministers to Parliament is captured by the doctrine of individual ministerial responsibility.[61] In modern times, the conduct of ministers is also governed by a range of other written instruments.

The doctrine of individual ministerial responsibility

Ministers are individually responsible to Parliament for the administration of their portfolio according to the doctrine of individual ministerial responsibility.[62]

As this doctrine developed in the English Parliament, it was expressed primarily as a doctrine of individual ministerial responsibility to the House of Commons. As stated in 1858 by Lord Grey, the Colonial Secretary:

> It is the distinguishing characteristic of Parliamentary Government, that it requires the powers belonging to the Crown to be exercised through Ministers, who are held responsible for the manner in which they are used, who are expected to be members of the Houses of Parliament … and who are considered entitled to hold their offices only whilst they possess the confidence of Parliament, and more especially the House of Commons.[63]

A century later, in 1959, AV Dicey also stated the doctrine in terms of responsibility to the House of Commons:

> It means in ordinary parlance the responsibility of ministers to Parliament or the liability of ministers to lose their offices if they cannot retain the confidence of the House of Commons.[64]

In the Australian context, in 1920 in the High Court decision in *Commonwealth and Central Wool Committee v Colonial Combing, Spinning and Weaving Company Ltd*,[65] Isaacs J also adopted a position on ministerial responsibility which made reference to 'the branch of Parliament that chiefly controls the finances', meaning the Lower House:

> Ministers, nominally the selection of the Crown, are in fact the choice of the Parliament, and pre-eminently that branch of Parliament that chiefly controls the finances. To Parliament, Ministers are responsible: the strict theory of the Constitution that Ministers are servants only of the Crown gives way in actual practice to the acknowledged fact that they are really the executants of the parliamentary will, and must account to Parliament, and look for their authority to Parliament – authority express or tacit, arising from the confidence

61 Ministers are also bound by a separate convention of collective ministerial responsibility, which relates to the operations and decision-making function of Cabinet.

62 For further discussion of the doctrine of individual ministerial responsibility, see D Blunt, 'Responsible Government: Ministerial responsibility and motions of 'censure'/'no confidence'', *Australian Parliamentary Review*, (Vol 19, No 1, Spring 2004), pp 71-87.

63 E Grey, *Parliamentary Government: Considered with reference to a Reform of Parliament. An Essay*, (Richard Bentley, 1858), p 4.

64 AV Dicey, *Introduction to the Study of the Law of the Constitution*, 10th ed, (Macmillan, 1959), p 325.

65 (1920) 31 CLR 421.

> it gives to the administration. The theory that the Crown chooses its Ministers is overshadowed by the constitutional rule that it chooses only such as possess the confidence of the Parliament …[66]

It was not until 1998 and the decision in *Egan v Willis* that the High Court was specifically called upon to address the relationship between ministers and the Upper House.

In *Egan v Willis*, counsel for the Hon Michael Egan submitted that, in the context of New South Wales, responsible government meant no more than that the Crown's representative acted on the advice of the ministers and that ministers enjoyed the confidence of the Lower House of Parliament. From this premise, the court was effectively urged to accept the proposition that the executive government was not accountable to the Legislative Council.[67]

This position was pointedly rejected by the High Court. In their majority decision, Gaudron, Gummow and Hayne JJ adopted a much broader concept of individual ministerial responsibility:

> One aspect of responsible government is that Ministers may be members of either House of a bicameral legislature and liable to the scrutiny of that chamber in respect of the conduct of the executive branch of government. Another aspect of responsible government, perhaps the best known, is that the Ministry must command the support of the Lower House of a bicameral legislature upon confidence motions. The circumstance that Ministers are not members of a chamber in which the fate of administration is determined in this way does not have the consequence that the first aspect of responsible government mentioned above does not apply to them.[68]

In his judgment, Kirby J observed:

> It reads too much into the statutory limits on the powers of the Council to suggest that it has no function in rendering the Executive Government accountable, through it, to the Parliament and thus to the electors of the State. This argument appears to be an attempt to put the Executive Government above Parliament, comprising as it does, two Houses. That attempt cannot succeed. …
>
> The reason why the accountability of Ministers in the Council is not spelt out in terms in the *Constitution Act* itself, or in the Standing Orders, may be that it is so fundamental to the existence of a legislative chamber in our system of government, and necessary to the performance of that Chamber's functions as such, that it was accepted as axiomatic …
>
> The fact that the Executive Government is made or unmade in the Legislative Assembly, that appropriation bills must originate there and may sometimes be presented for the royal assent without the concurrence of the Council does not reduce the latter to a mere cipher or legislative charade. The Council is an elected chamber of a Parliament of a State of Australia. Its power to render the Executive

66 *Commonwealth and Central Wool Committee v Colonial Combing, Spinning and Weaving Company Ltd* (1920) 31 CLR 421 at 449-450 per Isaacs J.

67 *Egan v Willis* (1998) 195 CLR 424 at 501-502 per Kirby J.

68 Ibid, at 453 per Gaudron, Gummow and Hayne JJ.

> Government in that State accountable, and to sanction obstruction where it occurs, is not only lawful. It is the very reason for constituting the Council as a House of Parliament.[69]

In turn, McHugh J observed:

> It is true, of course, that governments are made and broken in the Lower House of Parliament – in New South Wales, the Legislative Assembly. But that does not mean that the Legislative Council has no power to seek information from the government or the Minister who represents the government in the Legislative Council. It is part of the Legislature of New South Wales. If it is to carry out one of the primary functions of a legislative chamber under the Westminster system, it must be entitled to seek information concerning the administration of public affairs and finances. The Legislative Council is not, as Queen Elizabeth the First thought the House of Commons was, a chamber that merely says 'Aye or No' to bills presented to it. It is an essential part of a legislature which operates under a system of responsible government.[70]

Accordingly, a fundamental aspect of the system of responsible government in New South Wales is that ministers, and through them the executive government, are responsible to both Houses of the Parliament, and through them to the electors of New South Wales.

However, whilst the responsibility of ministers to both Houses of the Parliament was reaffirmed by the High Court in 1998, the precise application of the doctrine of individual ministerial responsibility continues to evolve. Various studies and reports have found that ministers tend to take individual responsibility in Parliament for their actions only in circumstances where they have acted unethically either personally or financially, where they have personally committed serious errors in administration, or in circumstances where they have been found to have deliberately misled Parliament.[71] Misleading of Parliament is regarded as a particularly serious offence. In October 1992, the Minister for Police, the Hon Ted Pickering, resigned after being found to have deliberately misled the Legislative Council during Question Time in relation to police administration.[72] In 2006, another Minister for Police, the Hon Carl Scully, resigned after misleading the

---

69 Ibid, at 502-503 per Kirby J.

70 Ibid, at 476 per McHugh J.

71 See, for example, D Blunt, 'Responsible Government: Ministerial responsibility and motions of 'censure'/'no confidence'', (n 62), pp 71-87; Members' Ethics and Parliamentary Privileges Committee, Legislative Assembly of Queensland, *Report on a matter of privilege: Alleged contempt by the Attorney-General for failing to resign his ministerial office following a vote of no confidence in him by the Legislative Assembly – matter referred to the Committee on 2 September 1997*, Report No 15, April 1998; I Killey, *Constitutional Conventions in Australia: An introduction to the unwritten rules of Australia's constitutions*, (Australian Scholarly Publishing, 2009), ch 5; B Page, 'Ministerial resignation and individual responsibility in Australia, 1976-1989', Monograph, 1990; E Thompson and G Tillotson, 'Caught in the Act: The Smoking Gun View of Ministerial Responsibility', *Australian Journal of Public Administration*, (Vol 58, No 1, March 1999), p 48; and G Lindell, 'The effect of a parliamentary vote of no-confidence in a minister: An unresolved question?', *Constitutional Law and Policy Review*, (Vol 1, No 1, May 1998), p 6.

72 *Minutes*, NSW Legislative Council, 27 October 1992, p 369.

Legislative Assembly in relation to a report into the Cronulla riot. In such instances, the imperative for a minister to resign is often the result of political pressure. By contrast, the link between the actions of departmental officials within a minister's portfolio and individual ministerial responsibility is less clear. According to some commentators, ministers no longer resign, if they ever did, on account of administrative failings by officials within their departments and agencies.[73]

Censure and no confidence motions

The Council may debate motions of censure of or no confidence in a minister. A censure motion, as the name implies, expresses disapproval or reprimand of a minister for particular actions. By contrast, a no confidence motion expresses doubt as to the capacity of a minister to perform the role.[74] Certainly this distinction has been drawn in the Legislative Assembly. In April 1992, Mr John Hatton MP, speaking to a censure motion against the Premier, the Hon Nick Greiner, and the Minister for the Environment, the Hon Time Moore, in relation to the so-called 'Metherell affair', observed:

> I want to draw a clear distinction between censure and no confidence: a censure motion is serious but it is not a no confidence motion. The distinction has been clear in this House over a long period of time and is established by parliamentary practice.[75]

The Council has debated motions of no confidence in a Council minister on two occasions,[76] but has never adopted such a motion:

- On 18 October 1989, a motion of 'no confidence' in the Minister for Police and Emergency Services, the Hon Edward Pickering, in relation to his management of the police force was amended to commend the minister.[77]
- On 8 May 2002, a motion of 'no confidence' in the Minister for Police, the Hon Michael Costa, for allegedly misleading the House in relation to the circumstances concerning the departure of the Commissioner of Police, and calling on the minister to resign in accordance with the Westminster convention, was negatived.[78]

73 See, for example, Thompson and Tillotson, (n 71), pp 50-51, 54-56.

74 DR Elder and PE Fowler (eds), *House of Representatives Practice*, 7th ed, (Department of the House of Representatives, 2018), p 324.

75 *Hansard*, NSW Legislative Assembly, 28 April 1992, p 2861.

76 On other occasions, the House had debated motions or amendments expressing a 'lack of confidence' in a minister. See, for example, *Minutes*, NSW Legislative Council, 26 June 1990, p 325; 17 November 1993, p 405.

77 *Minutes*, NSW Legislative Council, 18 and 19 October 1989 am, pp 976-982.

78 *Minutes*, NSW Legislative Council, 8 May 2002, pp 147-150.

However, the Council has on five occasions adopted motions censuring a minister in the House:

- On 1 May 1996, the House censured the Hon Michael Egan, in his capacity as Leader of the Government in the Legislative Council, for the government's failure to comply with a resolution of the House to table specified documents in relation to the Lake Cowal gold mine project.[79] The failure to provide these documents, amongst others, was subsequently the subject of further action to suspend Mr Egan from the House, precipitating the *Egan v Willis and Cahill* and *Egan v Willis* decisions.[80]
- On 13 October 1998, the House again censured the Hon Michael Egan, in his capacity as Leader of the Government in the Legislative Council, for the government's failure to comply with a resolution of the House to table documents relating to the contamination of Sydney's water supply.[81] The failure to provide these documents was again subsequently the subject of further action to suspend Mr Egan from the House, precipitating the *Egan v Chadwic*k decision.[82]
- On 25 February 2004, the House censured the Minister for Transport Services, the Hon Michael Costa, in relation to the delivery of transport services in New South Wales and for the 'Government's apparent belief that it is not accountable to the people of New South Wales' through the Legislative Council. The censure motion was somewhat unusual because the minister himself moved for the suspension of standing orders in order to bring on the motion.[83]
- On 5 June 2018, the House censured the Hon Don Harwin, in his capacity as Leader of the Government in the Legislative Council, for the government's failure to comply with various resolutions of the House for the production of various documents.[84] The documents were subsequently provided on 8 June 2018.[85]
- On 6 August 2020, the House again censured the Hon Don Harwin, in his capacity as Leader of the Government in the Legislative Council, for the government's

79 *Minutes*, NSW Legislative Council, 1 May 1996, pp 102-106.

80 See the decision of the New South Wales Court of Appeal in *Egan v Willis and Cahill* (1996) 40 NSWLR 650 and the decision of the High Court in *Egan v Willis* (1998) 195 CLR 424. For further information, see the discussion in Chapter 19 (Documents tabled in the Legislative Council) under the heading '*Egan v Willis and Cahill* (1996) and *Egan v Willis* (1998): The functions and powers of the Legislative Council'.

81 *Minutes*, NSW Legislative Council, 13 October 1998, pp 749-752.

82 See the decision of the New South Wales Court of Appeal in *Egan v Chadwick* (1999) 46 NSWLR 563. For further information, see the discussion in Chapter 19 (Documents tabled in the Legislative Council) under the heading '*Egan v Chadwick* (1999): The power to compel the production of State papers subject to claims of privilege'.

83 *Minutes*, NSW Legislative Council, 25 February 2004, pp 545-548.

84 *Minutes*, NSW Legislative Council, 5 June 2018, pp 2648-2649.

85 The House was notified of receipt of the documents when it next sat on 19 June 2018. See *Minutes*, NSW Legislative Council, 19 June 2018, pp 2731-2732. For further information, see the discussion in Chapter 19 (Documents tabled in the Legislative Council) under the heading 'The non-provision of Cabinet documents by the executive government'.

failure to comply with various resolutions of the House for the production of documents concerning the final business case and strategic business case for the proposed Western Harbour Tunnel and Beaches Link.[86]

The Council has also passed motions censuring a minister in the Legislative Assembly:

- On 8 March 2001, the Council censured the Minister for Police, the Hon Paul Whelan, 'for his interference in Committee proceedings and his statement that an inquiry into Cabramatta Policing should be terminated'.[87]
- On 11 April 2001, the Council adopted a motion 'condemning' the Minister for Land and Water Conservation, the Hon Richard Amery, for the decision to wind up the operations of the Hawkesbury Nepean Catchment Management Trust without any consultation or notice to trustees.[88]
- On 3 September 2009, the Council censured the Minister for Education and Training, the Hon Verity Firth, for misleading the Parliament as to the impacts of the Greens' amendment to the Education Amendment (Publication of School Results) Bill 2009 on Commonwealth education funding.[89]

Censure motions against a minister in the Legislative Assembly do not offend against the principle of comity and mutual respect between the two Houses[90] as the motion relates to the conduct of a minister in his or her capacity as a member of the executive government, rather than as a member of the Legislative Assembly.

There have also been a number of censure motions against ministers in the Legislative Council that have either been amended or negatived:

- On 29 October 1987, a motion to censure the Assistant Minister for Health, the Hon Deirdre Grusovin, for misleading the House in relation to the existence of hospital waiting lists was negatived.[91] It is believed that this was the first censure motion ever moved against a minister in the House.
- On 26 October 1995, a motion to censure the Leader of the Government in the Legislative Council, the Hon Michael Egan, for failing to comply with a resolution of the House to table specified documents in relation to the closure of veterinary laboratories was amended for the House to 'express its displeasure'.[92]
- On 22 October 1996, a motion to censure the Attorney General and Minister for Industrial Relations, the Hon Jeff Shaw, for his failure to proclaim the

86 *Minutes*, NSW Legislative Council, 6 August 2020, pp 1200-1202 (proof).
87 *Minutes*, NSW Legislative Council, 8 March 2001, pp 884-886.
88 *Minutes*, NSW Legislative Council, 11 April 2001, pp 952-954.
89 *Minutes*, NSW Legislative Council, 3 September 2009, pp 1329-1330.
90 For further information, see the discussion in Chapter 22 (Relations with the Legislative Assembly) under the heading 'Comity between the Houses'.
91 *Minutes*, NSW Legislative Council, 29 October 1987, p 1218.
92 *Minutes*, NSW Legislative Council, 26 October 1995, pp 280-283. This was a precursor to the successful censure motions of 1 May 1996 cited above.

commencement of certain legislation was amended for the House to express its concern at the failure.[93]

- On 10 May 2007 and 13 May 2010, two motions to censure the Hon Eric Roozendaal, the first in his capacity as Minister for Roads in relation to the widening of the Spit Bridge, and the second in his capacity as Treasurer in relation to the sale of NSW Lotteries, were negatived.[94]
- On 9 August 2011, a motion to censure the Minister for Finance and Services, the Hon Greg Pearce, for misleading the House in relation to the Australian Services Union's equal pay case was negatived.[95]
- On 14 September 2017, a motion to censure the Minister for Regional Water, the Hon Niall Blair, in relation to regional water management was negatived.[96]

On one occasion on 28 April 1992, the Council debated a motion to censure the government as a whole in relation to the appointment of Dr Terry Metherell to the Senior Executive Service. The motion was negatived on division.[97]

Motions of censure or no confidence are no different, at least in theory, from any other private members' motion, and are treated the same way, including the application of time limits. In particular, censure and no confidence motions initiated by private members in the Council do not take precedence over other items on the *Notice Paper*.[98]

The *Code of Conduct for Ministers of the Crown*

In addition to being covered by the *Code of Conduct for Members*,[99] ministers are also subject to the *Code of Conduct for Ministers of the Crown*.[100]

The *Code of Conduct for Ministers of the Crown* covers various matters. The preamble to the Code specifies that ministers are individually and collectively responsible to the Parliament, and ultimately to the people of New South Wales. The Code subsequently deals with compliance by ministers with their oaths of office, compliance with the law, ministers' duty to act honestly and in the public interest, conflicts of interest, misuse of public property and information for private benefit, and prohibited interests. It also deals with disclosures of interests, gifts and hospitality and employment after leaving ministerial office, discussed further below.

---

93 *Minutes*, NSW Legislative Council, 22 October 1996, pp 379-380. For further information, see the discussion in Chapter 15 (Legislation) under the heading 'Commencement of acts'.

94 *Minutes*, NSW Legislative Council, 10 May 2007, pp 61-63; 13 May 2010, pp 1803-1804.

95 *Minutes*, NSW Legislative Council, 9 August 2011, pp 327-329.

96 *Minutes*, NSW Legislative Council, 14 September 2017, pp 1895-1896.

97 *Minutes*, NSW Legislative Council, 28 April 1992, pp 116-118.

98 By contrast, in the House of Representatives, standing order 48 provides that a motion of censure or no confidence in the government which is accepted as such by a minister takes precedence over all other business until disposed of. See *House of Representatives Practice*, (n 74), p 319.

99 For further information, see the discussion in Chapter 5 (Members) under the heading 'The Code of Conduct for Members'.

100 *Independent Commission Against Corruption Regulation 2017*, Appendix.

Since 2014, the *Code of Conduct for Ministers of the Crown* has been designated as an applicable code for the purposes of section 9 of the *Independent Commission Against Corruption Act 1988*.[101] The effect of this is that a suspected breach of the Code by a minister may be investigated by the Independent Commission Against Corruption and, if substantiated, give rise to a finding of corrupt conduct.

Post-separation employment of ministers

The *Code of Conduct for Ministers of the Crown* includes provisions concerning post-separation employment of ministers which require ministers and former ministers to seek the advice of the Parliamentary Ethics Adviser in certain circumstances:

- A minister, still in office, who considers accepting an offer of post-separation employment must, if it relates to any of the minister's current portfolio responsibilities or any portfolio responsibilities held during the previous two years, first obtain the advice of the Parliamentary Ethics Adviser. A minister must not, whilst in office, accept any offer of post-separation employment if the Parliamentary Ethics Adviser advises against it.
- A former minister who, within 18 months of ceasing to hold office, considers accepting an offer of post-separation employment must, if it relates to any of the portfolio responsibilities held during the last two years of the minister's time in office, first obtain the advice of the Parliamentary Ethics Adviser.[102]

If a minister or former minister accepts an offer of post-separation employment, whether or not against the advice of the Parliamentary Ethics Adviser, any advice obtained from the Parliamentary Ethics Adviser in respect of that offer is to be tabled in the House to which the minister belongs or belonged.[103]

In 2006, the Houses expanded the functions of the Parliamentary Ethics Adviser to require the Adviser to provide advice to ministers and former ministers on post-separation employment on request.[104] The advice is to be provided to the Presiding Officer of the House of which the minister or former minister is or was a member.[105] Following receipt of the advice, the Presiding Officer tables the advice in the House.[106]

101 See the *Independent Commission Against Corruption Amendment (Ministerial Code of Conduct) Regulation 2014*, published on the NSW legislation website on 21 August 2014, and the *Independent Commission Against Corruption Regulation 2017*, cl 5.

102 *Independent Commission Against Corruption Regulation 2017*, Appendix, Schedule to the Code, pt 5.

103 Ibid.

104 *Minutes*, NSW Legislative Council, 27 September 2006, pp 235-240; *Votes and Proceedings*, NSW Legislative Assembly, 27 June 2007, pp 196-198; *Minutes*, NSW Legislative Council, 28 June 2007, pp 207-210.

105 Resolution appointing the Parliamentary Ethics Adviser. See *Minutes*, NSW Legislative Council, 18 June 2014, pp 2597-2600, para (6).

106 See, for example, *Minutes*, NSW Legislative Council, 6 September 2011, p 390; 12 September 2017, p 1871; 15 October 2019, p 498.

The intent of these provisions is to prevent ministers from modifying their conduct to improve their private sector employment prospects, to prevent confidential government information from being used to advantage former ministers or their new employers or clients, and to prevent former ministers improperly lobbying or influencing public officials to make decisions in their favour.[107]

Lobbying

The conduct of ministers is also regulated by the Lobbyists Code of Conduct and the *Lobbying of Government Officials Act 2011*.

The Lobbyists Code of Conduct[108] requires that a minister or parliamentary secretary must not permit lobbying in certain circumstances, as set out in Premier's Memorandum M2014-13 – 'NSW Lobbyists Code of Conduct'.

The *Lobbying of Government Officials Act 2011* makes it a criminal offence for a former minister or parliamentary secretary to engage in the lobbying of a government official, which includes current ministers and parliamentary secretaries, in relation to an official matter that was dealt with by the former minister or parliamentary secretary as part of his or her portfolio responsibilities in the period of 18 months immediately before ceasing to hold office.[109]

Publication of ministerial diaries and overseas travel information

By Premier's Memorandum M2015-05 – 'Publication of Ministerial Diaries and Release of Overseas Travel Information', ministers regularly publish on the Department of Premier and Cabinet's website extracts from their diaries detailing meetings held with stakeholders, external organisations, third-party lobbyists and individuals. Ministers also publish on agency websites information concerning overseas travel they or their staff have undertaken including the destinations visited, dates of travel, costs of airfares, accommodation and other expenses, and a detailed description of the purpose and benefits of the travel to the State.

---

107 The regulation of post-separation employment of ministers in New South Wales was implemented in response to a report of the Independent Commission Against Corruption into the Hon John Face in 2004 which found that as a minister, Mr Face had prepared for a new career by using the resources provided to him by the Parliament, and that he expected in his new career to draw on the experience, contacts and information he acquired as a minister. See Independent Commission against Corruption, *Report on investigation into conduct of the Hon J Richard Face*, June 2004, p 70.

108 *Lobbying of Government Officials (Lobbyists Code of Conduct) Regulation 2014*.

109 *Lobbying of Government Officials Act 2011*, s 18.

THE PRESENCE OF MINISTERS IN THE LEGISLATIVE COUNCIL

There is occasionally some debate as to the desirability of having ministers appointed from amongst the members of upper houses performing the role of a House of Review.[110] *Odgers* for example notes that from time to time, the proposition has been advanced that there should be no ministers in the Senate, the argument being that as the Senate is not the House which determines the composition of the government, the Senate's role should be one of review, and that the presence of ministers inhibits that role.[111]

The removal of ministers from upper houses was supported by the 1992 Royal Commission into WA Inc[112] and the 2002 Victorian Constitution Commission.[113] The Victorian Commission noted that the appointment of ministers from the Victorian Legislative Council tends to reinforce party political pressures in that House and reduce the independence of individual members, constraining the role of that House as a House of Review. The commission argued that ministers tend to see their role as shepherding legislation through the House with minimal amendment or controversy. In turn, members tend to shape their actions as loyal and effective party members, worthy of promotion to the ministry, and not as independent legislators or representatives of the people, with particular expertise in certain portfolios, with career aspirations as chairs of committees, and appropriate status and remuneration.[114]

However, the removal of ministers from the Legislative Council, should it ever be considered, would raise certain issues. One is the potential loss of talent to the House. Another is the capacity of the House to hold the government to account. It may be that at least one representative of the government, likely the Vice-President of the Executive Council, would need to remain a member of the Council, for example to respond to orders for State papers. Problems would also arise in relation to the conduct of Question Time and the guidance of government legislation through the chamber.[115]

---

110 For more detailed discussion, see J Young, 'Should upper houses have ministers?', *Australasian Parliamentary Review*, (Vol 29, No 1, Autumn 2014), p 87. The matter was raised in the Legislative Council on 23 October 1986, when the Hon Marie Bignold asked the Leader of the Government in the Legislative Council, the Hon Jack Hallam, a question concerning the eligibility of members of the House for the ministry. See *Hansard*, NSW Legislative Council, 23 October 1986, pp 5315-5316.

111 R Laing (ed), *Odgers' Australian Senate Practice*, as revised by H Evans, 14th ed, (Department of the Senate, 2016), p 615.

112 Royal Commission into Commercial Activities of Government and Other Matters, Western Australia, *Report of the Royal Commission into Commercial Activities of Government and Other Matters*, 1992, pt II, para 5.3.6. See also Commission on Government, Western Australia, *Report No 2*, 1995, pp 163-164.

113 Victorian Constitution Commission, *A House for our Future*, June 2002, pp 54-56.

114 Ibid.

115 In response to these issues, the Victorian Commission advocated that ministers in the Victorian Legislative Assembly should be readily able to attend Question Time and to explain and debate their bills in the Victorian Legislative Council. In New South Wales, as noted in Chapter 15 (Legislation), section 38A of the *Constitution Act 1902* and standing order 163(1) of the Legislative Council already provides that any minister who is a member of the Legislative Assembly may, at any time, on motion agreed to by the Council, sit in the Council for the purpose of explaining

PARTY ROLES IN THE LEGISLATIVE COUNCIL

The formation of a government entails the filling of a number of party roles in the House. The House is usually informed of the election or appointment of members to such positions at the earliest opportunity on the next sitting day.[116]

The Leader and Deputy Leader of the Government

Following a periodic Council election, the party or coalition of parties in government either elects or appoints a Leader and Deputy Leader of the Government in the Legislative Council.[117] Invariably, the position holders are either elected or appointed from amongst the members of the ministry.[118] Neither position is referred to in the *Constitution Act 1902*, but they are recognised office holders for the purposes of the *Parliamentary Remuneration Act 1989*.[119]

The primary responsibility of the Leader and Deputy Leader of the Government in the Legislative Council is promoting and defending the government's program in the House, including organising the order of government business. In addition to those rights attaching to the Leader and Deputy Leader of the Government as a minister,[120] notably the right to move a motion connected with the conduct of government business at any time without notice (SO 37), the standing orders also provide that:

---

the provisions of any bill relating to or connected with any department administered by that minister. However, this provision has only been used on one occasion. For further information, see the discussion in Chapter 15 (Legislation) under the heading 'Attendance of a minister from the Legislative Assembly'.

116 Under standing order 26, following a periodic Council election, and whenever changes occur, the leaders of parties or groups with two or more members in the House may announce the party leadership, including the party leader, deputy party leader, whip and deputy whip.

117 The major parties have different rules in relation to the election or appointment of the Leader and Deputy Leader of the Government in the Legislative Council. When the Labor Party is in office, the positions are elected by the full caucus in both Houses, whereas when the Coalition is in office, the positions are appointed by the Premier, with the Leader of the Government usually from the Liberal Party, the larger of the coalition parties, and the Deputy Leader of the Government usually from the Nationals, the smaller of the coalition parties. However, there have been occasions when this order has been reversed. On 10 July 1968, the Hon Sir John Fuller was appointed Leader of the Government in the Legislative Council, notwithstanding that he was a member of the then Country Party. See *Minutes*, NSW Legislative Council, 7 August 1968, p 7. Similarly, on 7 May 2014, the Hon Duncan Gay was appointed Leader of the Government in the Legislative Council, notwithstanding that he was a member of the Nationals. See *Minutes*, NSW Legislative Council, 7 May 2014, p 2474. On both occasions, the Deputy Leader of the Government in the Legislative Council was appointed from amongst the members of the Liberal Party.

118 During the first Wran ministry from 14 May 1976 to 19 October 1978, the Hon Edna Roper served as Deputy Leader of the Government in the Legislative Council, despite not holding office as a minister. See *Minutes*, NSW Legislative Council, 25 May 1976, p 11.

119 *Parliamentary Remuneration Act 1989*, sch 1.

120 For further information, see the discussion earlier in this chapter under the heading 'Ministers'.

- a request by the Leader or Deputy Leader of the Government for the recall of the House under either of the two mechanisms for the recall of the House is deemed to be a request by every member of the party or coalition of parties in government;[121] and
- the Leader of the Government may nominate government members to serve on Council committees (SOs 205(5) and 210(2)).

The Leader of the Government in the Legislative Council also has certain additional responsibilities in the House:

- Most importantly, although not stated in the standing orders, longstanding practice is that all orders for State papers made by the House under standing order 52 are directed to the Leader of the Government, who is ultimately held accountable for providing the return to order.[122]
- On the tabling of a report from a committee, which recommends that action be taken by the government, the Clerk refers the report to the Leader of the Government, who must provide a response to the House within six months (SO 233(1)).
- Any question without notice may be directed to the Leader of the Government, whether in his or her capacity representing the Premier, or on his or her own behalf, in relation to any matter of government responsibility.[123]

By longstanding practice, the Leader of the Government in the Legislative Council also holds the position of Vice-President of the Executive Council.[124] The Leader of the Government is also an *ex officio* member of the Procedure Committee (SO 205(3)).

The Leader of the House

At the commencement of the 53rd Parliament on 29 April 2003, the Leader of the Government in the Legislative Council announced the appointment of the Hon Anthony Kelly to the position of 'Leader of the House'.[125] This was only the second such appointment in the history of the Legislative Council, and the first in over

121 For further information, see the discussion in Chapter 9 (Meetings of the Legislative Council) under the heading 'Recall of the House'.

122 For further information, see the discussion in Chapter 19 (Documents tabled in the Legislative Council) under the heading 'Current procedures for the production of State papers under standing order 52'.

123 Ruling: Harwin, *Hansard*, NSW Legislative Council, 10 September 2014, p 127.

124 For further information, see the discussion in Chapter 1 (The New South Wales system of government) under the heading 'The Vice-President of the Executive Council'.

125 *Minutes*, NSW Legislative Council, 29 April 2003, p 17.

80 years.[126] The position has subsequently been re-appointed on a number of occasions.[127] Whilst the role entails responsibilities in relation to the management of business of the House and of the government, the expectations of the role have varied with different Leaders of the Government and lacks the more settled understanding that prevails in some other Houses.[128]

The position is not referred to in the standing orders or in the *Parliamentary Remuneration Act 1989*.

The Leader and Deputy Leader of the Opposition

Following a periodic Council election, the party or coalition of parties in opposition elects a Leader and Deputy Leader of the Opposition in the Legislative Council.[129]

Neither positions are referred to in the *Constitution Act 1902*, but are recognised office holders for the purposes of the *Parliamentary Remuneration Act 1989*.[130]

As with the Leader and Deputy Leader of the Government in the Legislative Council, the standing orders provide that:

- a request by the Leader or Deputy Leader of the Opposition for the recall of the House under either of the two mechanisms for the recall of the House is deemed to be a request by every member of the party or coalition of parties in opposition;[131] and

126 The Hon John Garland was appointed 'Leader of the House' from 12 June 1918 to 12 April 1920. See *Minutes*, NSW Legislative Council, 12 June 1918, p 5.

127 *Minutes*, NSW Legislative Council, 9 May 2007, p 18; 23 September 2008, p 763; 1 September 2009, p 1303; 3 May 2011, p 9; 21 February 2017, pp 1376, 1377. On 21 February 2017, the Hon Scott Farlow was appointed to a new position of Parliamentary Secretary to the Premier (Leader of the House) in the Legislative Council. See *Minutes*, NSW Legislative Council, 21 February 2017, p 1376. Subsequently, at the commencement of the 57th Parliament on 7 May 2019, he was appointed to the position of Parliamentary Secretary to the Treasurer and Leader of the House in the Legislative Council. See *Minutes*, NSW Legislative Council, 7 May 2019, p 11.

128 See, for example, *House of Representatives Practice*, (n 74), pp 65-66.

129 The major parties have different rules in relation to the election of the Leader and Deputy Leader of the Opposition in the Legislative Council. When the Labor Party is in opposition, the positions are elected by the full caucus in both Houses, whereas when the Coalition is in opposition, the Leader of the Opposition in the Legislative Council is elected by the full Liberal Party caucus in both Houses, and the deputy Leader of the Opposition in the Legislative Council is elected by Nationals members in the Legislative Council only. When in opposition, the Liberal Party also elects a Deputy Leader of the Liberal Party in the Legislative Council, but with only Liberal members in the Legislative Council eligible to vote. Likewise, the Nationals elect a Deputy Leader of the Nationals in the Legislative Council, but with only Nationals members in the Legislative Council eligible to vote.

130 *Parliamentary Remuneration Act 1989*, sch 1.

131 For further information, see the discussion in Chapter 9 (Meetings of the Legislative Council) under the heading 'Recall of the House'.

- the Leader of the Opposition may nominate opposition members to serve on Council committees (SOs 205(5) and 210(3)).

The Leader of the Opposition, or a member nominated by the Leader of the Opposition, also has certain additional speaking rights in the House in relation to ministerial statements (SO 48(2)), matters of public importance (SO 200(5)(c)), urgency motions (SO 201(4)(c)) and bills declared urgent under the sessional order stipulating cut-off dates for the introduction of government bills in the sitting period.

Although not stated in the standing orders, the Leader of the Opposition is always offered the first question in Question Time. The Deputy Leader of the Opposition is always offered the second opposition question in Question Time.

As with the Leader of the Government, the Leader of the Opposition is an *ex officio* member of the Procedure Committee (SO 205(3)).

The whips and deputy whips[132]

The government and opposition whips and deputy whips are elected by their parties.[133] They are responsible for liaising with ministers and party leaders regarding the management of business in the House, for ensuring the attendance of members in the chamber, for arranging speakers for debates, for arranging 'pairs' and generally for acting as intermediaries between the party leaders in the House and backbench members. They also often act as tellers in divisions in the House. In addition, since 2015, the whips, and especially the Government Whip, have also played a key role in determining the items of business to be debated on private members' business days.[134] Outside of the House, the whips have a pastoral care role as well as a role in ensuring members of their party comply with the *Code of Conduct for Members*, the requirements for the disclosure of interests and other aspects of the ethics regime.[135]

---

132 The term 'whip', an abbreviation of 'whipper-in', derives from fox-hunting in England where a whipper-in kept the hounds from straying from the pack. The first use of the term in a parliamentary context has sometimes been attributed to Edmund Burke, who in debate on 8 May 1769 described the intense lobbying over a particular division as a 'whipping-in' of members. See JR Odgers, *Australian Senate Practice*, 6th ed, (Royal Australian Institute of Public Administration, 1991), p 417. However, other authorities suggest that the term had been in use, although perhaps not with Burke's particular emphasis, for at least a generation before that. See PDG Thomas, *The House of Commons in the Eighteenth Century*, (Clarendon Press, 1971).

133 In the Labor party, whether in government or opposition, the whip and deputy whip are elected by the full caucus in both Houses. In the Coalition, whether in government or opposition, the whip is elected by the Liberal members of the Legislative Council only, and the deputy whip is elected by Nationals members in the Legislative Council only. See also *Hansard*, NSW Legislative Council, 19 September 2018, p 27 per the Hon Dr Peter Phelps.

134 For further information, see the discussion in Chapter 10 (The conduct of proceedings) under the heading 'General or private members' business'.

135 The Hon Amanda Fazio, 'The changing role of parliamentary whips: from manager of members and business to provider of pastoral care', Paper given to the CPA Regional conference, Melbourne, 2013.

The whips are only referred to in the standing orders in relation to membership of the Procedure Committee (SO 205(5)). However, both the Government Whip and Deputy Whip, and Opposition Whip and Deputy Whip, are recognised office holders for the purposes of the *Parliamentary Remuneration Act 1989*.[136]

The leaders of minor parties

Standing order 26 provides an opportunity for the leaders of minor parties with two or more members in the Council to make an announcement of party leadership, either after a periodic Council election or whenever changes occur. The practice of the Greens has always been not to nominate a party leader. At one time the Shooter and Fishers Party did the same. The Animal Justice Party adopted the same approach after the 2019 periodic Council election. However, the Shooters, Fishers and Farmers Party and Pauline Hanson's One Nation Party did nominate party leaders in the House after the 2019 periodic Council election.[137]

136 *Parliamentary Remuneration Act 1989*, sch 1.

137 *Hansard*, NSW Legislative Council, 3 May 2011, p 6; 5 May 2015, p 7; 7 May 2019, pp 8-9.

CHAPTER 8

THE BASIS OF LEGISLATIVE COUNCIL PROCEDURE

The conduct of proceedings in the Legislative Council is governed by various sources of authority which can be ranked in order of pre-eminence: the *Constitution Act 1902*, other statutes, the standing rules and orders, sessional orders, resolutions of continuing effect, rulings from the Chair and practice.

THE *CONSTITUTION ACT 1902*

As indicated in Chapter 1 (The New South Wales system of government), the *Constitution Act 1902* provides for many of the institutions of government in New South Wales, confers powers upon them, and imposes limits upon those powers.

The provisions of the *Constitution Act 1902* concerning the Legislative Council regulate:

- the election of members of the Council (ss 3, 11A, 11B, 22, 22A, 22B and the Sixth Schedule), including the filling of casual vacancies (ss 22D and 22E);[1]
- the membership of the Council (s 17),[2] including the swearing in of members (s 12)[3] and the resignation of seats in the Legislative Council (s 22J);[4]
- the disqualification from membership of the Council (ss 13, 13A, 13B, 13C, 14 and 14A);
- the election and role of the President and Deputy President and Chair of Committees (s 22G);[5]

---

1 For further information, see the discussion in Chapter 4 (Elections for the Legislative Council).

2 For further information, see the discussion in Chapter 1 (The New South Wales system of government) under the heading 'The Legislature (Parliament)'.

3 For further information, see the discussion in Chapter 4 (Elections for the Legislative Council) under the heading 'Swearing in'.

4 For further information, see the discussion in Chapter 4 (Elections for the Legislative Council) under the heading 'Resignation'.

5 For further information, see the discussion in Chapter 6 (Office holders and administration of the Legislative Council) under the headings 'The President' and 'The Deputy President and Chair of Committees'.

- the appointment and role of members of the Executive Council and ministers of the Crown (Pt 4) and parliamentary secretaries (Pt 4A);[6]
- the sessions of Parliament and meetings of the Council (ss 10, 10A, 11 and 22F);[7]
- certain aspects of the sittings of the Council such as quorum (s 22H)[8] and determination of questions (s 22I);[9]
- the power of the Legislature to make laws, including the power of the Council in relation to financial legislation (ss 5, 5A and possibly s 46), the legislative process (Pt 2), and the power of ministers in the Assembly to speak in the House on a bill (s 38A);[10]
- the adoption by the Council of standing orders (s 15);[11] and
- the appointment of officers of the Council by the Governor (s 47).[12]

OTHER STATUTES

In addition to the *Constitution Act 1902*, a range of other statutes also affect the operation of the Legislative Council. For example, additional requirements concerning the electoral arrangements of the Council are provided in the *Electoral Act 2017*; certain powers of the House and committees to require the attendance of witnesses are provided in the *Parliamentary Evidence Act 1901*; various acts provide for the tabling of reports of agencies that report to Parliament such as the Audit Office, the Ombudsman and the Independent Commission Against Corruption; and certain privileges of the House are founded on Article 9 of the *Bill of Rights 1689*, in force in New South Wales under the *Imperial Acts Application Act 1969*.

6 For further information, see the discussion in Chapter 7 (Parties, the Government and the Legislative Council).
7 For further information, see the discussion in Chapter 9 (Meetings of the Legislative Council).
8 For further information, see the discussion in Chapter 9 (Meetings of the Legislative Council) under the heading 'Quorum'.
9 For further information, see the discussion in Chapter 12 (Motions and decisions of the House) under the heading 'Determining a question'.
10 For further information, see the discussion in Chapter 15 (Legislation) and Chapter 17 (Financial legislation).
11 For further information, see the discussion in Chapter 3 (Parliamentary privilege in New South Wales) under the heading 'Standing orders' and later in this chapter under the heading ' The Standing Rules and Orders'.
12 For further information, see the discussion in Chapter 6 (Office holders and administration of the Legislative Council) under the heading 'The staffing of the Department'.

THE STANDING RULES AND ORDERS

As discussed in Chapter 3 (Parliamentary privilege in New South Wales),[13] under section 15 of the *Constitution Act 1902*, the House may adopt standing rules and orders for the 'orderly conduct' of its business,[14] subject to the approval of the Governor.[15]

Standing orders are continuing orders of the House which regulate procedure, debate and the conduct of members. Whilst they are subordinate to the *Constitution Act 1902* and other statutes, where those acts are silent, the standing orders are the primary source of authority on the operations of the House. They are designed to ensure business is conducted in an orderly manner, promote considered decision making by minimising the risk of haste and surprise, and provide opportunities for the expression of minority views. They may also facilitate compliance with statutory requirements such as those providing for documents to be tabled in the House.

Standing orders remain in force until repealed or replaced by the House with the approval of the Governor. A member may move amendments to the standing orders by substantive motion on notice in the ordinary way. However, it is usual for amendments to the standing orders to be trialled as sessional orders before being adopted. The Procedure Committee may consider, on its own initiative, amendments to the standing orders or may propose changes in procedures by report to the House (SO 205(2)(a) and (b)).

The current Standing Rules and Orders of the Legislative Council were adopted by resolution of the House on 5 May 2004,[16] informed by reports of the Standing Orders Committee,[17] and were approved by the Governor on 31 May 2004.[18] They adopted plain English and gender neutral language, codified various practices which had developed since the last substantial revision of the standing orders in 1895 and introduced a limited number of new procedures.[19] Prior to their adoption they were trialled as sessional orders from 14 October 2003.[20] Since their adoption a number of standing orders have been amended by sessional orders.

Under standing order 3, the President may issue practice notes on the procedures and practice to be followed under any standing order. These practice notes may be disallowed

13 See the discussion under the heading 'Standing orders'.

14 *Constitution Act 1902*, s 15(1)(a).

15 Ibid, s 15(2).

16 *Minutes*, NSW Legislative Council, 5 May 2004, p 676.

17 Standing Orders Committee, *Proposed new standing rules and orders*, Report No 1, September 2003; Standing Orders Committee, *Proposed new standing rules and orders*, Report No 2, May 2004. The role of the Standing Orders Committee is now undertaken by the Procedure Committee.

18 *Minutes*, NSW Legislative Council, 1 June 2004, p 807.

19 Standing Orders Committee, *Proposed new standing rules and orders*, Report No 1, September 2003, pp 99-101.

20 *Minutes*, NSW Legislative Council, 14 October 2003, p 324.

by the House, in whole or in part, by motion on notice. Since the adoption of standing order 3 in 2004, this mechanism has not been used.[21]

SESSIONAL ORDERS

Sessional orders are temporary orders of the House which regulate aspects of its procedures. Unlike standing orders they do not require the approval of the Governor but commence once adopted by resolution of the House. They expire at the end of the session in which they were adopted and need to be re-adopted in the next session if they are to continue.

Sessional orders are of three broad types:

- Sessional orders that are made under the authority of particular standing orders, such as standing order 35 which provides for the House to determine the days and times of meeting, or standing order 47(1) which provides for the House to appoint the time for questions without notice (Question Time) each day.
- Sessional orders that amend or suspend the operation of particular standing orders.[22] For example, standing order 186 which relates to debate on private members' motions has been amended by sessional order to reduce the maximum time for debate.[23] Similarly, standing order 44 concerning formal business has been amended by sessional order to include a requirement for written notice to be given of a request that a notice of motion be taken as formal business.[24]
- Sessional orders that implement procedures not addressed in the standing orders such as time limits on debate on government bills.[25]

In some cases procedures which have been trialled as sessional orders over a number of years have later been adopted as standing orders. For example, the procedure for the disallowance of statutory instruments in standing order 78 evolved from sessional orders first adopted in 1988,[26] whilst the procedure for the conduct of private members' business in standing orders 183 to 189 evolved from sessional orders introduced in 1999.[27]

---

21 For further information, see S Want and J Moore, edited by D Blunt, *Annotated Standing Orders of the New South Wales Legislative Council*, (Federation Press, 2018), p 5.

22 Whilst, as indicated, the standing orders would generally be regarded as having pre-eminence over sessional orders, in such cases where sessional orders suspend or amend standing orders, this ranking is reversed.

23 *Minutes*, NSW Legislative Council, 21 June 2011, pp 232-233; 9 September 2014, p 10; 6 May 2015, pp 58-59; 8 May 2019, p 64.

24 *Minutes*, NSW Legislative Council, 5 June 2007, p 102; 9 May 2011, p 73; 21 June 2011, p 232; 15 February 2012, p 688; 9 September 2014, pp 7-8; 6 May 2015, p 56; 8 May 2019, pp 64-65.

25 *Minutes*, NSW Legislative Council, 3 August 2011, pp 297-298; 9 September 2014, p 11; 6 May 2015, p 59; 8 May 2019, pp 72-73.

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

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

It is usual for a series of sessional orders to be agreed to by the House at the beginning of each session. The sessional orders may range from new procedures, such as the sessional order adopted at the commencement of the 57th Parliament in May 2019 setting out procedures for committees to order the production of State papers, through to routine orders such as orders dealing with the days and times of the week when the House is to meet, the precedence of government and general business, the time for Question Time each day, and the timing of debate on committee reports and government responses.

Resolutions of continuing effect

Under standing order 79, the House may adopt resolutions which have continuing effect until such time as they are amended or rescinded.[28] Such resolutions are passed where the intent is to establish procedures beyond the duration of a session of Parliament but without the permanency of a standing order. Alternatively, they may be adopted in relation to a matter which does not strictly relate to the 'orderly conduct' of the House under section 15 of the *Constitution Act 1902*. For example, resolutions of continuing effect have been adopted declaring the precincts of the Parliament to be a smoke-free environment,[29] authorising the broadcast of proceedings of the Council,[30] establishing a *Code of Conduct for Members*[31] and authorising the transfer of papers of the Council to the care but not control of the State Records Authority.[32]

The validity of resolutions intended to operate beyond a session was formerly the subject of some uncertainty, based on the absence of explicit provision in the standing orders and the view that the House should be free to choose for itself whether a resolution is to continue to have effect in each new session. However, the adoption of standing order 79 in 2004 ended such uncertainty.

Rulings from the Chair

The President, Deputy President and Chair of Committees and other occupants of the Chair may be called upon to interpret the standing and sessional orders by making rulings from the Chair. In interpreting the standing orders, individual orders should be read in conjunction with other relevant orders and regard had to the plain or ordinary meaning of the words used. Where there is doubt as to the interpretation of a standing or sessional order, the President or other occupant of the Chair should lean towards

28 Although the provision for resolutions of continuing effect was only codified in the standing orders in 2004, the authority to adopt such resolutions was established by precedent and practice prior to that time. For example, the resolution declaring the precincts of the Parliament as a smoke-free environment was adopted in 1993.

29 *Minutes*, NSW Legislative Council, 9 November 1993, pp 363-364.

30 *Minutes*, NSW Legislative Council, 11 October 1994, pp 279-281; 18 October 2007, pp 279-281.

31 *Minutes*, NSW Legislative Council, 26 May 1999, pp 91-92; 21 June 2007, pp 148-152; 24 March 2020, pp 883-886.

32 *Minutes*, NSW Legislative Council, 23 November 2006, pp 431-432.

a ruling which preserves or strengthens the powers of the Council and the rights of members over a ruling which weakens the powers of the Council or reduces the rights of members.[33]

Whilst rulings are not strictly binding, the President or other occupant of the Chair tend to follow the decisions of their predecessors unless rules or orders of the House have changed or particularly important new factors or considerations have arisen. This allows for the development of a consistent body of precedents over time.

Rulings generally arise from points of order being taken, but the President or other occupant of the Chair may also intervene and give a ruling without any point of order being taken (SO 95(3)). When a point of order is taken, the President or other occupant of the Chair usually gives a ruling immediately, as most matters on which a ruling is required are straightforward. However, on more complex or unusual matters, the President or other occupant of the Chair may choose to hear argument on the question, and may determine it immediately, or at a later time, at his or her discretion (SO 95(6)).

A member may dissent from a ruling of the President or other occupant of the Chair by motion moved immediately after the ruling is made. Points of order, rulings and dissent from rulings are discussed in more detail in Chapter 13 (Debate).[34]

The more important rulings of the various Presidents and Deputy Presidents and Chairs of Committees are collated and published in a publication entitled *A concise guide to Rulings of the President and the Chair of Committees*.

Cases not provided for

The President or other occupant of the Chair may also be called upon to give a ruling where a particular circumstance is not provided for in the procedural guidance available. In such instances, standing order 2 provides that the President or other occupant of the Chair may decide the matter as he or she think fit, based on the 'the customs, usages and precedents of the House and parliamentary tradition'.

For most of the Council's history, in any case not provided for in the standing orders, resort was had to the rules, forms, and practice of the Imperial Parliament.[35] However, under standing order 2, adopted in 2004, the House has departed from dependence on the rules and practice of other parliaments. In ruling on matters not provided for, the President and Deputy President and Chair of Committees are now more likely to refer to the body of rules, precedents and practice built up by the House itself over many years, as reflected in *New South Wales Legislative Council Practice* and the *Annotated Standing*

33 R Laing (ed), *Odgers' Australian Senate Practice*, as revised by H Evans, 14th ed, (Department of the Senate, 2016), p 38.

34 See the discussion under the heading 'Points of order and rulings'.

35 See standing order 1 adopted in 1856 and standing order 2 adopted in 1895, as amended in 1927 and 1951. For further information, see the *Annotated Standing Orders of the New South Wales Legislative Council*, (n 21), p 3.

Orders of the New South Wales Legislative Council. Where reference to the procedures of other parliaments is of assistance, reference is most commonly made to the practice of the Australian Senate, as reflected in *Odgers' Australian Senate Practice*, and then to the procedures of other Australian parliaments, the United Kingdom Parliament and other Westminster parliaments generally, including those in Canada and New Zealand.[36]

PRACTICE

The final basis for the conduct of proceedings in the Legislative Council is practice. Practice, as the name implies, refers to the manner in which things are consistently done in the House, but without being expressly laid down in the standing or sessional orders or rulings of the President. As such, parliamentary practice encompasses the customs, usages, and traditions of the House not captured elsewhere. However, practice cannot be inconsistent with the standing orders and other rules of the House.

An example of an important practice observed by the Legislative Council is the established practice, except in very unusual circumstances,[37] that all orders for papers made by the House under standing order 52 are directed to the Leader of the Government in the Legislative Council, who is ultimately held accountable for providing the return to order. Other examples are the practice of members of the House referring to the Legislative Assembly as 'the other place', and the practice of the President making a statement at the start of each sitting week acknowledging the traditional custodians of the land on which the House meets.

36 For further information, see the *Annotated Standing Orders of the New South Wales Legislative Council*, (n 21), pp 3-5.

37 On 14 September 2016, the Council passed an order for papers for documents held by a statutory authority, Greyhound Racing NSW, not under the direct control of a minister. In that instance, the order was communicated directly to Greyhound Racing NSW. For further information, see the discussion in Chapter 19 (Documents tabled in the Legislative Council) under the heading 'Orders for the production of State papers not in the custody or control of a minister'.

CHAPTER 9

MEETINGS OF THE LEGISLATIVE COUNCIL

This chapter describes the arrangements and rules for meetings of the Legislative Council. For an effective system of representative and responsible government, it is essential that Parliament and the Council meet regularly.

PARLIAMENTS

A 'Parliament' commences on the date the Houses first meet following the return of the writs after a periodic Council election and general election for the Assembly.[1] It ends on the Friday before the first Saturday in March in the fourth calendar year after the return of writs for an Assembly election, except in the very unlikely event of the early dissolution of the Assembly by the Governor by proclamation.[2]

Parliaments are numbered sequentially from the first Parliament which commenced at the advent of responsible government in New South Wales on 22 May 1856. Appendix 10 (Parliaments and sessions since the 1978 reconstitution of the Legislative Council) shows the duration of the Parliaments since the 1978 reconstitution of the Council, commencing with the 46th Parliament from November 1978 to August 1981.

SESSIONS

Within each Parliament there may be a number of 'sessions'. The first session of a Parliament begins on the first sitting day following an election. Any subsequent session

1 As discussed in Chapter 4 (Elections for the Legislative Council), the date by which the writ must be returned is a day not later than the 60th clear day after the writs were issued, or such later day as the Governor may direct. Subsequently, both Houses must be summoned to meet not later than the seventh clear day after the date appointed for the return of the writs. See *Electoral Act 2017*, ss 75(3)(b) and 78.

2 Since 1995 with the entrenchment of fixed four-year terms for the Legislative Assembly by section 24(1) of the *Constitution Act 1902*, the early dissolution of the Assembly will only happen in the very rare circumstances provided for within section 24B. These include where a motion of no confidence in the Government is passed in the Assembly or where the Assembly rejects an appropriation bill 'for the ordinary annual services of the Government'.

begins on the first sitting day following a prorogation of the Parliament,[3] but without an intervening election. The period between sessions is termed a recess.

The Governor convenes the Council and the Assembly to meet for each new session by proclamation published in the *Government Gazette*, acting on advice of the executive government. Section 10 of the *Constitution Act 1902* provides:

> The Governor may fix the time and place for holding every Session of the Legislative Council and Assembly, and may change or vary such time or place as he may judge advisable and most consistent with general convenience and the public welfare, giving sufficient notice thereof.

Section 11 of the *Constitution Act 1902* in turn provides that there shall be a session of the Council and Assembly at least once in every year, so that a period of 12 months shall not intervene between the last sitting of the Council and Assembly in one session and the first sitting of the Council and Assembly in the next session. The objective of section 11 is to ensure that the Houses are never prorogued for a period of over a year.[4]

Historically, it was usual for a Parliament to comprise between three and five sessions, with occasional variations either side of those numbers. It was also common practice for the initial session of a Parliament, entailing a commission opening, to be relatively short,[5] allowing for an official opening of the second session by the Governor shortly thereafter. The duration of the second and subsequent sessions was approximately 12 months each, with the third and any further sessions again opened by commission.

However, from the 53rd Parliament (2003-2007) onwards, there has been a discernible shift to sessions lasting the length of a Parliament, with a prorogation and subsequent opening of Parliament only being used to mark significant events. The first sessions of both the 54th Parliament (2007-2011) and the 56th Parliament (2015-2019) lasted the duration of the Parliament, a period of a little under four calendar years. In the 53rd Parliament (2003-2007), the opening of a second session by the Lieutenant-Governor on 22 May 2006 was used to mark the sesquicentenary of responsible government. Similarly, in the 55th Parliament (2011-2015), the opening of a second session on 9 September 2014 was used to mark the service of the then retiring Governor, Dame Marie Bashir, AD, CVO.

OPENINGS

Historically, there have been two types of openings of a session of the Parliament of New South Wales: official openings by the Governor and commission openings, where the Governor appoints commissioners authorised to open Parliament on his or her behalf.

---

3 For further information, see the discussion later in this chapter under the heading 'Prorogation'.

4 A Twomey, *The Constitution of New South Wales*, (Federation Press, 2004), p 467.

5 For example, the first sessions of the 24th and 25th Parliaments in April 1917 and April 1920 lasted only two days, entailing only one sitting day before the Houses were again prorogued. The first sessions of the 27th and 32nd Parliaments in June 1925 and April 1938 entailed the same procedures but lasted three days.

As noted above, longstanding practice was for the opening of the first session of a Parliament to be a commission opening, with the second session an official opening, and any further openings again commission openings. These traditional arrangements are described in detail in the 1st edition of *New South Wales Legislative Council Practice*[6] and in the *Annotated Standing Orders of the New South Wales Legislative Council*.[7]

However, the current arrangements for the opening of a new Parliament and any second or subsequent sessions within that Parliament differ somewhat from these traditional arrangements. This is discussed below.

Current arrangements for the opening of a new Parliament

The 55th, 56th and 57th Parliaments, commencing in 2011, 2015 and 2019 respectively, were opened by commissioners appointed by the Governor, and as such may be classified as commission openings. However, they also entailed a role for the Governor later in the proceedings. The Governor attended Parliament for the presentation of the newly elected President (and Speaker) and subsequently gave an address to the members of the Legislative Council and the Legislative Assembly assembled in the Council chamber.

These arrangements have now become established practice, and seem likely to be followed in the future. Details of the arrangements are described below.

Meeting according to Proclamation

On the first sitting day of a new Parliament, the House meets in the Legislative Council chamber at a specified time according to Proclamation by the Governor published in the *Government Gazette*. On meeting, the Proclamation is read to the House by the Clerk (SO 6(a)).

Commission to open Parliament

Following the reading of the Proclamation convening Parliament, the Clerk announces the names of commissioners appointed by the Governor to open the Parliament (SO 6(b)). The practice since 2011 has been for three ministers in the Council to be appointed as commissioners.[8] The commissioners subsequently take a place on the dais. A commissioner then directs the Usher of the Black Rod to request the attendance of the members of the Assembly in the Council chamber to hear the commissioners' message on the opening of Parliament (SO 6(c)).

---

6 L Lovelock and J Evans, *New South Wales Legislative Council Practice*, 1st ed, (Federation Press, 2008), pp 221-226.

7 S Want and J Moore, edited by D Blunt, *Annotated Standing Orders of the New South Wales Legislative Council*, (Federation Press, 2018), pp 8-27.

8 *Minutes*, NSW Legislative Council, 3 May 2011, p 2; 5 May 2015, p 2; 7 May 2019, pp 3-4.

When the Usher of the Black Rod arrives at the entrance to the Legislative Assembly chamber, the door is symbolically shut and barred.[9] The Usher raps three times on the door with the Black Rod before being admitted to the Assembly chamber. The Usher then delivers the message summoning the members of the Assembly to the Council chamber. Led by the Usher of the Black Rod, the Serjeant-at-Arms, members and officers of the Assembly walk in procession to and assemble in the Council chamber. The commissioners, Council members and officers stand during entry of the Assembly procession into the Council chamber.

When Assembly members are present in the Council chamber, a commissioner directs the Clerk to read the commission appointing the commissioners to open Parliament and to deliver messages to both Houses (SO 6(d) and (f)). The Clerk having done so, a commissioner, since 2011 the Leader of the Government in the Legislative Council, then reads a message from the Governor informing members of the Governor's desire that members take into consideration the matters submitted to them to provide for the peace, welfare and good government of the State, and directing the two Houses, after members have taken the pledge of loyalty or oath of allegiance, to proceed to the election of their presiding officers. The Assembly members then return to their chamber (SO 6(g)). Commissioners, Council members and officers again stand whilst the Assembly members and officers withdraw. The commissioners remain on the dais.

Swearing in of newly elected members

Following the departure of the Assembly members and officers, the Clerk announces receipt from the Governor of the writ for the periodic Council election, as returned to the Governor by the Electoral Commissioner, and reads the names of newly elected members (SO 6(h)).

Subsequently, the Clerk reads the Commission from the Governor appointing commissioners to administer the Pledge of Loyalty or Oath of Allegiance to the newly elected members (SO 6(i)). Since 2011, they have been the same commissioners as appointed to open the Parliament. The members elected at the periodic Council election then take a pledge of loyalty or an oath of allegiance, or make an affirmation of allegiance, before the commissioners, as required by section 12 of the *Constitution Act 1902*, and sign the Roll of Members of the Legislative Council (SO 6(j)). The commissioners then retire from the dais.

9 The tradition of barring the door of the Legislative Assembly to the Usher of the Black Rod, acting as the Governor's representative, derives from the well-known incident in 1642 when King Charles I entered the House of Commons at Westminster, accompanied by armed soldiers in an attempt to arrest five members of the House. King Charles' entry into the House of Commons remains the only time a Monarch has entered that chamber.

Election of the President

After the commissioners have left the dais, the Clerk conducts the election of the President (SOs 6(k), 12 and 13). The procedure for the election of the President is described in detail in Chapter 6 (Office holders and administration of the Legislative Council).[10] Upon the President being elected, the Leader of the Government in the Legislative Council informs the House of the time and location at which the Governor would be pleased to receive the House for the purpose of presenting the President, as discussed further below.[11]

Other matters

Following the election of the President, the House deals with a number of other matters. The House, under standing order 15, elects a member to be Deputy President and Chair of Committees. The House, according to resolution of continuing effect,[12] also elects a member to be the Assistant President. A ministerial statement is usually made by the Leader of the Government in the Legislative Council about the new administration, and party leaders and whips are announced.

It is also customary for a 'pro forma' bill to be read a first time. This custom arises from the practice of the House of Commons and House of Lords, since the 17th century, of asserting the right of each House to deliberate on any matter it wishes to discuss, rather than being bound to give first consideration to the priorities of the Crown. The practice of reading a 'pro forma' bill in the Council commenced in 1856.[13] Since 1901, the 'pro forma' Law of Evidence Bill has been used. There is no debate on the bill, and no date is fixed for a second reading, but the bill is recorded in the *Minutes of Proceedings* as having been read a first time.

Following these proceedings, the President leaves the Chair until the ringing of a long bell. This is to allow for the attendance of the Governor.

Attendance of the Governor and presentation of the President

At an appointed time the Governor arrives at Parliament House under police escort. He or she is met at the centre gates of Parliament House on Macquarie Street by the President and the Usher of the Black Rod,[14] and proceeds to inspect the Guard of Honour[15] and receive the Vice-regal Salute. A Welcome to Country and a smoking

10 See the discussion under the heading 'Election and vacation of office'.
11 See the discussion under the heading 'Attendance of the Governor and presentation of the President'.
12 *Minutes*, NSW Legislative Council, 28 June 2007, p 197.
13 See the Infants Real and Personal Estate Bill, *Minutes*, NSW Legislative Council, 23 May 1856, p 5.
14 The Speaker and the Serjeant-at-Arms are also included in the greeting party.
15 The Guard of Honour has in the past consisted of detachments from the defence services, the Mounted Police Troop or the Police and emergency services.

ceremony are also performed in the Parliament House forecourt.[16] The Governor is then escorted to a room within the building[17] where the House presents its newly elected President.[18] Upon presentation to the Governor, the President claims on behalf of the House the undoubted rights and privileges of the Council, particularly freedom of speech in debate.[19] The President then presents to the Governor the members and senior officers of the Legislative Council.[20]

Joint sitting to hear the Governor's speech

On the resumption of the House on the ringing of a long bell, the Governor is announced to the House by the Usher of the Black Rod and is conducted to the dais, where he or she occupies the Vice-regal chair (SO 7(1)). The Governor then directs the Usher to command the immediate attendance of the members of the Assembly in the Council chamber (SO 7(2)).

When the Usher of the Black Rod arrives at the Assembly chamber, the door is again shut and barred. Once again, the Usher raps three times on the door with the Black Rod. Upon receiving the Speaker's invitation to enter, the Usher delivers the message summoning the members of the Assembly to the Council chamber. Once again, led by the Usher of the Black Rod, the Serjeant-at-Arms, the Speaker, members and officers of the Assembly walk in procession to and assemble in the Council chamber.

Once the members of both Houses are assembled in the Council chamber, according to resolution of continuing effect of 21 June 2018,[21] the message stick presented to the Parliament on 11 October 2017 during the ceremony to mark the introduction of the Aboriginal Languages Bill 2017 in the Council, and now on permanent display in the Council chamber, [22] is removed from its display cabinet and placed on the dais. An Aboriginal Language group, selected on a rotational basis from a list of Aboriginal Language groups maintained by the President and the Aboriginal Languages Trust, nominates Aboriginal elders who are invited to remove the message stick from the display cabinet, briefly address the members from the Bar of the House in their language, and hand the message stick to the Usher of the Black Rod for placement on the dais.

16 The arrangements for the ceremony are at the discretion of the President, although the Speaker is consulted as a courtesy.

17 In 2011, 2015 and 2019 this was the Parliament's historic Jubilee Room.

18 Prior to the adoption of the current arrangements for the opening of a new Parliament in 2011, the presentation of the President to the Governor took place at a ceremony at Government House on a subsequent day.

19 For further information, see the discussion in Chapter 3 (Parliamentary privilege in New South Wales) under the heading 'The petition to the Governor for the 'usual rights and privileges''.

20 In 2011, 2015 and 2019 the Assembly presented its newly elected Speaker to the Governor immediately following the Council's ceremony.

21 Minutes, NSW Legislative Council, 21 June 2018, pp 2804-2805.

22 For further information, see the discussion in Chapter 25 (The Parliament Buildings and the Legislative Council chamber) under the heading 'The Aboriginal message stick'.

On the opening of the 57th Parliament on 7 May 2019, Donna McLaren, Aunty Maureen and Keith Munro of the Gamilaraay nation performed this role.[23]

Subsequently, the Governor delivers the opening speech which declares the causes of calling the Parliament together (SO 7(3)). The speech, which is composed by the executive, is the centrepiece of the proceedings of the first sitting day. It outlines the government's broad legislative program for the upcoming session.[24] Various dignitaries, including senior officers of the judiciary and senior public officials, are in attendance in the galleries. On conclusion of the speech by the Governor, the President advances to receive the speech which has just been read. The Speaker then advances and receives a copy of the speech. The Governor then retires from the chamber, accompanied by the Usher of the Black Rod (SO 7(4)). On the President resuming the Chair, the members of the Assembly withdraw.

Following the conclusion of the Governor's speech, the practice since 2011 has been for the House to adjourn.

Address-in-Reply

Following the opening of a Parliament, on the next sitting day the President reports receipt of the Governor's speech (SO 8(1)). Subsequently, a member, usually a government backbencher, moves a motion without notice for an Address-in-Reply to the Governor. This is discussed further in Chapter 10 (The conduct of proceedings).[25]

Current arrangements for the opening of a second session and subsequent sessions

As noted previously, traditionally the opening of a second session of Parliament was an official opening, in the presence of the Governor. It was often conducted very early in the life of a Parliament after a very short first session, sometimes lasting only a few days.[26]

However, since the commencement of the 53rd Parliament in 2003, there has been a discernible change in the pattern of sessions. Since 2003 there have been only two official openings of a second session of a Parliament, and both came towards the end of the Parliament, rather than at the beginning. The two openings were the opening of the second session of the 53rd Parliament on 22 May 2006 to mark the sesquicentenary of responsible government in New South Wales, and the opening of the second session of the 55th Parliament on 9 September 2014 to mark the service of the then retiring Governor Dame Marie Bashir.[27]

---

23 *Minutes*, NSW Legislative Council, 7 May 2019, p 14; *Hansard*, NSW Legislative Council, 7 May 2019, pp 9-10.

24 The text of the speech has been recorded in the *Minutes of Proceedings* since 1856.

25 See the discussion under the heading 'Address-in-Reply debate'.

26 For further information, see the discussion earlier in this chapter under the heading 'Sessions'.

27 For a more detailed discussion on Official Openings, see *New South Wales Legislative Council Practice*, 1st ed, (n 6), pp 223-226.

On each occasion, the House met according to proclamation and a 'pro forma' bill was read, prior to the Governor[28] addressing members of both Houses in the Council chamber and an Address-in-Reply being moved.

There has not been an opening of a third session of a Parliament since 26 February 2002.

Following prorogation and the commencement of a second (or subsequent) session, the House routinely readopts sessional orders which have lapsed on prorogation. The House may also adopt new sessional orders for trial. Standing order 159 also provides for the restoration to the *Notice Paper* of any bill that has lapsed by reason of prorogation.[29]

It has also become the practice of the House on the opening of a second session to restore business from the previous session. On the commencement of the second session in 2014, the House restored all business, including bills, to the *Notice Paper*. It also requested the restoration of all bills forwarded to the Assembly to the Assembly *Business Paper*, and restored all questions and answers to the *Questions and Answers Paper* with the same timeframe for reply as if prorogation had not intervened.[30] This was the first time the House had taken this approach. The House took different approaches to the restoration of business on previous occasions in 1999,[31] 2002[32] and 2006.[33]

Opening of a new session by the Monarch

There have been two occasions on which the Monarch has been present in New South Wales to open a session of Parliament. The first occasion was on 4 February 1954 during the visit to Australia by Queen Elizabeth II. This was the first occasion on which the Monarch of Australia had opened a session of any Australian Parliament. The Queen was present again for the opening of Parliament on 20 February 1992.

Standing order 9 now makes specific provision for the opening of Parliament by the Monarch.

28 In 2006 it was the Lieutenant-Governor.

29 For examples, see *Minutes*, NSW Legislative Council, 12 March 2002, pp 18-19; 23 May 2006, p 15; 9 September 2014, p 13.

30 *Minutes*, NSW Legislative Council, 9 September 2014, pp 12-15.

31 In 1999, the House restored all private members' business and contingent notices of motion to the *Notice Paper*. See *Minutes*, NSW Legislative Council, 9 September 1999, p 33.

32 In 2002, the House restored private members' business inside the order of precedence and contingent notices of motions to the *Notice Paper*. See *Minutes*, NSW Legislative Council, 12 March 2002, p 44.

33 In 2006, the House restored all unanswered written questions to the *Questions and Answers Paper* with the same timeframe for reply as if prorogation had not intervened. See *Minutes*, NSW Legislative Council, 23 May 2006, p 22.

SITTINGS

As indicated in Chapter 3 (Parliamentary privilege in New South Wales),[34] within each session of a Parliament, it is for the Council to determine its own proceedings such as sitting times and the sitting pattern, including the duration of sitting days. Standing order 35 provides that the days and times of meeting of the House in each sitting week will be determined by the House from time to time.

The annual sitting calendar

The Council follows an annual sitting calendar. Since the 55th Parliament (2011-2015), it has become practice at the end of each calendar year for the House to adopt a sitting calendar for the forthcoming year on motion moved by the Leader of the Government in the Legislative Council. In the past there was an exception to this where the forthcoming year was an election year. However, in 2019, which was an election year, the House adopted a sitting calendar on the commencement of the new Parliament in May.[35]

The annual sitting calendar incorporates a number of sitting blocks throughout the year in two distinct sitting periods: a spring sitting period and an autumn (budget) sitting period. Since 2019, it has also included an allocation of hearings days for the budget estimates inquiry.[36]

The periods between the autumn and spring sitting periods are known as the summer and winter long adjournments (although they are sometimes colloquially referred to as 'recesses').[37]

When adjourning from one sitting day to the next during a calendar year, the House generally follows the annual sitting calendar that it has previously adopted. However, there is no obligation on the House to do so. As discussed later in this chapter, the House can skip sitting days by special adjournment,[38] or can be recalled to sit on a day not specified in the annual sitting calendar.[39]

---

34 See the discussion under the heading 'The right of the House to control its proceedings'.

35 *Minutes*, NSW Legislative Council, 8 May 2019, pp 67-68.

36 *Minutes*, NSW Legislative Council, 8 May 2019, pp 67-68; 23 October 2019, pp 585-586; 20 November 2019, p 728. In 2019, the House also adopted an amendment to the motion for the adoption of the 2020 sitting calendar to reserve certain periods during the year, mainly during school holidays, when committees would not be able to meet, unless a committee resolves that the matter was urgent.

37 Technically, recesses are the periods between the prorogation of a session and the commencement of the next.

38 See the discussion under the heading 'Special adjournments'. Of note, on 24 March 2020, in view of the impact of the COVID-19 pandemic, the House adopted a special adjournment motion for the adjournment of the House until 15 September 2020, a period of close to six months. In the event, the House was recalled on 12 May 2020.

39 See the discussion under the heading 'Recall of the House'.

The practice of the House is to sit approximately 40 to 50 sitting days each year, other than in election years, across 14 to 16 sitting weeks. In 2020, the annual sitting calendar was curtailed by the impact of the COVID-19 pandemic.

The weekly sitting pattern

Under standing order 35, at the commencement of each session of a Parliament, the House adopts a sessional order setting out the time that the House will meet on each day of the week. The sessional order currently provides for the House to meet at 11.00 am on Mondays, 2.30 pm on Tuesdays, 10.00 am on Wednesdays and Thursdays, and 11.00 am again on Fridays.[40]

However, the operation of this sessional order is modified by the House's adoption of the annual sitting calendar, discussed above, which normally provides for the House to sit on Tuesdays, Wednesdays and Thursdays only. As a result, on a normal sitting week, the House currently sits at 2.30 pm on Tuesdays and at 10.00 am on Wednesdays and Thursdays only.[41]

The standing and sessional orders also set out aspects of the conduct of business on sitting days, including the routine of business at the commencement of each sitting day, the order in which the business of the day is to be dealt with and the time for questions. This is discussed in more detail in Chapter 10 (The conduct of proceedings).

Requirements for a sitting of the House

There are certain requirements for a sitting of the House to proceed: the President or other occupant in the Chair, a quorum and a minister in the House. This is discussed below.

The President in the Chair

A sitting commences when the President takes the Chair. Section 22G(5) of the *Constitution Act 1902* provides that the President shall preside at all meetings of the Council except as may be provided in the standing orders.

40 Minutes, NSW Legislative Council, 8 May 2019, p 58; 26 February 2020, pp 809-810.

41 In 2011, during the first year of the 55th Parliament, the House adopted a sitting pattern incorporating four sitting days per week in fortnightly blocks, so that in the first week of the fortnight the House sat from Tuesday to Friday and in the second week of the fortnight the House sat from Monday to Thursday. The House returned to three sitting days per week – Tuesdays, Wednesdays and Thursdays – when it resumed sittings in February 2012. In 2019, the House adopted an amendment to the government's proposed sitting pattern for 2020 which incorporated an additional sitting day on Friday 19 June 2020 to enable additional debate on the budget bills. See *Minutes*, NSW Legislative Council, 19 November 2019, pp 714-715. In the event, due to the COVID-19 pandemic, this sitting day did not proceed.

The role of the President when presiding in the House is described in detail in Chapter 6 (Office holders and administration of the Legislative Council).[42]

Absence of the President

Section 22G(7) of the *Constitution Act 1902* provides that, when the President is unavailable, such as being absent from the State, the Deputy President and Chair of Committees acts as the President. Standing order 20 also provides that in the absence of the President, the Deputy President and Chair of Committees will perform the duties and exercise the authority of the President in relation to all proceedings of the House.

If both the President and Deputy President and Chair of Committees are absent on a sitting day, the Assistant President will perform the duties of the President.[43] In the absence of all three, a Temporary Chair of Committees presides (SO 21(1)).[44] If none is available, the members present, provided they form a quorum, may elect a member to act as the President for that day only (SO 21(2)). In the unlikely event of this occurring, the election of a temporary President would be put to the House by the Clerk. Otherwise the House stands adjourned until the next sitting day.

When the President is unavailable, the Deputy President and Chair of Committees is referred to as the Acting President and, under section 22G(7), is vested with all the powers, authorities, duties and functions of the President.

Section 22G was inserted into the *Constitution Act 1902* in 1978. On some occasions before 1978, when the President was expected to be absent for an extended period, the House formally appointed the Chairman of Committees, as the position was then known,[45] as Acting President.[46] On other occasions, when the President was absent for a single sitting day or for a few sitting days, the Chairman of Committees took the Chair as Deputy President.[47] Since 1978, when the President has been absent and the Chairman of Committees/Deputy President and Chair of Committees has been present, he or she has automatically taken the Chair, in accordance with section 22G and standing order 20 (or its predecessor standing order 4).[48]

---

42 See the discussion under the heading 'Role and functions'.

43 See the resolutions of the House of continuing effect establishing the position of Office of the Assistant Deputy President, later renamed Assistant President. *Minutes,* NSW Legislative Council, 28 June 2007, p 197; 28 November 2007, p 377.

44 See, for example, *Minutes*, NSW Legislative Council, 28 September 1949, p 181; 18 September 1968, p 85; 6 March 1992, p 45; 9 November 1993, p 355; 10 November 1993, p 367; 11 November 1993, p 377. Note these references refer to instances of the absence of both the President and the Chairman of Committees (today known as the Deputy President and Chair of Committees). The position of Assistant President was not established until 2007.

45 The position is today known as the Deputy President and Chair of Committees.

46 *Minutes*, NSW Legislative Council, 13 July 1938, p 15; 27 July 1938, p 23; 22 May 1956, p 5.

47 *Minutes*, NSW Legislative Council, 3 June 1931, p 157; 23 August 1966, p 51.

48 The Chairman of Committees (today known as the Deputy President and Chair of Committees) made a statement to the House to this effect on 17 March 1981, referring to section 22G of the *Constitution Act 1902*. See *Hansard*, NSW Legislative Council, 17 March 1981, p 4551.

Quorum

Section 22H of the *Constitution Act 1902* provides that a quorum of the House is at least eight members in addition to the President or other member presiding. This is approximately 20 per cent of the membership of the House, which is comparable to the percentage of members required to form a quorum in most other Houses of Parliament in Australia and elsewhere.

The requirements for a quorum have varied over the history of the Legislative Council, from one-third of members exclusive of the President at the advent of responsible government in 1856, to one-quarter of members exclusive of the President in 1890, to 12 members exclusive of the President or other member presiding in 1978, to the current eight members exclusive of the President or other member presiding in 1991.[49]

The rationale for the requirement of a quorum for meetings of the Legislative Council was stated by President Hay in 1881:

> Important measures ought not to be dealt with in the House without a reasonable attendance of members, and when a member believes that there is not a sufficient number present he has the right to call attention to the state of the House.[50]

Technically, the House is required to maintain a quorum at all times. In reality, a quorum need only be present at the commencement of a sitting (SO 29, as amended by sessional order), during a division (SO 30, as amended by sessional order) and when a member draws attention to the absence of a quorum in the House or in committee. These scenarios are discussed further below. If the number of members in the House falls below the requirement in section 22H, but no notice is taken, then the House may continue to sit and conduct business.[51] Other than ensuring that a quorum is present before taking the Chair, it is not the responsibility of the President to call attention to the absence of a quorum. Rather it is the responsibility of the House as a whole to ensure the presence of a quorum.

Absence of a quorum at the commencement of a sitting

A quorum is required upon commencement of a sitting. Under standing order 29, as amended by sessional order,[52] if there is no quorum present when the Chair is due to be taken at the time appointed for a meeting of the House, the bells will be rung again for a further five minutes. If there is still no quorum present, the Chair will adjourn the

---

49 For further information, see *New South Wales Legislative Council Practice*, 1st ed, (n 6), p 232. See also the *Annotated Standing Orders of the New South Wales Legislative Council*, (n 7), pp 85-88.

50 Ruling: Hay, *Hansard,* NSW Legislative Council, 20 October 1881, p 1674.

51 Ruling: Hay, *Sydney Morning Herald*, 28 April 1876, p 2. See also DR Elder and PE Fowler (eds), *House of Representatives Practice*, 7th ed, (Department of the House of Representatives, 2018), pp 272-274.

52 This sessional order was first adopted on 18 October 2007 and readopted in subsequent sessions. See *Minutes*, NSW Legislative Council, 18 October 2007, pp 281-282; 9 May 2011, pp 73-74; 9 September 2014, pp 9-10; 6 May 2015, pp 56-57; 8 May 2019, p 61.

House until a later hour of the day or the next sitting day. A member who enters the chamber at or after the time appointed for the meeting of the House may not withdraw until a quorum is formed or the House is adjourned. When the House is adjourned for the lack of a quorum, the names of the members present are recorded in the *Minutes of Proceedings*.

Provided that a quorum is formed, the House is recorded in the *Minutes of Proceedings* as meeting at the time provided for according to sessional order.

Prior to the adoption of the sessional order, if at the expiration of five minutes after the time fixed for the meeting of the House a quorum was not present, the President was required to declare the House adjourned until the next sitting day. There was no option to adjourn the House until a later hour of the day.

The provisions of the sessional order have not been utilised to date, and the House has not been adjourned for the want of a quorum at the commencement of a sitting since 1900.[53]

Absence of a quorum during a sitting of the House

Under standing order 30, as amended by sessional order,[54] when notice is taken of the absence of a quorum during a sitting, the division bells are rung until a quorum is formed but for no longer than five minutes, after which the House is counted.

The doors remain open after the bells have ceased to ring as members are being counted, and a member who enters the chamber prior to the President declaring the result of the count may be counted. However, a member who enters after the President announces whether a quorum has been formed may not be counted.[55] Members also may not leave the House after attention has been called to the absence of a quorum. If when the House is counted a quorum is not present, the President declares the House adjourned until a later hour of the day or the next sitting day. When the House is adjourned for the lack of a quorum, the names of the members present when the House is counted are recorded in the *Minutes of Proceedings*.

Under standing order 106, as amended by sessional order,[56] if the proceedings of the House are interrupted by the lack of a quorum and consequent adjournment of the

---

53 *Minutes*, NSW Legislative Council, 19 July 1900, p 45; 5 December 1900, p 273. There are many precedents from 1856 until 1900 where a quorum was not present at the commencement of a sitting and the House was adjourned until the next sitting day.

54 This sessional order was first adopted on 18 October 2007 and readopted in subsequent sessions. See *Minutes*, NSW Legislative Council, 18 October 2007, pp 281-282; 9 May 2011, pp 73-74; 9 September 2014, pp 9-10; 6 May 2015, pp 56-57; 8 May 2019, p 62.

55 This follows Senate practice. See R Laing (ed), *Odgers' Australian Senate Practice*, as revised by H Evans, 14th ed, (Department of the Senate, 2016), p 203.

56 This sessional order was first adopted on 3 June 2009 and readopted in subsequent sessions. See *Minutes*, NSW Legislative Council, 3 June 2009, p 1188; 9 May 2011, p 72; 9 September 2014, p 8; 6 May 2015, p 57; 8 May 2019, p 62.

House, the resumption of the interrupted debate is made an order of the day for the next sitting day, and when the order is called on the proceedings will be resumed at the point where they were interrupted.

In the few instances in recent years where notice has been taken of the absence of a quorum during a sitting of the House, a quorum has been formed on the ringing of the bells.[57] By contrast, during the 1800s and early 1900s, there were many occasions when the House was counted out and adjourned following a quorum call after the commencement of business. The last was in 1916.[58]

If the House is counted and a quorum is found to be present, the House continues with the item of business before it when it was interrupted.

The Council's standing orders are silent as to whether the time taken to form a quorum comes out of the time of the member speaking. It is at the discretion of the President whether to stop the clock whilst time is taken to form a quorum.[59]

Absence of a quorum on a division in the House

Under standing order 30(1), as amended by sessional order,[60] if, on a report from a division in the House, it appears that there is not a quorum present, the President is to adjourn the House until a later hour of the day or the next sitting day. No decision of the House is considered to have been reached in the division, and there is no provision for the bells to be rung again in this circumstance.

In modern times, the likelihood of a quorum not being present on a division in the House is very low. There is no instance of this occurring in the Council since the early 1900s.[61]

Absence of a quorum in a Committee of the whole House

The quorum in a Committee of the whole House is the same as for the House: eight members in addition to the Chair of Committees or other member presiding (SO 176(1)).

If notice is taken of the absence of a quorum in committee, the Chair will count the committee, and if there is not a quorum present, the division bells will be rung for five minutes. If, after five minutes, a quorum is not formed, the Chair will leave the

57 *Minutes*, NSW Legislative Council, 12 October 2005, p 1626; 9 November 2005, p 1697; 15 November 2006, p 355; 2 June 2011, p 180; 26 June 2013, p 1868.

58 *Minutes*, NSW Legislative Council, 23 March 1916, p 279. For further information, see the *Annotated Standing Orders of the New South Wales Legislative Council*, (n 7), pp 85-88.

59 By contrast, Senate standing orders 52(7) and 197(6) provide that the time taken to form a quorum does not come out of a senator's speaking time or the time for a debate.

60 This sessional order was first adopted on 18 October 2007 and readopted in subsequent sessions. See *Minutes*, NSW Legislative Council, 18 October 2007, pp 281-282; 9 May 2011, pp 73-74; 9 September 2014, pp 9-10; 6 May 2015, pp 56-57; 8 May 2019, p 62.

61 *Minutes*, NSW Legislative Council, 12 September 1900, p 125; 27 November 1900, p 236; 4 December 1900, p 271; 11 December 1902, p 196.

Chair without any question being put and report the absence of a quorum to the House (SO 176(2)).

When the Chair of Committees informs the President that a quorum is not present in committee, the President will then count the House. If there is a quorum present, the House will again resolve itself into committee without any question being put (SO 176(3)). However, if there is not a quorum, the bells will ring for a further five minutes. The President will then count the House again, and if a quorum is still not present, will adjourn the House until a later hour of the day or the next sitting day. If a quorum is present, the President will leave the chair and the committee will resume.[62]

Under standing order 176(4), in the unlikely event that proceedings in a Committee of the whole House are interrupted by the lack of a quorum and consequent adjournment of the House, the resumption of the committee will be made an order of the day for the next sitting day, and when the order is called on the proceedings will be resumed at the point where they were interrupted.

There are very few instances of notice being taken of the absence of a quorum in committee, the last being in 1921.[63]

Absence of a quorum on a division in a Committee of the whole House

Standing order 176(2) provides that, if on a division in committee it appears that there is not a quorum present, the Chair will leave the Chair and report to the House.

Presence of a minister in the House

Standing order 34 provides that the House will not meet unless a minister is present in the House. In practice, governments maintain a roster of ministers and parliamentary secretaries in the House in order to meet this requirement.

Standing order 34 was adopted in 2004 to give effect to a longstanding convention that a minister or parliamentary secretary should be present in the chamber at all times to take charge of items of government business, but also that there should be a member present able to react with authority on behalf of the government to any unexpected development and to take note of or respond to matters raised during private members' business.[64] However, the application of the convention prior to 2004 was not always consistent.[65]

---

62 This sessional order was first adopted on 18 October 2007 and readopted in subsequent sessions. See *Minutes*, NSW Legislative Council, 18 October 2007, pp 281-282; 9 May 2011, pp 73-74; 9 September 2014, pp 9-10; 6 May 2015, pp 56-57; 8 May 2019, p 62.

63 *Minutes*, NSW Legislative Council, 26 October 1921, p 38.

64 *House of Representatives Practice*, 7th ed, (n 51), p 265.

65 For further information, see the *Annotated Standing Orders of the New South Wales Legislative Council*, (n 7), pp 100-101.

A highly unusual instance occurred on 19 June 2001, when a union picket in protest at changes to workers compensation arrangements prevented most government members from entering the Parliament. When the Deputy President, the Hon Anthony Kelly, took the Chair at 2.30 pm, the one government member in the House, not being a minister, drew the attention of the House to the absence of a minister. The Deputy President immediately left the Chair until the ringing of a long bell, refusing to hear any points of order from the opposition or to allow the commencement of any other business. The House resumed at 5.18 pm following the arrival of the ministers.[66] A notice of motion was subsequently given by the Leader of the Opposition for the removal from office of the Deputy President for his actions in leaving the Chair. The motion was moved the next day. Following considerable debate, the motion was defeated 23 votes to 14.[67]

Since its adoption in 2004, standing order 34 has been invoked on three occasions. On two occasions in September 2004 and June 2005, on notice being taken of the absence of a minister from the House, a minister or parliamentary secretary returned.[68] However, the third instance in June 2009 was highly unusual.[69] On that occasion, on it becoming clear that the government had lost the support of the House for its legislative program, the one remaining minister in the House left the chamber, forcing the President to suspend proceedings under standing order 34. The House remained suspended over the winter long adjournment, only resuming 67 days later on 1 September 2009. Inevitably, this incident prompted concern that the standing order had been abused by the government to prevent the House from sitting.[70]

Among all Australian Houses of Parliament, the Legislative Council is the only House to codify in standing orders the convention that there should be a minister in the House at all times. It is also notable that the convention is observed mainly in Lower Houses, with many Upper Houses, including the Senate, having no such convention.[71]

Suspending a sitting

Standing order 23 provides that the President may leave the Chair at any time to suit the convenience of members, without any question being put. Most commonly, it is used for a meal break.

66 *Minutes*, NSW Legislative Council, 19 June 2001, p 1028.

67 *Hansard*, NSW Legislative Council, 20 June 2001, pp 14790-14797, 14813-14824; *Minutes*, NSW Legislative Council, 20 June 2001, pp 1033, 1036-1037.

68 *Minutes*, NSW Legislative Council, 16 September 2004, p 998; 21 June 2005, p 1476.

69 *Minutes*, NSW Legislative Council, 24 June 2009, p 1282.

70 S Reynolds, 'The Tablecloth and the Long Bell: media perceptions of the NSW Legislative Council 1999-2009', *Australasian Parliamentary Review*, (Vol 26, No 1, Autumn 2011), pp 145-146; and D Blunt, 'Three unusual and dramatic recent "sitting days" in the New South Wales Legislative Council', Paper presented to the 43rd Conference of Presiding Officers and Clerks, Honiara, Solomon Islands, July 2012, p 4.

71 J Young, 'Should upper houses have ministers?', *Australasian Parliamentary Review*, (Vol 29, No 1, Autumn 2014), p 87.

In most instances the President suspends a sitting on the suggestion of the Leader of the Government in the Legislative Council or another minister or parliamentary secretary. In such instances, before leaving the Chair, the President announces to the House the time at which the sitting will resume. Two minutes before the designated time for the resumption of the sitting, the meeting bells are rung to call members back to the chamber. Subsequently, at the designated time, the President resumes the Chair, and the House resumes at the point where it left off. Such breaks in proceedings are not recorded in the *Minutes of Proceedings*.

The President may also simply leave the Chair until the ringing of a long bell. Most commonly, this procedure is used to facilitate joint sittings of the two Houses in the Legislative Council chamber to fill casual vacancies in the Council or in the representation of New South Wales in the Australian Senate. The significance of the resumption of the House on the ringing of a long bell is that it leaves the decision as to when the House will actually meet again in the hands of the President, although the expectation is that the President acts with the common understanding of all members as to when the sitting should resume. Such breaks in proceedings are recorded in the *Minutes of Proceedings*.

In addition to sittings being suspended for meal breaks and joint sittings for the purposes of filling casual vacancies in the Council and the Australian Senate, sittings may be suspended for any reason the House or President deems necessary. In the past, these reasons have included:

- to enable members to attend upon the Governor, for example to present an Address-in-Reply;
- to enable members to attend a joint sitting for another purpose;[72]
- to enable managers from the House to attend a free conference with managers from the Legislative Assembly;[73]
- to enable members to attend an official function;[74]
- to enable members to attend Remembrance Day services;[75]
- to enable a minister to attend a function;[76]
- to enable the President to consider and prepare a ruling on a point of order;[77]

72 *Minutes*, NSW Legislative Council, 22 October 2002, p 405.

73 For further information, see the discussion in Chapter 22 (Relations with the Legislative Assembly) under the heading 'Conferences between the Houses'.

74 *Minutes*, NSW Legislative Council, 5 May 1992, p 143.

75 *Minutes*, NSW Legislative Council, 11 November 2011, p 584.

76 *Minutes*, NSW Legislative Council, 14 September 1916, p 94; *Hansard*, NSW Legislative Council, 14 September 1916, p 1731.

77 *Minutes*, NSW Legislative Council, 13 October 1988, p 154; *Hansard*, NSW Legislative Council, 13 October 1988, p 2243; *Minutes*, NSW Legislative Council, 21 January 1926, p 160.

- to allow the House to await a message from the Assembly forwarding a bill for concurrence;[78]
- to permit 'negotiations and discussions' concerning legislation being considered in the House or in committee;[79]
- to allow the House to break for the night and to recommence the next morning without the need to commence a new sitting day;[80]
- to enable the House to proceed at a later time to a special adjournment and valedictory speeches by retiring members, but without the need to commence a new sitting, and without the necessity for other routine items of business, such as Question Time, to be proceeded with;[81] and
- to enable officers of the House and *Hansard* staff to attend an industrial rally.[82]

Sittings have also been suspended due to:

- the absence of a minister (SO 34);[83]
- grave disorder in the House (SO 193);[84]
- disorder in the galleries;[85] and
- technical problems, such as a power failure[86] or failure of the division bells.[87]

These lists should not be regarded as exhaustive.

In the Senate, sittings have also been suspended over one or more days to allow behind the scenes negotiations between parties over the provisions of urgent or important bills, with the Senate resuming on the later day at the point in its business where it left off. However, *Odgers* notes that whilst this strategy can be used to enable government

78 *Minutes*, NSW Legislative Council, 14 December 1993, p 457; *Hansard*, NSW Legislative Council, 14 December 1993, p 6030.

79 On 15 December 1993, proceedings in committee were interrupted to allow negotiations on the Homefund Restructuring Bill 1993. See *Minutes*, NSW Legislative Council, 15 December 1993, pp 462-463; *Hansard*, NSW Legislative Council, 15 December 1993, pp 6171, 6176. On 24 November 2011, proceedings in the House were interrupted to allow negotiations on the Police Amendment (Death and Disability) Bill 2011. See *Minutes*, NSW Legislative Council, 24 November 2011, p 647; *Hansard*, NSW Legislative Council, 24 November 2011, p 783.

80 *Minutes*, NSW Legislative Council, 2-4 June 2011, p 180.

81 *Minutes*, NSW Legislative Council, 5 December 2002, pp 585-586.

82 *Minutes*, NSW Legislative Council, 8 September 2011, p 408.

83 For further information, see the discussion earlier in this chapter under the heading 'Presence of a minister in the House'.

84 *Minutes*, NSW Legislative Council, 2 May 1996, p 118. On this occasion, the grave disorder in the House arose following the suspension of the Leader of the Government in the Legislative Council, the Hon Michael Egan.

85 *Minutes*, NSW Legislative Council, 27 May 1997, p 750.

86 *Minutes*, NSW Legislative Council, 16 April 1997, p 610; 23 February 2016, p 644.

87 *Minutes*, NSW Legislative Council, 12 November 2002, p 464.

business, including urgent legislation, to proceed without interruption, 'if used excessively by a determined majority, the procedure could be severely restrictive of the rights of individual senators'.[88]

Duration of sitting days

The duration of sitting days in the Legislative Council, determined by the time of meeting and adjournment of the House each sitting day, is regulated by standing and sessional orders:

- As indicated previously, by sessional order adopted under standing order 35, the House usually sits at 2.30 pm on Tuesdays, and at 10.00 am on Wednesdays and Thursdays.[89]
- At the commencement of the 57th Parliament in 2019, the House adopted a sessional order for the 'hard adjournment' of the House at midnight each sitting day, effectively limiting the duration of sitting days, although the operation of this sessional order may be suspended if the House so desires.[90]

Prior to the adoption of the sessional order for the 'hard adjournment', the Council never fixed the time for the adjournment of the House on a particular sitting day. As a result, there have been some extremely long sitting days in the Legislative Council extending over a number of calendar days:

- In 1978, the House sat from 2.00 pm on Tuesday 31 January until 6.07 pm on Tuesday 7 February, a period of 7 days, 4 hours and 7 minutes, during which time a free conference was held with managers from the Assembly to consider a bill to reconstitute the Council.[91]
- In 2011, the House sat from 9.30 am on Thursday 2 June until 5.48 pm on Saturday 4 June, a period of 2 days, 8 hours and 18 minutes, during which time the House debated the Industrial Relations Amendment (Public Sector Conditions of Employment) Bill 2011.[92]

In 2009, in highly unusual circumstances, the House continued to 'sit' over the winter long adjournment for 67 days, although the House did not actually meet during that time.[93]

---

88 *Odgers*, 14th ed, (n 55), p 202.

89 For further information, see the discussion earlier in this chapter under the heading 'The weekly sitting pattern'.

90 For further information, see the discussion later in this chapter under the heading 'Hard adjournments'.

91 *Minutes*, NSW Legislative Council, 31 January 1978, pp 767-773. For further information, see the discussion in Chapter 2 (The history of the Legislative Council) under the heading '1978: Direct election and reconstitution from 60 to 45 members'.

92 *Minutes*, NSW Legislative Council, 2-4 June 2011, pp 174-187. See also Blunt, (n 70), pp 4-5.

93 For further information, see the discussion earlier in this chapter under heading 'Presence of a minister in the House'.

The simple fact of the continuation of the sitting day beyond midnight does not constitute an additional sitting day.

There have also been some extremely short sitting days in the Legislative Council:

- On 12 September 2001, the House met at 11.00 am and adjourned at 11.10 am following the moving of a condolence motion marking the 11 September 2001 terrorist attacks on the United States.[94]
- On 3 May 2016, the House met at 2.30 pm and adjourned at 2.35 pm after the President informed the House of the death of a member of the House, Dr John Kaye.[95]

Other occasions on which the House has adjourned early, in some cases without the House conducting any other business, have included:

- on the death of the Monarch;[96]
- on the death of the Governor;[97]
- on the death of a former President;[98]
- on the death of a Premier;[99]
- on the death of a minister and a former Premier;[100] and
- on the death of a minister in the Assembly.[101]

The House also adjourned on the outbreak of World War II following a brief ministerial statement without proceeding to any other business,[102] and following the tabling of the minutes of a joint sitting held for the purposes of considering a motion of sympathy to the families and friends of victims of the bomb attacks in Bali on 12 October 2002.[103]

There have also been occasions when the House has commenced and concluded two sitting days on one calendar day:

- On 1 July 1982, the House adjourned at 1.01 am and commenced a new sitting at 1.15 am. This was done to allow the House to proceed to the second reading of the Business Franchise Licenses (Petroleum Products) Bill 1982, after the House denied leave on the first sitting day for the suspension of standing orders to

94 *Minutes*, NSW Legislative Council, 12 September 2001, p 1146.
95 *Minutes*, NSW Legislative Council, 3 May 2016, p 820.
96 *Minutes*, NSW Legislative Council, 27 February 1952, p 233.
97 *Minutes*, NSW Legislative Council, 10 November 1936, p 32.
98 *Minutes*, NSW Legislative Council, 18 August 1952, p 10.
99 *Minutes*, NSW Legislative Council, 22 October 1959, p 92.
100 *Minutes*, NSW Legislative Council, 26 February 1985, p 304.
101 *Minutes*, NSW Legislative Council, 13 November 1957, p 66.
102 *Minutes*, NSW Legislative Council, 5 September 1939, p 238.
103 *Minutes*, NSW Legislative Council, 22 October 2002, pp 405-406.

allow the bill to pass through all its remain stages during any one sitting of the House.[104]

- On 16 October 1997, the House adjourned at 4.15 pm and commenced a new sitting at 5.30 pm. This was done in order to allow a member to give a notice of motion on the first sitting day concerning the tabling of documents by the Hon Franca Arena and for the motion to be moved on the second sitting day.[105] In the event, Mrs Arena was not in the House to table the documents.
- On 28 August 2008, the House adjourned at 11.48 am and commenced a new sitting at 12.17 pm. This was done to allow the Treasurer to give a notice of motion on the first sitting day for leave to bring in two cognate bills for the restructuring of the electricity industry and to move for their introduction on the second sitting day.[106]

Where two sitting days occur on one calendar day this is to be regarded as a single sitting day for the purposes of statutory requirements, such as for the tabling or disallowance of delegated legislation.[107]

'Joint meetings' with members of the Legislative Assembly

On occasion members of the Legislative Council have assembled for 'joint meetings' with members of the Legislative Assembly for the purposes of hearing addresses from visiting members of the Royal Family or dignitaries and to consider joint motions:[108]

- On 15 October 1974, a joint meeting was held in the Council chamber to hear an address by His Royal Highness the Prince of Wales on the 150th anniversary of the first meeting of the Legislative Council on 25 August 1824.[109]
- On 19 October 1989, a joint meeting was held in the Council chamber to hear an address by His Excellency the Hon Shunichi Suzuki, Governor of the Metropolis of Tokyo.[110]
- On 8 September 1998, a joint meeting was held in the Assembly chamber to hear an address by Her Excellency Mary McAleese, President of Ireland.[111]

104 *Minutes*, NSW Legislative Council, 30 June and 1 July 1982 am, pp 7-8, 22-23.

105 *Minutes*, NSW Legislative Council, 16 October 1997, p 117. Standing order 73 provides that a member may not move a motion without having given notice at a previous sitting of the House, except by leave or where expressly provided for in the standing orders.

106 *Minutes*, NSW Legislative Council, 28 August 2008, p 750. Following the giving of notice on the first sitting day, on the second sitting day the bills were introduced, read a first time and declared urgent, allowing the second reading debate to proceed immediately. See also Blunt, (n 70), pp 2-3.

107 *Interpretation Act 1987*, s 18.

108 For further information, see *New South Wales Legislative Council Practice*, 1st ed, (n 6), pp 239-240.

109 *Minutes*, NSW Legislative Council, 15 October 1974, pp 124-126.

110 *Minutes*, NSW Legislative Council, 19 October 1989, p 989.

111 *Minutes*, NSW Legislative Council, 8 September 1998, pp 674-675.

- On 7 June 2000, a joint meeting was held in the Assembly chamber to hear an address by Mr Rhodri Morgan, AM MP, First Secretary of the National Assembly for Wales.[112]
- On 22 October 2002, a joint meeting was held in the Assembly chamber for the purpose of considering a motion of sympathy to the families and friends of victims of the bomb attacks in Bali on 12 October 2002.[113]
- On 18 September 2002, a joint meeting was held in the Assembly chamber for the purpose of a seminar on reform of the law of negligence.[114]
- On 19 September 2014, a joint meeting was held in the Assembly chamber for the purpose of hearing an address by His Excellency Mr Zhu Xiaoda, Governor of Guangdong Province in the People's Republic of China.

Meetings of this kind are not provided for in the standing orders, but may occur if both Houses agree.

Secret sittings

There is no precedent in the Legislative Council for the holding of secret sittings, for example during wartime, as there is in a number of other Houses of Parliament.[115]

ADJOURNMENTS

The periods between sitting days are called 'adjournments'. The periods between sitting periods – that is, the spring sitting period and the autumn sitting period – are called 'long adjournments', although they are sometimes colloquially referred to as 'recesses'.

Adjournments moved by a minister

Under standing order 31(2), a minister or parliamentary secretary may move a motion for the adjournment of the House at any time.

Under standing order 32, the House may appoint a time at which proceedings will be interrupted each sitting day to permit a motion for the adjournment of the House to be moved, if a minister so wishes, to terminate the sitting.[116] By sessional order, the House

112 *Minutes*, NSW Legislative Council, 6 June 2000, p 495; 7 June 2000, p 500.

113 *Minutes*, NSW Legislative Council, 22 October 2002, pp 404-405.

114 *Minutes*, NSW Legislative Council, 17 September 2002, pp 353-354.

115 See D Natzler KCB and M Hutton (eds), *Erskine May's Treatise on The Law, Privileges, Proceedings and Usage of Parliament,* 25th ed, (LexisNexis, 2019), para 17.22; *House of Representatives Practice*, 7th ed, (n 51), p 116; and M Harris and D Wilson (eds), *McGee Parliamentary Practice in New Zealand*, 4th ed, (Oratia Books, 2017), p 750.

116 Standing order 32(1) as adopted by the House in 2004 technically only provides for the interruption of business to permit the moving of the adjournment motion on Thursdays and Fridays. In practice

has specified 10.00 pm on Tuesdays, Wednesdays and Thursdays as that time.[117] Under the terms of standing order 32, if at the time of interruption a division is in progress, the division will be completed and the result announced before the adjournment may be moved. Alternatively, under the terms of a sessional order amending standing order 32,[118] if at the time of interruption the House is in committee, the Chair is to inquire if a minister wishes the Chair to report progress to the House to allow the motion for the adjournment to be moved.

Under these arrangements, there is no obligation on a minister to move the adjournment at the time of interruption, and it is common for the House to continue to sit, for example where it has a heavy legislative workload. However, if the minister does move the adjournment, the item of business which is interrupted is set down as an order of the day for the next sitting day without any question being put. The member speaking at the time of interruption may continue speaking when proceedings are resumed.[119]

The adjournment of the House under standing order 31 is until the next sitting day in the sitting calendar,[120] unless a special adjournment motion (discussed below) has been previously agreed to that at its rising the House do adjourn to a future day other than the next sitting day in the sitting calendar.

Debate on the motion for the adjournment of the House is discussed in Chapter 10 (The conduct of proceedings).[121]

'Hard adjournments'

By sessional order adopted at the commencement of the 57th Parliament in May 2019, if the motion for the adjournment of the House on a sitting day has not already been moved, at midnight the President shall propose the question that the House do now adjourn. The same arrangements as those outlined above under standing order 32 apply if a division is in progress or the House is in committee. However, unlike the interruption for the adjournment moved by a minister, discussed above, there is no discretion for the President to decline to propose the question for the adjournment of the House at midnight: hence the term 'hard adjournment'.[122]

The 'hard adjournment' was adopted by the House in 2019 as a means of forcing the commencement of the adjournment debate at midnight. However, like any other standing or sessional order, if desired, the 'hard adjournment' can be dispensed with by

---

it is applied every sitting day. For further information, see the *Annotated Standing Orders of the New South Wales Legislative Council*, (n 7), p 95.

117 *Minutes*, NSW Legislative Council, 8 May 2019, pp 69-70.

118 *Minutes*, NSW Legislative Council, 8 May 2019, pp 62-63.

119 *Minutes*, NSW Legislative Council, 8 May 2019, pp 62-63. For further information, see the *Annotated Standing Orders of the New South Wales Legislative Council*, (n 7), pp 89-91.

120 Standing order 31(5) covers circumstances in which the standing and sessional orders do not specify the day and hour for the next meeting of the House.

121 See the discussion under the heading 'The adjournment debate'.

122 *Minutes*, NSW Legislative Council, 8 May 2019, pp 69-70.

motion moved either according to notice or following the suspension of standing and sessional orders by leave of the House.

Special adjournments

Under standing order 74(4)(a), a motion may be moved without notice by a minister for a special adjournment of the House. Special adjournments are used where it is the desire of the House to adjourn to a specific date and time other than the next sitting day as set out in the standing and sessional orders and the sitting calendar. The special adjournment motion simply specifies an alternate sitting date and time when the House is to meet.

Prior to 2016, a special adjournment motion was moved on a Thursday when it was the desire of the House to adjourn until a following Tuesday, rather than the next calendar day (Friday). However, in March 2016, the President ruled that as a consequence of the House's adoption of an annual sitting calendar specifying the days of meeting of the House, there was no need for a special adjournment to be moved each Thursday until a following Tuesday. Rather, a special adjournment was only required when the House sought to adjourn to an unscheduled day or time.[123]

As a result of this change of practice, since 2016 special adjournments have normally only been moved at the end of a sitting period, that is, before the winter or summer long adjournments. In this instance, the special adjournment is moved in order that the House may adopt a recall provision to enable the President, or, if the President is unable to act on account of illness or other cause, the Deputy President and Chair of Committees, to be able to fix an alternative date and/or hour at which the House should next meet.[124]

However, an exception to this occurred on 24 March 2020, when in view of the impact of the COVID-19 pandemic, the House adopted a special adjournment motion for the adjournment of the House until 15 September 2020, a period of close to six months.[125] In adopting the motion, members noted the capacity for committees to continue to meet and for the House if necessary to be recalled.[126] Recall of the House is discussed further below.

From time to time, the special adjournment motion has been amended. For example, on 26 June 1990, the special adjournment motion was amended to insert an early recall provision at the request of a majority of members.[127] On 2 December 1977, the special

123 *Hansard*, NSW Legislative Council, 10 March 2016, p 7211.

124 For further information, see the discussion later in this chapter under the heading 'Recall by the President according to the special adjournment resolution'.

125 *Minutes*, NSW Legislative Council, 24 March 2020, pp 861-862.

126 *Hansard*, NSW Legislative Council, 24 March 2020, pp 8-11. In the event, the House was recalled on 12 May 2020.

127 For further information, see the discussion below under the heading 'Recall by the President at the request of a majority of members'.

adjournment motion was amended to change the date for the reconvening of the House.[128]

Recall of the House

At the end of the spring and autumn (budget) sitting periods, the House adjourns to the date and time of the next meeting of the House in the next sitting period according to the sitting calendar adopted by the House.

However, there are two mechanisms for the recall of the House at a different time from that agreed to by the House in the sitting calendar. These mechanisms are discussed below.

Recall by the President according to the special adjournment resolution

Since 1934, the special adjournment motion moved at the end of each sitting period has generally included provision for the President, or if the President is unable to act on account of illness or other cause, the Deputy President and Chair of Committees, to fix an alternative date and/or hour of meeting. The current special adjournment resolution is in the following terms:

> That the House at its rising today do adjourn until [date] unless the President, or if the President is unable to act on account of illness or other cause, the Deputy President, prior to that date, by communication addressed to each member of the House, fixes an alternative day or hour of the sitting.

In exercising this power to recall the House, the President may act on the advice of the executive government, usually conveyed by request of the Leader of the Government in the Legislative Council. Examples where the House has been recalled under these arrangements include:

- on the death of the Monarch;[129]
- on the entry of Japan into World War II;[130]
- to enable both Houses of Parliament to deal with urgent legislation;[131]
- to enable the Council to deal with a message from the Assembly in relation to Council amendments to a bill;[132]

128 *Minutes*, NSW Legislative Council, 2 December 1977, pp 722-723.
129 *Minutes*, NSW Legislative Council, 18 February 1936, pp 67, 71; 27 February 1952, pp 225, 232.
130 *Minutes*, NSW Legislative Council, 13 January 1942, pp 139, 142.
131 *Minutes*, NSW Legislative Council, 20 October 1976, pp 105, 113-115; 12 June 1984, pp 239, 242; 14 December 1993, pp 449, 457; 28 August 2008, pp 734, 749-750; 30 January 2014, pp 2289, 2305-2308; 12 May 2020, p 855.
132 *Minutes*, NSW Legislative Council, 11 March 1992, pp 53, 60-62.

- for the House to be informed of the resignation of the Premier and the appointment of a new Premier and ministry, together with the tabling of the report of the Independent Commission Against Corruption which precipitated the resignation of the Premier;[133]
- to enable the return of writs for the filling of a vacancy in the Legislative Council;[134]
- to hold a joint sitting to fill a casual vacancy in the Legislative Council;[135] and
- to hold a joint sitting to fill a casual vacancy in the representation of New South Wales in the Australian Senate.[136]

The three most recent occasions on which the President recalled the House, acting on a request of the Leader of the Government in the Legislative Council, were on 28 August 2008, when the House was recalled to debate bills relating to electricity privatisation;[137] on 30 January 2014, when the House was recalled to debate separate bills regarding drug and alcohol related violence and the cancellation of certain mining exploration licences;[138] and on 12 May 2020, when the House was recalled to consider urgent legislation in relation to the COVID-19 pandemic.[139] On this third occasion, in the extraordinary circumstances of the COVID-19 pandemic, and in circumstances where the House had recently adopted a provision for the postponement of a sitting by the President upon consultation with all party leaders,[140] the President chose to consult with all party leaders prior to the recall of the House.

Recall by the President at the request of a majority of members

Standing order 36, as amended by sessional order,[141] provides that the President, at the request of an absolute majority of members, being 22 or more members, must fix a time of meeting of the House in accordance with the request, and must notify all members accordingly (SO 36(1)). A request by the leader or deputy leader or a designated representative of a party in the Council is deemed to be a request by every member of that party (SO 36(2), as amended by sessional order). A request may be made to the Clerk for delivery to the President (SO 36(3)).

133 *Minutes*, NSW Legislative Council, 30 June 1992, pp 193, 196-197, 204-205, 208-209.
134 *Minutes*, NSW Legislative Council, 25 October 1977, pp 571, 576-577. This occasion predated the current arrangements for filling of casual vacancies in the Council by way of a joint sitting.
135 *Minutes*, NSW Legislative Council, 4 July 2001, pp 1120-1121; 6 September 2001, pp 1123, 1125-1126.
136 *Minutes*, NSW Legislative Council, 11 February 1987, pp 643, 649-650.
137 *Minutes*, NSW Legislative Council, 28 August 2008, pp 734, 749-750.
138 Minutes, NSW Legislative Council, 30 January 2014, pp 2305-2308.
139 *Minutes*, NSW Legislative Council, 12 May 2020, p 855.
140 For further information, see the discussion under the heading 'Postponement of a scheduled meeting'.
141 *Minutes*, NSW Legislative Council, 24 March 2020, p 877.

Early recall by the President at the request of a majority of members under standing order 36 provides a mechanism for non-government parties to have the House recalled, although the government can also use this mechanism if it has a majority of members in support of a recall.

The only occasion on which the procedure under standing order 36 has been used was on 15 December 2005 when the House met at the time and place fixed by the President to deal with legislation introduced by the government in response to social disturbances in Cronulla and other areas. On this occasion, the request for recall of the House was made by both the Leader of the Government in the Legislative Council and the Acting Leader of the Opposition.[142]

However, there is also an instance of the House being recalled at the request of a majority of members prior to the adoption of standing order 36.

On 13 June 1990, on the usual special adjournment motion being moved at the end of the autumn sitting period incorporating the procedure for the recall of the House by the President, the Leader of the Opposition moved an amendment to also provide for recall of the House at the request of an absolute majority of members. The amendment was agreed to.[143] This was the first time the House had adopted such a provision.

At the time the amendment was moved, it was argued that not only should the government have the power to have the House reconvene if it so wished, so too should the majority of members. The Leader of the Opposition, the Hon Michael Egan, argued:

> As can be seen from the terms of the amendment, the purpose is to provide the House with the option of reconvening during the recess if a majority of members so request. During any recess there is always the possibility that important reports may be tabled or other significant issues may arise that warrant the House being reconvened so that those matters can be discussed while they are still topical. There is precedent in the Commonwealth Senate for a similar amendment'. … I would point out to honourable members that the Government always has the power to have the House reconvened if it so wishes. I believe, and the Senate believes, that it is a right which should also be held by a majority of the House. For that reason I have moved the amendment. It needs to be emphasised that this House is the master of its own destiny, and that the Government is answerable to the Parliament and to the House. We are not the property of the Government; the Parliament is supreme.[144]

The provision was used just over a week later when the President received correspondence dated 21 June 1990 from the Leader of the Opposition, the Leader of the Australian Democrats and another cross-bench member requesting the recall of the House. The House was subsequently recalled and met on 26 June 1990 to consider a motion of no confidence in the Minister for Police and Emergency Services. On the House meeting, a point of order was taken concerning the appropriateness of the President being included

142 *Minutes*, NSW Legislative Council, 15 December 2005, pp 1818-1819.

143 *Minutes*, NSW Legislative Council, 13 June 1990, pp 316-319.

144 *Hansard*, NSW Legislative Council, 13 June 1990, p 5542.

as one of the members forming the majority. The President ruled that there was no point of order.[145]

The recall of the House at the request of a majority of members arose again over the summer long adjournment of 1995-1996. On 15 December 1995, the special adjournment at the end of the spring sitting period included the usual provision for recall of the House by the President (effectively at the request of the Leader of the Government in the Legislative Council), but no provision for recall at the request of a majority of members. Subsequently, on 11 January 1996, in accordance with the special adjournment resolution, the Leader of the Government in the Legislative Council requested that the President communicate with each member and call the House to meet on 16 April 1996 rather than 5 February 1996 as originally specified. However, the President subsequently received a further request from a majority of members that the House be recalled early. This request was made by the majority in response to considerable public debate in January 1996 concerning the role of the Governor and the use of Government House.

Despite the special adjournment agreed to by the House on 15 December 1995 not including provision for recall of the House at the request of a majority of members, on 25 January 1996, the President indicated that he was 'duty bound to respond to the wishes of the majority of members' and communicated to each member that he had fixed 13 February 1996 as the date for the House to next meet. In the event, the government thwarted this attempt to recall the House. On 27 January 1996 the Premier wrote to the President indicating that he had submitted a recommendation to the Governor that the Council and Assembly be prorogued to 15 April 1996 and be called together to next meet on 16 April 1996. A proclamation to that effect was issued by the Governor and published in a Special Supplement to the *Government Gazette* on the same day.

Following the first instance of 13 June 1990 cited above, the second occasion on which the motion for the special adjournment at the end of a sitting period was amended to include a provision for recall of the House at the request of a majority of members of the House was on 5 December 1996.[146] On this occasion the amendment referred to a request from 'a majority' of members, rather than 'an absolute majority'.

Subsequently, between 1997 and the autumn sitting period of 2003, the motion for the special adjournment at the end of each sitting period was routinely amended to provide for a recall at the request of 'a majority' of members. The provision was finally adopted in the standing orders in 2004, having been trialled as a sessional order in 2003, the terms of the standing order reverting to reference to 'an absolute majority of members'.

POSTPONEMENT OF A SCHEDULED MEETING

On 24 March 2020, the House adopted a sessional order authorising the President, or, if the President is unable to act, the Deputy President and Chair of Committees,

145 *Hansard*, NSW Legislative Council, 26 June 1990, pp 5557-5565.
146 *Minutes*, NSW Legislative Council, 5 December 1996, pp 565-566.

in the event of a public health concern, and following consultation with the Leader or designated representative of each party and independent cross-bench members, to postpone a scheduled meeting of the House and fix an alternate day and hour of meeting by communication addressed to each member of the House.[147] The House adopted this sessional order in response to the COVID-19 pandemic to facilitate postponement of a future meeting of the House on public health grounds.

PROROGATION

Section 10A(1) of the *Constitution Act 1902* provides that the Governor may prorogue the Legislative Council and the Legislative Assembly by proclamation whenever he or she deems it expedient to do so, subject to sections 10A(2)[148] and 24B[149] and of the *Constitution Act 1902*. In reality, the Governor prorogues the Houses on the advice of the executive government.

A proclamation of the Governor proroguing the Legislative Council and the Legislative Assembly specifies the date from which they are prorogued. When the Houses are prorogued at the end of a Parliament, the current practice is to prorogue the Legislative Council until a date on (or after) the anticipated date on which the Parliament will meet again after the election. When the Houses are prorogued at the end of a session without an intervening election, the prorogation is to a date and time for the meeting of the Houses at the commencement of the new session.

The act of proroguing the Houses brings to an end a session of the Parliament. According to practice inherited from the Westminster Parliament:

- the House may not meet again until the date nominated in the proclamation, although this is not entirely free from doubt;[150]
- all business on the *Notice Paper* lapses, including all notices of motions and orders of the day; and
- all sessional orders cease to have effect.

147 *Minutes*, NSW Legislative Council, 24 March 2020, p 877.

148 Section 10A(2) is discussed further below under the heading 'The restriction on prorogation prior to an election'.

149 Section 24B prohibits the Legislative Assembly from being prorogued in the eight days after passage in the Assembly of a motion of no confidence in the government. This period is to allow an opportunity for a further motion of confidence in the government to be passed. If the Governor were advised to prorogue the Parliament in the eight days after the passage of a motion of no confidence in the government, the Governor would be obliged by law not to act on that advice.

150 For further information, see the discussion below under the heading 'Prorogation and parliamentary scrutiny'.

Bills may be assented to by the Governor after prorogation.[151] However, bills that have not passed both Houses lapse on prorogation.[152] As discussed in Chapter 20 (Committees),[153] committees may continue to operate after prorogation.

As noted earlier in this chapter,[154] on the commencement of a second or subsequent session of a Parliament following prorogation, the recent practice of the House has been for various items of business to be restored to the Notice Paper.[155] However, it is not possible to restore items to the *Notice Paper* at the commencement of a new session in a new Parliament following a periodic Council election. The rationale for this is that the membership of the House has changed.

In 2003 in *Attorney-General (WA) v Marquet*,[156] the High Court noted, at least in the Western Australian context, that the power of prorogation 'may be exercised with respect to each House at different times or at the one time'.[157] However, this statement does not appear to contemplate that houses of parliament generally may be prorogued completely independent of one another. The Westminster tradition, at least since the 17th century, is for both Houses to operate as constituent parts of a whole Parliament. As stated by Sir Robert Atkyns, a former Lord Speaker, in 1688:

> Both Houses must be prorogued together, and dissolved together; like the twins of Hippocrates, they live and die together, and the one cannot be in being, without the other also, at the same time be in being too.[158]

This Westminster tradition is reflected in the wording of section 10A, which refers to the proroguing of the Legislative Council and Assembly rather than either/or. The Houses are called together to exercise their power to enact laws at the discretion of the Crown. With the termination of a session of the Parliament by the Crown, this power to enact laws ceases until the Houses are called together again.[159]

---

151 Twomey, (n 4), p 464 and the authorities there cited.

152 Standing order 159 specifically provides for the restoration of bills to the Council *Notice Paper* following prorogation. For further information, see the discussion in Chapter 15 (Legislation) under the heading 'Restoration of bills after prorogation', and the *Annotated Standing Orders of the New South Wales Legislative Council*, (n 7), pp 519-524.

153 See the discussion under the heading 'The effect of prorogation on committees'.

154 See the discussion under the heading 'Current arrangements for the opening of a new Parliament'.

155 Following the most recent prorogations of the House and the commencement of a new session in 2014, the *Notice Paper* was restored in its entirety, together with the restoration of unanswered written questions to the *Questions and Answers Paper* and unanswered questions without notice. See *Minutes*, NSW Legislative Council, 9 September 2014, pp 12-15.

156 (2003) 78 ALJR 105.

157 *Attorney-General (WA) v Marquet* (2003) 78 ALJR 105 at [85] per Gleeson CJ, Gummow, Hayne and Heydon JJ.

158 Atkyns, 13 *Cobberr's State Trials*, 1442, cited in CH McIlwain, *The High Court of Parliament and its Supremacy*, (Yale University Press, 1910), p 244.

159 The Crown Solicitor has also suggested that there is no capacity to prorogue one House and not the other. See Crown Solicitor, 'Prorogation of the Legislative Council only', 23 December 1996.

Prior to 1893, it was normal although not universal practice for the Governor to personally prorogue Parliament. The Governor would attend the Legislative Council and, after summoning the Legislative Assembly, read a speech terminating the session until a stated day. However, since 1893, the standard practice has been for the Governor to prorogue the Parliament by proclamation.

In two instances in 1904 and 1908, the Parliament was prorogued by proclamation of the Governor whilst the Assembly was sitting. In those instances, the proclamation was handed to the Speaker in the Chair who announced that he had received the proclamation, and that he must leave the Chair.[160] In neither of these cases was the Council sitting.

Prorogation and parliamentary scrutiny

As indicated, the conventional view is that prorogation of the Parliament terminates a session and dispenses with sittings of both Houses.

This understanding brings with it the potential for prorogation to be used by the executive government to undermine parliamentary sovereignty and the accountability of the executive to Parliament. There have been three occasions since the 1990s when governments of both political persuasions in New South Wales have been accused of using prorogation as a mechanism to evade parliamentary scrutiny:

- On 7 December 1994, the Parliament was prorogued by the Governor on the advice of the Premier several months before the election on 25 March 1995. This was despite a resolution passed in the Legislative Assembly on 24 November 1994 requesting 'His Excellency the Governor not to prorogue the Parliament prior to the statutory date of 3 March 1995', being the date of the expiry of the Legislative Assembly, thereby allowing the House to sit again after Christmas.[161] At the time, the government was accused of using prorogation to avoid parliamentary debate on a number of issues, including potentially damaging reports on the superannuation payout to a former government minister.
- On 27 January 1996, the Parliament was prorogued by the Governor on the advice of the Premier after the recall of the Legislative Council. At the time, the government was accused of seeking to avoid debate on the role of the Governor and the use of Government House.[162]
- On 22 December 2010, the Parliament was prorogued by the Governor on the advice of the Premier several months prior to the election on 26 March 2011. At the time, the government was accused of using prorogation to attempt to avoid parliamentary scrutiny of the government's proposed sale of electricity generators.

160 *Votes and Proceedings*, NSW Legislative Assembly, 21 January 1904, p 15; 10 April 1908, p 72.

161 *Votes and Proceedings*, NSW Legislative Assembly, 24 November 1994, pp 561-562.

162 For further information, see the discussion earlier in this chapter under the heading 'Recall by the President at the request of a majority of members'.

On the first two of these occasions, neither House met again after prorogation, but on the third occasion, as discussed in Chapter 20 (Committees),[163] General Purpose Standing Committee No 1 continued to conduct an inquiry into the government's proposed sale of the electricity generators.

In 2019, in the landmark judgment of *R (on the application of Miller) (Appellant) v The Prime Minister (Respondent)*,[164] the UK Supreme Court found that prorogation cannot be used for the purposes of 'frustrating or preventing the constitutional role of Parliament in holding the Government to account'.[165] The court found that the prorogation of the UK Parliament by Her Majesty the Queen, on the advice of the UK Prime Minister, on 10 October 2019 for five weeks in advance of the 'Brexit' deadline of 31 October 2019 was unlawful, null and of no effect.[166] The court indicated the following limit of the power to prorogue:

> For the purposes of the present case, therefore, the relevant limit upon the power to prorogue can be expressed in this way: that a decision to prorogue Parliament (or to advise the monarch to prorogue Parliament) will be unlawful if the prorogation has the effect of frustrating or preventing, without reasonable justification, the ability of Parliament to carry out its constitutional functions as a legislature and as the body responsible for the supervision of the executive. In such a situation, the court will intervene if the effect is sufficiently serious to justify such an exceptional course.[167]

It seems likely that, should the Houses of the Parliament of New South Wales in the future be prorogued in an apparent attempt to prevent parliamentary scrutiny of the executive, this judgment of the UK Supreme Court would be found as applicable to the system of responsible government in operation in New South Wales under which 'the Executive's primary responsibility in its prosecution of government is owed to Parliament'.[168]

It is also noted that there are circumstances in which the Governor has in the past exercised discretion to refuse advice from the Premier to prorogue the Houses.[169] Those

---

163 See the discussion under the heading 'The effect of prorogation on committees'.

164 [2019] UKSC 41.

165 *R (on the application of Miller) (Appellant) v The Prime Minister (Respondent)* [2019] UKSC 41 at [55]-[56] per Lady Hale on behalf of the whole court.

166 Ibid, at [69] per Lady Hale on behalf of the whole court.

167 Ibid, at [50] per Lady Hale on behalf of the whole court.

168 *Egan v Willis* (1998) 195 CLR 424 at 451 per Gaudron, Gummow and Hayne JJ.

169 On 27 July 1911, the Lieutenant-Governor, Sir William Cullen, refused a request from the Acting Premier, the Hon William Holman, to prorogue the Parliament when the resignation of two members put the government in a minority position in the Legislative Assembly. See D Clune and G Griffith, *Decision and Deliberation: The Parliament of New South Wales 1856-2003*, (Federation Press, 2006), pp 214-215. On 26 May 1927, following a meeting of the full Executive Council, the Governor, Sir Dudley de Chair, refused a request from the Premier, the Hon Jack Lang, to prorogue the Parliament when it was clear that Premier Lang was not acting with the full support of the Executive Council. See A Twomey, 'Sir Dudley Rawson Stratford de Chair', in D Clune and K Turner (eds), *The Governors of New South Wales 1788–2010*, (Federation Press, 2009), pp 468-469. See also Twomey, (n 4), p 465.

circumstances could in the future include circumstances in which the government was seeking to avoid, for example, a motion of no-confidence.[170]

Moreover, there is also some doubt whether prorogation, under the system of responsible government in New South Wales, necessarily acts to prevent the House from meeting. The *Constitution Act 1902* is silent in relation to the capacity of the Legislative Council to meet and dispatch business after prorogation,[171] and the matter has never been conclusively determined. Whilst as indicated previously the House could likely not meet to pass legislation after prorogation, or perform any other act requiring the concurrence of the whole Parliament, including the Crown, this does not necessarily mean that either House could not meet to conduct debates or inquiries consistent with their scrutiny function. An opinion to this effect was provided to the Senate by Professor Howard in 1973.[172]

The restriction on prorogation prior to an election

The occasion on 22 December 2010 cited above, when the government was accused of using prorogation several months before an election in an attempt to prevent an inquiry by General Purpose Standing Committee No 1, was specifically addressed in 2011 with the passage of the *Constitution Amendment (Prorogation of Parliament) Act 2011*.[173] Following passage of that act, section 10A(2) of the *Constitution Act 1902* now provides that the Premier or Executive Council may not advise the Governor to prorogue the Legislative Council and Legislative Assembly for a period of approximately four months prior to 26 January in the year in which an election is due to be held.[174]

OTHER MEETINGS THAT ARE NOT OFFICIAL MEETINGS OF THE COUNCIL

Members of the Legislative Council may also be called upon to attend other meetings which are not official meetings of the Council. Of note are joint sittings of the two Houses for the purposes of filling casual vacancies in the Legislative Council and the Australian Senate. From time to time summits have also been held. This is discussed further below.

---

170 *Odgers* speculates as to such a scenario in the Commonwealth arena. See *Odgers*, 14th ed, (n 55), p 605.

171 Section 22F of the *Constitution Act 1902* only provides that 'the Legislative Council shall not be competent to dispatch any business during the period commencing on the day of the termination, either by dissolution or expiry, of any Legislative Assembly and ending on the day fixed for the return of the writ for the periodic Council election held next after that termination'.

172 *Odgers*, 14th ed, (n 55), pp 197-198, 604-605. See also H Evans, 'Power to prorogue a relic of imperial past', *Canberra Times*, 1 February 1996.

173 *Hansard,* NSW Legislative Council, 9 May 2011, p 431.

174 The specific wording of section 10A(2) is as follows: 'The Premier or Executive Council may not advise the Governor to prorogue the Legislative Council and Assembly on a date that is before 26 January in the calendar year in which the Legislative Assembly is due to expire and that is after the fourth Saturday in the preceding September.'

Joint sittings

Joint sittings of both Houses are held to elect persons to fill casual vacancies in the Legislative Council under section 22D of the *Constitution Act 1902* and in the representation of New South Wales in the Australian Senate under section 15 of the Commonwealth Constitution.

Joint sittings to fill casual vacancies in the Council are convened on receipt of a message from the Governor specifying the place and time of the meeting, which, by convention, always takes place in the Council chamber. The filling of casual vacancies in the Council is discussed in more detail in Chapter 4 (Elections for the Legislative Council).[175]

Joint sittings to fill casual vacancies in the representation of New South Wales in the Australian Senate are convened in a different manner. The Governor transmits to both Houses a copy of the despatch received from the President of the Senate[176] notifying that a vacancy has occurred in the representation of New South Wales in the Australian Senate. The Assembly subsequently sends a message to the Council indicating that it has resolved to meet with the Council at a joint sitting for the purposes of filling the casual vacancy, and requesting that the Council fix the time and place for the joint sitting. The Council sends a message in reply specifying the time and place of the meeting. Once again, by convention, the joint sitting takes place in the Council chamber. The filling of casual vacancies in the representation of New South Wales in the Australian Senate is discussed in more detail in Chapter 24 (Casual vacancies in the Australian Senate).

On three occasions joint sittings have been held consecutively to fill a casual vacancy in the Council and a casual vacancy in the Senate.[177]

In practice, the date and time of joint sittings to fill casual vacancies in both the Council and the Senate is negotiated between the President, the Speaker, the Leader of the Government in the Legislative Council and the government in advance of the exchange of messages.

Joint sittings may also be convened for the purpose of resolving disagreement between the Houses over bills under section 5B of the *Constitution Act 1902*. This is discussed in more detail in Chapter 22 (Relations with the Legislative Assembly).[178]

175 See the discussion under the heading 'Casual vacancies in the Legislative Council'.

176 Under section 21 of the Commonwealth Constitution, the Governor-General of the Commonwealth may act if there is no President of the Senate or if the President is absent from the Commonwealth.

177 *Minutes*, NSW Legislative Council, 17 September 1997, p 46; 6 May 2015, pp 73-74; 8 May 2019, pp 76-77.

178 See the discussion under the heading 'Joint sittings under section 5B of the *Constitution Act 1902*'.

Summits

In May 1999, the Legislative Council and Legislative Assembly agreed to hold a drug summit.[179] The summit involved members of both Houses participating in joint proceedings together with invited community representatives. Plenary sessions of the summit were held in the Council chamber and working groups met in various meeting rooms throughout Parliament House. The summit was chaired jointly by a former Speaker of the House of Representatives and a former Premier of Victoria. The summit agreed to 'summit rules' which ensured that quasi-parliamentary procedures were followed in plenary sessions. However, the summit was not a parliamentary proceeding.

In the years since the drug summit, three further summits have taken place, concerning salinity, child obesity and alcohol. Although some members of Parliament have participated in these summits, they have clearly been executive government activities rather than parliamentary proceedings.

179 *Minutes*, NSW Legislative Council, 12 May 1999, pp 38-39.

CHAPTER 10

THE CONDUCT OF PROCEEDINGS

This chapter describes how the Legislative Council orders and manages its proceedings on sitting days.

FORMALITIES AT THE COMMENCEMENT OF EACH SITTING DAY

At the commencement of each sitting day, the House considers a number of items of business, sometimes referred to as formalities, according to a set routine or order. This order is established under standing order 38,[1] read in conjunction with a number of other standing orders, and also by practice of the House. The full list of items of business that may be considered at the commencement of a sitting day is as follows:

- prayers (SO 28);
- messages from the Governor (SO 122);
- messages from the Legislative Assembly (SO 126);
- statements by the President;
- observances, marks of respect and condolence motions;
- tabling of reports and papers by the President (SO 38);
- formal business under standing order 44, as amended by sessional order (SO 38);
- tabling of reports and papers by ministers, committee chairs and the Clerk (SO 38);
- presentation of petitions (SO 38);
- giving of notices of motions (SO 38);
- postponements (SO 45);

1 For further information, see S Want and J Moore, edited by D Blunt, *Annotated Standing Orders of the New South Wales Legislative Council*, (Federation Press, 2018), pp 111-115.

- reporting of committee related matters;
- urgency motions (SO 201);[2]
- ministerial statements (SO 38); and
- ministerial replies to matters raised on the adjournment motion (SO 38).

A number of these items of business can also be considered at other times during the sitting day, such as messages from the Legislative Assembly, postponements of business, presentation of papers and ministerial statements.

Whilst the list of items of business that may be considered at the commencement of each sitting day is long, not all of the items would be expected to occur on any given sitting day. Whilst some items of business such as formal business occur routinely each sitting day, others such as urgency motions are infrequent, whilst others are extremely rare: there has only ever been one ministerial reply to a matter raised on the adjournment motion since the procedure was introduced in 1988.[3]

The number of items of business occurring at the commencement of a sitting day also varies considerably from one sitting day to the next. On the first sitting day after a long adjournment, there are usually a large number of items of business for the House to work through at the commencement of proceedings. By contrast, when the House is meeting on consecutive calendar days with no break in between, there may be relatively few items of business for the House to work through at the commencement of proceedings.

Further information is provided below on each individual item of business that may be considered at the commencement of a sitting day, and in some cases at other times when there is no other business before the House.

Warning bells

Fifteen minutes before the time fixed for the meeting of the House, the bells are rung for one minute to give members notice of the sitting. Two minutes before the time fixed for the meeting of the House, the bells are rung continuously to call members to the House (SO 27).

The President takes the Chair

At the time fixed for the meeting of the House, the bells are silenced, the Usher of the Black Rod announces the President to the House, and the President takes the Chair and acknowledges the House (SO 27).[4]

---

2 Described in standing order 38 as 'Matters of public interest'.

3 *Minutes*, NSW Legislative Council, 19 September 1996, p 334.

4 Former standing order 10 in force between 1895 and 1985 provided that the President take the chair on every day fixed for the meeting of the House within half-an-hour of the appointed time of meeting. Under this standing order, it became the accepted norm that the President would

As discussed in Chapter 9 (Meetings of the Legislative Council),[5] for the House to meet, there must be a quorum of at least eight members in addition to the President or other member presiding (SO 29(1)). A minister or a parliamentary secretary must also be present (SO 34).

Prayers

Upon taking the Chair, the President usually leads the House in reading the prayers — the Parliamentary Prayer and the Lord's Prayer (SO 28(1)). Alternatively, the President may nominate another member[6] or the Clerk[7] to read the prayers (SO 28(2)).

As a matter of practice, on the first day of each sitting week immediately following the reading of the prayers, the President also acknowledges the Gadigal clan of the Eora nation, the traditional owners of the land on which the Parliament meets.[8]

The Parliamentary Prayer was included in the standing orders in 1934, most likely in response to the adoption of a standing order in the same terms in the Legislative Assembly.[9] The Lord's Prayer was originally adopted by way of a sessional order in 1988, on the motion of the new Leader of the Government in the Legislative Council, the Hon Edward Pickering, following the election of the Greiner Government.[10] It was included in the current standing orders in 2004.

The reading of the prayers has been the subject of debate in the House on a number of occasions.[11] Of note, on two occasions in October 2001 and September 2003, the House debated motions moved by Ms Lee Rhiannon, a member of The Greens, to amend the sessional order in relation to prayers to require the President, instead of offering prayers, to ask all members 'to stand in silence and pray or reflect on [their] responsibilities to the people of New South Wales'. The question was resolved in the negative on both occasions.[12]

---

only take the chair half-an-hour after the appointed time of meeting according to sessional order, except in circumstances where the House had adjourned to a specific time, not being the usual hour of meeting, or in circumstances where the House adjourned to a specific time 'sharp'.

5 See the discussion under the heading 'Requirements for a sitting of the House'.

6 As an example, on 11 October 2011, President Harwin nominated the Revd the Hon Fred Nile to lead the House in reading the prayers in acknowledgment of the 30th anniversary of his election to the Legislative Council. See *Minutes*, NSW Legislative Council, 11 October 2011, p 457.

7 From the first day after the adoption of standing order 28 in 2004 until the end of her presidency in 2007, President Burgmann routinely requested the Clerk to lead the House in reading the prayers. See also *Minutes*, NSW Legislative Council, 19 November 2019, p 711.

8 For further information, see the *Annotated Standing Orders of the New South Wales Legislative Council*, (n 1), p 78.

9 *Minutes*, NSW Legislative Council, 31 May 1934, p 26. For further information, see the *Annotated Standing Orders of the New South Wales Legislative Council*, (n 1), p 79.

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

11 For further information, see the *Annotated Standing Orders of the New South Wales Legislative Council*, (n 1), pp 79-81.

12 *Minutes*, NSW Legislative Council, 17 October 2001, pp 1209, 1211-1212; 16 September 2003, pp 289-291.

Messages from the Governor

After taking the Chair and reading the prayers, the President reports the receipt of any messages from the Governor, or from the Lieutenant-Governor or the Administrator in the absence of the Governor, received since the last sitting of the House (SO 122(1)).

Messages from the Governor may also be received whilst the House is sitting, in which case they must be reported as soon as practicable without interrupting proceedings, usually at the conclusion of the item of business then before the House (SO 122(1)). However, there have been instances where business under consideration has been adjourned to allow a message from the Governor to be reported immediately.[13] If a message is received from the Governor whilst the House is in a Committee of the whole House, the President may resume the Chair without any question being put to report the receipt of the message, after which the President may leave the Chair and the committee resume its proceedings (SO 122(3)).

The most common messages from the Governor are messages indicating assent to bills and messages concerning the administration of the government. Other messages include messages concerning casual vacancies in the Council or in the representation of New South Wales in the Australian Senate and messages convening joint sittings to fill those vacancies.

Messages from the Legislative Assembly

Following the reporting of any messages from the Governor, the President reports the receipt of any messages from the Legislative Assembly received since the last sitting of the House (SO 126(2)).

Messages from the Legislative Assembly may also be received whilst the House is sitting, in which case, as with messages from the Governor, they must be reported as soon as practicable, usually at the conclusion of the item of business then before the House. On occasions a message has been received from the Legislative Assembly after the House has commenced the adjournment debate, but the President has nevertheless reported the message to the House before putting the question that the House do now adjourn.[14]

The most common messages from the Assembly relate to bills, such as forwarding an Assembly bill for concurrence, returning a Council bill with or without amendment, or responding to amendments made by the Council to an Assembly bill. Other common messages relate to the membership of joint committees and to arrangements for joint sittings.

13 For further information, see the *Annotated Standing Orders of the New South Wales Legislative Council Council*, (n 1), p 392.

14 See, for example, *Minutes*, NSW Legislative Council, 14 February 2018, p 2291.

Statements by the President

After any messages from the Governor or the Legislative Assembly have been reported, the President may make a statement to the House on important matters of privilege or procedure, or on the appointment of officers of the House. The following are recent examples:

- a statement concerning the 2014 reports of the Legislative Council and Legislative Assembly Privileges Committees into members' conduct;[15]
- a statement concerning the failure of GreyHound Racing NSW to comply with an order of the House for the production of State papers;[16]
- a statement concerning arrangements for filling a casual vacancy in the representation of New South Wales in the Australian Senate;[17]
- a statement concerning correspondence from the Independent Commission Against Corruption in relation to the Mt Penny return to order;[18] and
- a statement concerning the special adjournment motion.[19]

In making such statements the President may, when relevant, table supporting papers for the information of the House.[20]

It is also routine for the President to make statements to the House after postponements. Such statements usually concern more routine procedural matters, such as the President notifying the House of advice received by the Clerk of changes in the membership of committees, or statements concerning the administration of the House and the Parliament. The following are recent examples:

- a statement concerning the hosting of the Presiding Officers and Clerks Conference at Parliament House;[21]
- a statement concerning the display of the Aboriginal flag in the Council chamber;[22]

15 *Minutes*, NSW Legislative Council, 22 June 2016, p 966.
16 *Minutes*, NSW Legislative Council, 18 November 2015, p 608.
17 *Minutes*, NSW Legislative Council, 17 June 2014, p 2570.
18 *Minutes*, NSW Legislative Council, 14 March 2013, p 1537.
19 *Minutes*, NSW Legislative Council, 10 March 2016, p 717.
20 For example, the President accompanied his statement concerning the 2014 reports of the Legislative Council and Legislative Assembly Privileges Committees into members' conduct with the tabling of two items of correspondence between the Presiding Officers and the Premier concerning the matter. Similarly, the President concluded his statement concerning the failure of GreyHound Racing NSW to comply with an order of the House for the production of State papers by tabling a legal opinion from Mr Bret Walker SC.
21 *Minutes*, NSW Legislative Council, 8 August 2017, p 1807.
22 *Minutes*, NSW Legislative Council, 19 February 2013, p 1443.

- statements concerning the Parliament's twinning relationship with the National Parliament of Solomon Islands and the House of Representatives of the Autonomous Region of Bougainville;[23]
- statements concerning the Legislative Council's oral history project;[24]
- statements concerning the photography of proceedings; and
- statements concerning the broadcasting of proceedings[25] and the chamber's broadcasting system.[26]

Statements by the President may also be made at other times when there is no other business before the House, for example regarding urgent matters suddenly arising.

Observances, marks of respect and condolence motions

Following the reporting of any messages and statements by the President on important matters of privilege or procedure, the President may also make a statement to the House concerning a death, natural disaster or human tragedy, whereupon the House often pauses as a mark of respect. Ministers may also move a condolence motion without notice (SO 74(4)). Such business may also be taken at any other time when there is no other business before the House.[27]

There are no formal rules in relation to such observances, marks of respect and condolence motions. Presidents have acknowledged at the commencement of a sitting day the death of a former Governor,[28] the death of a former President,[29] the death of a serving member,[30] the death of a former member, the death of a serving member of the Assembly[31] and the death of a serving Clerk.[32] Presidents have also acknowledged at the commencement of

23 *Minutes*, NSW Legislative Council, 21 September 2010, p 2058; 21 June 2017, p 1743.
24 *Minutes*, NSW Legislative Council, 11 May 2015, p 890; 22 February 2017, p 1396.
25 *Minutes*, NSW Legislative Council, 13 October 2015, p 434.
26 *Minutes*, NSW Legislative Council, 22 May 2012, p 980; 12 June 2012, p 1041.
27 See, for example, *Minutes*, NSW Legislative Council, 15 September 2004, p 989.
28 See, for example, the announcement of the death of the Hon Gordon Jacob Samuels AC CVO QC, *Minutes*, NSW Legislative Council, 26 February 2008, p 436.
29 See, for example, the announcement of the death of the Hon Virginia Chadwick, *Minutes*, NSW Legislative Council, 22 September 2009, p 1374; and the announcement of the death of the Hon John Johnson, *Minutes*, NSW Legislative Council, 9 August 2017, p 1830.
30 See, for example, the announcement of the death of the Hon Roy Smith, *Minutes*, NSW Legislative Council, 31 August 2010, p 1977; and the announcement of the death of Dr John Kaye, *Minutes*, NSW Legislative Council, 3 May 2016, p 820.
31 See, for example, the announcement of the death of Mr Tony McGrane, Member for Dubbo, *Minutes*, NSW Legislative Council, 15 September 2004, p 989; and the announcement of the death of Ms Kathy Smith, Member for Gosford, *Minutes*, NSW Legislative Council, 1 June 2017, p 1714.
32 See the announcement of the death on 4 July 1971 of Major-General John Stevenson, CBE, DSO, ED, Clerk of the Parliaments and Clerk of the Legislative Council, *Minutes*, NSW Legislative Council, 4 August 1971, p 14.

a sitting day the death of foreign dignitaries and heads of state,[33] politicians from other jurisdictions,[34] religious leaders[35] and Australian military personnel.[36]

Following such statements it is usual practice for the President to ask members and officers to stand in their places as a mark of respect. On rare occasions, members have, by leave, addressed the House in eulogy of the deceased.[37]

The President may also inform the House that, on behalf of the members of the Council and the people of New South Wales, he or she has sent messages of condolence following natural or human disasters in other countries.[38]

Whilst it is normal practice for an acknowledgment of a death or human tragedy to be made by the President without a motion being moved, where considered appropriate, a condolence motion may be moved immediately without notice according to standing order (SO 74(4)(b)). For example, following the Port Arthur tragedy on 28 April 1996, the Leader of the Government in the Legislative Council, the Hon Michael Egan, moved without notice that the House convey its heartfelt and deep sympathy to the relatives of those who lost their lives and to those who suffered injury, and that the President convey the terms of the resolution to the people and the Government of Tasmania.[39] Similarly, following the terrorist attacks on the United States of America on 11 September 2001, Mr Egan moved without notice that the members, on their own behalf and on behalf of the people of New South Wales, express to the President of the United States of America and the people of the United States of America their deepest sorrow and heartfelt sympathy.[40]

A motion observing particular anniversaries may also be moved without notice by a minister (SO 74(4)(b)) or by another member according to notice. Under the standing orders in operation prior to 2004 all such motions required notice. For example, on 23 November 1995, at the commencement of the sitting day, the Leader of the Government

33 See, for example, the announcement of the death of the Rt Hon Sir Peter Kenilorea KBE, PC, former Speaker of the National Parliament of Solomon Islands and founding Prime Minister of Solomon Islands, *Minutes*, NSW Legislative Council, 8 March 2016, p 689; and the announcement of the death of Mr Nelson Mandela AC, former President of South Africa, *Minutes*, NSW Legislative Council, 30 January 2014, p 2290.

34 See, for example, the announcement of the death of Ms Jo Cox MP, a member of the British House of Commons, *Minutes*, NSW Legislative Council, 21 June 2016, p 952.

35 See, for example, the announcement of the death of His Holiness Pope John Paul II, *Minutes*, NSW Legislative Council, 5 April 2005, p 1304.

36 See, for example, the announcement of the death, on 2 April 2005, of nine Royal Australian Navy and Royal Australian Air Force personnel in a Sea King helicopter tragedy whilst undertaking humanitarian relief efforts in Indonesia. *Minutes*, NSW Legislative Council, 5 April 2005, p 1304. See also *Minutes*, NSW Legislative Council, 18 June 1996, p 222.

37 See, for example, *Minutes*, NSW Legislative Council, 14 April 2000, p 400. The occasion was the death of the Hon Dr Marlene Goldsmith.

38 See, for example, a message of condolence sent by the President to the Speaker of the New Zealand House of Representative in the wake of the terrorist attack in Christchurch on 15 March 2019. *Minutes*, NSW Legislative Council, 8 May 2019, p 34.

39 *Minutes*, NSW Legislative Council, 30 April 1996, p 78.

40 *Minutes*, NSW Legislative Council, 12 September 2001, p 1146.

in the Legislative Council, the Hon Michael Egan, moved pursuant to notice that the House commemorate the 50th Anniversary of the end of World War II on 15 August 1945. Members and officers of the House stood as a mark of respect and a bugler standing in the upper public gallery played the Last Post and Reveille.[41]

If sitting, the House also observes one minute of silence at 11.00 am on 11 November (Remembrance Day). The business before the House is interrupted and both members and officers stand as a mark of respect.

Between 2014 and 2018, it was the practice of the President at the commencement of proceedings each sitting week to make a statement concerning incidents or events occurring that month 100 years ago, to commemorate the centenary of the First World War.

There have also been occasions where ministers have used ministerial statements to mark the death of members of the community.[42]

Tabling of reports and papers by the President

A practice has developed whereby, following any messages, statements by the President and condolence motions, the President tables any reports required by statute to be tabled by the Presiding Officer of the Legislative Council, along with certain other papers. The President may also table such reports and papers at any other time when there is no other business before the House (SO 54(1)).

The tabling of reports and papers by the President is discussed further in Chapter 19 (Documents tabled in the Legislative Council).[43]

Formal business

Following the tabling of any reports or papers by the President, the House considers any requests for items of business to be taken as formal business (SO 38).

Formal business is an opportunity for notices of motions to be moved and determined by the House without amendment or debate, provided that no member present objects. In effect, it is a means of expediting the consideration of certain notices of motions on the *Notice Paper*.

41 *Minutes*, NSW Legislative Council, 23 November 1995, p 354.

42 For example, on 27 November 2007, the Leader of the Government in the Legislative Council, the Hon John Della Bosca, made a ministerial statement to the House concerning the death that day of the asbestos campaigner Mr Bernie Banton, AM. See *Minutes*, NSW Legislative Council, 27 November 2007, pp 367-368. The following day the House adopted a motion acknowledging the death of Mr Banton. See *Minutes*, NSW Legislative Council, 28 November 2007, p 374.

43 See the discussion under the heading 'Tabling of documents by the President'.

The process by which members put forward notices of motions for consideration as formal business is governed by standing order 44, as amended by sessional order. The terms of the sessional order are as follows:

> **44. Formal motions**
>
> (1) Before the House proceeds to business on the *Notice Paper*, the House will consider formal motions.
>
> (2) Any member wishing to have a notice of motion standing in the name of that member on the *Notice Paper* be taken as a formal motion must hand a signed request to one of the Clerks-at-the-Table by 4.00 pm on the sitting day before the sitting day on which the member wishes the matter to be considered as a formal motion.
>
> (3) At the time for formal motions, the President will ask with respect to each notice of motion for which a request has been received, in the order in which they appear on the *Notice Paper*, whether there is any objection to it being taken as a formal motion. If no objection is taken, the motion shall be taken as a formal motion.
>
> (4) The question on a formal motion must be put and determined without amendment or debate.
>
> (5) An order of the day for the third reading of bills may be dealt with as a formal motion.[44]

Under the terms of the sessional order, a single objection is sufficient to prevent a notice of motion being considered as formal business, in which case the House simply proceeds to the next item of business.[45] If no objection is taken to a notice of motion being considered as formal business, the member with carriage, or another member on his or her behalf,[46] moves the motion, and the motion is put to the House by the President without amendment or debate. In almost every instance, the motion is passed immediately on the voices, although members may call for a division to vote against the motion.[47]

Whilst the question on a motion listed as formal business must be determined without amendment, it has become common practice for a member with carriage of a motion listed as formal business to seek and obtain the leave of the House to amend the notice before moving it as formal business in order to make the motion, as amended, acceptable to all members of the House.

As indicated, the terms of standing order 44, as amended by sessional order, also prevent debate on a motion moved as formal business. However, in an unusual precedent on 17 June 2011, members, by leave, debated a motion brought on as formal

---

44 *Minutes*, NSW Legislative Council, 8 May 2019, pp 64-65.

45 The notice of motion remains listed on the *Notice Paper* and can be nominated again as formal business another day.

46 It is routine for members to move items listed as formal business on behalf of another member, for example in the absence of a member due to illness (SO 75(2)).

47 See, for example, *Minutes*, NSW Legislative Council, 27 May 2015, pp 129-130; 19 October 2010, pp 2089-2090.

business concerning the attendance of a magistrate at the Bar of the House. The debate was subsequently adjourned and resumed at a later hour and the question, as by leave amended, agreed to.[48]

As cited above, formal business is also an opportunity for orders of the day for the third reading of a bill to be moved and determined by the House without amendment or debate. This arises in instances where a bill originating in the Council is amended in committee, requiring preparation of a second print of the bill before it can be forwarded to the Legislative Assembly for concurrence. In such instances, the third reading of the reprinted bill should be held over to the next sitting day and is automatically listed as formal business.[49]

Whilst these arrangements for the consideration of formal business provide maximum flexibility to members and the House, on some sitting days the number of motions being put forward as formal business has reached close to 50. At times, this has attracted criticism.[50]

Tabling of reports and papers by ministers, committee chairs and the Clerk

The tabling of documents, other than by the President, takes place after formal business. It is an opportunity for the tabling of reports and papers by ministers, followed by the tabling of committee reports by committee chairs and the tabling of reports and papers by the Clerk (SO 38). Reports and papers may also be tabled by the President, ministers, committee chairs and the Clerk at any other time when there is no other business before the House (SOs 42(1), 54(1) and (2)). Private members require leave to table documents (SOs 42(2) and 54(4)).

The tabling of reports and papers by ministers, committee chairs and the Clerk is discussed in detail in Chapter 19 (Documents tabled in the Legislative Council).[51] In summary:

- Ministers routinely table government reports such as annual reports and reports prepared pursuant to statute, government responses to committee reports (SO 233, as amended by sessional order), ministerial responses to petitions (tabled according to sessional order), lists of unproclaimed legislation pursuant to standing order 160(2), and lists of papers tabled and not ordered to be printed in the previous calendar month (SO 59(1)).

48 *Minutes*, NSW Legislative Council, 19 June 2011, pp 214-215, 218-219. For another usual precedent, see *Minutes*, NSW Legislative Council, 10 August 2017, pp 1853-1864.

49 See, for example, *Minutes*, NSW Legislative Council, 23 August 2012, p 1162; 18 October 2017, p 1999.

50 See Procedure Committee, *Notices of motions*, Report No 7, June 2012; Procedure Committee, *Report relating to the rules for notices of motions, the rules for questions, e-petitions and two new sessional orders*, Report No 10, November 2017; and S Reynolds, 'Cane Toads, Notices of Motion and the Law of Unintended Consequences', Paper presented to the Society of Clerks at the Table, held at the 60th Commonwealth Parliamentary Association Conference, October 2014.

51 See the discussion under the headings 'Tabling of documents by ministers', 'Tabling of committee reports by committee chairs' and 'Tabling of documents by the Clerk'.

- Committee chairs, or in the absence of the chair, the committee deputy chair or another member of the committee, routinely table committee reports, and also occasionally committee discussion papers.
- The Clerk routinely tables reports of the Auditor General, the Statutory Rules and Instruments Paper (SO 231), committee reports received out of session (SO 42(1)), government responses to committee reports received out of session (SO 233, as amended by sessional order), returns to order under standing order 52(2), reports of the Independent Legal Arbiter under standing order 52(8), and government responses to petitions received out of session.

On a committee chair, or in the absence of the chair, the deputy chair or another member of the committee, tabling a committee report, or the Clerk tabling a committee report received out of session, the chair or another member may move that the House 'take note' of the report (SO 232, as amended by sessional order).[52] Debate on this motion is usually adjourned immediately after it is moved until the next sitting day, although it may also be adjourned to a later hour.[53] On occasion, the member moving the motion has commenced a take note speech before moving adjournment of the debate.[54]

On a minister tabling a government response to a committee report or the Clerk tabling a government response to a committee report received out of session, by sessional order adopted at the commencement of the 57th Parliament,[55] a member may move without notice that the House 'take note' of the government response. The debate must then be immediately adjourned to a later hour or the next sitting day. Alternatively, a notice of motion to 'take note' of the government response may be given and moved at a later time.[56]

52 *Minutes*, NSW Legislative Council, 8 May 2019, p 71.

53 As adopted in 2004, standing order 232(2) specifies that debate is to be adjourned to the next sitting day, without provision for adjournment to a later hour. However, for many years, members have routinely moved that the 'take note' debate on committee reports be adjourned to a later hour of the sitting, allowing debate to be resumed later in the day. In accordance with this practice, the requirement that debate be adjourned to the next sitting day was not included in the sessional order amending standing order 232 adopted by the House at the commencement of the 57th Parliament in May 2019. See *Minutes*, NSW Legislative Council, 8 May 2019, p 71. See also Ruling: Harwin, *Hansard*, NSW Legislative Council, 14 February 2012, p 8061.

54 As an example, on 31 October 2013, the Chair of the Privileges Committee moved the take note motion and then spoke in detail to Report No 69 of the Privileges Committee entitled *The 2009 Mount Penny Return to Order*, which was a significant report concerning the power of the House to order the production of State papers and compliance with such orders. See *Hansard*, NSW Legislative Council, 31 October 2013, pp 25158-25160.

55 *Minutes*, NSW Legislative Council, 8 May 2019, p 71.

56 The notice is placed on the *Notice Paper* before orders of the day for committee reports and government responses. If the notice is moved and adopted by the House, the debate on the government response is again to be immediately adjourned to a later hour or the next sitting day. Resumption of debate under these arrangements is set down on the *Notice Paper* for the next sitting day on which debate on committee reports and government responses takes precedence.

The House has set aside a specific time on Tuesdays after Question Time for debate on committee reports and government responses.[57]

Presentation of petitions

Members may present petitions to the House at the commencement of a sitting day after the tabling of papers and reports (SO 38) or at other times by leave of the House (SO 68(8)). The right to petition Parliament is one of the oldest parliamentary procedures.

Petitions may only be presented to the House by a member (SO 68(1)). Members and their staff often coordinate the collection of signatures to a petition, although a member may not present a petition that he or she has signed (SO 68(6)). Alternatively, petitions may be collated independently by a citizen or group of citizens and forwarded to a member for presentation to the House. In such circumstances, the petition is normally provided to a member likely to be sympathetic to the contents of the petition. Whilst petitions are usually presented by private members, on rare occasions they have also been presented by ministers[58] and even the President.[59]

On the President calling for the presentation of petitions, members may seek the call and present a petition stating the number of signatories, whether the petitioners are citizens or residents of the State,[60] a summary of the subject matter of the petition and the petition's prayer or request for action (SO 68(3)). On presentation of the petition, the member may move that the petition be received (SO 68(4)).[61] This motion is not open to amendment or debate (SO 68(5)). It is usual practice for the petition to be received by the House, regardless of its content, as members of the public are entitled to have their views placed before Parliament.

Members also routinely seek leave of the House for the suspension of standing orders for the presentation of an 'irregular petition'. An irregular petition is a petition which does not comply with the rules of the House, for example because it is not correctly addressed to the President and members of the Legislative Council.[62] The House routinely grants leave for the presentation of an irregular petition. However, on occasion the House

57 For further information, see the discussion later in this chapter under the heading 'Debate on committee reports and government responses'.

58 See, for example, *Minutes*, NSW Legislative Council, 2 December 2010, p 2334.

59 See, for example, *Minutes*, NSW Legislative Council, 7 November 1968, p 176; 10 December 1968, p 288; 4 August 2011, p 304.

60 Whilst most petitions are received from citizens of New South Wales, the House may also receive petitions from citizens outside the State.

61 A motion may also be moved that the petition be read by the Clerk, although this provision was last used in 1998. See *Minutes*, NSW Legislative Council, 24 June 1998, p 580.

62 Prior to February 2010, it was the practice of a member wishing to present an irregular petition to first seek leave to move a motion to suspend standing orders and, if leave were granted, to then move a motion for the suspension of standing orders. If that motion were agreed to, the member then presented the petition. However, in February 2010, the President adopted a new practice that once a member obtains leave of the House to suspend standing orders to allow the presentation of an irregular petition, that is sufficient authority to proceed with the presentation

has declined leave, for example where the House was not aware of the nature of the irregularity. In 2013, the President ruled that members should not presume that leave will automatically be given by the House for the presentation of an irregular petition, and that members should consult with all other parties before seeking leave to present an irregular petition.[63] 'Petitions' which have been deemed by the Clerk to be so irregular as not to constitute a petition have on occasion been presented by members as a tabled paper under standing order 54.[64]

Petitions may not be presented after the House proceeds to the business of the day, except by leave of the House (SO 68(8)).[65]

The rules related to the content of petitions and the management of petitions once they are presented to the House are discussed in more detail in Chapter 19 (Documents tabled in the Legislative Council).[66]

Giving of notices of motions

Following the presentation of any petitions the President calls for the giving of notices of motions (SO 38).

Notices of motions are advice of motions to be moved or bills to be introduced on a future sitting day. A member who wishes to initiate discussion by the House of a substantive motion[67] is required to give the House notice of the matter on a previous sitting day, unless the member has leave of the House or as otherwise provided in the standing orders.[68] This allows members time to prepare for debate on the motion.

On the President calling for the giving of notices of motions each sitting day, members seek the call from the President. On receiving the call, a member indicates the day proposed for moving the motion, usually the next sitting day,[69] and reads the notice of motion aloud, before handing a signed written copy to the clerks (SO 71(1)). If the notice is lengthy it need not be read in full, provided a summary of the intent of the notice is

---

of the petition. See *Minutes*, NSW Legislative Council, 23 February 2010, p 1652; *Hansard*, NSW Legislative Council, 23 February 2010, pp 20675-20676.

63 Ruling: Harwin, *Hansard*, NSW Legislative Council, 27 November 2013, p 26449.

64 See, for example, *Minutes*, NSW Legislative Council, 22 April 2010, p 1761; 4 June 2015, p 190; 23 June 2016, p 1000.

65 See, for example, *Minutes*, NSW Legislative Council, 26 June 1996, p 284.

66 See the discussion under the heading 'Petitions'.

67 For further information, see the discussion in Chapter 12 (Motions and decisions of the House) under the heading 'Substantive and subsidiary motions'.

68 For further information, see the discussion in Chapter 12 (Motions and decisions of the House) under the heading 'Moving of substantive motions'.

69 Whilst members generally give notice of their intention to move a motion on the next sitting day, they may give notice for a specific day not more than four weeks from the day the notice is given (SO 71(7)).

indicated to the House (SO 71(2)).[70] It has been ruled, however, that a member has the right to read a notice in its entirety, even if it is lengthy.[71]

In giving the call to members to give their notices, the President usually recognises ministers first, then the Leader of the Opposition, and then alternates the call between government, opposition and cross-bench members until all notices have been given.[72] Under a practice first instituted by President Willis in 1992, ministers may give consecutive notices of motions whereas private members may only give one notice on each call from the Chair (SO 71(5)).[73] However, for convenience, in some instances, the President may allow members to give consecutive notices. There is no restriction on the number of notices a member may give,[74] nor on members giving notices identical to other members' notices.[75] A member may give notice on behalf of another member who is not present in the House (SO 71(4)).[76]

There are few restrictions on the subject matter of notices of motions, aside from the rules which apply to debate generally.[77] Of note there is no application of the rule of anticipation in regard to the giving of notices as it is not until a motion is before the House that the rule is invoked.[78] Nevertheless, the President has on several occasions ordered that notices contrary to the standing orders be amended before appearing on the *Notice Paper* (SO 71(8)). For example, in 2016 the President ruled that a notice containing an embedded image was contrary to precedent and ordered that the image and text referring to it be removed from the notice.[79] In 1990, certain paragraphs of a notice of motion for the appointment of a select committee were ruled by the President to be *sub*

---

70 Ruling: Fazio (Deputy), *Hansard*, NSW Legislative Council, 3 May 2006, p 22429.

71 Ruling: Burgmann, *Hansard*, NSW Legislative Council, 5 May 2004, p 8263.

72 In the Senate, the rationale for this is that a senator giving a number of notices could take up a number of places in a row on the *Notice Paper*, and thereby make it less likely that subsequent notices would be reached. See R Laing (ed), *Odgers' Australian Senate Practice*, as revised by H Evans, 14th ed, (Department of the Senate, 2016), p 231. This is not applicable in the Council, however the practice is followed anyway.

73 For statements by the President at the beginning of a session of the order in which members would be given the call for the giving of notices, see *Hansard*, NSW Legislative Council, 29 April 2003, pp 13-14 per President Burgmann; 28 May 2019, p 4 per President Ajaka.

74 However, from time to time, the number of notices of motions given has attracted criticism. See Procedure Committee, *Notices of motions*, Report No 7, June 2012; Procedure Committee, *Report relating to the rules for notices of motions, the rules for questions, e-petitions and two new sessional orders*, Report No 10, November 2017; and S Reynolds, 'Cane Toads, Notices of Motion and the Law of Unintended Consequences', (n 50).

75 Ruling: Harwin, *Hansard*, NSW Legislative Council, 19 March 2013, p 18740. If there was a restriction on members giving identical notices of motions, a member could give notice of motion with no intention of ever moving it, for the purposes of preventing, or attempting to prevent, the matter coming before the House. See *Odgers*, 14th ed, (n 72), p 233. See, for example, *Notice Paper*, NSW Legislative Council, 21 November 2012, p 7140 (three notices for leave to bring in a State Marriage Equality Bill).

76 In such cases, the names of both members are recorded in the *Notice Paper*.

77 Ruling: Harwin, *Hansard*, NSW Legislative Council, 13 March 2013, pp 18463-18464.

78 Ruling: Harwin, *Hansard*, NSW Legislative Council, 9 November 2011, p 7110.

79 *Minutes*, NSW Legislative Council, 9 March 2016, p 708 per President Harwin.

judice and the Clerk was directed to amend the notice.[80] On a few occasions notices have been ruled out of order entirely.[81]

Notices of motions are set down on the *Notice Paper* under the relevant category of business in the order in which they are given (SO 71(3)). For example, notices given by a minister are set down under government business, and notices given by private members are set down under private members' business.[82] There is no restriction on the number of notices a member may have on the *Notice Paper*.

Notices of motions may not be given after the House proceeds to the business of the day as set out in the *Notice Paper*, except by leave of the House (SO 71(6)).[83] However, the House generally agrees to any such requests for leave, particularly when a matter has occurred during a sitting day which requires action the next sitting day. No debate is allowed on the question that leave be given.[84]

Notices of motions are not considered to be in the custody of the House until they are moved. Until then a notice may be withdrawn by the member with carriage at any time before the motion is moved (SO 72(2)).[85] Members usually withdraw notices during the giving of notices, although there is no restriction on members withdrawing notices at any other time when there is no other business before the House. Unlike Senate standing order 77(2), there is no provision for alteration of notices already given. As a result, members wishing to change a notice standing in their name should withdraw the notice and give a new notice.[86]

On occasion, the House has adopted a resolution that members be able to give notice of motions by delivery to the Clerk, to be entered into the *Notice Paper* in random order.[87]

---

80 *Minutes*, New South Wales Legislative Council, 16 May 1990, pp 164-165; *Hansard*, NSW Legislative Council, 16 May 1990, pp 3364-3369.

81 For further information, see L Lovelock and J Evans, *New South Wales Legislative Council Practice*, 1st ed, (Federation Press, 2008), pp 278-279; and the *Annotated Standing Orders of the New South Wales Legislative Council*, (n 1), pp 245-246.

82 Notices set down for a specific day under standing order 71(7) are set down under business for future consideration. For further information, see the discussion in Chapter 11 (Publication of and access to the proceedings of the Legislative Council) under the heading 'The *Notice Paper*'.

83 An exception to this rule is provided in standing order 77(5) under which, if the President determines that a matter of privilege should have precedence of other business, a member may give notice of motion to refer the matter to the Privileges Committee.

84 Ruling: Trickett (Deputy), *Hansard*, NSW Legislative Council, 30 November 1900, pp 6079-6080.

85 Members may also by notice change the day proposed for the moving of a notice of motion, but only to a later day (SO 72(1)).

86 Although, as noted previously, it has become common practice for a member with carriage of a notice of motion listed as formal business to obtain the leave of the House to amend the notice before moving it as formal business in order to make the motion, as amended, acceptable to all members of the House.

87 For further information, see the *Annotated Standing Orders of the New South Wales Legislative Council*, (n 1), p 246.

The expiry of certain notices of motions given by private members is discussed in Chapter 11 (Publication of and access to the proceedings of the Legislative Council).[88]

Postponements

Following the giving of any notices of motions, an opportunity is provided to members to postpone any item of business standing in their name on the *Notice Paper* for that day (SO 45(1)). They may also postpone an item of business on behalf of another member.

An item of business may also be postponed at the time in proceedings when the item is called on (SO 45(2)). This is discussed further later in the chapter.[89]

Reporting of committee related matters

After any postponements, any additional committee related matters are reported to the House. Such matters include new terms of reference self-referred by committees, new terms of reference adopted by the Law and Justice, Social Issues and State Development Committees following a reference from a minister,[90] and resolutions of committees extending their inquiry reporting dates where the House has not imposed a reporting date on the committee or the inquiry was self-referred.

Urgency motions

Following the reporting of any outstanding committee related matters, the House may debate an urgency motion under standing order 201.

The provision under standing order 201 for urgency motions is a procedural device for a member to initiate discussion on an urgent matter without the usual requirement of notice.

A member seeking to move an urgency motion is required to hand a written statement of the proposed matter of urgency to the President before the commencement of the sitting (SO 201(2)). The matter should be framed as a simple and brief statement, and should not attempt to introduce argument or opinion. At the appointed time in proceedings, the President informs the House that an urgency motion under standing order 201 has been received,[91] and puts the question on urgency to the House without amendment or

88 See the discussion under the heading 'The *Notice Paper*'.

89 See the discussion under the heading 'Postponement of business'.

90 Adopted under the resolution appointing the subject standing committees.

91 The President has no discretion in deciding whether to inform the House of the receipt of an urgency motion. However, the requirement under standing order 201(2) for the provision of the motion to the President in advance does provide the President and the Clerk with an opportunity to consider whether the motion complies with the standing orders and practice. Prior to the adoption of standing order 201(2) in 2004, there was no requirement for the provision of the written statement of the proposed matter of urgency to the President in advance, which meant that it could not be reviewed by the President or the Clerk. On 3 June 1987, the President made a

debate, except a statement by the mover and a statement by a minister not exceeding 10 minutes each (SO 201(3)). If the question on urgency is negatived, the matter lapses, and the House proceeds to the next item of business.

If urgency is agreed to, the member then moves 'That this House do now adjourn to discuss the following matter of urgency: [specifying the matter]', whereupon debate on the motion takes precedence of all other business until concluded. The motion is not open to amendment.[92] If the debate is interrupted by order of the House, for example for Question Time or debate on committee reports, it is resumed at a later hour, or is set down for further consideration on the next sitting day.[93]

Time limits apply to individual speakers on an urgency motion, as listed in Appendix 11 (Time limits on debates and speeches in the Legislative Council) (SO 201(4)).[94] However there is no time limit for the overall debate. At the end of the debate, the motion lapses, without the question that the House adjourn being put (SO 201(5)).[95] A second urgency motion may not be debated on the same sitting day (SO 201(6)).

There are two notable features of urgency motions under SO 201. First, unlike debate on a matter of public importance initiated under standing order 200,[96] of which notice is required to be given, the House receives no notice of an urgency motion under SO 201. The House is simply notified by the President that an urgency motion has been received and, following statements by the mover and a minister, must decide immediately whether to grant urgency. As such, urgency motions may surprise other members of the House and have sometimes been described as 'the ultimate ambush' on the government. Second, the nature of an urgency motion is that no issue is determined or resolved. At the conclusion of the debate the motion simply lapses. Accordingly, the debate is

---

statement that an urgency motion moved earlier that day, on which the question of urgency was negatived on division, was out of order as it contained matters of a substantive nature, including allegations against ministers, that were couched in terms requiring the House to express a decision. The President declared that the House's consideration of the motion should not be regarded as a precedent. See *Hansard*, NSW Legislative Council, 3 June 1987, p 13451.

92 On 19 May 1993, an attempt to move an amendment to an urgency motion was ruled out of order by the Deputy President on the grounds that the motion for adjournment is a procedural device to provide an opportunity for the House to discuss a matter of public importance and that the moving of an amendment to the motion was outside the rules of the House. See *Minutes*, NSW Legislative Council, 19 May 1993, pp 149-150.

93 For further information, see the *Annotated Standing Orders of the New South Wales Legislative Council*, (n 1), p 659. There is one instance in which an urgency motion was superseded by a motion to adjourn of the House. See *Minutes*, NSW Legislative Council, 20 September 2005, pp 1583-1584.

94 On one occasion, the House granted leave for individual speakers to speak for additional time. See *Minutes*, NSW Legislative Council, 16 February 1982, p 154.

95 Under former standing order 13 in place prior to 2004, very different arrangements applied to the conclusion of debate on an urgency motion and for moving to the next question. For further information, see the *Annotated Standing Orders of the New South Wales Legislative Council*, (n 1), p 661.

96 For further information, see the discussion later in this chapter under the heading 'Matters of public importance'.

solely an opportunity to spotlight some specific matter that, in the opinion of the House, is of sufficient urgency to warrant immediate consideration.[97]

Urgency motions under standing order 201 are infrequent, particularly in recent years. Where urgency motions have been used, they have mostly been used by opposition or cross-bench members, but on rare occasions the government has used the procedure.[98]

Ministerial statements

Following any urgency motion, ministers may make a ministerial statement (SO 38). Ministerial statements may also be made at other times when there is no other business before the House (SO 48(1)). For example, it is common for ministerial statements to be made at the end of Question Time.

Standing order 48(1) requires that ministerial statements relate to 'government policy'. Ministers have used them to notify changes in the ministry, announce legislative proposals and to correct remarks made in Question Time. However, the requirement for statements to relate to 'government policy' has been interpreted very broadly, and a very wide range of subjects have been canvassed in ministerial statements.[99]

The Leader of the Opposition, or a member nominated by the Leader of the Opposition, may speak to a ministerial statement for a period of time not exceeding the time taken by the minister in making the statement (SO 48(2)). Although not mandatory, it is a courtesy for the minister making a ministerial statement to have previously advised the Leader of the Opposition of the subject and nature of the statement.

There is no provision for any other member to speak to a ministerial statement.[100] They may only do so by leave of the House.

Ministerial replies to matters raised on the adjournment

After any ministerial statements, ministers may make a statement in relation to any matter raised in the adjournment debate on a previous sitting day (SO 33). This provision was

97 Ruling: Johnson, *Hansard*, NSW Legislative Council, 3 June 1987, p 13451.

98 For example, on 3 May 2006, the government used an urgency motion to discuss the proposed sale of the Snowy Hydro Ltd. See *Minutes*, NSW Legislative Council, 3 May 2006, pp 1981, 1984.

99 For further information, see the *Annotated Standing Orders of the New South Wales Legislative Council*, (n 1), pp 143-145.

100 From May 1988, soon after the commencement of the 49th Parliament, to the end of the 51st Parliament in February 1999, provision was made by sessional order for the leader of any other party or group, where such leadership had been previously announced to the House, or a member nominated by the leader, to also reply to a ministerial statement for a time not exceeding the time taken by the minister in making the statement. This provision was discontinued in the sessional orders adopted at the commencement of the 52nd Parliament in May 1999. For further information, see the *Annotated Standing Orders of the New South Wales Legislative Council*, (n 1), p 145.

first adopted as a sessional order in May 1988,[101] before being incorporated in the current standing orders in 2004. However, it has been used on only one occasion, and then only in its earlier form as a sessional order.[102] Ministers have preferred to reply to matters raised in the adjournment debate immediately at the conclusion of the debate (SO 31(4)).

BUSINESS OF THE DAY

Following the conclusion of formalities at the commencement of each sitting day, the House proceeds to business of the day (SO 38). Business of the day includes items of business set down on the *Notice Paper* under the following categories: matters of privilege, business of the House, matters of public importance, government business, general or private members' business and debate on committee reports and government responses.

Sitting days also almost always include Question Time and the adjournment debate, and may also include other business such as the 'take note' debate on answers to questions.

Matters of privilege

A motion concerning a matter of privilege takes precedence over all other items of business listed on the *Notice Paper* (SO 74(3)). Whilst matters of privilege are rare, they are always the first item listed on the *Notice Paper*.

The procedures for members to raise matters of privilege are discussed in more detail in Chapter 3 (Parliamentary privilege in New South Wales).[103]

Business of the House

A motion concerning business of the House takes precedence over all other business of the day, with the exception of a motion concerning a matter of privilege. Business of the House is listed on the *Notice Paper* after any matter of privilege.

Standing order 39 requires that the following business be set down as business of the House:

- a motion for leave of absence of a member under standing order 63 (SO 39(a));
- a motion concerning the qualification of a member (SO 39(b));[104] and

101 *Minutes*, NSW Legislative Council, 24 May 1988, p 49.

102 On 19 September 1996, the Hon Michael Egan replied to a matter concerning Port Stephens Council raised by Mr Cohen during the adjournment debate on 17 June 1996. See *Minutes*, NSW Legislative Council, 19 September 1996, p 334.

103 See the discussion under the heading 'Raising a matter of privilege'.

104 For further information, see the *Annotated Standing Orders of the New South Wales Legislative Council*, (n 1), pp 116-117.

- a motion concerning the operations of the chamber (SO 39(c)), such as the adoption of standing orders, the adoption or variation of sessional orders, the adoption of rules for visitors to the galleries,[105] and the restoration of business from a previous session.[106]

The following business is also set down as business of the House according to other standing orders:

- a motion to disallow a statutory instrument (SO 78(1));[107]
- a motion to adopt a report of the Privileges Committee on a right of reply (SO 203(7));[108] and
- a motion to disallow a practice note on the procedure or practice to be followed under any standing order (SO 3(3)).[109]

This list is not exhaustive. For example, a motion for proceedings to be interrupted at a certain time for a member to give his or her first or valedictory speech is set down as business of the House.[110] Certain other items of business have also been set down as business of the House, for example the adjourned debate on the question that standing and sessional orders be suspended. The giving of precedence to some items as business of the House is not a precise science and involves the exercise of judgement by the Clerk. If the House does not wish to consider a matter that has been listed on the *Notice Paper* as business of the House, the House may postpone or adjourn consideration of the matter.

Matters of public importance

Standing order 200(1) provides that a member may give a notice of motion 'That the following matter of public importance be discussed forthwith: [specifying the matter]'. As with urgency motions, the motion should be framed as a simple and brief statement, and should not attempt to introduce argument or opinion. Such a notice is set down on the *Notice Paper* as a matter of public importance. Matters of public importance take precedence of all other business on the *Notice Paper*, except matters of privilege and

105 *Minutes*, NSW Legislative Council, 10 November 2009, pp 1487-1488.

106 For further information, see the *Annotated Standing Orders of the New South Wales Legislative Council*, (n 1), pp 117-118.

107 For further information, see the discussion in Chapter 18 (Delegated legislation) under the heading 'Disallowance procedure'.

108 A notice of motion to adopt a report of the Privileges Committee on a right of reply is placed on the *Notice Paper* as business of the House for six sitting days. If it is not dealt with within the six sitting days it is placed on the *Notice Paper* as general business.

109 Practice notes have not been issued by the President since provision for them was incorporated in the standing orders in 2004.

110 For the first instance of this, see *Notice Paper*, NSW Legislative Council, 17 November 2016, p 7042.

business of the House (SO 200(2)), subject to the caveat that matters of public importance are only considered on days on which government business has precedence (SO 200(8)).[111]

Consideration of a matter of public importance proceeds in a somewhat similar manner to an urgency motion. On the matter of public importance being reached in the order of business, the member with carriage moves that the matter proceed forthwith, whereupon the President puts the question to the House without amendment or debate, except a statement by the mover and a statement by a minister not exceeding 10 minutes each (SO 200(3)). If the question that the matter proceed forthwith is negatived, the matter lapses, and the notice is removed from the *Notice Paper*.[112]

If the question that the matter proceed forthwith is agreed to, the member with carriage moves the motion and debate continues. As with urgency motions, the motion is not open to amendment.[113] Where debate is interrupted by order of the House, for example for Question Time, it is resumed at a later hour, or is set down for further consideration on the next sitting day. The discussion may also be adjourned and its resumption set down on the *Notice Paper* as an order of the day (SO 200(6)).[114]

Various time limits apply to individual speakers in the debate, as listed in Appendix 11 (Time limits on debates and speeches in the Legislative Council) (SO 200(5)). The overall debate is limited to one hour and 30 minutes, at which time the President calls on the mover to speak in reply (SO 200(4)). At the end of the debate, the motion simply lapses, without any question being put, and the House proceeds to the next item of business. A second matter of public importance may not be brought on on the same sitting day, although this does not preclude resumption of an adjourned debate on a matter of public importance on the same sitting day (SO 200(7)).

Debate of a matter of public importance is similar to debate on an urgency motion. As with an urgency motion, the motion 'That the following matter of public importance be discussed forthwith: [specifying the matter]' does not require the House to express an opinion on the matter. The two motions are also similar in the priority afforded to them over other items of business, and in the time limits imposed on individual speakers. The fundamental difference between the two is that, unlike an urgency motion, members have notice of debate on a matter of public importance.

111 For example, on 25 September 2008, a general business day, a notice of motion on a matter of public importance was set down on the *Notice Paper* after general business. See *Notice Paper*, NSW Legislative Council, 25 September 2008, p 3191.

112 See, for example, *Minutes*, NSW Legislative Council, 7 March 2018, p 2318.

113 This is because the motion that the House discuss the following matter of public importance is a procedural device only to provide the House with an opportunity to discuss the matter.

114 Resumption of the debate is set down on the *Notice Paper* with the same precedence as provided under standing order 200(2).

As with urgency motions, the House has seldom debated matters of public importance in recent years.[115] On a number of occasions, the House has declined to debate such motions.[116]

Government business

Government business is business initiated by a minister concerning the operations of the government.[117] Most items of government business listed on the *Notice Paper* are for government bills to be introduced into the House or to progress through their remaining stages as part of the government's legislative program. Other government business includes the Address-in-Reply to the Governor's speech on opening Parliament and the budget estimates take note debate. These items are considered separately below.

Standing order 40 requires that the House appoint the days and times on which government business is to take precedence. The sessional order adopted at the commencement of the 57th Parliament in May 2019, as amended on the second sitting day of 2020, provides that government business take precedence of general or private members' business on Tuesdays and Thursdays.[118]

This arrangement is reflected in the order in which government and general business appear on the *Notice Paper*. On Tuesdays and Thursdays, government business is listed on the *Notice Paper* after any matters of privilege, business of the House or matters of

115 On 4 June 2020, the House debated a matter of public importance relating to public sector wages. See *Minutes*, NSW Legislative Council, 4 June 2020, pp 1022-1023 (proof). The previous occasion on which the House debated a matter of public importance was in 2005, when the House debated a motion relating to gaming machine taxes. See *Minutes*, NSW Legislative Council, 12 October 2005, pp 1621-1622.

116 *Minutes*, NSW Legislative Council, 9 April 2008, p 531; 14 May 2008, p 590; 20 October 2008, p 818; 13 September 2017, p 1882; 18 October 2017, pp 2003-2004; 8 March 2018, p 2318; 14 March 2018, p 2353; 17 October 2018, pp 3027-3028; 13 November 2019, p 660.

117 Whilst invariably business listed in the name of a minister on the *Notice Paper* concerns the operations of the government, there would be nothing to prevent a minister seeking to list an item on the *Notice Paper* in a private capacity. However, in a precedent to the contrary, on 10 September 2014, a motion standing in the name of the Leader of the Government in the Legislative Council, the Hon Duncan Gay, in relation to the Australian Women's Hockey Team was listed and moved as business of the House. See *Notice Paper*, NSW Legislative Council, 10 September 2014, p 2; *Minutes*, NSW Legislative Council, 10 September 2014, pp 36-37. In the Senate, ministers occasionally initiate business with an indication that they do so in a private rather than ministerial capacity. See *Odgers*, 14th ed, (n 72), p 210.

118 *Minutes*, NSW Legislative Council, 26 February 2020, pp 809-810. Prior to the commencement of the 57th Parliament, the sessional orders generally provided that government business take precedence of general or private members' business on Tuesdays, Wednesdays and on Thursdays after a specified time. It was also not uncommon towards the end of a sitting period when there was a significant amount of government business before the House for a motion to be moved that government business take precedence of general business for the entirety of Thursdays. For further information on variations in the operation of this standing order since 2004, see the *Annotated Standing Orders of the New South Wales Legislative Council*, (n 1), p 121.

public importance, but before general or private members' business. On Wednesdays the order of government and general business is reversed.

Ministers may arrange the order in which government business is placed on the *Notice Paper* for the next sitting day by indication to the Clerk (SO 43).

Time limits apply to individual speakers during debate of government bills, as listed in Appendix 11 (Time limits on debates and speeches in the Legislative Council). However, there is no overall time limit on debate on government bills or government motions.

Address-in-Reply debate

The Address-in-Reply to the Governor's speech on opening Parliament is routinely debated at the commencement of a new session of a Parliament. It is considered to be an item of government business.

As indicated previously in Chapter 9 (Meetings of the Legislative Council), following the opening of a Parliament, at the next sitting of the House, the President reports receipt of the Governor's speech (SO 8(1)). Subsequently, a member of the government, usually a government backbencher,[119] moves a motion without notice for an Address-in-Reply to the Governor. The motion is the only motion that requires a seconder,[120] also by tradition a government backbencher (SO 8(2)). The form of the motion is as follows:[121]

> MAY IT PLEASE YOUR EXCELLENCY –
>
> We, the members of the Legislative Council of the State of New South Wales, in Parliament assembled, desire to express our thanks for Your Excellency's speech, and to express our loyalty to Australia and the people of New South Wales.
>
> We assure Your Excellency that our earnest consideration will be given to the measures to be submitted to us, and that we will faithfully carry out the important duties entrusted to us by the people of New South Wales.
>
> We join Your Excellency in the hope that our labours may be so directed as to advance the best interests of all sections of the community.[122]

119 However in 2015, the motion for the Address-in-Reply was moved by the Leader of the Government in the Legislative Council, and seconded by a government backbencher. See *Minutes*, NSW Legislative Council, 6 May 2015, p 75.

120 See standing order 75(1).

121 Prior to 1875, it was the practice of the House for a select committee to be appointed to prepare the Address-in-Reply, whilst business of the House was suspended. For further information, see *New South Wales Legislative Council Practice*, 1st ed, (n 81), pp 225-226.

122 This form of words was first adopted in 1997. See *Minutes*, NSW Legislative Council, 17 September 1997, p 45. Prior to the Address-in-Reply to the Governor's opening speech on 22 May 2006, the Address-in-Reply expressed loyalty to the Sovereign rather than 'to Australia and the people of New South Wales'. See, for example, *Minutes*, NSW Legislative Council, 24 May 2006, pp 42-43. Prior to 1977, the final paragraph of the Address-in-Reply stated: 'We join Your Excellency in the hope that, under the guidance of Divine Providence, our labours may be so directed as to advance the best interests of all sections of the community.'

Members are given wide latitude in their contributions to the debate on the Address-in-Reply, although members' remarks should be relevant to the Governor's speech.[123] The debate often becomes a wide-ranging discussion of any matter which may properly be considered by the Parliament, including the conduct of the government, the administration of government departments, any proposed legislation and the need for other legislative measures to be taken. It is usual for debate on the Address-in-Reply to continue over several days, and for the debate to be adjourned several times to allow the House to deal with other business in the meantime.[124]

Occasionally, amendments have been moved to the motion for the Address-in-Reply. In most cases these amendments have either been negatived[125] or withdrawn by leave.[126] However, in 1961 the Address-in-Reply was amended, on division, to add a paragraph recording the rejection of the bill to abolish the Council at a referendum held earlier that year.[127] In 1889, the order of the day for the Address-in-Reply was discharged after an amendment had been moved expressing regret at the action of the Governor in appointing certain members to the Legislative Council.[128] On another occasion in 1904, the motion for the Address-in-Reply was dispensed with on the suggestion of the Governor.[129]

Once the Address-in-Reply has been agreed to, a motion is moved and adopted for it to be presented to the Governor by the President and members (SO 8(4)).[130] At the appointed hour, the President, accompanied by members and officers, proceeds to Government House to be received by the Governor. The President reads the Address-in-Reply and formally presents it to the Governor who makes a reply. The President then introduces accompanying members and officers to the Governor. On returning, the President reports to the House on the presentation of the Address and the reply of the Governor (SO 8(5)).

123 Rulings: Suttor, *Hansard*, NSW Legislative Council, 23 July 1912, p 15; Flowers, *Hansard*, NSW Legislative Council, 8 September 1920, p 700.

124 In 2006, the Address-in-Reply was not adopted until six months after it was moved, and only one day before the House adjourned ahead of an election. See *Minutes*, NSW Legislative Council, 22 November 2006, pp 401-402.

125 *Minutes*, NSW Legislative Council, 16 November 1875, p 4; 17 March 1885, p 4; 19 May 1891, p 6; 9 July 1903, p 34; 17 March 1994, pp 86-87.

126 *Minutes*, NSW Legislative Council, 10 September 1878, p 4; 28 August 1894, p 8; 27 April 1897, p 6; 24 August 1904, p 8; 17 July 1924, p 22.

127 *Minutes*, NSW Legislative Council, 30 August 1961, p 56.

128 *Minutes*, NSW Legislative Council, 7 March 1889, p 16; *Hansard*, NSW Legislative Council, 7 March 1889, pp 248-249.

129 *Hansard*, NSW Legislative Council, 19 January 1904, p 2. For further information, see the *Annotated Standing Orders of the New South Wales Legislative Council*, (n 1), p 21.

130 On the day for the presentation of the Address-in-Reply, the presentation is listed as a separate item of business on the *Notice Paper*.

Budget estimates 'take note' debate

Each year following the tabling of the budget papers in the Council,[131] the Leader of the Government in the Legislative Council, or the Treasurer if the Treasurer is a member of the Council,[132] moves a motion that the House 'take note' of the budget estimates and related papers for the financial year. The debate is set down as government business, and is an opportunity for members to debate a wide range of issues in relation to the budget and the operations of the government generally.

The House may adopt provisions concerning the scheduling of the budget estimates 'take note' debate, including time limits for individual speakers.[133] It is not unusual for the 'take note' debate on the budget estimates to take up to 12 months, during which time it remains listed on the *Notice Paper* under government business.

There are various rulings of the Chair that members are afforded very wide latitude in debating the budget estimates.[134] A corollary is that the rule of anticipation for questions is not applied to debate on budget estimates (SO 65(4)).

At the conclusion of the debate, the question that the House 'take note' of the budget estimates is put. The agreement of the House to this question is not an expression in favour of or against the budget, but merely concludes the debate.

The annual budget estimates inquiry under each year by the portfolio committees is discussed in more detail in Chapter 20 (Committees).[135]

131 The appropriation bills for the forthcoming financial year are usually introduced into the Legislative Assembly in May or June of the preceding financial year. They are accompanied by the budget papers, which are tabled in the Legislative Assembly immediately following the introduction of the budget bills in that House. Shortly after, they are also tabled in the Legislative Council by the Leader of the Government in the Legislative Council, or by the Treasurer if the Treasurer is a member of the Council.

132 On 4 April 1995, the Governor appointed the Hon Michael Egan as Treasurer, the first time a Treasurer had been appointed from the Legislative Council since responsible government in 1856. Subsequently, on 21 September 1995, the House agreed to a request from the Assembly for the Treasurer to attend at the table of the Legislative Assembly on 10 October 1995 for the purpose of giving the budget speech. See *Minutes*, NSW Legislative Council, 21 September 1995, p 186. Subsequently, on the Treasurer's return to the Legislative Council, the Treasurer tabled the budget papers in the House. See *Minutes*, NSW Legislative Council, 10 October 1995, p 196. This practice has continued for all subsequent budgets when the Treasurer has been a member of the Council.

133 In the past, the House has adopted sessional orders setting aside a particular time for the debate on the budget estimates and implementing time limits for speakers. Most recently, by sessional order adopted on 12 August 2014, debate on the motion to 'take note' of the budget estimates was given precedence after debate on committee reports on Tuesdays until 7.00 pm, and each speaker on the motion was limited to 15 minutes. See *Minutes*, NSW Legislative Council, 12 August 2014, pp 2647-2648.

134 Rulings: Gardiner (Deputy), *Hansard*, NSW Legislative Council, 12 October 2011, p 6023; 18 September 2012, p 15274.

135 See the discussion under the heading 'Budget estimates'.

General or private members' business

General or private members' business[136] is business listed on the *Notice Paper* under the names of private members,[137] including both motions and bills. The term 'private member' is not defined in the standing orders but has been understood to refer to any member of the House other than the President, a minister or a parliamentary secretary acting on behalf of a minister in relation to government business.

Standing order 40 requires that the House appoint the day and time on which general business is to take precedence. On the second sitting day of 2020, the House adopted an amendment to the sessional orders providing that general or private members' business take precedence of government business on Wednesdays.[138]

This arrangement is reflected in the order in which private members' business and government business appear on the *Notice Paper*. On Wednesdays, private members' business is listed on the *Notice Paper* after any matters of privilege, business of the House or matters of public importance, but before government business. On Tuesdays and Thursdays the order of private members' business and government business is reversed.

In modern times, except when the House first meets after prorogation, the House generally has before it far more private members' business than may be dealt with on a single sitting day. In order to prioritise debate on items of private members' business, standing order 184 provides that the House is to consider items of private members' business in a sequence established by draw conducted by the Clerk at the beginning of each session and from time to time under standing order 185. The items selected in the draw are shown on the *Notice Paper* under the category 'Private members' business—items in the order of precedence.' All other private members' business is listed under the category 'Private members' business—items outside the

136 The two terms are used interchangeably, although 'private members' business' is the term used in the *Notice Paper*.

137 Some items listed in the name of a private member may also be placed on the *Notice Paper* under other categories. For example, a notice of motion given by a private member to disallow a statutory instrument is placed on the *Notice Paper* as business of the House.

138 *Minutes*, NSW Legislative Council, 26 February 2020, pp 809-810. Prior to the commencement of the 57th Parliament, the sessional orders generally provided that government business take precedence of general or private members' business on Tuesdays, Wednesdays and on Thursdays after a specified time. It was also not uncommon towards the end of a sitting period when there was a significant amount of government business before the House for a motion to be moved that government business take precedence of general business for the entirety of Thursdays. For further information on variations in the operation of this standing order since 2004, see the *Annotated Standing Orders of the New South Wales Legislative Council*, (n 1), p 121.

order of precedence.' Various rules apply to the postponement[139] or substitution[140] of items in the order of precedence.[141]

However, since 2015 the House has moved to a new process for managing private members' business.[142] On the day before general business days, the party whips and other interested private members meet to agree on the items of private members' business to be debated the following day. Then, on the next sitting day before the House proceeds to business of the day, the Government Whip moves the suspension of standing orders to allow a motion to be moved forthwith relating to the conduct of business of the House. If this question is agreed to, the Government Whip then moves the proposed order of private members' business for that day as agreed at the meeting the previous day. The question is open to amendment, and any member of the House may move to omit or add items of business.[143] If the motion is agreed to, as it invariably is, it dictates the order of private members' business for that sitting day.[144]

On 3 June 2020, in light of the ongoing success of these alternate arrangements for the management of private members' business, the House resolved on the motion of the Leader of the Government in the Legislative Council that for the remainder of the current session and unless otherwise ordered, standing orders 184 and 185, and the sessional order for the substitution of items in the order of precedence, be suspended.[145]

---

139 An item of private members' business listed in the order of precedence may be postponed. However, according to sessional order, a notice of motion postponed for a second time is removed from the order of precedence and returned to its position outside the order of precedence. This provision does not apply to notices of motions for bills. A notice of motion for a bill which is postponed a third time is removed from the order of precedence, and set down at the end of 'Private members' business – items outside the order of precedence', unless the House orders otherwise (SO 188).

140 According to sessional order, a member who has an item of private members' business in the order of precedence may substitute it with an item standing in his or her name outside the order of precedence. However, once a motion has been moved, it cannot be substituted.

141 These arrangements were first adopted in 1999. For further information, see *New South Wales Legislative Council Practice*, 1st ed, (n 81), pp 259-261. See also the *Annotated Standing Orders of the New South Wales Legislative Council*, (n 1), pp 597-609. For further information on the arrangements for the management of private members' business according to the system of remanets in place between 1895 and 1999, see the *Annotated Standing Orders of the New South Wales Legislative Council*, (n 1), pp 599-600.

142 This procedure was first adopted on 4 June 2015. See *Minutes*, NSW Legislative Council, 4 June 2015, p 191. For a statement by the Government Whip in relation to the operation of this system, see *Hansard*, NSW Legislative Council, 4 June 2015, p 1423 per the Hon Dr Peter Phelps.

143 The operation of this new process for managing private members' business was debated in the House on 12 April 2018. See *Hansard*, NSW Legislative Council, 12 April 2018, pp 11-14.

144 If debate of an item of private members' business in the order agreed to by the House under these arrangements is postponed to a later hour, debate on that item may be resumed after debate has concluded on all other items of private members' business agreed to by the House for that day. Alternatively, the debate may be brought back on at an earlier time by motion moved without notice on the suspension of standing and sessional order. See Ruling: Ajaka, *Hansard*, NSW Legislative Council, 21 November 2019, p 9.

145 *Minutes*, NSW Legislative Council, 3 June 2020, p 999 (proof).

Various time limits apply to debate on private members' motions (SO 186, as amended by sessional order)[146] and bills (SO 187) as listed in Appendix 11 (Time limits on debates and speeches in the Legislative Council).[147]

Short form motions

At the commencement of the 57th Parliament in May 2019, the House adopted a sessional order providing a means for private members' motions to be considered in a short form format, as a mechanism for expediting the consideration of private members' motions. Under the terms of the sessional order, prior to a private member moving a motion standing in his or her name, the member may move that the motion be considered in short form format. If the question is agreed to, on the member moving the substantive motion, the member is restricted to speaking for not more than five minutes, any other member for not more than three minutes, the mover in reply for not more than three minutes, and the overall debate is limited to 30 minutes.[148]

Since the adoption of this sessional order, consideration of private members' motions in short form format has become common.

Question Time

Standing order 47(1) specifies that the House is to appoint the time when questions without notice (Question Time) will be taken each sitting day.[149]

According to a sessional order adopted at the commencement of the 57th Parliament in May 2019, Question Time commences at 4.00 pm on Tuesdays and at 12.00 noon on Wednesdays and Thursdays, unless the House decides otherwise.[150] Whenever the

146 *Minutes*, NSW Legislative Council, 8 May 2019, p 64.

147 In circumstances where debate on a private member's motion is interrupted to allow the mover of the motion to speak in reply, the House has adopted a sessional order allowing debate on the motion to be extended by motion moved without notice. See *Minutes*, NSW Legislative Council, 6 May 2015, pp 58-59; 8 May 2019, p 64.

148 *Minutes*, NSW Legislative Council, 8 May 2019, p 74.

149 Under standing order 47(2), in any given session, until a time for Question Time is appointed by the House by sessional order, Question Time will be taken at the time and day last appointed by the House in the previous session. For further information, see the *Annotated Standing Orders of the New South Wales Legislative Council*, (n 1), pp 140-143.

150 *Minutes*, NSW Legislative Council, 8 May 2019, p 69. For the duration of the 55th and 56th Parliaments between 2011 and 2019, the House adopted sessional orders stipulating that Question Time begin at 2.30 pm on Wednesdays and Thursdays, rather than at 12.00 noon. See *Minutes*, NSW Legislative Council, 9 May 2011, pp 74-75; 23 November 2011, pp 610-611; 9 September 2014, p 7; 6 May 2015, p 55. At the time these arrangements were adopted, the Greens opposed the commencement of Question Time at 2.30 pm on Wednesdays and Thursdays, on the basis that it would coincide with Question Time in the Legislative Assembly. They were unsuccessful in an amendment for Question Time to commence at 12.00 noon on Wednesdays and Thursday. See *Hansard*, NSW Legislative Council, 9 May 2011, pp 398-401. The matter was referred to the Procedure Committee in 2017, but the Procedure Committee did not recommend

House adjourns to a time later than the time appointed for Question Time, questions commence 30 minutes after the time appointed for the meeting.

Business before the House is routinely interrupted on a sitting day in order that Question Time might commence at the specified time. The interrupted debate may be resumed at a later hour, or is set down on the *Notice Paper* for the next sitting day (SO 46, as amended by sessional order).[151] However, if at the time for interruption for Question Time a division is in progress, the division is completed and the result announced prior to the commencement of Question Time. If the House is in committee, the Chair leaves the Chair and reports progress.[152]

Question Time is generally conducted each sitting day. However, there have been sitting days on which Question Time has not occurred, for example when the House has adjourned prior to the time appointed for questions,[153] or when a resolution of the House concerning the conduct of business has superseded Question Time.[154] It is also current practice on the first sitting day of a new Parliament for the House to adopt a resolution that there be no Question Time that day.[155]

---

any change. See Procedure Committee, *Report relating to the rules for notices of motions, the rules for questions, e-petitions and two new sessional orders*, Report No 10, November 2017. For further information, see the *Annotated Standing Orders of the New South Wales Legislative Council*, (n 1), pp 140-143. The decision of the House at the commencement of the 57th Parliament in May 2019 to revert to Question Time at 12.00 noon on Wednesdays and Thursdays restored the arrangement previously in place between 2001 and 2011.

151 If an item of business had been brought on by suspension of standing and sessional orders and the debate is interrupted by Question Time, the practice of the House is that such debate does not automatically resume after Question Time but rather its resumption requires a further suspension of standing and sessional orders.

152 For further information, see the discussion later in this chapter under the heading 'Interruption of business'.

153 For example, on 12 September 2001, the House did not proceed to Question Time or any other business following the moving of a condolence motion in response to the terrorist attacks on the United States of America on 11 September 2001. See *Minutes*, NSW Legislative Council, 12 September 2001, p 1146. As another example, on 28 August 2008, the House sat twice on the one calendar day. At the first sitting, the Treasurer gave a notice of motion for leave to bring in two cognate bills for the restructuring of the electricity industry. At the second sitting, the bills were introduced and read a first time, after which they were declared urgent, allowing the second reading debate and subsequent stages to proceed immediately (SO 138(3)). However, in the event, the debate was adjourned after the speech of the Leader of the Opposition. At neither sitting did the House proceed to Question Time. See *Minutes*, NSW Legislative Council, 28 August 2008.

154 For example, on 15 December 2005, consideration of government business took precedence of all other business, including questions, to enable the House to consider the Law Enforcement Legislation Amendment (Public Safety) Bill 2005, introduced by the government in response to riots in Cronulla on 11 December 2005. See *Minutes*, NSW Legislative Council, 15 December 2005, p 1819. As another example, on 24 March 2020, consideration of government bills relating to the COVID-19 pandemic took precedence of questions. See *Minutes*, NSW Legislative Council, 24 March 2020, p 856.

155 This resolution is adopted because of the volume of other business that the House needs to complete on the first sitting day of a new Parliament. See *Minutes*, NSW Legislative Council, 3 May 2011, p 7; 5 May 2015, p 7; 7 May 2019, p 9.

The standing orders do not specify the duration of Question Time each sitting day. Rather, the Leader of the Government is entitled to draw Question Time to a close at any time he or she wishes.[156] However, by convention Question Time is generally held for one hour.[157] At the end of the hour, the Leader of the Government in the Legislative Council generally seeks the call[158] and suggests that further questions be placed on the *Questions and Answers Paper*.[159] However, there would be nothing to prevent the Leader of the Government concluding questions before the lapse of one hour, or extending questions beyond one hour.[160] It is also the practice of the House that when Question Time commences late, the time lost is added at the end of Question Time in compensation.

Time limits for questions and answers in Question Time are listed in Appendix 11 (Time limits on debates and speeches in the Legislative Council) (SO 64).

The allocation of questions and the rules that apply to questions and answers in Question Time are discussed in more detail in Chapter 14 (Questions).

The 'take note' debate on answers

By sessional order adopted at the commencement of the 57th Parliament in May 2019,[161] and subsequently further amended,[162] at the conclusion of Question Time, and following any supplementary questions,[163] a member may move without notice that the House 'take note' of answers to questions.[164] Debate on the motion may canvass any answers to questions without notice during Question Time, any deferred answers, and any answers to written questions or supplementary questions. A member speaking to the motion is in order as long as the contribution is relevant to the subject matter of a question asked and an answer given.[165]

As listed in Appendix 11 (Time limits on debates and speeches in the Legislative Council), members may speak for not more than three minutes to the motion to 'take note' of answers and the debate shall not exceed 30 minutes. There is no right of reply

156 Ruling: Harwin, *Hansard*, NSW Legislative Council, 10 November 2015, p 5432.

157 Very unusually, on 12 May 2020, in circumstances related to the COVID-19 pandemic, the House resolved that Question Time be restricted to 40 minutes, with no government questions. See *Minutes*, NSW Legislative Council, 12 May 2020, pp 896-897.

158 Ruling: Ajaka, *Hansard*, NSW Legislative Council, 18 June 2019, p 33.

159 Ruling: Harwin, *Hansard*, NSW Legislative Council, 21 February 2013, p 17795.

160 For an example when Question Time went beyond an hour, see *Hansard*, NSW Legislative Council, 21 February 2013, p 17795.

161 *Minutes*, NSW Legislative Council, 8 May 2019, p 85.

162 See *Minutes*, NSW Legislative Council, 19 June 2019, p 232; 7 August 2019, p 311; 22 August 2019, p 377.

163 See the discussion in Chapter 14 (Questions) under the heading 'Supplementary questions requiring written response following Question Time'.

164 The adoption of this new procedure followed a report of the Procedure Committee in 2017 canvassing a 'take note' debate, based on the model in the Australian Senate. See Procedure Committee, *Report relating to the rules for notices of motions, the rules for questions, e-petitions and two new sessional orders*, Report No 10, November 2017, Appendix 2.

165 Ruling: Ajaka, *Hansard*, NSW Legislative Council, 22 August 2019, p 32.

for the mover. If the question has not been disposed of earlier, at three minutes before the expiration of 30 minutes, debate will be interrupted to allow a minister to speak for not more than three minutes, which closes the debate.[166]

The motion to 'take note' of answers provides members with an opportunity to debate answers which they regard as unsatisfactory or inappropriate, or which raise issues that in their opinion require debate.

Private members' statements

By sessional order adopted at the commencement of the 57th Parliament, and subsequently amended on the second sitting day of 2020,[167] on Wednesdays immediately after Question Time and any 'take note' debate on answers, there is an opportunity for private members to make statements to the House without any question before the Chair. Members may speak for not more than three minutes on any matter they wish, subject to the normal rules of debate.

The adoption of this arrangement followed a report of the Procedure Committee in 2017 which canvassed additional opportunities for members to place matters on the parliamentary record.[168]

Debate on committee reports and government responses

Standing order 41 requires that the House appoint a day and time on which a 'take note' debate on committee reports and any government responses to committee reports is to take precedence.

For many years, the House adopted a sessional order specifying that debate on committee reports should take precedence after Question Time on Tuesdays until 6.30 pm.[169] However, the sessional order did not specifically mention debate on government responses to such reports, and it was not the practice of the House for such responses to be debated, although they may have fallen within the scope of the standing and sessional orders. For clarity, at the commencement of the 57th Parliament in May 2019, the House adopted a revised sessional order that specially provided for debate on committee reports and government responses to committee reports to take precedence after Question Time on Tuesday until 6.30 pm. It is now the practice of the House to debate both committee reports and government responses to committee reports on Tuesdays.[170] As Question Time on Tuesdays usually lasts for one hour from 4.00 pm to 5.00 pm, with up to a

166 Ruling: Ajaka, *Hansard*, NSW Legislative Council, 7 August 2019, pp 5-6.

167 *Minutes*, NSW Legislative Council, 26 February 2020, pp 809-810.

168 Procedure Committee, *Report relating to the rules for notices of motions, the rules for questions, e-petitions and two new sessional orders*, Report No 10, November 2017, Appendix 1.

169 See, for example, *Minutes*, NSW Legislative Council, 9 May 2011, p 72; 9 September 2014, p 7; 6 May 2015, p 56.

170 *Minutes*, NSW Legislative Council, 8 May 2019, pp 71-72.

further 30 minutes for the 'take note' debate on answers, this allows approximately one hour for debate on committee reports and government responses on Tuesdays.[171]

These arrangements for the consideration of committee reports and government responses to committee reports on Tuesday are reflected in the order in which committee reports and government responses appear on the *Notice Paper*. On Tuesdays, debate on committee reports and government responses is listed on the *Notice Paper* after government business, but before general or private members' business. On Wednesdays and Thursdays, debate on committee reports and government responses is listed after both government and private members' business on the *Notice Paper*, as committee reports and government responses are not expected to come on for debate on those days.

Committee reports and government responses to committee reports are listed on the *Notice Paper* in the order in which the 'take note' motion was moved. By resolution, the House may vary the order of consideration of committee reports and government responses,[172] however this is unusual. It is more usual for the House to bring on debate on a particular report or response by postponing debate on other committee reports and government responses.

The question that the House 'take note' of a committee report or government response does not require the House to express an opinion on the content of the report or response.

Time limits apply to individual speakers on the question that the House 'take note' of a committee report or government response, as listed in Appendix 11 (Time limits on debates and speeches in the Legislative Council) (SO 232, as amended by sessional order).[173]

'Take note' debate on reports and documents

Standing order 57 provides that on a document being laid before the House, other than a petition or a return to order, a motion may be moved that a day be appointed for its consideration. Such motions have a chequered past in the Legislative Council, having not been used at all between 1927 and 2012. However, in recent years they have been used with greater frequency. They are discussed in more detail in Chapter 19 (Documents tabled in the Legislative Council).[174]

171 As adopted in 2004, standing order 232(4) specifies that debate on committee reports is to be interrupted after one hour. This restriction was not included in the sessional order amending standing order 232 adopted by the House at the commencement of the 57th Parliament in May 2019. See *Minutes*, NSW Legislative Council, 8 May 2019, p 71.

172 See, for example, *Minutes*, NSW Legislative Council, 5 November 2014, p 234.

173 *Minutes*, NSW Legislative Council, 8 May 2019, p 71.

174 See the discussion under the heading 'The motion that the House 'take note' of a report or document'.

First and valedictory speeches

First and valedictory speeches are an opportunity for new members to introduce themselves to the House and for departing members to farewell the House and to reflect on their time and achievements whilst a member of Parliament.[175]

To facilitate members giving their first and valedictory speeches, since 2016 the practice has developed of the Leader of the Government in the Legislative Council giving notice of a motion that proceedings be interrupted at a certain time, but not so as to interrupt a member speaking, in order to permit a member to give his or her first or valedictory speech without any question before the Chair. The notice of motion is set down as business of the House. On the House adopting the motion, the speech is listed as a separate item of business on the *Notice Paper* for the day on which the speech is to be given. The resolution does not impose a time limit on the duration of the speech.

Prior to the adoption of this practice, members often gave their first and valedictory speeches during wide-ranging debates, such as debate on the Address-in-Reply or the budget estimates 'take note', in order to minimise any constraint imposed by the usual rule that a speaker's remarks must be relevant to the question before the House (SO 92).[176]

Special conventions apply to the first and valedictory speeches of members.

It is customary for all members of the House, if available, to attend the first and valedictory speech of a member, and, where space allows, to sit on the opposite side of the chamber to the member speaking, so that the member may speak directly to as many members of the House as possible.[177] On such an occasion the member's family and friends often attend in the galleries.

It is also customary for the member to be heard in silence without interruption.[178] This custom has a long history in Westminster parliaments. However, the corollary is that a member should avoid making comments which are contentious, critical of or offensive to other members or which in some other way provoke points of order.[179]

175 For further information, see G Griffith, 'Inaugural speeches in the NSW Parliament', New South Wales Parliamentary Research Service Briefing Paper No 4/2013.

176 For further information, see *New South Wales Legislative Council Practice*, 1st ed, (n 81), p 335.

177 Ruling: Johnson, *Hansard*, NSW Legislative Council, 27 February 1986, p 821.

178 Rulings: Johnson, *Hansard*, NSW Legislative Council, 23 November 1982, p 2731; Gay (Deputy), *Hansard*, NSW Legislative Council, 25 October 1995, p 2272; Burgmann, *Hansard*, NSW Legislative Council, 19 November 2001, p 16801.

179 In a very unusual instance, on 18 June 2013, during the valedictory speech of Ms Cate Faehrmann, President Harwin had occasion to caution the member that whilst she had been extended wide latitude in debate, if she reflected on individual members she would be directed to resume her seat. See *Hansard*, NSW Legislative Council, 18 June 2013, p 21403.

A member may make a first speech to the Council even if he or she has previously served as a member of the Assembly.[180] However, former members of the Council who are re-elected are not accorded another opportunity to give a first speech.[181]

The making of a personal explanation has been ruled not to constitute a first speech.[182]

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. However, in one instance a member made her first speech some 15 years after being elected. The occasion was notable because the member, in her state of anticipation, rose to address the House on a bill not then before the House. In keeping with tradition, no point of order was taken, and the speech was heard in silence.[183]

The adjournment debate

The adjournment debate is a routine element of almost every sitting day.[184]

Except where the standing orders provide for the President or Clerk to adjourn the House in the absence of a quorum or in instances of serious disorder,[185] the House can only be adjourned by its own resolution (SO 31(1)).

As discussed previously in Chapter 9 (Meetings of the Legislative Council), the adjournment of the House may be moved by a minister at any time, with proceedings specifically interrupted at 10.00 pm on Tuesdays, Wednesdays and Thursdays to permit a minister to move the adjournment motion if desired.[186] Alternatively, the question that

---

180 See, for example, the first speeches of the Hon Michael Egan, the Hon Marie Ficarra and the Hon Damien Tudehope, all of whom had previously been members of the Legislative Assembly. *Hansard*, NSW Legislative Council, 30 September 1986, pp 4110-4114; 5 June 2007, pp 723-727; 28 May 2019, pp 22-27.

181 Ruling: Johnson, *Hansard*, NSW Legislative Council, 27 February 1986, p 521; *Minutes*, NSW Legislative Council, 27 February 1986, p 52.

182 Ruling: Johnson, *Hansard*, NSW Legislative Council, 27 February 1986, p 521.

183 The bill to which the member's speech referred was still before the Assembly, although the bill to which the member actually spoke was on a related topic. See *Hansard*, NSW Legislative Council, 17 November 1976, p 3038.

184 Provision for interruption for a formal adjournment debate was first introduced in the Council in 1984, although it was restricted to Thursdays. See *Minutes*, NSW Legislative Council, 16 August 1984, p 36. In 1986, specific arrangements for the adjournment debate were extended to each sitting day, with speakers restricted to five minutes, although the total time for debate remained 15 minutes. See *Minutes*, NSW Legislative Council, 19 March 1986, p 89. In 1995, the time for the adjournment debate was increased to 30 minutes. See *Minutes*, NSW Legislative Council, 24 May 1995, p 33. For further information, see the *Annotated Standing Orders of the New South Wales Legislative Council*, (n 1), pp 92-94.

185 For further information on the adjournment of the House for the want of a quorum, see the discussion in Chapter 9 (Meetings of the Legislative Council) under the heading 'Quorum'. For further information on the adjournment of the House in instances of serious disorder under standing order 193, see the discussion in Chapter 13 (Debate) under the heading 'Suspension of a sitting (SO 193)'.

186 See the discussion under the heading 'Adjournments moved by a minister'.

the House do now adjourn is automatically proposed by the President at midnight on Tuesdays, Wednesdays and Thursdays (the 'hard adjournment').[187]

The question that the House do now adjourn is determined by vote of the House,[188] ensuring that the sitting may only conclude with the support of a majority of members present.

The motion for the adjournment of the House may be debated. On the motion being moved or put by the President, any member may speak to the motion for five minutes,[189] and the question will be put after 30 minutes or, in circumstances where a minister wishes to speak or is speaking in reply,[190] at the conclusion of the minister's remarks (SO 31(4) and the sessional order for the 'hard adjournment').[191]

When the motion to adjourn the House is moved by a minister who subsequently leaves the chamber, the presence of a parliamentary secretary is sufficient to satisfy the requirement under standing order 34 for the presence of a minister in the House, notwithstanding that the parliamentary secretary may have spoken during the adjournment debate.[192]

Presidents have also ruled that a minister or parliamentary secretary may speak as a private member in the adjournment debate without closing off debate provided another minister or parliamentary secretary is in the House at the same time. However, regardless of whether there is another minister or parliamentary secretary in the House, a minister or parliamentary secretary who moves the adjournment debate and then speaks to it closes debate as he or she is effectively speaking in reply.[193]

Members are permitted wide latitude in their contribution to the adjournment debate.[194] They are not required to speak to matters relevant to the question before the House, that is, that the House do now adjourn. However, members may not refer to matters that are otherwise not in order (SO 31(4)(b)), that is to say, contravene the normal rules of

187 See the discussion under the heading 'Hard adjournments'.

188 For further information, see the *Annotated Standing Orders of the New South Wales Legislative Council*, (n 1), pp 92-94.

189 On rare occasions, members have spoken for more than five minutes, with the President and House choosing not to observe the five minute time restriction.

190 A minister or parliamentary secretary closing the adjournment debate is not limited in the time for his or her remarks. No debate is permitted on a minister's remarks in reply. See Ruling: Johnson, *Hansard*, NSW Legislative Council, 9 April 1989, p 6663.

191 *Minutes*, NSW Legislative Council, 8 May 2019, pp 69-70.

192 Ruling: Fazio (Deputy), *Hansard*, NSW Legislative Council, 5 April 2006, p 22100.

193 Rulings: Primrose, *Hansard*, NSW Legislative Council, 13 May 2008, p 7416; Harwin, *Hansard*, NSW Legislative Council, 27 March 2012, p 9829.

194 Rulings: Burgmann, *Hansard*, NSW Legislative Council, 5 September 2000, p 8652; Gardiner (Deputy) *Hansard*, NSW Legislative Council, 14 February 2012, p 8082. Prior to the introduction of the formal adjournment debate in 1984, very different rules applied to speakers on the adjournment, such as there were. See Ruling: Steele (Deputy), *Hansard*, NSW Legislative Council, 2 May 1950, p 6350.

debate. The remarks of a speaker may be supported by other speakers, but not debated or argued.[195] Members may speak on more than one subject during their contribution.[196]

From time to time, the adjournment debate has been interrupted by the consideration of other items of business.[197]

The question that the House do now adjourn is usually put and passed on the voices, in which case the House adjourns to the next sitting day as per the sitting calendar,[198] unless a special adjournment motion has previously been agreed to that at its rising the House do adjourn to a future day other than the next sitting day. However, the House may divide on the question that it do now adjourn.[199] If the question is negatived, the House continues to sit and proceeds to the next item of business.[200]

The motion for the adjournment has also been withdrawn by leave.[201]

Very rarely, the adjournment of the House has been moved to supersede the question on a motion then before the House (SO 105). In such instances, assuming the motion for adjournment is agreed to, the original motion lapses.[202]

THE WEEKLY SITTING PATTERN

As indicated previously in this chapter, various standing orders concern the routine of business in the Legislative Council:

- Standing order 35 provides that the days and times of meeting of the House in each sitting week will be determined by the House from time to time.
- Standing order 40 provides that the House must appoint the days and times on which government business and general business is to take precedence.

195 Ruling: Johnson, *Hansard*, NSW Legislative Council, 29 October 1980, p 2310.

196 Rulings: Saffin (Deputy), *Hansard*, NSW Legislative Council, 26 June 2001, p 15323; Burgmann, *Hansard*, NSW Legislative Council, 15 November 2006, p 4005.

197 For example, the reporting of messages concerning bills and the membership of committees, and the tabling of certain papers by the President and ministers. See, for example, *Minutes*, NSW Legislative Council, 23 June 2011, p 279; 29 October 2015, p 536; 10 August 2017, p 1862.

198 If the House has not adopted sessional orders and a sitting calendar by resolution of the House, standing order 31(5) provides that the House will meet on the day and hour appointed in the previous session.

199 See, for example, *Minutes*, NSW Legislative Council, 19 September 2013, p 2022.

200 There are numerous precedents from the 19th century where the motion for the adjournment of the House was negatived. However, the last occasion on which it happened was 23 August 1978, following which the President called on the next item of business listed for that day. See *Minutes*, NSW Legislative Council, 23 August 1978, pp 66-68.

201 *Minutes*, NSW Legislative Council, 23 October 1929, p 54.

202 For further information, see the discussion in Chapter 12 (Motions and decisions of the House) under the heading 'Superseding motions'.

- Standing order 41 provides that the House must appoint the day and time on which motions for the consideration or adoption of committee reports and any government responses on such reports are to take precedence.
- Standing order 47(1) provides that the House is to appoint the time when questions without notice will be taken each sitting day.
- Standing order 32(1), as amended by sessional order, provides that the House may appoint the time that proceedings will be interrupted to permit a motion for adjournment to be moved.

In accordance with these standing orders, the House adopts sessional orders at the commencement of each session to determine the routine of business of the House. Taking these sessional orders together with the annual sitting calendar,[203] the current sitting pattern of the House is shown below.

Table 10.1: New South Wales Legislative Council sitting pattern

	Tuesday	Wednesday	Thursday
10.00 am		Formalities	Formalities
11.00 am		General business	Government business
12.00 noon		Questions	Questions
1.00 pm		Take note of answers	Take note of answers
1.30 pm		**Lunch**	**Lunch**
2.30 pm	Formalities		
3.00 pm	Government business	Members' statements	Government business
4.00 pm	Questions	General business	
5.00 pm	Take note of answers		
5.30 pm	Debate on committee reports and responses		
6.30 pm	**Dinner**	**Dinner**	**Dinner**
8.00 pm	Government business	General business	Government business
10.00 pm interruption			
12.00 hard adjournment	Adjournment debate	Adjournment debate	Adjournment debate
	Rise	**Rise**	**Rise**

203 For further information, see the discussion in Chapter 9 (Meetings of the Legislative Council) under the heading 'The annual sitting calendar'.

MANAGING BUSINESS

Notices of motions and orders of the day

Within the categories of business on the *Notice Paper* such as business of the House, government business and general or private members' business there are two types of business: notices of motions and orders of the day.

Notices of motions are items of business proposed by members for consideration by the House, but which have not yet come before the House. They are given during formalities at the commencement of a sitting day and at any other time by leave of the House.[204] They are set down on the *Notice Paper* under the relevant category of business under the subheading 'Notices of Motions' in the order in which they are given (SO 71(3)). Notices of motions are not considered to be the property of the House until they are moved. Until then a member may withdraw a notice (SO 72(2)),[205] or by notice change the day proposed for moving the notice, but only to a later day (SO 72(1)). A notice that has lapsed or been withdrawn can be given again in the same session, as the matter has not been determined by the House (SO 75(5)).

Under a sessional order first adopted on 21 June 2011 and readopted in subsequent sessions,[206] notices of private members' business that have remained on the *Notice Paper* for 20 sitting days without being moved are removed from the *Notice Paper*. This sessional order does not apply to notices for the introduction of bills or for the disallowance of statutory rules.[207]

The moving of notices of motions is discussed in detail in Chapter 12 (Motions and decisions of the House).

Orders of the day are items of business which the House has commenced debating but has ordered be further considered at a later time (SO 80), for example by debate being adjourned (SO 101), postponed (SO 45) or interrupted (SO 46, as amended by sessional order).[208] Orders of the day are set down on the *Notice Paper* under the heading 'Orders of the Day'. Unlike notices of motions, an order of the day is in the possession of the House and can only be withdrawn by the mover with the leave of the House (SO 75(4)).[209]

---

204 For further information, see the discussion earlier in this chapter under the heading 'Giving of notices of motions'.

205 In the past, members have on some occasions sought leave of the House to withdraw a notice of motion standing in their name on the *Notice Paper*. Leave is not required under standing order 72(2). A notice may be withdrawn by the sponsoring member at any time before it is moved.

206 *Minutes*, NSW Legislative Council, 21 June 2011, p 232; 9 September 2014, p 12; 6 May 2015, p 72; 8 May 2019, p 63.

207 For further information, see the *Annotated Standing Orders of the New South Wales Legislative Council*, (n 1), pp 246-247.

208 Standing order 80 provides a further definition of an order of the day.

209 For further information, see the *Annotated Standing Orders of the New South Wales Legislative Council*, (n 1), p 259.

Items of business which include more than one stage, notably the various stages of the passage of a bill, are also listed as orders of the day, in the case of a Council bill, following the motion for introduction, first reading and printing of the bill, and in the case of an Assembly bill, following the receipt of the bill by message from the Assembly and first reading. Thus, the second and third reading of a bill, or the bill's consideration in a Committee of the whole House, is set down on the *Notice Paper* as an order of the day even if debate on that stage has yet to commence. Once again, orders of the day for the consideration of a bill are in the possession of the House and can only be discharged by motion moved on the order of the day being read (SO 140(1)(b)).

On each sitting day, notices of motions and orders of the day are called over in the order in which they appear on the *Notice Paper* (SOs 74(1) and 81(1)) according to the category of business being considered by the House at the time. For example, if the House is dealing with government business, the House first deals with any notices of motions concerning government business, such as notices of motions for the introduction of government bills, before then dealing with any orders of the day, such as orders of the day for the commencement or resumption of the second reading of a government bill.

On the House reaching consideration of a notice of motion on the *Notice Paper*, it is the responsibility of the member with carriage of the matter to move the motion and commence the debate. If the motion is not moved pursuant to the notice or no action is taken to postpone its consideration, the notice lapses. Debate on orders of the day, on the other hand, are resumed by the Clerk at the direction of the Chair reading the order of the day for resumption of the debate. If there is no debate the question is then put.

Standing orders 74(2) and 81(2) provide that any notices of motions or orders of the day on the *Notice Paper* which have not been dealt with by the adjournment of the House are to be set down on the *Notice Paper* for the next sitting day, at the end of any business already set down for that day. In practice, items retain their existing position on the *Notice Paper*, unless otherwise ordered. However, where a member has postponed consideration of an item of business until a particular day, that item is initially listed at the back of the *Notice Paper* under a separate category of 'Business for Future Consideration' until the appointed day, when it is returned to the relevant category of business as the first item of business in that category.[210]

Bills referred to a committee for inquiry and report are also listed at the back of the *Notice Paper* under the category of 'Bills referred to Select or Standing Committees' until the committee reports, whereupon they are returned to the relevant category of business.

Although items of business are routinely set down for the next sitting day, that does not necessarily mean that they will come on for debate that day. This is particularly the case in relation to private members' business. The House invariably has far more

210 For further information, see the discussion below under the heading 'Postponement of business'. Note, however, that different arrangements apply to committee reports and private members' business. For further information, see the *Annotated Standing Orders of the New South Wales Legislative Council*, (n 1), pp 279-280.

private members' business before it than may be considered by the House on a single sitting day. As a result, the House has adopted modified arrangements for managing the volume of private members' business.[211]

Adjournment of debate

Debate on a motion before the House may be adjourned to a later hour of the same day, to the next sitting day, or to a specified day (SO 101(1)).[212]

Only the member with the call may move that debate on a motion be adjourned. A member may move that the debate be adjourned at any time during his or her speech. Alternatively, a member may seek the call for the sole purpose of moving that the debate be adjourned, but this right is restricted to a member who has not previously spoken in the debate (SO 87(1)).

The motion to adjourn debate may itself be debated (SO 101(2)) before the question that the debate be adjourned is put (SO 102(1)). The motion may also be amended, for example to change the date set down for resumption of the debate (SO 101(2)). In 2009, President Primrose ruled that whilst it is not possible when debating a motion to adjourn debate not to mention the substantive motion, members should address the issue that is before the House, that is whether debate should or should not be adjourned.[213]

If the motion to adjourn debate is negatived, debate on the substantive motion continues. In such instances, the member speaking may continue, if time permits. Alternatively, if the member had not commenced speaking when he or she moved that the debate be adjourned,[214] the member has the option of speaking at a later time during the debate (SO 101(5)).

If the motion to adjourn debate is agreed to, a member may further move, without notice, that the order of the day for resumption of the debate take precedence of all other business on the *Notice Paper* for a particular day, except government business on a government business day (SO 101(3)). This provision has been used infrequently in recent years but was once common.[215] The House then proceeds to the next item of business on the *Notice Paper*.

---

211 For further information, see the discussion earlier in this chapter under the heading 'General or private members' business'.

212 Very rarely, debate has also been adjourned to a particular time on a particular day, or until another matter has been dealt with. For further information, see the *Annotated Standing Orders of the New South Wales Legislative Council*, (n 1), p 328.

213 Ruling: Primrose, *Hansard*, NSW Legislative Council, 21 October 2009, p 18353.

214 That is to say, the mover sought the call for the sole purpose of moving that the debate be adjourned.

215 For further information, see the *Annotated Standing Orders of the New South Wales Legislative Council*, (n 1), p 329.

An item of business which is adjourned to the next sitting day is set down on the *Notice Paper* under the provisions of standing order 81(2).[216] In practice, the item is set down on the *Notice Paper* in the order in which it previously appeared, unless otherwise ordered. An item of business which is adjourned to a later hour of the sitting may be resumed on the same sitting day, however if it is not, it is also set down on the *Notice Paper* for the next sitting day in the same way.[217]

On resumption of an adjourned debate, the member who moved its adjournment is entitled to continue speaking (SO 101(4)). This is known as having pre-audience. However, a member who moved the adjournment of a debate but did not otherwise commence speaking at that time has two choices on the resumption of the debate: the member may either commence his or her speech immediately or allow the call to go to another member whilst retaining the right to speak at a later point in the debate.[218]

The adjournment of debate moved as a superseding motion to prevent further discussion on a matter before the House and to cause the matter to lapse is discussed in further detail in Chapter 12 (Motions and decisions of the House).[219]

Postponement of business

Members may move the postponement of debate on any item or items of business standing in their name on the *Notice Paper* when the item is reached but before it is called on (SO 45(2)).[220] Members also routinely move the postponement of debate on items of business at the commencement of a sitting day during formalities (SO 45(1)).[221]

Members may also move the postponement of debate on an item of business on behalf of another member in the absence of that member or at the request of the member (SO 81(3)). There is an expectation that a member moving to postpone debate on an item of business on behalf of another member does so with that member's agreement.

---

216 Standing order 81(2) provides: 'Any orders of the day on the *Notice Paper* each day which have not been dealt with at the adjournment of the House will be set down on the *Notice Paper* for the next sitting day at the end of any business already set down for that day.'

217 An item of business set down for resumption of debate on a particular day under the provisions of standing order 101(3) outlined above is initially listed at the back of the *Notice Paper* under the separate category of 'Business for Future Consideration' before being returned to the relevant category of business on the appointed day with precedence of all other business, except government business on a government business day. See, for example, *Minutes*, NSW Legislative Council, 31 August 2000, p 618; *Notice Paper*, NSW Legislative Council, 7 September 2000, p 1758.

218 The effect of this rule is that the member, in simply moving a procedural motion for the adjournment of debate, is not obliged to speak immediately the debate resumes.

219 See the discussion under the heading 'Superseding motions'.

220 Debate on an item of business may not be postponed once the Clerk reads the order of the day for resumption of the debate on that item. In such instances, the debate is deemed to have resumed, and can only then be deferred by the debate being adjourned. For further information, see the *Annotated Standing Orders of the New South Wales Legislative Council*, (n 1), p 135.

221 For further information, see the discussion earlier in this chapter under the heading 'Postponements'.

There is also an expectation that items of government business be postponed only by ministers.

Members may move the postponement of debate on an item or items of business until a later hour of the sitting, until the next sitting day or until a specified day.[222]

The question that debate on an item of business be postponed must be put and determined without amendment or debate (SO 45(1)).[223] Although unusual, the House may divide on the question that debate on an item of business be postponed.[224]

An item of business on which debate is postponed is set down on the *Notice Paper* in the same manner as an item of business on which debate is adjourned.[225] The member with pre-audience retains the right to speak first in debate on an order of the day that has been postponed.

Interruption of business

Debate on an item of business may be interrupted by the operation of a standing order or other order of the House, such as the sessional order for the calling on of Question Time each sitting day.[226] In such circumstances, resumption of the interrupted debate is managed under standing orders 46 and 32, as amended by sessional orders.

Standing order 46, as amended by sessional order adopted at the commencement of the 57th Parliament,[227] deals with the interruption of business to enable consideration of another item of business, such as Question Time. Under the terms of the sessional order, at a time appointed for interruption, the President or other occupant of the Chair interrupts debate and announces the category of business that has precedence. The business which is interrupted may be resumed at a later hour of the sitting. Alternatively, resumption of the interrupted business is set down on the *Notice Paper* as an order of the day for the next sitting day without any question being put. The member who was interrupted is entitled to resume speaking on resumption of debate. If at the time of interruption a vote or division is in progress, the vote will be completed and the result announced before the business is interrupted. Alternatively, if at the time of interruption the House is in

222 Unusually, a member may also move that consideration of the item be postponed until consideration of another item has concluded or been disposed of. For further information, see the *Annotated Standing Orders of the New South Wales Legislative Council*, (n 1), p 134.

223 There are various rulings that debate on a motion to postpone an order of the day must be pertinent to the question of postponement. For example, it is not in order to discuss the merits of a bill on a motion to postpone its second reading. See Rulings: Lackey, *Hansard*, NSW Legislative Council, 13 June 1895, p 7139; 29 May 1896, p 6514.

224 See *Minutes*, NSW Legislative Council, 3 May 2006, p 1987; 2 June 2011, pp 175-176; 11 August 2011, pp 340-341. On each occasion, the question that debate on the item of business be postponed was agreed to.

225 For further information, see the discussion earlier in this chapter under the heading 'Adjournment of debate'.

226 For further information, see the discussion earlier in this chapter under the heading 'Question Time'.

227 *Minutes*, NSW Legislative Council, 8 May 2019, p 63.

committee, the Chair is to interrupt proceedings and report progress to the House. The President then fixes further consideration of the business before the committee as an order of the day for a later hour without any question being put.

Standing order 32, as amended by sessional order adopted at the commencement of the 57th Parliament,[228] in turn deals with the interruption of business to permit a motion to be moved for the adjournment of the House under standing order 31. Under the terms of the sessional order, at the appointed time, the President or other occupant of the Chair announces that proceedings are interrupted to allow the minister to move the adjournment, if desired. If the minister does not move the adjournment, business continues. If the minister does move the adjournment, resumption of the interrupted debate is again set down on the *Notice Paper* as an order of the day for the next sitting day without any question being put. The member who was interrupted is entitled to resume speaking on resumption of debate. If at the time of interruption a vote or division is in progress, the vote will be completed and the result announced before the business is interrupted. Alternatively, if at the time of interruption the House is in committee, the Chair is to inquire if a minister wishes the Chair to report progress to the House to allow the motion for the adjournment to be moved. If the minister does desire to move the adjournment, the Chair reports progress, and the President again fixes further consideration of the business before the committee as an order of the day for the next sitting day without any question being put.[229]

The same arrangements as those outlined above under standing order 32, as amended by sessional order, apply where proceedings are interrupted at midnight for the 'hard adjournment'.[230]

Similarly, in the unlikely event that debate on a motion is interrupted by the adjournment of the House owing to the absence of a quorum, the resumption of the interrupted debate is set down on the *Notice Paper* as an order of the day for the next sitting day, and when the order is called on, proceedings resume at the point at which they were interrupted (SO 106, as amended by sessional order,[231] and SO 176(4)).[232]

---

228 *Minutes*, NSW Legislative Council, 8 May 2019, pp 62-63.

229 Under the terms of standing order 32 as adopted by the House in 2004, on the Chair reporting progress, the Chair is required to seek leave for the committee to sit again (SO 32(2)(b)). If leave is not granted, the business before the House lapses, and the matter drops from the *Notice Paper*. This approach is inconsistent with the terms of standing order 46 as adopted in 2004, which provides that on the Chair reporting progress, an item of business is automatically set down as an order of the day for a later hour without any question being put (SO 46(2)(b)). The sessional orders adopted at the commencement of the 57th Parliament remove this inconsistency. For further information, see the *Annotated Standing Orders of the New South Wales Legislative Council*, (n 1), pp 94-97, 137-139.

230 *Minutes*, NSW Legislative Council, 8 May 2019, pp 69-70.

231 This sessional order was first adopted on 3 June 2009 and readopted in subsequent sessions. See *Minutes*, NSW Legislative Council, 3 June 2009, p 1188; 9 May 2011, p 72; 9 September 2014, p 8; 6 May 2015, p 57; 8 May 2019, p 62.

232 For further information, see the *Annotated Standing Orders of the New South Wales Legislative Council*, (n 1), pp 345-347.

Rearrangement of business under the standing orders

The standing orders provide opportunities to rearrange the order of business so that business is dealt with in an order different from that specified by the standing orders and the *Notice Paper*.[233]

Ministers may at any time move without notice a motion connected with the conduct of government business (SO 37, as amended by sessional order).[234] Ministers now routinely use this provision to move motions to rearrange business before the House where it concerns government business, for example to move that government business take precedence of committee reports or general business.[235] Such a motion of course needs the agreement of the House to take effect. Where a particular item of government business is sought to be accorded priority, ministers simply move a motion to postpone other items of government business listed on the *Notice Paper* before the item in question, thereby bringing it on for consideration.

Business may also be rearranged by motion on notice in the usual way. For example, on one occasion the sitting days were changed for the Easter break by motion moved on notice.[236] On other occasions, the House has resolved to accord precedence to a particular item of business on a specific day.[237] The procedure has not been used to afford priority to a particular item of government business.

Members may also seek to rearrange business by suspension of standing and sessional orders or by leave of the House, as discussed below.

Rearrangement of business by suspension of standing and sessional orders

The standing and sessional orders are binding on the House unless otherwise determined. However, in urgent cases, when there is no other business before the House, a member may move that standing and sessional orders be suspended to allow a particular course of action to be undertaken which is not provided for or contrary to the standing orders.

There are three mechanisms by which standing and sessional orders may be suspended:

- by motion moved without notice by leave of the House;

---

233 As noted earlier, prior to the publication of the *Notice Paper* after each sitting day, ministers may arrange the order in which government business, both notices of motions and orders of the day, is placed on the *Notice Paper* for the next sitting day by indication to the Clerk (SO 43).

234 *Minutes*, NSW Legislative Council, 8 May 2019, p 65.

235 Despite the adoption of standing order 37 in 2004, and its trial since 2003, it is only since 2015 that ministers and the House have made consistent use of standing order 37 to rearrange business. For further information, see the *Annotated Standing Orders of the New South Wales Legislative Council*, (n 1), pp 110-111.

236 *Minutes*, NSW Legislative Council, 19 March 2013, p 1549.

237 For further information, see the *Annotated Standing Orders of the New South Wales Legislative Council*, (n 1), p 256.

- by motion moved on notice, including on contingent notice; and
- by motion moved without notice according to sessional order.

These three mechanisms are discussed further below.

Suspension by motion moved without notice by leave of the House

Standing and sessional orders may be suspended at any time on motion moved without notice by leave of the House, that is, when no member present objects to the proposed course of action (SOs 76(1) and 198, as amended by sessional order).[238] A relatively common example where standing orders are suspended on motion moved by leave is the suspension of standing orders to allow the presentation of irregular petitions.[239] Leave has also frequently been granted to allow the immediate consideration of messages from the Legislative Assembly,[240] and to allow a motion to be moved forthwith for rescission of a motion.[241]

Suspension by motion moved on notice, including on contingent notice

Standing and sessional orders may also be suspended by motion moved on notice given at a previous sitting of the House (SO 198, as amended by sessional order).[242] As an example, on 11 October 2017 the House suspended standing orders by motion moved on notice to allow government business relating to the Aboriginal Languages Bill 2017 to proceed in a particular manner.[243]

Standing and sessional orders may also be suspended by motion moved on contingent notice. Contingent notices, as the name implies, are notices given by members that, contingent on a particular event occurring, they will move a motion to allow a certain procedure to occur.[244]

Contingent notices in turn fall into two categories: contingent notices that relate to a specific event, and which expire once used, and contingent notices that may be used repeatedly during a Parliament.

238 *Minutes*, NSW Legislative Council, 8 May 2019, p 65.

239 For further information, see the discussion earlier in this chapter under the heading 'Presentation of petitions'.

240 Under standing order 126(3), if any proceedings are necessary on receipt of a message from the Legislative Assembly, except for bills, a future day must be fixed for consideration of the message. Leave to suspend standing orders is required if the message is to be taken into consideration immediately.

241 Under standing order 104, a resolution, order or vote of the House may not be rescinded during the same session unless seven days' notice is given. Leave is required if seven days' notice is not given of a rescission motion.

242 *Minutes*, NSW Legislative Council, 8 May 2019, p 65.

243 *Minutes*, NSW Legislative Council, 11 October 2017, pp 1951-1952.

244 Contingent notices, and those members who have given them, are listed at the back of the *Notice Paper*.

An example of a contingent notice specific to a particular event is a contingent notice that, upon the receipt of a message from the Legislative Assembly requesting the Treasurer to attend at the table of the Legislative Assembly to give a speech in relation to the Budget, standing and sessional orders be suspended to allow consideration of the Assembly's message forthwith. Once used, such a contingent notice expires.[245]

By contrast, contingent notices which do not relate to a particular item of business generally do not expire until prorogation. Accordingly, any member who has given such a notice can use it at any time. Such contingent notices are usually given by members at the commencement of a session or on their election to the House.

Prior to the commencement of the 56th Parliament in 2015, members routinely gave a significant number of contingent notices.[246] However, as noted in the *Annotated Standing Orders of the New South Wales Legislative Council*, the routine use of such contingent notices, removing the need for true notice to be given to the House, had become somewhat artificial, such that the procedure intended by the standing orders was virtually superseded.[247] To address this concern, at the commencement of the 56th Parliament, and again at the commencement of the 57th Parliament, new sessional orders were introduced for suspension of standing and sessional orders in various circumstances previously covered by contingent notices. Members now only routinely give two contingent notices. The first provides for the censure of any minister for failing to table documents in accordance with an order of the House, and the second provides for a minister to be held in contempt of the House for failing to table documents in accordance with an order of the House.

Suspension by motion moved without notice according to sessional order

At the commencement of the 56th Parliament in May 2015, and again at the commencement of the 57th Parliament in May 2019, the House adopted a number of sessional orders amending the standing orders to facilitate the rearrangement of business on motion moved without notice. As outlined above, these sessional orders have largely removed the use of most contingent notices.

The House has adopted a sessional order amending standing order 37 to allow any member to move a motion, without notice, that standing and sessional orders be suspended to allow the moving of a motion forthwith relating to the conduct of business of the House.[248] Since May 2015, this provision has been used routinely by the Government Whip each Thursday to move the adoption of the proposed order of private members' business for that day as agreed to at the whips' meeting the previous evening.[249]

---

245 See, for example, *Minutes*, NSW Legislative Council, 3 May 2000, p 417.

246 For further information, see *New South Wales Legislative Council Practice*, 1st ed, (n 81), pp 280-281; and the *Annotated Standing Orders of the New South Wales Legislative Council*, (n 1), pp 650-651.

247 *Annotated Standing Orders of the New South Wales Legislative Council*, (n 1), p 650.

248 *Minutes*, NSW Legislative Council, 6 May 2015, p 62; 8 May 2019, p 65.

249 For further information, see the discussion earlier in this chapter under the heading 'General or private members' business'.

The House has also adopted a sessional order amending standing order 198 to provide a simplified procedure for the suspension of standing and sessional orders to give precedence to a particular item of business, again replacing the previous arrangements under contingent notice. The sessional order provides that on the President calling on any notice of motion, or reading the prayers, or on the Clerk being called upon to read any order of the day, a motion may be moved, without notice, that standing and sessional orders be suspended to allow a particular order of the day or motion on the *Notice Paper* to be called on forthwith. On a suspension motion relating to an order for State papers or an Address to the Governor for documents under standing order 52 or 53, the question is to be decided without amendment or debate, except a statement by the mover and a statement by a minister not exceeding five minutes each.[250] On all other suspension motions, a member may not speak for more than five minutes, and if the debate is not concluded after the expiration of 30 minutes the question on the motion is put.[251] These time limits are listed in Appendix 11 (Time limits on debates and speeches in the Legislative Council).

The House has also adopted a sessional order amending standing order 154 to provide that on any bill being presented by the Legislative Assembly to the Legislative Council for its concurrence and being read a first time and printed, a motion may be moved, without notice, that standing orders be suspended to allow the passing of the bill through all its remaining stages during the present or any one sitting of the House.[252] Again this sessional order replaced a previous contingent notice.

Of course, all of these scenarios and procedures require the agreement of a majority of the House, although not the unanimous consent of the House, to take effect. Thus the House retains full control over the circumstances in which standing and sessional orders, that is its rules of procedure, are temporarily set aside to allow for the rearrangement of business.

Debate on the question that standing and sessional orders be suspended

The motion that standing and sessional orders be suspended may be debated. When speaking to the question, members' comments should be directed to establishing why standing orders should or should not be suspended. The test that has been applied by the House is why the matter is more urgent than other business on the *Notice Paper*, adopting the reference to 'urgent cases' used in standing order 198, and continued in the sessional order amending standing order 198. There are numerous rulings of past Presidents that members must confine their remarks on whether standing and sessional orders should be suspended to the question why the matter is more urgent than other business on the *Notice Paper*. Members should not address the substantive motion any

250 This provision was first adopted by sessional order on 21 June 2011, on the recommendation of the Procedure Committee. It was adopted in an attempt to streamline the orders for papers process. See Procedure Committee, *Report relating to private members' business and the sitting pattern*, Report No 5, June 2011.

251 *Minutes*, NSW Legislative Council, 6 May 2015, p 61; 8 May 2019, p 65.

252 *Minutes*, NSW Legislative Council, 6 May 2015, p 62; 8 May 2019, p 59.

more than is necessary. Arguing that a matter is important is not the same as arguing that it is urgent.

The motion that standing and sessional orders be suspended may also be amended or the debate adjourned. In one instance in 2014, debate on the motion moved pursuant to contingent notice that standing and sessional orders be suspended was adjourned twice before being agreed to.[253] Where debate on the question is adjourned, it is set down on the *Notice Paper* as business of the House.[254]

It is a well-established principle that the suspension of standing orders is limited in its operation to the particular purpose for which the suspension was sought (SO 199) and for the period specified in the motion. For example, where a member successfully moves the suspension of standing orders in order to move a motion without notice, the only standing orders that are suspended are those that would have prevented the moving of the specific motion. That motion and any debate upon it is still subject to all other provisions of the standing orders, such as the rules of debate.[255]

Leave of the House

A motion which requires notice may nevertheless be moved without notice by leave of the House (SO 76(1)).

Leave of the House is granted when no member present in the House objects to the moving of the motion or other course of action for which leave is sought (SO 76(2)). Leave is not granted when any one member present in the House objects. However, once granted, leave generally may not be withdrawn. The one exception to this is where a member is granted leave to make a personal explanation, where a practice has developed in the House for leave to be withdrawn at any time during the personal explanation if it is felt that the member is straying outside the boundaries of a personal explanation.[256]

The standing orders specify a number of specific circumstances in which leave of the House may be sought:

- private members may only table documents by leave of the House (SOs 42(2) and 54(4));
- a minister may seek leave to extend the time for an answer to a question by one minute (SO 64(5));

253 *Minutes*, NSW Legislative Council, 10 September 2014, p 39; 11 September 2014, p 55; 16 September 2014, p 73. The suspension related to a motion that a select committee be established to inquire into and report on aspects of the planning process in Newcastle and the broader Hunter Region.

254 See, for example, *Notice Paper*, NSW Legislative Council, 11 September 2014, p 110.

255 For further information, see the *Annotated Standing Orders of the New South Wales Legislative Council*, (n 1), p 651.

256 For further information, see the discussion in Chapter 13 (Debate) under the heading 'Personal explanations'.

- a petition may be presented after the House proceeds to business of the day by leave of the House (SO 68(8));
- a notice of motion may be given after the House proceeds to business of the day by leave of the House (SO 71(6));
- a motion that requires notice may be moved without notice by leave of the House (SOs 73 and 76(1));
- a motion that has been moved and is in the possession of the House may be withdrawn by the mover by leave of the House (SO 75(4));
- a member may seek leave to make a personal explanation to the House (SO 88);
- an amendment which has already been moved may be withdrawn by leave of the House (SO 109(5));
- a call for a division may be withdrawn by leave of the House at any time before the appointment of tellers (SO 112(6));
- when several bills are received from the Assembly concurrently, the House may grant leave for procedural motions relating to the bills to be dealt with on one motion without formalities (SO 154, as amended by sessional order);
- after the second reading of a bill, the House may grant leave to proceed to the third reading of the bill forthwith, thus by-passing consideration of the bill in committee (SO 141(1)(a)); and
- in considering a bill in a Committee of the whole House, the committee, by leave, may consider clauses, parts, divisions or schedules together (SO 142(6)).

In practice, leave is regularly granted for a great deal of the work of the Legislative Council under these provisions, including the making of personal explanations and proceeding to the third reading of a bill after its second reading.

However, members also often seek leave to undertake actions for which specific provision is not made in the standing orders. For example:

- ministers routinely seek leave to incorporate their second reading speech in *Hansard* where substantially the same speech has previously been given in the Legislative Assembly;
- members routinely seek leave to amend a notice of motion to be moved during formal business in order to make the motion, as amended, acceptable to all members of the House;[257] and

257 For further information, see the discussion earlier in this chapter under the heading 'Formal business'.

- it is routine in a Committee of the whole House for leave to be granted to take a bill as a whole rather than by clauses and schedules.[258]

The granting of leave is therefore an important and expeditious way for the House to transact business by unanimous consent.

When seeking leave, a member must make clear to the House the purpose for which leave is sought. The President must then seek the will of the House by asking: 'Is leave granted?'. If there is no objection, the President states 'There being no objection, leave is granted', whereupon the member may proceed with the matter. If an objection is taken, the President states 'Objection has been taken' and the matter does not proceed.

The granting of leave is specific to the particular purpose for which leave was sought. For example, a member cannot seek leave for the making of a personal explanation and then move a motion in relation to that explanation.[259]

Items of business taken together

In very unusual circumstances, items of business may be taken together with the consent of the House. For example, as noted earlier, the House has in the past granted leave for multiple disallowance motions, relating to a common subject, to be moved together.[260] In a very unusual example, on 10 May 2017, the House granted leave for three notices of motions in identical terms to be moved *in globo* as formal business and for the House to vote on the three motions concurrently.[261]

DISTINGUISHED VISITORS

Under standing order 195, a distinguished visitor may be admitted to a seat on the floor of the House at any time, by motion moved without notice. Since 2004, this standing order has been used to allow a number of distinguished visitors to take a chair on the dais to the right of the President. In some cases, a motion has been moved by leave proposing that a distinguished visitor be invited to take a chair on the dais later in the day, in the event of the visitor's attendance.

Distinguished visitors may also be admitted to the President's Gallery and announced to the House by the President.[262]

---

258 For further information, see the discussion in Chapter 16 (Committee of the whole House) under the heading 'Consideration of a bill as a whole'.

259 For further information, see R Laing (ed), *Annotated Standing Orders of the Australian Senate*, (Department of the Senate, 2009), pp 312-314. See also D Blunt, 'The limits of leave', Paper prepared for the Biennial Clerk's Conference, Brisbane, 27 January 2017.

260 *Minutes*, NSW Legislative Council, 16 May 1996, p 144; 10 March 2016, p 718; 3 May 2017, p 1561.

261 *Minutes*, NSW Legislative Council, 10 August 2017, pp 1853-1864.

262 For further information, see the *Annotated Standing Orders of the New South Wales Legislative Council*, (n 1), pp 635-636.

CHAPTER 11

PUBLICATION OF AND ACCESS TO THE PROCEEDINGS OF THE LEGISLATIVE COUNCIL

This chapter examines publication of and access to the proceedings of the Legislative Council.

PUBLICATION OF PROCEEDINGS

The Legislative Council produces a range of publications which record in detail the proceedings of the House. The official records of the House are the *Minutes of Proceedings*, the *Notice Paper*, the *Questions and Answers Paper*, the *Journals of the Legislative Council* and *Hansard*. In addition, the Clerk publishes certain other papers such as the Statutory Rules and Instruments Paper.

Historically these publications were only available in hard copy. However in modern times they are all available online on the Parliament's website, with the exception of historical *Journals of the Legislative Council*. In some cases, they are also available online in different formats, such as an online database for tracking questions on notice listed in the *Questions and Answers Paper*.

The official records of the House

Under the standing orders, the Clerk is required to ensure that the proceedings of the Legislative Council are recorded and published in the *Minutes of Proceedings* (SO 49(1)), that notices of motions and orders of the day are published in the *Notice Paper* (SO 49(2)), that questions on notice are published in a *Questions and Answers Paper* (SO 67, as amended by sessional order), and that a *Hansard* record is kept of all debates in the House (SO 51(1)).

Collectively, the *Minutes of Proceedings*, the *Notice Paper* and the *Questions and Answers Paper* are referred to as the 'House Papers'. They are produced each sitting day by the Procedure Office of the Legislative Council. *Hansard* is produced each sitting day by the Parliamentary Reporting Staff.

The House has authorised the publication of the official records of the House, in both written and electronic form (SOs 49(3) and 51(2)).[1] Such publication is protected by section 27 of the *Defamation Act 2005*, which provides a defence of absolute privilege to anything published by order or under the authority of the House.[2] The official records of the House are discussed in further detail below.

The *Minutes of Proceedings*

Standing order 49(1) requires that all proceedings of the House are to be recorded by the Clerk and published in the *Minutes of Proceedings*, signed by the Clerk.

The *Minutes of Proceedings* are the official record of the votes and proceedings of the Legislative Council. In addition to the requirement in standing order 49(1), various standing orders specify that the following matters must be recorded in the *Minutes*:

- the names of members present should the House be adjourned for lack of a quorum (SOs 29, 30);
- reports or documents lodged out of session with the Clerk (SOs 55, 231, 233);
- the names of members not present at any time during a sitting day (SO 62);
- the name of a member who is the only member to call for a division, at the request of that member (SO 112);
- records of divisions and pairs (SO 115);
- reasons given by the Chair in the event of a casting vote (SO 116);
- every message received from the Legislative Assembly, together with any answer given (SO 127); and
- any protest received against the passing of a bill (SO 161).[3]

The *Minutes of Proceedings* are prepared by the Procedure Office of the Legislative Council each sitting day. After the sitting concludes, the *Minutes* are published as a draft or 'proof', both on the Parliament's website and in printed form the following morning.[4]

---

1 For further information on the adoption of standing order 49(3), specifically the House's authorisation of publication of the *Minutes of Proceedings*, *Notice Paper* and *Questions and Answers Paper* in electronic form, see S Want and J Moore, edited by D Blunt, *Annotated Standing Orders of the New South Wales Legislative Council*, (Federation Press, 2018), p 149.

2 For further information, see the discussion in Chapter 3 (Parliamentary privilege in New South Wales) under the heading 'Statutory protection of the publication and broadcasting of proceedings'.

3 For further information, see the *Annotated Standing Orders of the New South Wales Legislative Council*, (n 1), p 147.

4 On 25 June 2009, the President left the Chair until the ringing of a long bell due to the absence of a minister from the House. When it became clear that the House would not resume sitting until after the winter long adjournment, the Clerk published interim *Minutes*. The House next met on 1 September 2009 after the winter long adjournment. The sitting day of 24 June 2009 was resumed and concluded and a proof of the *Minutes* published.

For ease of identification, the proof *Minutes* are printed on blue paper.[5] After extensive checking and any corrections, a final version of the *Minutes* is produced and published on the Parliament's website. Ultimately this final version is also signed, bound and published in hard copy as part of the *Journal of the Legislative Council*.

The *Minutes of Proceedings* have been published in hard copy since the commencement of responsible government in 1856. Prior to that, the proceedings of the colonial Legislative Council from 1824 to 1855 were recorded in the *Votes and Proceedings of the Legislative Council*. Online publication of the *Minutes of Proceedings* only commenced in 1991. However, in recent years, to improve access to the records of the Legislative Council, the Department of the Legislative Council has digitised and made available online the full set of the *Minutes of Proceedings* and the *Votes and Proceedings of the Legislative Council* since 1824.

Historically, the *Minutes of Proceedings*, in addition to recording the proceedings of the House, also included written questions on notice, answers to written questions received each day, and notices of motions and orders of the day. This is no longer the case. Written questions and answers to questions received each day have been published in a separate *Questions and Answers Paper* since 16 August 1984,[6] whilst notices of motions and orders of the day have been published in a separate *Notice Paper*[7] since 22 February 1990.[8]

The *Notice Paper*

Standing order 49(2) requires the Clerk to publish a business paper, referred to elsewhere in the standing orders as the *Notice Paper*, containing notices of motions and orders of the day. As noted above, the Legislative Council has published a separate *Notice Paper* since 22 February 1990.

Notices of motions and orders of the day are discussed in detail in Chapter 10 (The conduct of proceedings).[9] Briefly, notices of motions are items of business proposed by members for consideration by the House, but which have not yet come before the House. Orders of the day are items of business which the House has commenced debating but has ordered be considered further at a later time (SO 80).

With the exception of the first sitting day of a new session when there is no *Notice Paper*, notices of motions and orders of the day are arranged in the *Notice Paper* according to the

5 If a substantial error is made in the proof *Minutes of Proceedings*, a 'revised proof' is prepared and published on white paper before the next meeting of the House.

6 On 15 August 1984, the House adopted a resolution for the publication of a separate *Questions and Answers Paper*. See *Minutes*, NSW Legislative Council, 15 August 1984, pp 27-28.

7 The paper was originally titled 'Notices of motions and orders of the day'.

8 On 22 February 1990, the President made a statement that he had approved, as from the previous day, the publication of a Notices of Motions and Orders of the Day Paper separate from the *Minutes of the Proceedings*. See *Minutes*, NSW Legislative Council, 22 February 1990, p 27.

9 See the discussion under the heading 'Notices of motions and orders of the day'.

order of business for that day as determined under standing and sessional orders.[10] The order of business following formalities on any given sitting day is discussed in detail in Chapter 10 (The conduct of proceedings).[11] However, in summary, the order in which categories of business are arranged in the *Notice Paper* is as follows:

- matters of privilege;
- business of the House;
- matters of public importance;
- depending on the day: government business/private members' business/ committee reports and government responses;[12]
- business for future consideration;[13]
- bills or provisions of bills referred to select or standing committees;
- contingent notices of motions; [14] and
- bills discharged, laid aside, negatived or withdrawn.

Within these categories of business, as a general rule, notices of motions are listed first and orders of the day second, reflecting the order in which they are dealt by the House.[15]

---

10 Note, however, that it is open to the House to rearrange the order of business on any given sitting day, notwithstanding the order in which business is listed in the *Notice Paper*. For further information, see the discussion in Chapter 10 (The conduct of proceedings) under the heading 'Managing business'.

11 See the discussion under the heading 'Business of the day'.

12 For further information on the ordering of government business, private members' business and committee reports and government responses, see the discussion in Chapter 10 (The conduct of proceedings) under the headings 'Government business', 'General or private members' business' and 'Debate on committee reports and government responses'.

13 Business for future consideration comprises notices of motions and orders of the day which the House has set down for further consideration on a specific day. When the *Notice Paper* for the relevant day is prepared, the item is returned to the relevant category of business as the first item in that category. For example, a notice of motion for disallowance of a statutory rule set down as business for future consideration is returned to Business of the House as a notice of motion on the relevant date as the first item of business. However, this arrangement is modified in relation to private members' business and debate on committee reports, where the item is returned to its original place in the order of business. For further information, see the *Annotated Standing Orders of the New South Wales Legislative Council*, (n 1), pp 279-280. In the event that a notice of motion is given for a specific day, rather than for the next sitting day as is the normal practice, the notice would also be listed under business for future consideration until the *Notice Paper* for the relevant day is prepared, when it is returned to the relevant category of business according to the rules outlined above.

14 Contingent notices of motion are listed in full in the *Notice Paper* on the first sitting day of each week. On other days only new contingent notices are published in the *Notice Paper*. This commenced on 16 April 1996. See *Journals*, NSW Legislative Council, 1995-1996, vol 187, pp 1203-1220.

15 For further information, see the discussion in Chapter 10 (The conduct of proceedings) under the heading 'Notices of motions and orders of the day'. Ministers may arrange the order in which

However, committee reports and government responses to committee reports, having been tabled and set down for further debate, are by default always orders of the day, whilst contingent notices of motions are, as their name indicates, notices of motions only. In addition, bills or provisions of bills referred to select or standing committee and bills discharged, laid aside, negative or withdrawn are simply lists of bills.

Under a sessional order first adopted on 21 June 2011 and readopted in subsequent sessions,[16] notices of private members' business that have remained on the *Notice Paper* for 20 sitting days without being moved are removed from the *Notice Paper*. This sessional order does not apply to notices for the introduction of bills or for the disallowance of statutory rules.[17]

Notices of motions appearing in the *Notice Paper* are accompanied by the name of the member who gave the notice, and in the case of a notice to introduce a bill, the short title of the bill. Notices of motions given by private members also indicate the date on which the notice was given and the date on which the notice expires, according to the rules outlined in the paragraph above.

Orders of the day appearing in the *Notice Paper* include information on the name of the bill or motion, the question before the House,[18] the member with carriage of the bill or motion, the date on which the debate was last adjourned or interrupted, and the member with pre-audience (SO 101(4)),[19] including the time remaining for that member to speak to the bill or motion.

Where the House begins a second or subsequent session in a Parliament, business which has lapsed because of prorogation may be restored to the *Notice Paper*. This is discussed in more detail in Chapter 9 (Meetings of the Legislative Council).[20] However, business may not be restored to the *Notice Paper* on the opening of the first session of a new Parliament, as the membership of the House has changed since the previous Parliament.

Where a member ceases to be a member of the Legislative Council, notices of motions standing in the name of that member are removed from the *Notice Paper*. However, this does not apply to orders of the day, which are in the possession of the House. In such instances, other members may take carriage of the bill or motion.[21]

---

government business is listed on the *Notice Paper* for the next sitting day by indication to the Clerk (SO 43).

16 *Minutes*, NSW Legislative Council, 21 June 2011, p 232; 9 September 2014, p 10; 6 May 2015, p 58; 8 May 2019, p 63.

17 For further information, see the *Annotated Standing Orders of the New South Wales Legislative Council*, (n 1), pp 246-247.

18 For example: 'That this bill be now read a second time.'

19 For further information, see the discussion in Chapter 13 (Debate) under the heading 'Pre-audience'.

20 See the discussion under the heading 'Current arrangements for the opening of a second session and subsequent sessions'.

21 For discussion of instances where other members have taken carriage of orders of the day listed in the name of a member who has died, see the *Annotated Standing Orders of the New South Wales Legislative Council*, (n 1), p 281.

As with the *Minutes of Proceedings*, the *Notice Paper* is prepared by the Procedure Office of the Legislative Council each sitting day. After the sitting concludes, the *Notice Paper* is published as a draft or 'proof', both on the Parliament's website and in printed form the following morning.[22] For ease of identification, the proof *Notice Paper* is printed on pink paper.[23] After extensive checking and any corrections, a final version of the *Notice Paper* is produced. However, unlike the *Minutes of Proceedings*, the final *Notice Paper* is no longer subsequently bound and published as part of the *Journals of the Legislative Council*. This is discussed further below.[24]

The *Questions and Answers Paper*

Standing order 67, as amended by sessional order adopted at the commencement of the 57th Parliament in May 2019, requires that the Clerk publish a *Questions and Answers Paper*. The *Questions and Answers Paper* contains written questions, referred to as questions on notice, submitted by members to ministers each day before 4.00 pm, together with answers from ministers. It is published each day, excluding weekends and public holidays.[25] Every Tuesday of each week it contains, by number and title only, all unanswered questions, together with the text of any new questions and any answers received on the previous day. On other days, only new questions and answers are printed.[26]

Standing order 67, as amended by sessional order, also requires the Clerk to publish a *Questions and Answers Paper* on prorogation containing answers to questions on notice received since the last sitting of the House.[27] However, with the move in the 57th Parliament to publish a *Questions and Answers Paper* each working day, this requirement is now largely redundant.[28]

---

22 As noted previously, on 25 June 2009 the President left the Chair until the ringing of a long bell due to the absence of a minister from the House. When it became clear that the House would not resume sitting until after the winter long adjournment, the Clerk published an interim *Notice Paper*. The House next met on 1 September 2009 after the winter long adjournment.

23 If a substantial error is made in the *Notice Paper*, a 'revised proof' is prepared and published on white paper before the next meeting of the House.

24 See the discussion under the heading 'The *Journals of the Legislative Council*'.

25 Prior to the adoption of the sessional order amending standing order 67 in May 2019, the *Questions and Answers Paper* was only published on sitting days.

26 Consequently, the full text of any question will only be printed twice: when notice is given and when answered.

27 On 22 November 2006, prior to prorogation of the House at the end of the 53rd Parliament, the House agreed to a sessional order requiring the Clerk to publish a *Questions and Answers Paper* on specific dates in the lead up to prorogation. See *Minutes*, NSW Legislative Council, 22 November 2006, p 397.

28 For further information on the history of written questions and answers in the Legislative Council, see the discussion in Chapter 14 (Questions) under the heading 'The history of questions in the Legislative Council'. See also the *Annotated Standing Orders of the New South Wales Legislative Council*, (n 1), pp 223-225.

As noted previously, the Legislative Council has published a separate *Questions and Answers Paper* since 16 August 1984.[29]

The rules for members lodging written questions on notice to ministers, and for ministers lodging answers to questions on notice, including the requirement that answers to questions on notice be lodged within 21 calendar days of the question's publication, are discussed in detail in Chapter 14 (Questions).[30]

In 2006 and 2014, at the commencement of the second sessions of the 53rd and 55th Parliaments, the House restored all questions and answers to the *Questions and Answers Paper* with the same timeframe for reply as if prorogation had not intervened. This is discussed in more detail in Chapter 9 (Meetings of the Legislative Council).[31]

As with the other House papers, the *Questions and Answers Paper* is prepared by the Procedure Office of the Legislative Council. It is initially published as a draft or 'proof' before later being finalised. As with the *Notice Paper*, the final *Questions and Answers Paper* is no longer subsequently bound and published as part of the *Journals of the Legislative Council*. This is discussed further below.[32]

Questions on notice and answers received since 1988 are also available in an online database on the Parliament's website. The database allows the user to search for questions and answers by the member who asked the question, the date of the question, the portfolio to which the question relates and the subject matter of the question.

Under standing order 66, as amended by sessional order, on prorogation of a session the Clerk is also required to publish answers to questions without notice, that is to say, answers to questions asked during Question Time, received since the last sitting of the House. A separate *Answers to Questions without Notice* paper, distinct from the *Questions and Answers Paper*, is published.

The *Journals of the Legislative Council*

The bound *Journals of the Legislative Council* are a complex and varied set of papers recording the proceedings of the Legislative Council since 1824.

The current bound *Journals of the Legislative Council – Minutes of Proceedings* contain a full set of the *Minutes of Proceeding* for a given session, a comprehensive index to the *Minutes* for that session, an index to papers tabled in that session, and a series of sessional returns summarising key aspects of business of the House in that session. These include: the proclamation convening the session; a register of Addresses to the Governor and orders

29 On 15 August 1984, the House adopted a resolution for the publication of a separate *Questions and Answers Paper*. See *Minutes*, NSW Legislative Council, 15 August 1984, pp 27-28.

30 See the discussion under the headings 'Rules governing questions on notice' and 'Rules governing answers to question on notice'.

31 See the discussion under the heading 'Current arrangements for the opening of a second session and subsequent sessions'.

32 See the discussion below under the heading 'The *Journals of the Legislative Council*'.

for State papers; a register of separate and joint Addresses to the Governor not being for papers; registers of the passage of bills; a register of committees appointed; an abstract of petitions received; a list of new members who took the pledge of loyalty or oath of allegiance; a sessional list of all members and the duration of their service, and a list of the attendance of all members both in the House and during divisions.[33]

The Legislative Council also published bound *Journals of the Legislative Council – Questions and Answers* and *Journals of the Legislative Council – Notice Paper* from August 1984 and February 1990 respectively until the end of the 54th Parliament in December 2010.[34] However, these volumes were discontinued in the 55th Parliament, with final versions of both the *Questions and Answers Paper* and *Notice Paper* moving to online publication only.

From 1856 until the end of 2014, the Legislative Council also published a separate bound volume of *Legislative Council Proceedings in Committee of the Whole*. However this was discontinued from the beginning of 2015, with proceedings in committee thereafter recorded directly in the *Minutes of Proceedings*. A 'Report of Divisions in Committee of the Whole House' was also included in the *Journals of the Legislative Council* between 1856 and 2003, but was discontinued following the adoption of the 2004 standing orders (after initial trial in 2003 as sessional orders).[35]

Between 1856 and 2003, the *Journals* also incorporated reports from the Printing Committee. Before 2004, all documents tabled in the House and not ordered to be printed were referred to the Printing Committee for consideration as to whether they should be printed. The Printing Committee would report to the House if the printing of any of the documents was recommended. However, the adoption of standing order 59 in 2004, requiring a minister to table a list of all papers tabled in the previous session and not ordered to be printed, made obsolete reports of the Printing Committee.[36]

Between 1856 and 1904, the *Journals* also contained printed parliamentary papers: those documents ordered to be printed by the House. However, from 1904, papers ordered by the House to be printed were published in separate volumes called 'Joint Volumes of Parliamentary Papers' (being joint with the Legislative Assembly). In 2006, by agreement between the Clerks of both Houses, the publication of this series was discontinued.[37]

---

33 For further information, see the *Annotated Standing Orders of the New South Wales Legislative Council*, (n 1), p 147. An 'official' copy of the *Journals of the Legislative Council*, with the *Minutes of Proceedings* and other sessional returns signed by the Clerk, has been maintained since 1968.

34 For further information on the content of these *Journals*, see the *Annotated Standing Orders of the New South Wales Legislative Council*, (n 1), p 147.

35 For further information, see the *Annotated Standing Orders of the New South Wales Legislative Council*, (n 1), p 149.

36 For further information, see the *Annotated Standing Orders of the New South Wales Legislative Council*, (n 1), pp 149-150.

37 For further information, see the discussion in Chapter 19 (Documents tabled in the Legislative Council) under the heading 'Custody and availability of tabled documents'.

Finally, the Legislative Council also continues to maintain a bound series entitled *Legislative Council Elections*, capturing key information in relation to both periodic Council elections and casual vacancies in the Council.

Hansard[38]

Standing order 51(1) provides that the Clerk is to ensure that a *Hansard* record is kept of all debates in the Legislative Council (SO 51(1)).[39]

Hansard is the official record of debates in the Legislative Council, including debate when the House resolves into a Committee of the whole House. As such, it differs from the *Minutes of Proceedings*, which records the votes and proceedings of the Legislative Council. It is not a word-for-word transcript, as repetition and redundancies are omitted and obvious mistakes corrected, including grammatical mistakes. However, it is substantially a verbatim report, which attempts to capture the full meaning and argument of members in their contributions to debates in the House.

Whilst *Hansard* is intended as a record of debates in the House, members may seek leave to have the text of a document incorporated in *Hansard*, where it automatically becomes public. This is discussed further in Chapter 13 (Debate).[40]

Unlike the other House papers, which are prepared by the Procedure Office of the Legislative Council, *Hansard* is prepared by the Parliamentary Reporting Staff. As with the House papers, it is initially published as a draft or 'proof' after each sitting day, before later being finalised and published as a final version.[41] Copies of *Hansard* are available on the Parliament's website. In recent years, there have been significant improvements in the accessibility and searchability of *Hansard* on the Parliament's website.

This increased accessibility of *Hansard* online has led to occasional requests for material to be expunged from the *Hansard* record. Such a step is undesirable. The *Hansard* record

---

38 The name *Hansard* derives from Thomas Curson Hansard, the printer, and later publisher, of *Hansard's Parliamentary Debates* of the House of Commons and House of Lords in Westminster. In 1803 the House of Commons passed a resolution giving the press the right to enter the public gallery. In the same year, William Cobbett, a newspaper publisher, began publishing an extract in his *Weekly Political Register* entitled 'Parliamentary Debates' which was a summary of journalists' reports of speeches extracted from various newspapers. In 1812, Cobbett's assistant, Thomas Hansard, took over the publication of the *Weekly Political Register* and in 1829 renamed the reports as *Hansard's Parliamentary Debates*. The Hansard family continued to produce the parliamentary debates in England until 1889. See Australasian and Pacific Hansard Editors Association, 'History of Hansard', January 2003.

39 Standing order 115(5) also requires that members paired during any division will be recorded in *Hansard*.

40 See the discussion under the heading 'Incorporation of material in *Hansard*'.

41 In 1985, an incident occurred where the precise wording used in *Hansard* was at issue, prompting both the Hon Franca Arena and the Hon Max Willis to make personal explanations on the matter and the Editor of Debates to write to Mr Willis and confirm a correction to the final *Hansard*. See *Hansard*, NSW Legislative Council, 26 September 1985, p 7206; 1 October 1985, p 7290; 17 October 1985, pp 8124-8126.

should as closely as possible record debates in the House. Where an individual has been named in the House and objects to the reference, the proper course of action is to seek a right of reply.[42] However, there have been three occasions, involving the naming of minors in the House, where the House has agreed to expunge words from the *Hansard* record.[43] On the third occasion in 2005, the words were removed from the electronic record only.

The publication of *Hansard* in New South Wales commenced on 28 October 1879 at the start of the third session of the 9th Parliament.[44] Prior to that, reports of debates, but not a complete record, were published in the *Sydney Morning Herald*.

In modern times, as well as recording debates in the House, the Parliamentary Reporting Staff also records and provides a transcript of proceedings in Legislative Council committees.

Other publications

In addition to the official records of the Legislative Council, the Department of the Legislative Council also produces certain other publications, discussed below.

The Statutory Rules and Instruments Paper

Although not required by standing order, the Clerk publishes for the information of members a Statutory Rules and Instruments Paper which shows all statutory rules and instruments subject to disallowance, the date of their tabling in the House (where this has occurred), and the time within which notice of their disallowance may be given. The paper is issued on the Tuesday of each week that the Council is sitting, and on the first Tuesday of each month when the Council is not sitting. Copies are available on the Parliament's website.

The Statutory Rules and Instruments Paper was first produced in 1987 following the commencement of the *Interpretation Act 1987*.

List of members

The Procedure Office keeps up-to-date a list of members of the Legislative Council, providing the full name and title of all members, their position and party, date of election and term of service. It also provides a summary of party representation in the Legislative Council and the names of the senior officers of the Legislative Council.

---

42 For further information, see the discussion in Chapter 3 (Parliamentary privilege in New South Wales) under the heading 'Right of reply to statements made by members in the House'.

43 *Minutes*, NSW Legislative Council, 4 April 1990, pp 81-82; 15 May 1996, p 137; 21 September 2005, p 1590.

44 The Parliament of New South Wales was somewhat later than other Australian parliaments in adopting a *Hansard* reporting service. The Victorian Parliament commenced publication of debates from 12 February 1866.

ACCESS TO PROCEEDINGS

There are many means of accessing the proceedings of the Legislative Council. The Legislative Council conducts all its proceedings in public and members of the public are welcome to attend any sitting of the House. The proceedings of the Legislative Council are also webcast live over the Parliament's website and real time updates of proceedings are made available through the Running Record. In addition, the Legislative Council makes available a significant range of other information on the Parliament's website, and increasingly through its social media presence. The Legislative Council also provides for the broadcasting and reporting of its proceedings by the media. This is discussed in more detail below.

Of course, for many members of the public, the most likely means of direct engagement with the Legislative Council and its members is through the Legislative Council's extensive committee system and the many inquiries undertaken by Council committees. The conduct of committee inquiries is discussed separately in Chapter 20 (Committees).

Public access to proceedings in the chamber

Members of the public may view the proceedings of the Legislative Council from the public gallery at the western end of the chamber (SO 196(1)),[45] which is open whenever the House is sitting.[46] The President may also admit distinguished visitors into the President's gallery, located on either side of the President's Chair (SO 196(2)). In practice the President also allows other members to invite visitors into the President's gallery.

Visitors to the House are expected to observe normal courtesies and not to interrupt the proceedings. In November 2009, the House adopted by resolution of continuing effect the following rules for visitors to the President's gallery and the public gallery:

- no audible conversations may take place;
- applause, jeering or any other gestures responding to the proceedings is not permitted;
- visitors to the galleries are not to converse with members in the chamber;
- visitors are not to trespass onto the chamber floor or to impede the access of members entering or leaving the chamber;
- the use of mobile telephones, radios, iPods and other electronic equipment that creates sound in the chamber is not permitted;
- food and drink are not permitted in the chamber at any time;

45 For further information, see the discussion in Chapter 25 (The Parliament buildings and the Legislative Council chamber) under the heading 'The public gallery'.

46 An exception to this occurred during the COVID-19 pandemic in 2020, when for health reasons the Parliament building remained closed to members of the public during sittings of the House.

- protests or other actions that interrupt the proceedings of the House are not permitted and banners, posters and clothing with messages that may be used to protest are not to be worn or taken into the galleries;
- photographs may not be taken unless permission has been granted by the President;
- visitors in the President's Gallery when the House is sitting are subject to the same dress code as applies to members; and
- visitors must comply with instructions given by chamber and support staff or other parliamentary staff.[47]

These rules are provided on pamphlets available from Chamber and Support Services staff and at the entrance of the public gallery.

These rules have been reiterated in various rulings by Presidents.[48]

If a visitor interrupts the proceedings of the House, the President or other occupant of the Chair may order the Usher of the Black Rod to remove that person and exclude him or her from the House for a specified period (SO 197).[49] On the rarest of occasions, when there is significant disorder in the public gallery, the President has also ordered that the public gallery be cleared.[50] As noted in Chapter 3 (Parliamentary privilege in New South Wales), the House has both an inherent power but also power under the standing orders, adopted pursuant to section 15 of the *Constitution Act 1902*, to remove and exclude visitors. Removal pursuant to the standing orders must be necessary for the 'orderly conduct' of the House within the meaning of section 15.[51]

Members of the public are also welcome to visit the Legislative Council chamber on non-sitting days during the open hours of Parliament. The Parliament runs regular public tours of the building.

Live webcasting of proceedings, the Running Record and other resources

The Legislative Council has authorised, by resolution of continuing effect,[52] the live webcast of its proceedings on the Parliament's website. For most members of the public, this is the most readily available means of accessing the proceedings of the Legislative Council in real time on sitting days. The webcast is protected by parliamentary privilege.

47 *Minutes*, NSW Legislative Council, 10 November 2009, pp 1487-1488.

48 Rulings: Primrose, *Hansard,* NSW Legislative Council, 4 June 2009, p 15752; Harwin, *Hansard,* NSW Legislative Council, 31 October 2013, pp 25161, 25172; Ajaka, *Hansard*, NSW Legislative Council, 16 November 2017, p 44.

49 For further information, see the *Annotated Standing Orders of the New South Wales Legislative Council*, (n 1), pp 638-643.

50 See, for example, *Minutes*, NSW Legislative Council, 30 May 1995, p 76.

51 For further information, see the discussion in Chapter 3 (Parliamentary privilege in New South Wales) under the heading 'Removing and excluding visitors pursuant to the standing orders'.

52 *Minutes*, NSW Legislative Council, 18 October 2007, pp 279-281.

In addition to the webcasting of proceedings, since 2009 the Department of the Legislative Council has published online on sitting days the Running Record, which is a real-time record of proceedings in the Legislative Council updated almost immediately as proceedings occur in the House. It is written in a less formal and more accessible manner than the *Minutes of Proceedings*, and contains links to other information on the Parliament's website, such as bills and amendments under consideration by the House. As such, it is intended to make the proceedings of the Legislative Council on a sitting day more immediately and easily accessible to members, their staff, departmental and ministerial staff and the wider community.

The Department of the Legislative Council also publishes during sitting weeks an online blog entitled 'The House in Review'. This is discussed further below.[53]

In addition, the Legislative Council publishes ahead of each sitting day a Daily Program of business anticipated to come before the House at its next meeting. However, it is important to emphasise that the Daily Program provides a guide only to anticipated business. The House has the discretion to change the order of business as it sees fit.

Other information available online

In addition to the official records of the House discussed above, a great deal of other information about the work of the Legislative Council is made available through the Parliament's website. This includes:

- Information on members, including their current position or positions, past positions and contributions in *Hansard* by topic and bill.
- Details of all bills before the House and the Parliament, including the text of the bill, the explanatory memorandum accompanying the bill, the second reading speech of the minister or member with carriage of the bill, any circulated amendments to the bill and details of the progress of the bill through the Parliament.
- Information on papers tabled in the House, including pdf versions of significant papers such as indexes to returns to order, searchable in a tabled papers database.
- A range of information on committees, including committee membership, inquiries, reports and government responses.
- A range of procedural publications, including the Standing Rules and Orders and sessional orders, the *Annotated Standing Orders of the New South Wales Legislative Council*, *A concise guide to Rulings of the President and the Chair of Committees*, the *Parliamentary Record*, various procedural manuals, and *New South Wales Legislative Council Practice.*

53 See the discussion under the heading 'The Legislative Council's social media presence'.

- A range of statistical information on the Legislative Council, including election results since 1978, party representation in the House since 1978 and orders for State papers made by the House since 1995.
- Information on the role and history of the Council, together with journal articles on the Council published by office holders and officers of the Legislative Council.
- A virtual tour of the chamber and other important areas of the Parliament.
- Information on the Department of the Legislative Council, including the annual reports of the department.

The Legislative Council's social media presence

The Department of the Legislative Council also devotes considerable resources to promoting the work of the Legislative Council through social media. The Legislative Council operates Twitter and Facebook accounts and publishes a blog through WordPress with the aim of providing accessible, accurate and timely information to the public and the media about the Legislative Council, encouraging engagement with the parliamentary process and promoting a positive image of the Legislative Council and the Parliament.

Each social media platform offers different opportunities to inform and engage with a variety of persons and organisations outside the Parliament. The Twitter account (@nsw_upperhouse) prioritises engagement with those directly involved in politics and policy making or in journalism. Whilst information is tweeted about a wide range of matters including events at the Parliament of New South Wales, the primary focus is on the work of the Legislative Council and its committees.

The primary audiences of the Facebook page (@nswupperhouse) are the general public and community groups. Because of this focus, the account mainly informs the public about committee inquiry activities and encourages formal engagement through the submission process. The department regularly 'boosts' posts to disseminate information to specific audiences. For example, a post advertising a regional committee hearing may be 'boosted' to people who live in the local area and have an interest in the subject matter.

As noted above, the Legislative Council also publishes through WordPress an online blog entitled 'The House in Review'. This blog is a dynamic space where the department summarises the daily activities of the House when it is sitting, including significant legislation under consideration. The blog also provides regular committee inquiry updates and allows for detailed posts on hot topics such as election procedures. In addition to being read by blog subscribers, each post is shared on Twitter and Facebook.

The established 'voice' of the Legislative Council's social media accounts is impartial, informative and educational. Original content is non-political, written in a conversational tone, and designed to be inclusive and accessible.

The broadcasting of proceedings by the media

The Legislative Council has authorised, by resolution of continuing effect,[54] the broadcasting of proceedings of the House within the precincts of Parliament House, by direct signal to the media gallery in Parliament House, which accommodates the Parliamentary Press Gallery, and to persons and organisations outside Parliament House approved by the President on terms and conditions determined by the President from time to time.

The broadcasting of proceedings is on the basis of an undertaking by broadcasters to observe certain terms and conditions set out in the resolution, the key conditions of which are as follows:

- excerpts may only be taken from the sound or audio-visual signal provided by the Legislative Council to the media gallery;
- broadcasts of excerpts must be used only for the purposes of fair and accurate reports of proceedings and must provide a balanced presentation of differing views;
- excerpts must not be used for political party advertising or election campaigns, or for the purpose of satire or ridicule or commercial sponsorship or commercial advertising;
- excerpts must be placed in context;
- commentators must identify members by name;
- where the excerpts are used on a commercial radio or television station, the station must ensure that advertising before and after excerpts is of an appropriate nature; and
- events in the galleries must not be shown in excerpts.[55]

The President may also, on request, approve filming in the chamber by parties not represented in the Parliamentary Press Gallery. The media must request permission from the President to have a camera in the House to record footage for broadcasts.

The broadcasting resolution also contains specific conditions for still photography which, in addition to certain of the requirements for broadcasting outlined above, require that photographs of members be no closer than 'head and shoulders' distance and prohibit focus on members' documents, members not speaking in debate, the use of flash photography or digital enhancement of images. The President may approve access to the proceedings of the Legislative Council by still photographers who are accredited members of the Parliamentary Press Gallery.[56]

---

54 *Minutes*, NSW Legislative Council, 18 October 2007, pp 279-281. For information on previous resolutions of the Legislative Council authorising the broadcasting of proceedings, see L Lovelock and J Evans, *New South Wales Legislative Council Practice*, 1st ed, (Federation Press, 2008), p 274.

55 *Minutes*, NSW Legislative Council, 18 October 2007, pp 279-281.

56 Ibid.

A breach of the conditions set out in the broadcasting resolution may result in the suspension or withdrawal of permission by the President for the offender to broadcast excerpts of the proceedings of the House, or withdrawal of accreditation as a member of the Parliamentary Press Gallery.

Media guidelines

In March 2013 the Presiding Officers issued new guidelines for the Parliamentary Press Gallery. The guidelines are designed as a reference for media representatives regarding such things as the availability of the live feed of proceedings and the procedural publications outlined in this chapter, and the terms and conditions for broadcasting and rebroadcasting of proceedings. The guidelines also outline the conditions for membership of the Parliamentary Press Gallery, security and access in Parliament House and filming and reporting conditions for the parliamentary precincts as a whole.

Education programs

The Department of the Legislative Council offers or participates in various education programs designed to raise awareness of the work of the Legislative Council and the Parliament generally. The department offers a seminar program for public servants on the work of the House and its committees, and where possible, the department reaches out to regional schools with a regional school outreach program. Officers of the department also participate in the program of school visits to Parliament House managed through the Parliamentary Education Office.

COPYRIGHT

Under the *Copyright Act 1968* (Cth), copyright in the various records of the House and other information published by the Legislative Council is vested in and remains with the State of New South Wales through the Parliament of New South Wales (with the exception of any third party material, such as papers tabled in Parliament and written submission to committees where the copyright rests with the author).

Members of the public are encouraged to access, copy, display, disseminate and exchange information on the workings of the Legislative Council and the Parliament (apart from any third party material), on the condition that such use is not for the purpose of advertising, satire or ridicule. However, third parties must obtain permission from the Parliament before charging others for access to the material or modifying the material.

The copyright of the Parliament in the publications and proceedings made available by the Legislative Council may be indicated by the inclusion of the following copyright notice: '© State of New South Wales through the Parliament of New South Wales.'

CHAPTER 12

MOTIONS AND DECISIONS OF THE HOUSE

This chapter describes how the Legislative Council comes to decisions on items of business moved as motions. In general terms, there are two types of motions: substantive motions, which are self-contained proposals drafted in a form capable of expressing a decision or opinion of the House; and subsidiary motions, generally motions of a procedural nature. Members normally move substantive motions on notice, and they may generally be debated and amended. Alternatively, they may be superseded or withdrawn. They may also never come on for debate at all. If they are debated, they may be determined by vote of the House, either on the voices or on division. If agreed to, they become resolutions and orders of the House.

SUBSTANTIVE AND SUBSIDIARY MOTIONS

Motions may be classified into two broad types: substantive and subsidiary motions:

- Substantive motions are propositions put forward for the purposes of eliciting a decision of the House. They take the form of a proposal by a member that the House do something, order that something be done, or express an opinion with regard to some matter. As such, substantive motions are phrased in such a way that, if agreed to by the House, they express the judgement or will of the House.[1]
- Subsidiary motions are largely procedural in nature. They are generally motions moved in relation to an item of business, for example a motion to defer a decision on a question by moving that the debate be adjourned; motions moved for the purposes of avoiding a question, such as a superseding motion; motions flowing from an occurrence in the House, for example a motion that a report be printed or that a petition be received; and motions dependent on another motion, notably amendments.[2]

1 DR Elder and PE Fowler (eds), *House of Representatives Practice*, 7th ed, (Department of the House of Representatives, 2018), p 289.

2 Ibid. See also D Natzler KCB and M Hutton (eds), *Erskine May's Treatise on The Law, Privileges, Proceedings and Usage of Parliament,* 25th ed, (LexisNexis, 2019), para 20.2.

MOVING OF MOTIONS

Under standing order 73, a motion may only be moved in the Legislative Council by one of three means:

- according to notice given at a previous sitting;
- by leave of the House; and
- without notice according to standing order.

Motions may also be moved without notice where standing orders are suspended to allow that to occur.

In general terms, substantive motions are moved according to notice and subsidiary motions are moved without notice, although there are certain exceptions. This is discussed further below.

Moving of substantive motions

The moving and debate of substantive motions constitutes a significant proportion of the work of the Legislative Council, second only in terms of time to that spent considering bills.

Substantive motions moved according to notice

The vast majority of substantive motions moved and debated in the Legislative Council are moved according to notice, notice having been given on a previous sitting day.

The giving of notices of substantive motions, including the timing of the giving of notices, restrictions on the content of notices, and the order in which they are set down on the *Notice Paper*, is discussed in detail in Chapter 10 (The conduct of proceedings).[3] The giving of notice of the intended moving of a substantive motion allows members time to prepare for debate on the motion.

The order in which notices of substantive motions listed on the *Notice Paper* are moved is dictated by standing order 74(1), which provides that motions be called over each sitting day in the order shown on the *Notice Paper*. In turn, the order in which notices of motions are listed on the *Notice Paper* varies each sitting day according to various standing and sessional orders, including standing orders 74(3) and 39 giving precedence to matters of privilege and business of the House, standing orders 200 and 201 giving precedence to matters of public importance and urgency motions, and standing orders 40 and 41 and sessional orders giving precedence to debate on government business, private members' business and committee reports and government responses to committee reports on different days. This is discussed further in Chapter 10 (The conduct of proceedings).

3 See the discussion under the heading 'Giving of notices of motions'.

The requirement under standing order 74(1) that motions be called over in the order shown on the *Notice Paper* is also routinely modified each sitting day by decisions of the House concerning the management of business. For example, it is routine on any given sitting day for the moving of certain notices of motions to be postponed to a later hour or a future sitting day, or conversely for the moving of certain notices of motions to be brought forward by the suspension of standing and sessional orders. In addition, since 2015, the House has regularly modified the order in which private members' business, both notices of motions and orders of the day, is considered on private members' business days through the adoption of a resolution concerning the order of private members' business. Once again, this is discussed further in Chapter 10 (The conduct of proceedings).[4]

It is also notable that a certain proportion of motions, especially those given by private members, never progress to being moved and voted on by the House at all, and instead either expire according to sessional order or fall from the *Notice Paper* on prorogation.

The operation of standing order 74(1) is considered in further detail in the *Annotated Standing Orders of the New South Wales Legislative Council*.[5]

On the House reaching a notice of motion on the *Notice Paper* according to the arrangements for giving precedence to motions outlined above, the member in whose name the notice of motion stands seeks the call from the Chair and moves the motion. The form of words used is as follows: 'Mr/Madam President, I move according to notice: [insert the text of the motion].' If the motion is lengthy, the mover may instead simply refer to its number and place in the *Notice Paper* and the general subject matter of the motion. When a motion is called over as formal business, members also sometimes simply state: 'Mr/Madam President: I move the motion standing in my name on the *Notice Paper* for today.' Motions, other than the motion for the Address-in-Reply, do not require a seconder (SO 75(1)).[6]

Where a member is absent from the House, the member may request another member to move a motion standing in his or her name (SO 75(2)). This practice is relatively common during consideration of formal business at the commencement of a sitting day,[7] but less common at other times.[8] Where a member does move a substantive motion on behalf of another member, the *Minutes of Proceedings* record both members' names.

4 See the discussion under the heading 'General or private members' business'.

5 S Want and J Moore, edited by D Blunt, *Annotated Standing Orders of the New South Wales Legislative Council*, (Federation Press, 2018), pp 254-257.

6 For further information, see the *Annotated Standing Orders of the New South Wales Legislative Council*, (n 5), pp 257-260.

7 For further information, see the discussion in Chapter 10 (The conduct of proceedings) under the heading 'Formal business'.

8 In one example, on 14 September 2017, the Hon Michael Veitch moved a motion censuring the Minister for Regional Water on behalf of the Leader of the Opposition. See *Minutes,* NSW Legislative Council, 14 September 2017, p 1895.

If a substantive motion is not moved at the point it is reached in the day's proceedings the motion lapses and is withdrawn from the *Notice Paper* (SO 75(3)). Such occurrences are rare.[9] In most instances, in circumstances where a member is not in a position to move a motion standing in his or her name, consideration of the motion is postponed on the member's behalf by another member, or alternatively another member moves the motion on behalf of the member.

Whilst substantive motions are usually moved separately, on rare occasions identical motions have been moved and voted on concurrently in the House.[10] There is also precedent for a number of related but not identical motions to be moved and voted on concurrently.[11] The House has also on occasion considered concurrently motions containing alternative propositions for resolution of the House.[12]

In a very unusual instance, on 20 September 2012, both the Legislative Council and the Legislative Assembly considered concurrently the same motion, an apology for the forced adoption practices of the past. The motion was moved in identical terms in both Houses, with the same allocation of time for speakers in both Houses.[13]

Once moved, a motion may be debated according to the rules for debate, unless otherwise provided in the standing orders. This is discussed in Chapter 13 (Debate). Members may also move amendments to the motion, as discussed further below.[14]

Substantive motions requiring notice moved by leave of the House

A substantive motion which otherwise requires notice to be moved may be moved without notice by leave of the House, that is, with the unanimous consent of all members present (SOs 73 and 76(1)).

It is not the practice of the House to grant leave for substantive motions requiring notice to be moved without notice, except as otherwise provided for by the standing orders, as discussed further below. However, on occasion, substantive motions have been moved where notice was given earlier that same day. For example, there are a number of occasions on which the House has granted leave for the moving of a motion for the introduction of a bill, notice of which was given earlier that day.[15] Similarly, the House has granted leave for the moving of a motion for an order for State papers, notice of

9 See, for example, *Minutes*, NSW Legislative Council, 18 September 1997, p 57; 11 May 2006, p 2027; 8 May 2019, p 73.

10 See, for example, *Minutes,* NSW Legislative Council, 10 August 2017, pp 1853-1854.

11 See, for example, *Minutes,* NSW Legislative Council, 23 November 1999, p 255; 6 April 2017, pp 1542-1544.

12 For example, on 21 November 1923 and 14 November 1941, the House considered concurrently two alternate motions for the appointment of a representative to the University of Sydney Senate. See *Minutes,* NSW Legislative Council, 21 November 1923, p 90; 13 November 1941, pp 126-127.

13 *Minutes*, NSW Legislative Council, 20 September 2012, pp 1256-1257; *Votes and Proceedings*, NSW Legislative Assembly, 20 September 2012, pp 1279-1280.

14 See the discussion later in this chapter under the heading 'Amendments to motions'.

15 See, for example, *Minutes*, NSW Legislative Council, 24 May 2011, p 120; 30 January 2014, p 2305.

which was given earlier that day,[16] and the moving of a motion for the appointment of a committee, notice of which was given earlier that day.[17]

Substantive motions moved without notice according to standing order

Whilst the majority of substantive motions moved in the House are moved according to notice, certain substantive motions may be moved without notice according to standing order in circumstances where it is not practicable or in keeping with the relevant procedure for notice to be given. The following are examples:

- a motion for a member to take the Chair as President moved on the first sitting day of a new Parliament following a periodic Council election, or whenever a vacancy in that office occurs (SOs 11 and 12);
- a motion for a member to be elected Deputy President and Chair of Committees moved on the first sitting day of a new Parliament following a periodic Council election, or whenever a vacancy in that office occurs (SO 15(1));
- a motion moved by a minister to express the appreciation, thanks or condolences of the House (SO 74(4)); and
- a motion for a distinguished visitor to be admitted to a seat on the floor of the House (SO 195).[18]

From time to time, the House has also adopted resolutions affording precedence to the moving of a motion without notice on a particular day.[19]

In addition, although not strictly an example of the moving of a motion without notice, standing order 77(7) provides that where notice of motion is given of a matter of privilege, and the House is not expected to meet within a week of the notice being given to allow the consideration of the matter, the motion may be moved at a later hour of the sitting as determined by the President.

Moving of subsidiary motions

Generally speaking, subsidiary motions are moved without notice according to standing order. However, there are certain subsidiary motions which require notice. Both are discussed further below.

16 *Minutes*, NSW Legislative Council, 19 October 2006, p 282.

17 *Minutes*, NSW Legislative Council, 16 October 2007, p 263.

18 Very occasionally, the *Minutes of Proceedings* also record a substantive motion moved by leave and as a matter of necessity without previous notice. See, for example, *Minutes,* NSW Legislative Council, 2 May 1995, p 18 concerning the appointment of the Chairman of Committees (today known as the Deputy President and Chair of Committees).

19 For further information, see the *Annotated Standing Orders of the New South Wales Legislative Council*, (n 5), p 256.

Subsidiary motions moved without notice according to standing order

The following subsidiary motions may be moved without notice according to standing order:

Motions concerning the sittings of the House

- a motion moved by a minister for the adjournment of the House (SO 31, as amended by sessional order); and
- a motion moved by a minister for a special adjournment of the House (SO 74(4)(a)).

Motions concerning the management of business

- a motion moved by a minister regarding the conduct of government business (SO 37, as amended by sessional order);
- a motion for the postponement of an item of business on the *Notice Paper* (SO 45(1) and (2));
- a motion 'That the question be now put' (SO 99(1)) (the closure motion);[20]
- a motion for the adjournment of debate on an item of business before the House (SO 101(1));
- a motion superseding a question, including a motion 'That the debate be now adjourned' (SO 105);[21]
- a motion for the previous question (SO 107(1));[22]
- a motion, following the adjournment of debate on an item of business, that the order of the day for resumption of the debate take precedence over all other business on the *Notice Paper* for that day, except government business on a government day (SO 101(3));
- a motion to discharge an order of the day from the *Notice Paper* (SO 81(4)); and
- a motion that an item of private members' business in the order of precedence, postponed for a third time, remain in its place on the *Notice Paper* (SO 188).

20 For further information, see the discussion later in this chapter under the heading 'The closure motion'.

21 For further information, see the discussion later in this chapter under the heading 'Superseding motions'.

22 For further information, see the discussion later in this chapter under the heading 'The previous question'.

Motions concerning debate

- a motion that a member who rises to address the House 'be now heard' (SO 97);
- a motion that a member who is speaking in a debate 'be no longer heard' (SO 98(1)); and
- a motion dissenting from a ruling of the Chair (SO 96(1)).

Motions concerning documents

- a motion that a document relating to public affairs quoted by a minister in debate be ordered to be laid upon the table (SO 56(1) and (2));[23]
- on a document being tabled, a motion that a day be appointed for its consideration or that it be printed (SO 57, as amended by sessional order);[24]
- a motion that certain papers tabled in the previous month and not ordered to be printed at that time be printed (SO 59(2)); and
- a motion following the tabling of a committee report or a government response to a committee report that the House take note of the report or government response (SO 232, as amended by sessional order).

Motions concerning bills[25]

- procedural motions for advancing a bill to the next stage of consideration, for example a motion that a bill be read a second or third time, or that it be considered in a Committee of the whole House;
- a motion for an amendment to the second or third reading of a bill,[26] including to refer a bill to a committee (SO 141(2)(a));
- a motion moved by a minister that a bill be declared an urgent bill (SO 138(1) and (2));
- a motion for an amendment to a bill in a Committee of the whole House (SO 144(1)); and

23 For further information, see the discussion in Chapter 19 (Documents tabled in the Legislative Council) under the heading 'The motion for the tabling of a document quoted by a minister in debate'.

24 For further information, see the discussion in Chapter 19 (Documents tabled in the Legislative Council) under the heading 'The motion that the House 'take note' of a report or document'.

25 This list of subsidiary motions that may be moved without notice in relation to bills is not exhaustive. There is also a significant range of other subsidiary motions that may be moved without notice in relation to the management of bills, particularly in relation to bills that are the subject of disagreement between the Houses. This is discussed further in Chapter 15 (Legislation).

26 For further information, see the discussion in Chapter 15 (Legislation) under the heading 'Amendments to the second or third reading of a bill'.

- a motion, following the adoption of the report of a Committee of the whole House on a bill, that a future day be fixed for the third reading of the bill (SO 148(1)).

Other motions

- a motion for the suspension of a member for an offence under the standing orders (SOs 190(3) and 191(1));
- a motion that strangers be ordered to withdraw from the House before a division is taken (SO 114(1)); and
- a motion at any time when there is no other business before the House that a resolution of the House be communicated by message to the Legislative Assembly (SO 125).

Sessional orders may also provide for the moving of subsidiary motions of a procedural nature without notice, such as a motion for the suspension of standing and sessional orders, a motion at the end of Question Time each day that the House 'take note' of answers to questions (moved according to sessional order);[27] and a motion for the extension of members' speaking times and the time allocated for debate on an item of private members' business.[28]

Subsidiary motions requiring notice

Whilst the vast majority of subsidiary motions may be moved without notice under standing or sessional orders, as outlined above, there are certain subsidiary motions which the standing orders require to be moved on notice.

For example, a motion for the suspension of standing and sessional orders is a subsidiary motion requiring notice, unless leave of the House is granted (SO 198, as amended by sessional order). However, this requirement is routinely circumvented by the suspension of standing orders according to sessional order or contingent notice (in addition to leave of the House). This is discussed in detail in Chapter 10 (The conduct of proceedings).[29]

As another example, a motion that a member be discharged from a committee and another member appointed is required to be moved on notice (SO 210(7)). However, this requirement is sometimes overridden by leave of the House.[30]

Members are also required to give notice in order to move subsidiary motions to amend previous resolutions of the House, such as motions to amend the membership of committees,[31] and motions to amend an order for the production of State papers

27 For further information, see the discussion in Chapter 10 (The conduct of proceedings) under the heading 'The 'take note' debate on answers'.
28 See, for example, *Minutes*, NSW Legislative Council, 6 May 2015, pp 58-59; 8 May 2019, p 64.
29 See the discussion under the heading 'General or private members' business'.
30 See, for example, *Minutes*, NSW Legislative Council, 13 February 2018, p 2280.
31 *Minutes*, NSW Legislative Council, 23 November 2011, p 618.

previously agreed to.[32] However, in many instances, members move such motions by leave of the House.

The same question rule

Standing order 103(1) stipulates that a motion may not be proposed if it is the same in substance as a motion which has been determined during the same session, unless the order, resolution or vote on such question was determined more than six months previously or has been rescinded. This is called the same question rule. The intent behind the rule is to avoid the time of the House being wasted on matters which it has already decided.

Under standing order 103(2), an exception to the same question rule is made for motions for the disallowance of a statutory instrument substantially the same in effect as one previously disallowed. This exception is intended to allow the House to again consider a motion to disallow a statutory instrument where a motion to disallow a similar instrument was previously agreed to by the House, but the executive government subsequently remade the instrument.[33] However, if a motion to disallow a regulation in the Legislative Council was previously negatived by the House, the same question rule does apply, such that a motion in the same terms could not be proposed again in the same session except in accordance with standing order 103(1).

The operation of the same question rule is discussed in detail in the *Annotated Standing Orders of the New South Wales Legislative Council*.[34] In summary, as stated in both the *Annotated Standing Orders of the New South Wales Legislative Council* and *Odgers*, the same question rule is rarely applied to motions, as it is seldom that the wording of a motion is exactly the same as the wording of a motion previously moved in the House. Indeed, even if a motion is exactly the same as one previously moved, it may still be able to be moved, for example if it is moved in a different context.[35]

However, this is not to say that the rule is of no effect. As an example of its application to substantive motions, on 7 May 2014, a notice standing in the name of Dr John Kaye for the disallowance of a regulation[36] was removed from the *Notice Paper* on the basis that a motion in the exact same terms had been moved by the Leader of the Opposition in the Legislative Council, the Hon Luke Foley, the previous day. As an example of its application to subsidiary motions, on 8 April 1997, a motion for the suspension of

32 *Minutes*, NSW Legislative Council, 13 November 2013, p 2191.

33 Under section 8 of the *Subordinate Legislation Act 1989*, a statutory instrument cannot be remade within four months of the date of its disallowance, unless the resolution disallowing the statutory instrument has been rescinded.

34 *Annotated Standing Orders of the New South Wales Legislative Council*, (n 5), pp 337-340.

35 R Laing (ed), *Odgers' Australian Senate Practice*, as revised by H Evans, 14th ed, (Department of the Senate, 2016), pp 238-239; *Annotated Standing Orders of the New South Wales Legislative Council*, (n 5), p 337.

36 The *Protection of the Environment Operations (General) Amendment (Native Forest Bio-material) Regulation 2013*.

standing orders moved immediately after a failed motion for the exact same purpose was ruled out of order, on the basis of the same question rule.[37]

Determining whether a motion is the same in substance as one already determined by the House is a matter for the Chair. As with other such matters, the House may dissent from the Chair's ruling.

The application of the same question rule to bills is considered in Chapter 15 (Legislation).[38]

The rule of anticipation

Standing order 92 provides that, with the exception of an item of private members' business outside the order of precedence, members may not discuss a notice of motion or an order of the day already listed on the *Notice Paper* 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. This is called the rule of anticipation.

The application of the rule of anticipation to debate generally is examined in detail in Chapter 13 (Debate).[39] However, the rule has particular application to motions.

As noted previously in Chapter 10 (The conduct of proceedings), there is no restriction on identical or very similar notices being placed on the *Notice Paper* by different members.[40] However, in circumstances where one such motion has been moved and is before the House as an order of the day, the rule of anticipation may potentially prevent another motion in the same or similar terms being moved.[41] Whether this would in fact be the case would depend on the particular circumstances. As stated in *Odgers*, virtually any motion could be regarded as anticipatory of some item of business, and the rule, if interpreted strictly, would be unduly restrictive of the rights of members.[42]

Withdrawal and discharge of motions

Unlike a notice of motion on the *Notice Paper* which may be withdrawn at any time,[43] a motion which has been moved is in the possession of the House (SO 75(4)), and may only be withdrawn or discharged in the following circumstances:

---

37 *Minutes*, NSW Legislative Council, 8 April 1997, pp 580-581.

38 See the discussion under the heading 'Two or more bills relating to the same subject'.

39 See the discussion under the heading 'The rule of anticipation'. See also the *Annotated Standing Orders of the New South Wales Legislative Council*, (n 5), pp 309-312.

40 See, for example, *Notice Paper,* NSW Legislative Council, 21 November 2012, p 7140, when three identical notices for leave to bring in a State Marriage Equality Bill were listed on the *Notice Paper*.

41 For an example of the application of this rule, see the *Annotated Standing Orders of the New South Wales Legislative Council*, (n 5), p 338.

42 *Odgers*, 14th ed, (n 35), p 239.

43 For further information, see the discussion in Chapter 10 (The conduct of proceedings) under the heading 'Notices of motions and orders of the day'.

- a motion being debated by the House may be withdrawn by the mover with the leave of the House (SO 75(4));[44] and
- a motion not currently before the House but set down on the *Notice Paper* as an order of the day for further debate may be discharged from the *Notice Paper* by motion moved without notice, requiring a vote of the House (SO 81(4)).

If an amendment has been proposed to a motion, the motion may not be withdrawn (or discharged) unless the House first disposes of the amendment (SO 75(6)).

Under standing order 75(5), a motion which has been withdrawn may be moved again during the same session.

AMENDMENTS TO MOTIONS

A substantive or subsidiary motion that has been duly moved and become a question before the House may be the subject of an amendment, or multiple amendments, except where the standing orders or practice provide otherwise. An amendment is itself a form of a subsidiary motion.

The form of amendments

Standing order 109(1) provides that a member may seek to amend a motion by:

- omitting words;
- omitting words in order to substitute other words; and
- inserting or adding words.

An amendment to a substantive motion may seek to modify parts of the motion to make it more acceptable to the mover of the amendment. Alternatively, an amendment to a substantive motion may seek to supersede the motion by presenting an alternative proposition, although any new words must be relevant to the words being replaced.[45] For example, substantive motions often begin with the words 'That this House notes …' or similar. An amendment to insert an alternative proposition could be achieved by omitting all words after the word 'That' and inserting alternate but relevant words.

Subsidiary motions of a procedural nature may also be the subject of an amendment, except where the standing orders or practice provide otherwise. Examples of subsidiary motions that may be amended include a motion that debate on a question be adjourned to a specified time, a motion that the report of a Committee of the whole House be adopted, and a motion that the question of the disallowance of a statutory instrument

44 See, for example, *Minutes*, NSW Legislative Council, 16 September 2004, pp 993-994; 25 October 2006, pp 303-304; 2 June 2011, p 179; 10 May 2012, pp 971-972; 8 September 2011, p 409.

45 *Erskine May*, 25th ed, (n 2), para 20.31.

be considered forthwith. Procedural motions that may be moved as amendments to the question on the second or third reading of a bill are discussed in Chapter 15 (Legislation).[46]

In addition, an amendment may itself be the subject of an amendment, as if the proposed amendment were the original question (SO 109(2)). An amendment to an amendment must be specific to that amendment and not to the original question.

Motions not open to amendment

Most substantive and subsidiary motions may be amended. However, there are exceptions.

The following substantive motions may not be amended:

- a motion taken as formal business under standing order 44, as amended by sessional order;[47]
- a motion for debate on a matter of public importance (SO 200); and
- an urgency motion (SO 201(3)).

The following subsidiary motions may not be amended:

- a motion for the adjournment of the House to terminate a sitting (SO 31(3), as amended by sessional order);
- a motion that disallowance of a statutory rule proceed as business of the House (SO 78(2));
- a motion for the adjournment of debate on a motion dissenting from a ruling of the President (SO 96(2));
- a motion that a member 'be no longer heard' (SO 98(2));[48]
- a motion that a question 'be now put' (SO 99(3));[49]
- a motion to supersede a question;[50]

46 See the discussion under the heading 'Amendments to the second or third reading of a bill'.

47 However, it has become common practice for a member with carriage of a notice of motion listed as formal business to obtain the leave of the House to amend the notice before moving it as formal business in order to make the motion, as amended, acceptable to all members of the House.

48 For further information, see the discussion in Chapter 13 (Debate) under the heading 'The motion that a member 'Be no longer heard''.

49 For further information, see the discussion later in this chapter under the heading 'The closure motion'.

50 For further information, see the discussion later in this chapter under the heading 'Superseding motions'.

- a motion for the previous question[51] (SO 107(3)) and, if that motion is negatived, the original question and any amendments to it (SO 108(2));
- a motion for the first reading and printing of an Assembly bill (but not a Council bill) (SOs 137(1) and 187(2));
- a motion that a bill be considered urgent (SO 138(2)); and
- a motion in a Committee of the whole House that the Chair report progress and seek leave to sit again (SO 173(6)).

It is notable that certain standing orders providing that motions may not be amended also provide that they may not be debated.[52]

Rules concerning the content of amendments

The standing orders specify a number of rules concerning the content of amendments. In addition, various rulings of Presidents and precedents have further clarified the grounds on which amendments may be out of order.

The main rules concerning the content of amendments are:

- An amendment must be relevant to the motion it proposes to amend (SO 109(4)). This rule is interpreted liberally so as not to unduly restrict members seeking to amend a motion. If an amendment relates to the subject matter of a substantive motion or a closely related subject matter it is acceptable.[53] Nevertheless, the rule has on occasion been invoked and upheld.[54]
- An amendment must not be a direct negative of the question (SO 109(4)), as the proper course of expressing outright opposition to a motion is to vote against it. An amendment is only regarded as a direct negative if agreeing to it would have exactly the same effect as negativing the motion. An amendment that is an alternative proposition is not a direct negative.[55]
- An amendment should be framed so that, if agreed to, the amended motion is intelligible and internally consistent.[56]

Additional rules concerning the admissibility of amendments to bills in a Committee of the whole House are discussed in Chapter 16 (Committee of the whole House).[57]

---

51 For further information, see the discussion later in this chapter under the heading 'The previous question'.

52 For further information, see the discussion in Chapter 13 (Debate) under the heading 'Motions not open to debate'.

53 *Odgers*, 14th ed, (n 35), p 241.

54 See, for example, *Minutes*, NSW Legislative Council, 7 December 1999, p 326. See also Ruling: Peden, *Hansard*, NSW Legislative Council, 27 September 1932, pp 519-520.

55 Ruling: Harwin, *Hansard*, NSW Legislative Council, 31 May 2012, p 12380.

56 *Erskine May*, 25th ed, (n 2), para 20.38.

57 See the discussion under the heading 'The admissibility of amendments'.

Moving amendments

An amendment, including an amendment to a proposed amendment, may be moved at any time without notice[58] during a member's contribution to debate on a motion. The moving of an amendment does not require a seconder (SO 109(8)).

Where a member wishes to move an amendment to a motion, or to move an amendment to an amendment, the form of words used is as follows: 'Mr/Madam President, I move that the question be amended by [insert the text of the amendment].' It is accepted practice that a member may move a number of separate amendments in one motion.

If required by the Chair, an amendment must be provided in writing, signed by the mover, thus enabling circulation of the amendment to members in the chamber (SO 109(7)). This requirement is routinely applied in relation to amendments to bills in a Committee of the whole House.[59] However, it is seldom applied in the House in relation to substantive motions, as most amendments to substantive motions before the House are simple and clear in their effect. However, there have been some occasions on which the Chair has required the provision of an amendment in writing.[60]

The mover of a motion may not subsequently move an amendment to the motion when speaking in reply (SO 109(6)).[61] Nor may a member who has already spoken in debate on a motion again seek the call in order to move an amendment (SO 109(6)), as this would be contrary to the rule that members may only speak once in debate (SO 87(1)).[62]

However, a member who has spoken in debate on a motion before the House may speak again to an amendment to the motion, provided that the member addresses the amendment only and not the question contained in the original motion.[63] In effect, the moving of an amendment during the course of debate interposes a new cycle of debate and ultimately decision.[64]

---

58 Although there is nothing to prevent a member giving notice of an amendment. See *Odgers*, 14th ed, (n 35), p 241.

59 For further information, see the discussion in Chapter 16 (Committee of the whole House) under the heading 'The preparation and lodgment of amendments'.

60 See, for example, *Hansard*, NSW Legislative Council, 8 March 2001, pp 12444-12445.

61 For examples where attempts to do so were ruled out of order, see *Hansard*, NSW Legislative Council, 17 November 2005, p 19934; *Minutes*, NSW Legislative Council, 30 August 2006, p 151. For a recent precedent to the contrary, by leave of the House, see *Minutes*, NSW Legislative Council, 8 May 2019, pp 75-76. However, it has now become commonplace for notices of motion to be amended by the mover by the leave of the House before being moved. This is especially the case in relation to formal business. Leave is generally granted. For further information, see the discussion in Chapter 10 (The conduct of proceedings) under the heading 'Formal business'.

62 For further information, see the discussion in Chapter 13 (Debate) under the heading 'Speaking once to a motion'.

63 Rulings: Solomons (Deputy), *Hansard*, NSW Legislative Council, 17 November 1988, p 3599; Harwin, *Hansard*, NSW Legislative Council, 31 May 2012, pp 12375, 12385. This rule does not apply during debate on amendments in a Committee of the whole House, when members may speak to a question before the committee as many times as they like.

64 *Erskine May*, 25th ed, (n 2), para 20.29.

An amendment that has been moved cannot be withdrawn except by the mover of the amendment or, in the absence of the mover, with the mover's authority, by leave of the House (SO 109(5)).[65] The withdrawing of amendments to bills in a Committee of the whole House is relatively routine. However, it is rare for it to happen in other contexts in the House.

The moving of amendments in a Committee of the whole House is discussed in Chapter 16 (Committee of the whole House).[66]

THE CLOSURE MOTION

Standing order 99 allows a member, either in the House or in a Committee of the whole House, to move without notice 'That the question be now put' (SO 99(1)). This is known as the closure motion or colloquially the 'guillotine'. On being moved, debate on the question before the House or committee ceases immediately and the closure motion is put without amendment or debate (SO 99(3)). If agreed to, the motion forces the House or committee to immediately vote on the substantive motion before it without further amendment or debate, except a reply by the mover who may speak for no more than 30 minutes (SO 99(5)). If the closure motion is not agreed to, the debate on the substantive motion before the House or committee may resume.

The closure motion may be moved at any time during debate on a motion. Indeed, a member speaking may be interrupted for the moving of the closure motion (SO 99(1)). This is one of the few circumstances in which a member may interrupt a member speaking.[67] However, a member who has already spoken in a debate, or who has previously moved the closure motion during the same debate, may not again move the closure motion. Ministers are specifically exempt from this restriction (SO 99(2)).

Before putting the question on a closure motion, 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)).

There is no limit to the number of times the closure motion may be moved during the same debate in the House or in a committee. However, by convention, the provision is used exceedingly sparingly in the Legislative Council, on the basis that all elected members of the House, including those in the minority on a particular issue, have a right to speak and represent the views of their constituents in the House.

The only occasion on which standing order 99 in its current form has been used in the Council was in debate on the Industrial Relations Amendment (Public Sector Conditions

65 See, for example, *Minutes*, NSW Legislative Council, 22 June 2011, p 261.

66 See the discussion under the headings 'Consideration of a bill under standing orders 142, 143 and 144' and 'Consideration of a bill as a whole'.

67 For further information, see the discussion in Chapter 13 (Debate) under the heading 'Interruption of the member speaking'.

of Employment) Bill 2011 on 4 June 2011, when the government used the closure motion on three separate occasions to close debate and force the bill through the House.[68]

Prior to that, the closure motion had only been moved on eight previous occasions in the Council, the last being in 1906.[69]

DILATORY MOTIONS FOR THE AVOIDANCE OF A QUESTION

There are various subsidiary motions which may be moved under the rules and practice of the House to avoid or delay the putting of the question on a substantive motion before the House. These are known as dilatory motions.

There are two types of dilatory motions: superseding motions and the motion for the previous question. This is discussed further below.

Superseding motions

A superseding motion is a subsidiary motion which if agreed to supersedes the House's consideration of a substantive motion or bill. As such it is a type of dilatory motion.

There are three superseding motions that may be moved in the House:

- a motion 'That the debate be now adjourned' (SO 105);
- a motion 'That further consideration of the bill be now adjourned'; and
- a motion 'That the House do now adjourn'.[70]

On a superseding motion being moved, debate on the substantive motion or bill before the House is suspended. Instead, the House immediately debates the question on the superseding motion. If the superseding motion is agreed to, debate on the substantive motion or bill before the House lapses. In the case of each of the three superseding motions noted above the reason is the same: the superseding motion adjourns or interrupts debate and deliberately does not specify when debate should be resumed, for example a later hour or the next sitting day. As a result, the substantive motion or bill drops from the *Notice Paper*.

In 2010, in acknowledgment of the similarity between the first two of the superseding motions listed above and the normal motion that debate be now adjourned *to a specified time*, such as a later hour or the next sitting day, the President ruled that a motion to

68 *Minutes*, NSW Legislative Council, 2-4 June 2011, pp 181 and 184; *Hansard*, NSW Legislative Council, 2-4 June 2011, p 2052.

69 For further information, see the *Annotated Standing Orders of the New South Wales Legislative Council*, (n 5), pp 324-326.

70 For further information, see the *Annotated Standing Orders of the New South Wales Legislative Council*, (n 5), pp 342-344.

supersede a question must be moved in a manner that makes clear to the House the intention of the person moving the motion.[71]

If the House agrees to either of the first two superseding motions listed above, the House proceeds immediately to the next item of business. If the House agrees to the third superseding motion listed above, the House proceeds immediately to the adjournment debate. In such circumstances, the requirement under standing order 31(4)(a)) for a 30 minute debate on the question that the House do now adjourn still applies. Such a motion was moved and carried in September 2005 to supersede debate on an urgency motion.[72]

A superseding motion may only be moved by a member who has the call and who has not previously spoken on the substantive motion or bill before the House. This follows from the rule that a member may only speak once in debate (SO 87(1)). In addition, the third of the three superseding motions listed above, the motion 'That the House do now adjourn', may only be moved by a minister (SO 31), but not so as to interrupt a member speaking. The motion cannot be moved in a Committee of the whole House, and cannot be moved before the House has proceeded to the business of the day.[73] A superseding motion also cannot be moved if a motion for the adjournment of debate or of the House is already before the Chair.[74]

Erskine May also indicates that superseding motions cannot be coupled with other words, or for a superseding motion to be amended to attempt to insert a future time for the debate to be resumed.[75]

If the question on a superseding motion is negatived by the House, the member who moved the superseding motion may not subsequently speak again to the substantive motion or bill.[76]

A substantive motion or bill which has been superseded and consequently dropped from the *Notice Paper* may be restored to the *Notice Paper* by motion on notice. Alternatively, the motion may be moved afresh, on notice, as a new item of business, thereby avoiding any restrictions arising from the same question rule.

The moving of a superseding motion to a bill is discussed further in Chapter 15 (Legislation).[77] The moving of the superseding motions in a Committee of the whole House is discussed further in Chapter 16 (Committee of the whole House).[78]

---

71 Ruling: Fazio, *Hansard*, NSW Legislative Council, 25 February 2010, pp 20921-20922.
72 *Minutes*, NSW Legislative Council, 20 September 2005, p 1584.
73 *Erskine May*, 25th ed, (n 2), para 20.23.
74 Ibid.
75 Ibid.
76 Ibid.
77 See the discussion under the heading 'Superseding motions'.
78 See the discussion under the heading 'Dilatory motions'.

The previous question

The moving of the previous question is another form of dilatory motion for avoiding the putting of the question on a substantive motion before the House. It is moved in the form: 'That the question be *not* now put' (SO 107(1)).[79]

A motion for the previous question may not be amended (SO 107(3)).[80] However, it may be debated and, in debating the motion, the original question and any amendments to the original question may also be debated (SO 107(4)). A member who has spoken on the original question may speak to the previous question as it is a new question for debate.

If the motion for the previous question is agreed to, that is to say, the House resolves that the question on the substantive motion before the House be *not* now put, the question on the substantive motion and any amendments to it is disposed of, and the House proceeds immediately to the next item of business (SO 108(1)).[81] The substantive motion and any amendments drops from the *Notice Paper*, but may be restored by motion on notice (SO 106(2)).[82]

Conversely, if the previous question is negatived, the question on the substantive motion before the House and any amendments to it must be put forthwith without further amendment or debate (SO 108(2)). This is because, in negativing the question that the question be *not* now put, the House has in effect resolved that the question *be now* put.

Either way, the effect of moving the previous question is dramatic: either the substantive motion before the House lapses without further debate, or the question on the substantive motion and any amendments must be put without further debate. For this reason, the previous question has been seldom used in the Council: it was last moved in the House on 5 December 1994,[83] and prior to that a century earlier on 10 June 1896.[84]

The previous question may not be moved to an amendment or in a Committee of the whole House (SO 107(2)).

The moving of the previous question during debate on the second or third reading of a bill is discussed in Chapter 15 (Legislation).[85]

---

79 Before the adoption of current standing orders in 2004, the form of the previous question was the same as the form of the closure motion: 'That the question be now put'. The form of the previous question was changed in order to avoid confusion between the two. For further information, see the *Annotated Standing Orders of the New South Wales Legislative Council*, (n 5), pp 347-351.

80 However, the motion may be withdrawn, or it may be superseded by another dilatory motion such as an adjournment motion.

81 If the original question consists of a series of motions, and the questions are to be put separately, the decision on the previous question on the first motion is conclusive for all the motions (SO 108(3)). For further information, see the *Annotated Standing Orders of the New South Wales Legislative Council*, (n 5), p 349.

82 The decision of the House *not* to put the question on the motion is interpreted as applying only at the time that decision is taken.

83 *Minutes,* NSW Legislative Council, 5 December 1994, pp 483-490.

84 *Minutes*, NSW Legislative Council, 10 June 1896, p 26.

85 See the discussion under the heading 'The previous question'.

PUTTING THE QUESTION ON A MOTION

Every question in the Legislative Council, whether on a substantive or subsidiary motion, including an amendment, is decided by the President, Deputy President and Chair of Committees or other occupant of the Chair putting the question on the motion for decision by the House (SO 102(2)) or a Committee of the whole House.[86] The only exception to this is the resolution of certain questions in the House by ballot.[87]

In general terms, the question on most motions is put at the conclusion of debate on the motion. This applies to substantive motions; stand alone subsidiary motions, such as a motion for the adjournment of the House; and amendments to motions, for example an amendment to a substantive motion, or an amendment to the question that a bill be now read a second time. However, there are certain motions on which the question is put immediately on being moved, although in some instances debate on the motion may be permitted first. Examples of such motions are motions to adjourn debate on a question, the closure motion and dilatory motions. The question on these motions is put immediately because of the nature and intent of these motions.

A member may not speak to the question on a motion after it has been put to the House or a committee by the President, Deputy President and Chair of Committees or other occupant of the Chair (SO 100).[88]

The form in which a question is put by the President or other occupant of the Chair to the House or a committee varies according to the circumstances. As examples:

- The question on a substantive motion moved in the House is put to the House by the President or other occupant of the Chair in the following terms: 'The question is: That the motion be agreed to'.
- The question on a subsidiary motion for the suspension of standing and sessional orders is put to the House by the President or other occupant of the Chair in the following terms: 'The question is: That standing and sessional orders be suspended'.
- The question on a motion for the second reading of a bill is put to the House by the President or other occupant of the Chair in the following terms: 'The question is: That this bill be now read a second time'.
- The question on a subsidiary motion for the adjournment of the House is put to the House by the President or other occupant of the Chair in the following terms: 'The question is: That this House do now adjourn'.

---

86 For further information, see the discussion later in this chapter under the heading 'Determining a question'.

87 For further information, see the discussion later in this chapter under the heading 'Resolution of questions by ballot'.

88 For instances where the House has granted leave to a member to speak following the putting of the question by the Chair, see the *Annotated Standing Orders of the New South Wales Legislative Council*, (n 5), p 327.

At the request of a member,[89] a motion consisting of more than one question may be put by the President or other occupant of the Chair sequentially, often referred to as *in seriatim* (SO 102(4)). An example of a motion consisting of more than one question is a motion containing a number of paragraphs each of which can stand as a distinct question for decision of the House.[90] Another example is the question on the second reading of cognate bills, which members can request be put separately.

The putting of the question on motions moved as formal business under standing order 44, as amended by sessional order, is discussed in detail in Chapter 10 (The conduct of proceedings).[91]

Putting the question on amendments

Where amendments are moved during debate of a motion or a bill, the President or other occupant of the Chair first puts the question on the amendments in the order in which they occur in the motion (SO 111(1)), including any amendments to the amendments, followed by the question on the original motion, as moved or as amended as the case may be (SO 111(1) and (2)). The form of words used by the President or other occupant of the Chair in putting the question on an amendment or an amendment to an amendment again varies according to the circumstances. As examples:

- The question on an amendment to a substantive motion is put to the House by the President or other occupant of the Chair in the following terms: 'The question is: That the amendment be agreed to'. The Chair then puts the question on the substantive motion, as moved or as amended.
- The question on a motion for the second reading of a bill, to which a member has moved an amendment to refer the bill to a committee, is put to the House by the President or other occupant of the Chair in the following terms: 'The question is: That this bill be now read a second time; to which [insert member's name] has moved an amendment to refer the bill to [insert the name of the committee]'. If the question on the amendment is agreed to, the bill stands referred to the relevant committee. If the question on the amendment is not agreed to, the Chair puts the question on the second reading of the bill.
- The question on an amendment to a bill in a Committee of the whole House is put to the committee by the Chair of Committees in the following terms: 'The question is: That the amendment of [insert member's name] on sheet [insert sheet number] be agreed to'. At the conclusion of consideration of all amendments to the bill, the Chair puts the question on the bill, as read or as amended.

89 The request should be made by the member during the member's contribution to debate.

90 For further information, see the *Annotated Standing Orders of the New South Wales Legislative Council*, (n 5), pp 335-336.

91 See the discussion under the heading 'Formal business'.

- The question on an amendment to an amendment in a Committee of the whole House is put to the committee by the Chair of Committees in the following terms: 'The question is: That the amendment of [insert member's name] to the amendment of [insert member's name] be agreed to'. The Chair then puts the question on the original amendment, as moved or as amended. At the conclusion of consideration of all amendments to the bill, the Chair puts the question on the bill, as read or as amended.

The form of words above for putting the question on amendments has been routinely used since they were first adopted by resolution of the House in May 1990.[92]

However, very occasionally, when the House wishes to consider separately the impact of different parts of an amendment, it may divide an amendment into those parts for separate decision (SO 102(3)). For example, an amendment to omit words and insert other words may be divided into two separate questions: the first that the words be omitted, the second that other words be inserted. The form of questions used where the House wishes to adopt this approach is as follows:

- If the purpose of a proposed amendment is to omit certain words, the Chair puts the question: 'That the words proposed to be omitted stand part of the question'. If this question is agreed to, that is the omission of words is not agreed to, the Chair puts the original question as moved. Alternatively, if this question is negatived, that is the omission of the words is agreed to, the Chair puts the original question as amended.

- If the purpose of a proposed amendment is to insert words, the Chair puts the question: 'That the words proposed to be inserted be so inserted'. If this question is agreed to, that is the words are inserted, the Chair then puts the original question as amended. Alternatively, if this question is negatived, that is the insertion of the words is not agreed to, the Chair puts the original question as moved.

- If the purpose of a proposed amendment is to omit words and insert other words, the Chair first puts the question: 'That the words proposed to be omitted stand part of the question'.

  If this question is agreed to, that is the omission of words is not agreed to, the further question on the insertion of other words lapses, and the Chair puts the original question as moved.

  If this question is negatived, that is the omission of the words is agreed to, the Chair puts the further question on the insertion of the words: 'That the words proposed to be inserted be so inserted'. The Chair then puts the original question, as amended (with or without the words proposed to be inserted).[93]

92 *Minutes,* NSW Legislative Council, 21 May 1990, p 180.

93 For further information, see the *Annotated Standing Orders of the New South Wales Legislative Council*, (n 5), pp 334-335.

The House has adopted this approach for the putting of amendments on only two occasions since May 1990.[94]

DETERMINING A QUESTION

Section 22I of the *Constitution Act 1902* provides that a question arising in the Legislative Council shall be decided by a majority of the votes of the members present, other than the President or other member presiding.[95] This is called a simple majority.[96] Where there is an equality of votes, the President or other member presiding has a casting vote.[97] These provisions are replicated in standing order 102(7). Significantly, there is no rule in either section 22I or standing order 102(7) requiring a member to vote on a question before the House.

Questions before the House may be determined by one of two methods: on the voices or on division. These two methods are outlined below.

Voting on the voices

A question put to the House or a Committee of the whole House by the President, Deputy President and Chair of Committees or other occupant of the Chair is initially determined on the voices. In brief, the Chair invites members present in the chamber to declare their support for the 'ayes' or the 'noes' and, members having done so declares, in his or her opinion, whether the 'ayes' or 'noes' have it.[98] If there is no challenge to the declaration of the Chair, the Chair declares that the 'ayes' or the 'noes' have it, and the determination of the Chair is recorded as the decision of the House or the committee on the question (SO 102(5) and (6)).

Many questions in the House and in committee are decided on the voices, either unanimously or by the declared minority choosing not to contest the Chair's declaration of the outcome of the vote.

---

94 *Minutes*, NSW Legislative Council, 14 October 1992, pp 344-351; 31 May 2012, pp 1029-1032.

95 There was a temporary exception to this rule in 1997. Under an amendment to the *Special Commissions of Inquiry Act 1983* adopted in schedule 1 of the *Special Commissions of Inquiry Amendment Act 1997*, now repealed, there was a requirement for the agreement by two-thirds of the members of the House present and voting to authorise the Governor to establish a special commission of inquiry concerning parliamentary proceedings. For further information, see the discussion in Chapter 3 (Parliamentary privilege in New South Wales) under the heading 'The Arena case'.

96 As opposed to an absolute majority, which is a majority of the whole number of members of the Legislative Council.

97 For further information, see the discussion later in this chapter under the heading 'Casting vote of the Chair'.

98 That is to say, whether the 'ayes' or 'noes' are in the majority. On occasion, members have indicated their support for a motion by standing in their place. For further information, see the *Annotated Standing Orders of the New South Wales Legislative Council*, (n 5), p 334.

Voting on division

Where the Chair declares a vote of the House or of a committee on the voices, the declared minority may contest that determination by requiring a division, which is a more formal method of determining a question (SOs 102(6) and 112(2)). The process is as follows. On the Chair declaring on the voices that in his or her opinion, the 'ayes' or 'noes' have it, the declared minority may declare to the contrary that 'the ayes have it!' or 'the noes have it!', as the case may be. If this occurs, the Chair announces that a division is required and calls on the Usher of the Black Rod to ring the division bells. In order to object to the Chair's determination of the outcome of a question on the voices and to call for a division, members must have clearly voted on the voices for or against the question (SO 112(3)). In addition a division may only be held if two or more members call for a division (SO 112(4)).[99] If only one member calls for a division, the member may ask for his or her name to be recorded in the *Minutes of Proceedings*, but without a division ensuing (SO 112(5)).[100]

When a division is required, the division bells are rung for five minutes (SO 114(2)), calling all members not present to the chamber.[101] The five minutes is timed by the occupant of the Deputy Clerk's position at the table of the House using a five-minute hourglass. When successive divisions are taken and there is limited or no intervening debate, the Chair, by leave of the House or committee, may direct that the bells be rung for one minute only (SO 114(4)).[102] On expiry of the five minutes (or one minute) the Chair orders the doors to be locked (SO 114(3)). The Usher of the Black Rod or the officer occupying Black Rod's position at the table of the House bars the northern door to the chamber, whilst chamber and support staff bar the entrances to the chamber at the eastern end of the chamber. No member is permitted to enter or leave the chamber after the Chair has ordered that the doors be locked (SO 114(3) and (6)).

Once the doors have been locked the Chair restates the question before the House or the committee and directs members present to take their seats for the division, the 'ayes' to the right of the Chair, the 'noes' to the left of the Chair (SO 114(5)(c)).[103] A member is not entitled to vote in a division unless the member is present on the floor of the House when the question is put with the doors locked (SO 113, as amended by sessional

99 In 1987, the House adopted a sessional order requiring that five or more members must call for a division in order for a division to be held. However the sessional order was never used and was not readopted in subsequent sessions. For further information, see the *Annotated Standing Orders of the New South Wales Legislative Council*, (n 5), p 372.

100 See, for example, *Minutes*, NSW Legislative Council, 3 December 2003, pp 482-483.

101 The division bells ring throughout the Parliament House buildings for this purpose.

102 For further information, see the *Annotated Standing Orders of the New South Wales Legislative Council*, (n 5), p 371.

103 In 2017, President Ajaka ruled that the requirement for members to take their seat only takes effect when the Chair calls for members to pass to the right and the left. See Ruling: Ajaka, *Hansard*, NSW Legislative Council, 22 November 2017, p 74. In 2020, during the COVID-19 pandemic, the House by sessional order adopted different arrangements for members to vote by standing in their places. This arrangement was adopted to maintain social distancing. See *Minutes*, NSW Legislative Council, 2 June 2020, p 963 (proof).

order).[104] Every member then present must vote in accordance with the member's vote by voice (SO 113, as amended by sessional order). However, unlike in the Senate,[105] the Council standing orders do not require members who have voted with their voice to remain in the chamber to vote in a division on the same question. This was the subject of a ruling by President Burgmann on 2 March 2006 following a point of order that two members who had voted with their voice with the 'noes', and had called for a division, were no longer in the chamber when the doors were locked.[106]

If it appears that there is only one member voting on one side of the House in a division, the Chair declares the question at once (SO 115(3)).

Assuming there is more than one member voting on both sides of the House, the Chair appoints two tellers from each side (SO 114(5)). Often the tellers are the whips of the major parties, but other members are also routinely appointed as tellers, especially members of the cross-bench. Once tellers have been appointed, members may not move from their seats until the result of the division has been declared (SO 114(7)). The tellers record on a division sheet the names and total number of members voting respectively with the 'ayes' and 'noes', sign their respective sheets, and present them to the Chair. The Chair subsequently declares the result of the division to the House or committee (SO 115(1)). The members voting in a division according to the 'ayes' and 'noes' are recorded in the *Minutes of Proceedings* and in *Hansard*.[107]

Under standing order 113, as amended by sessional order, a member may not vote in any division on a question on which the member has a direct pecuniary interest, unless it is in common with the general public or is on a matter of state policy. This standing order does not prevent a member from participating in the debate.[108]

As noted previously, there is no rule in either section 22I of the *Constitution Act 1902* or standing order 102(7) requiring a member to vote on a question before the House, and members frequently abstain from voting in division by not attending the chamber for the division.

---

104 *Minutes*, NSW Legislative Council, 9 November 2016, p 1260; 8 May 2019, p 66. The sessional order amends the standing order to provide an exception to this rule such that a member caring for a child may vote from the President's Gallery. This exception was adopted in 2016 on the recommendation of the Procedure Committee. See Procedure Committee, *Young children accompanying members into the House*, Report No 9, October 2016. For further information, see the *Annotated Standing Orders of the New South Wales Legislative Council*, (n 5), pp 364-365.

105 *Odgers*, 14th ed, (n 35), p 291.

106 Ruling: Burgmann, *Hansard*, NSW Legislative Council, 2 March 2006, p 20944. For further information, see the *Annotated Standing Orders of the New South Wales Legislative Council*, (n 5), pp 362-367.

107 If the numbers of members voting in a division are later found to have been incorrectly reported, the House on being informed of the error may order the record to be corrected by motion moved without notice (SO 118). See, for example, *Minutes*, NSW Legislative Council, 1 April 1925, p 28; 25 October 1932, p 87; 26 October 1955, p 50; 30 November 1983, p 589.

108 For further information, see the discussion in Chapter 5 (Members) under the heading 'Standing order 113(2): Voting and participating in debate in the House'. See also the *Annotated Standing Orders of the New South Wales Legislative Council*, (n 5), pp 362-367.

Casting vote of the Chair

The Chair does not exercise a deliberative vote in the House or in a Committee of the whole House.[109] However, in the event of an equality of votes on division of the House or a committee, the Chair exercises a casting vote. The Chair may give reasons for casting his or her vote in a particular way, and those reasons are recorded in the *Minutes of Proceedings* (SO 116). The established principles guiding a casting vote, as articulated in *Erskine May*, are:

- the Chair should always vote for further discussion where this is possible;
- where no further discussion is possible, decisions should not be taken except by majority; and
- a casting vote on an amendment to a bill should always leave the bill in its existing form.[110]

For some years, there were a number of instances where occupants of the Chair voted according to the wishes of their party. However, in recent times, the President and Deputy President and Chair of Committees have returned to casting their votes in accordance with these established principles.

Further information on the application of these principles guiding the casting vote of the Chair is provided in the *Annotated Standing Orders of the New South Wales Legislative Council*.[111]

Pairs

Pairs are an informal arrangement between the whips of the major parties whereby a member who is absent from the House and who would be expected to vote with his or her party on a particular question may be 'paired' with a member from an opposition party who would be expected to vote in the opposite manner. The member from the opposition party may also be absent, or may deliberately not vote in order to cancel out the first member's absence.

Pairing arrangements are generally not observed between parties on the cross-bench, or between parties on the cross-bench and the major parties. However, during the absence of Dr John Kaye from the House in 2016 due to illness, the Coalition parties adopted an informal pairing arrangement with The Greens.[112]

The standing orders make only one reference to pairs: under standing order 115(5), the names of members paired during a division will be recorded by the tellers and printed

109 *Constitution Act 1902*, s 22I.
110 *Erskine May*, 25th ed, (n 2), para 20.90.
111 *Annotated Standing Orders of the New South Wales Legislative Council*, (n 5), pp 376-379.
112 *Hansard*, NSW Legislative Council, 24 February 2016, p 6722 per the Hon Dr Peter Phelps.

in the *Minutes of Proceedings* and *Hansard*.[113] In all other respects pairing arrangements are beyond the notice of the House.

This arose in 1998 when the Clerk acted as Chair for the election of a new President following the resignation as President of the Hon Max Willis. On the bells having been rung and the doors locked for the conduct of a ballot, the Hon Michael Egan took a point of order that a member of the Labor Party was absent for the ballot, and that a pair was not being provided by the opposition. The Clerk advised that the standing orders do not recognise pairs. However, in view of the member's concerns, the Clerk indicated that he would entertain the suggestion that he leave the chair until a later hour, which was done. The ballot was conducted later that day.[114]

More recently, in September 2017, on the tellers counting a division and recording pairs, it was apparent that there was not an equal number of pairs for the 'ayes' and the 'noes'. At the request of the Chair and in accordance with precedence, the whips came to an agreement that 'pair not provided' would be recorded in the *Minutes of Proceedings* against one of the paired members under standing order 115(5). This resulted in an equality of votes and the Chair casting his vote with the 'noes', giving as his reason that a casting vote on an amendment to a bill should leave the bill in its existing form.[115]

Further information on pairing arrangements is provided in the *Annotated Standing Orders of the New South Wales Legislative Council*.[116]

Free votes

In general, members of political parties may be expected to vote on motions and bills in conformity with pre-determined positions taken by their party. However, on occasion, parties allow their members a free vote or 'conscience' vote, allowing them to vote in accordance with their own personal views. In general terms, such free votes often relate to religious, moral or ethical issues rather than issues of administration or public policy. There are no standing rules or orders relating to free votes.[117]

113 This provision was first adopted by sessional order in May 1988. See *Minutes*, NSW Legislative Council, 24 May 1988, p 49. It was adopted each subsequent session until its incorporation as the current standing order 115(5) in 2004.

114 *Minutes,* NSW Legislative Council, 29 June 1998, pp 610-611; *Hansard*, NSW Legislative Council, 29 June 1998, p 6713.

115 *Hansard,* NSW Legislative Council, 20 September 2017, pp 62-63. There are a number of previous instances where a pair was not provided. See *Minutes,* NSW Legislative Council, 2-4 June 2011, p 181; 12 August 2011, p 346; 19 September 2013, p 2023; 11 September 2014, p 59.

116 *Annotated Standing Orders of the New South Wales Legislative Council*, (n 5), pp 374-375.

117 For further information, including examples of free votes in the Legislative Council, see the *Annotated Standing Orders of the New South Wales Legislative Council*, (n 5), p 361.

RESOLUTION OF QUESTIONS BY BALLOT

The standing orders make provision for the resolution of certain questions before the House by way of ballot:

- Standing orders 13 and 15(2) provide for the conduct of a ballot to elect the President and Deputy President and Chair of Committees in circumstances where two or more candidates are proposed. The President and Deputy President and Chair of Committees are elected by exhaustive ballot, whereby successive ballots are taken until a candidate has the majority of votes of members present. This is discussed in detail in Chapter 6 (Office holders and administration of the Legislative Council).[118]
- Standing order 210(5) provides that where there is an absence of agreement as to representation on a committee, the matter is to be determined by the House. The House may subsequently agree to a motion that membership of the committee be determined by ballot.
- Standing order 129(2) provides for the use of a ballot for the appointment of managers for the Council for a free conference with the Assembly.

Ballots for the appointment of members to a committee under standing order 210(5) and for the appointment of managers for a free conference under standing order 129(2) are held in accordance with standing order 135. Standing order 135 provides that when a ballot is required, the bells are rung and the doors locked as in a division (SO 135(1)). Ballot papers are then distributed by the clerks to all members in their places. Members must write on the ballot paper the name or names of the candidate or candidates for whom they wish to vote and deposit it in the ballot boxes provided by the Clerk (SO 135(2)). For ballots other than ballots to elect the President, the Clerk ascertains and reports to the President the name of the member or members having the greatest number of votes, who will then be declared appointed by the President (SO 135(3)). If two or more members have an equality of votes, the result of the ballot will be decided by the casting vote of the President (SO 135(4)).[119]

Further information on the conduct of ballots under standing order 135 is provided in the *Annotated Standing Orders of the New South Wales Legislative Council*.[120]

118 See the discussion under the heading 'Election and vacation of office'.

119 For instances where this occurred, see *Minutes*, NSW Legislative Council, 19 March 2002, pp 73-74; 26 May 2015, pp 118, 119. On the occasion on 26 May 2015, the President 'reserved' his casting vote on the appointment of a member of the cross-bench to the Privileges Committee, before advising the House of his vote and declaring the result of the ballot at a later hour of the sitting.

120 *Annotated Standing Orders of the New South Wales Legislative Council*, (n 5), pp 423-427.

Resolutions and orders of the House

The decisions of the House on motions are referred to as resolutions and orders of the House:

- A resolution of the House is a statement of the Legislative Council's opinion, but without directing that any action be taken on the matter which is the subject of the resolution.
- An order of the House requires that a particular action be taken by a committee or by the government or by another body accountable to the Council. Examples are an order that a committee of the Council undertake an inquiry into a particular issue or an order that the executive government produce certain State papers.

In reality, the distinction between resolutions and orders of the House is often lost. Generally speaking, only procedural orders, notably the Standing Rules and Orders themselves, together with orders for the production of State papers are referred to as orders, whilst many other orders are in fact referred to by practice as resolutions, for example an order that a standing committee inquire into and report on a particular matter.

Duration of resolutions and orders

The majority of resolutions and orders of the House have a one-off effect. For example, the effect of the House agreeing to a procedural motion on a bill, such as the motion that a bill be now read a second or third time, is limited to the specific purpose for which the motion is moved. Other resolutions and orders have a defined duration, such as sessional orders which expire at the end of a session, a resolution (order) appointing a select committee which expires at the end of the committee inquiry, and a resolution (order) appointing a standing committee which expires at the end of a Parliament.

Resolutions of continuing effect, as their name implies, are of ongoing effect until such time as they are rescinded by resolution of the House or superseded by a further resolution of the House. Resolutions of continuing effect are discussed in Chapter 8 (The basis of Legislative Council procedure).[121]

Rescission of resolutions and orders

A resolution or order of the House may not be rescinded during the same session unless seven days' notice is given (SO 104). The rescission of a resolution or order has retrospective effect, annulling the resolution or order from the time it was made. However, it is rare that the rescission of a resolution or order is required, as in most cases a resolution or order can be amended or a new resolution or order passed with prospective effect. It is only where the consequences of a resolution or order have already occurred where rescission is necessary.

121 See the discussion under the heading 'Resolutions of continuing effect'.

In the relatively small number of cases where members have sought to rescind a resolution or order of the House, it has been more common for standing orders to be suspended on notice, or without notice by leave, to override the requirement for seven days' notice, thereby allowing a motion for the rescission of the resolution or order to be moved immediately, or the next day. Examples of resolutions and orders that have been rescinded are provided in the *Annotated Standing Orders of the New South Wales Legislative Council*.[122]

For instances where the House has rescinded resolutions disallowing statutory instruments, see Chapter 18 (Delegated legislation).[123]

122 *Annotated Standing Orders of the New South Wales Legislative Council*, (n 5), pp 340-342.

123 See the discussion under the heading 'Regulatory void'.

CHAPTER 13

DEBATE

Before the Legislative Council comes to a decision on a motion put to it by the President or other occupant of the Chair, the House usually debates the question. Debate fulfils one of the primary functions of the Legislative Council, that of informing itself and the public by deliberation before decisions are made.

It is a fundamental principle of parliamentary procedure that all members are entitled to speak freely in debate on questions before the House, subject only to the rules and conventions which the House itself has imposed. These rules of debate are intended to ensure that all members can expect a fair hearing whether or not their opinions concur with those of the majority. They are embodied in the standing orders, the practices of the House, and rulings of successive Presidents and Deputy Presidents and Chairs of Committees.

THE NATURE OF DEBATE

Debate in the Legislative Council must always be in relation to a motion before the House, the question on which is put to the House by the President or other occupant of the Chair, except as the standing orders otherwise provide. This is discussed in Chapter 12 (Motions and decisions of the House).

Most substantive and subsidiary motions[1] moved in the Council may be debated, except where the standing orders explicitly provide that the question on the motion is to be decided without debate.[2]

When a member moves a motion in the House which may be debated, the member may speak to the motion, thus initiating debate. Subsequently, other members may also speak to the motion on receiving the call from the Chair. When all members who wish to speak to the motion have spoken, the member who moved the motion may be entitled to speak in reply, depending on the nature of the motion.

---

1 For further information, see the discussion in Chapter 12 (Motions and decisions of the House) under the heading 'Substantive and subsidiary motions'.

2 For further information, see the discussion below under the heading 'Motions not open to debate'.

Importantly, debate of the question on a motion before the House is intended to be an exchange of views and arguments, in which members are expected, to some extent, to respond to the arguments of previous speakers. It is not, as observed in *Erskine May*, 'a series of set speeches prepared beforehand without reference to each other'.[3] As stated by Redlich:

> According to the theory of English parliamentary procedure all parliamentary deliberation is debate; it is not a succession of independent orations, but is composed of speeches and replies: it is a mutual play of opinion upon opinion expressed by the speeches of members of a numerous body … occupied with some question to be answered in the affirmative or negative.[4]

For this reason, it is usual for members to be in the chamber for the speeches of members before them in debate, and it is considered discourteous for members to leave the chamber immediately after finishing their contribution to debate. In the 'cut and thrust' of debate, it is usual for each speaker to comment on the preceding speeches, and for that reason it is traditional for the member who has just spoken to remain in the chamber for a reasonable time.

Motions not open to debate

The majority of motions moved in the Legislative Council may be debated. However, under the standing orders, there are certain motions which are not open to debate.

The following substantive motions are not open to debate (or further debate):

- a motion dealt with as formal business (SO 44, as amended by sessional order); and
- the original motion and any amendment before the House where the previous question is put and negatived (SO 108(2)).

The following subsidiary motions are not open to debate:

Motions concerning the management of business

- a motion for the postponement of an item of business on the *Notice Paper* (SO 45(1));
- a motion that the disallowance of a statutory instrument proceed as business of the House (SO 78(2));

3 D Natzler KCB and M Hutton (eds), *Erskine May's Treatise on The Law, Privileges, Proceedings and Usage of Parliament*, 25th ed, (LexisNexis, 2019), para 21.4.

4 J Redlich, *The Procedures of the House of Commons – A Study of its History and Present Form*, vol III, (Archibald Constable & Co Ltd, 1903), p 51. For further information, see D Blunt, 'Parliamentary speech and the location of decision making', Paper presented to the Australasian Study of Parliament Group (ASPG) 2014 National Conference, Sydney, 2 October 2014.

- a motion in the House or in a Committee of the whole House 'That the question be now put' (the closure motion) (SOs 99(3) and 173(6));
- a motion to extend the time available for debate on a private member's motion (SO 186, as amended by sessional order);[5] and
- a motion for the suspension of standing and sessional orders to permit an item of business on the *Notice Paper* to be considered forthwith.

Motions concerning debate

- a motion 'That the member be further heard' (SO 94(2));
- a motion that a member who rises to address the House 'Be now heard' (SO 97); and
- a motion that a member who is speaking in a debate 'Be no longer heard' (SO 98(2)).

Motions concerning bills

- a motion for the first reading and printing of an Assembly bill (but not a Council bill) (SOs 137(1) and 187(2));
- a motion moved by a minister that a bill be declared an urgent bill (SO 138(2));
- a motion for committal of a bill to a Committee of the whole House after the second reading of the bill (SO 141(1));[6]
- a motion in a Committee of the whole House 'That the Chair report progress and ask leave to sit again' (SO 173(6)); and
- a motion, following the adoption of the report of a Committee of the whole House on a bill, that a future day be fixed for the third reading of the bill (SO 148(1)).

Other motions

- a motion for a petition to be received or for a petition to be read by the Clerk (SO 68(5));
- a motion that a complicated question be divided (SO 102(3)); and
- a motion for the suspension of a member for an offence under the standing orders (SO 190(3)).

The subject of a personal explanation may also not be debated (SO 88).

5 *Minutes*, NSW Legislative Council, 23 November 2017, p 2246; 8 May 2019, p 64. The motion may be amended but not debated.

6 Ruling: Johnson, *Hansard*, NSW Legislative Council, 29 October 1986, p 5668.

There are also motions and other types of business upon which only a limited contribution from members is permitted. For example:

- by sessional order amending standing order 198, debate on a motion for the suspension of standing and sessional orders to allow a motion to be brought on concerning an order for State papers or an Address to the Governor for documents under standing orders 52 and 53 is limited to a statement by the mover of the motion and a minister in response not exceeding five minutes each;[7]
- only the Leader of the Opposition, or a member nominated by the Leader of the Opposition, may speak to a ministerial statement for a time not exceeding the time taken by the minister in making the statement (SO 48(1));
- the mover of a motion that a matter of public importance be discussed forthwith, and a minister, may make a statement in relation to the motion not exceeding 10 minutes each (SO 200(3));
- the mover of a motion that the House adjourn to discuss a matter of urgency, and a minister, may each make a statement in relation to urgency not exceeding 10 minutes each (SO 201(3)); and
- the mover of a motion that a minister in the Legislative Assembly sit in the Legislative Council for the purposes of explaining the provisions of a bill is limited to a statement not exceeding 10 minutes (SO 163(3)).

THE RIGHT TO SPEAK

Seeking the call

A member who wishes to speak in debate on a motion before the House must seek and receive the call from the President or other occupant of the Chair. To seek the call, the member rises in his or her place and indicates a wish to speak by stating aloud 'Mr/Madam President/Deputy President' or 'Mr/Madam Chair', as the case may be (SO 85(1)).[8]

Historically, the member first standing who 'caught the President's eye' was given the call, a tradition inherited from the English House of Commons.[9] However, in modern times, the President or other occupant of the Chair recognises members according to established principles:

---

7 *Minutes*, NSW Legislative Council, 8 May 2019, p 65.

8 For further information, see S Want and J Moore, edited by D Blunt, *Annotated Standing Orders of the New South Wales Legislative Council*, (Federation Press, 2018), pp 290-292. See also Ruling: Ajaka, *Hansard*, NSW Legislative Council, 29 May 2019, p 2.

9 Historically in the English House of Commons, when several members of the House stood 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.' See N Wilding and P Laundy, *An Encyclopaedia of Parliament*, (Cassell & Company, 1958), p 57.

- members are generally called from the government benches, opposition benches and the cross-benches alternately;
- 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;
- if not the Leader of the Opposition, 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; and
- members who have a right to the call to speak in reply are discouraged from exercising that right if doing so would have the effect of closing the debate whilst other members still wish to speak.

For some debates an agreed list of speakers is compiled by the whips and provided to the President or other occupant of the Chair, and members generally seek and receive the call in the order shown on the list. However, such a list does not prevent the President or other occupant of the Chair from recognising another member seeking the call.

The motion that a member 'Be now heard'

Under standing order 97, the allocation of the call by the President or other occupant of the Chair may be challenged by a member moving without notice that a member who has risen to address the House 'Be now heard'. On this motion being moved, the Chair must put the question on the motion immediately without amendment or debate. There is nothing in the standing order to prevent a member moving the motion in respect of himself or herself. However, there are few examples of the motion being moved in the Legislative Council.[10]

Pre-audience

Certain standing orders specify that members have pre-audience, in effect priority, on the commencement or resumption of debate on an item of business:

- 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 moving procedural motions for advancing the bill to the next stage of consideration, such as the motion that the bill be read a second or third time, or that it be considered in a Committee of the whole

10 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. See *Minutes*, NSW Legislative Council, 24 August 1978, p 77. For further information, see the *Annotated Standing Orders of the New South Wales Legislative Council*, (n 8), pp 320-322.

House. Pre-audience also allows the member with carriage of a bill to have priority when moving the postponement of consideration of the bill.

- Under standing order 46, as amended by sessional order, a member interrupted by the operation of a standing order or other order of the House whilst speaking on any item of business is entitled to continue speaking when proceedings are resumed.[11]
- Under standing order 101, a member who successfully moves that debate on a motion be adjourned is entitled to speak first on the resumption of the debate. However, if the member did not commence speaking to the substantive motion before moving that the debate be adjourned, the member has the option not to commence speaking on resumption of the debate, but instead to speak at a later time during the debate (SO 101(5)).[12]

Speaking once to a motion

Except as otherwise provided in the standing orders, a member may only speak once to the question on a motion before the House or the question on an amendment (SO 87(1)), other than in a Committee of the whole House where members may speak more than once on a question (SOs 87(2) and 173(5)). There are three exceptions to this rule. Members may speak a second time in debate in the House:

- on a matter on which they have been misquoted or misunderstood, sometimes known as an explanation of a speech;
- on an amendment to a motion; and
- in reply.

These three exceptions are examined further below.

On occasion the House has also granted leave to members to speak a second time in debate when special circumstances have warranted it, but this is very much an exception to the practice of the House.[13]

Explanation of a speech

Under standing order 89, a member who has already spoken in a debate may speak a second time to explain a matter on which he or she has been misquoted or misunderstood and, in practice, misrepresented.[14] In doing so, the member may not interrupt the

11 For further information, see the discussion in Chapter 10 (The conduct of proceedings) under the heading 'Interruption of business'.

12 For further information, see the discussion in Chapter 10 (The conduct of proceedings) under the heading 'Adjournment of debate'.

13 For further information, see the *Annotated Standing Orders of the New South Wales Legislative Council*, (n 8), pp 295-298.

14 R Laing (ed), *Odgers' Australian Senate Practice*, as revised by H Evans, 14th ed, (Department of the Senate, 2016), p 257. See also Ruling: Burgmann, *Hansard,* NSW Legislative Council, 28 June 2001, p 15633.

member speaking nor introduce new material into the debate. No debate may arise following such an explanation.

Odgers notes that an explanation of a speech cannot be used to respond to matters which have occurred at an earlier stage in proceedings, or to simply respond to arguments raised in debate with which a member does not agree. To use the procedure, a member must claim to have been misquoted, misunderstood or misrepresented.[15]

An explanation of a speech may be given by the member who moved the motion being debated by the House in order to inform other members and influence debate, notwithstanding that the member may also have a right of reply.

Speaking to an amendment

Under standing order 87(1), a member may speak a second time in debate when an amendment has been moved to the motion before the House after the member's original contribution, and the member wishes to speak to the amendment. In speaking to the amendment, the member may not again speak to the original question.

Speaking to an amendment is discussed in more detail in Chapter 12 (Motions and decisions of the House).[16]

Speaking in reply

The member who moves a substantive motion, a motion for the first reading of a Council bill,[17] or a motion for the second or third reading of either a Council or an Assembly bill, is entitled to speak in reply at the conclusion of the debate (SO 90(1)), in the process closing the debate (SO 90(2)). In general terms, there is no right of reply to debate on subsidiary motions, such as a motion moved by a minister regarding the conduct of government business (SO 37, as amended by sessional order) or a motion for the suspension of standing and sessional orders.

A member speaking in reply should endeavour to speak only to the matters that were raised in the debate by other members. It is not an opportunity to introduce new material into the debate.[18]

Since the reply of the mover of a substantive motion or the motion for the first, second or third reading of a bill closes off further debate, the President will not call on a member to speak in reply if there is any other member who has not spoken in the debate and who

15 *Odgers*, 14th ed, (n 14), p 257.

16 See the discussion under the heading 'Moving amendments'.

17 Under standing order 137, there is no debate on the motion for the first reading of an Assembly bill. For further information, see the *Annotated Standing Orders of the New South Wales Legislative Council*, (n 8), pp 438-440.

18 Rulings: Johnson, *Hansard*, NSW Legislative Council, 17 September 1980, p 1067; Primrose, *Hansard*, NSW Legislative Council, 10 September 2009, p 17686.

seeks the call to speak. However, there have been occasions on which a member has received leave to speak after a speech in reply.[19]

A member who speaks in reply on behalf of another member, or a minister who speaks in reply on behalf of another minister, does not close off debate.[20] However, a member who gave notice of a motion speaks in reply and closes debate even where another member moved the motion on his or her behalf. Similarly, the speech of a minister in charge of a bill in reply to the second reading debate is regarded as closing the debate, even though another minister or parliamentary secretary may have moved the motion for the second reading of the bill on the minister's behalf.[21]

Personal explanations

When there is no other business before the House, a member may, by leave of the House, make a personal explanation to address a statement made in the House or any other forum reflecting adversely on the member in a personal way.[22] In a significant ruling in 1986, President Johnson observed:

> [A personal explanation] should allow the member concerned to explain a matter reflecting on the honour, character or integrity of that member, or to explain any matter which reflects upon the member in a personal way. It should not be used to explain matters on behalf of any other person. The matter which is the subject of the personal explanation should not be amplified or debated. Provocative or disputative language should not be used.[23]

This ruling has been cited with approval by a number of Presidents since.[24]

A personal explanation may not be used to canvass views expressed by another member in the House,[25] or to comment on the conduct of another person.[26] Nor should a personal explanation be used to make a debating point.[27]

---

19 See, for example, *Minutes*, NSW Legislative Council, 16 September 1999, p 67; 31 August 2006, p 161; 19 March 2014, p 2380.

20 Ruling: Kelly (Deputy), *Hansard*, NSW Legislative Council, 1 March 2001, p 12159.

21 There is precedent in 2007 for more than one minister speaking during debate on a government bill on which there was a free vote. It was only when the minister who had moved the second reading of the bill spoke a second time in reply that the debate was closed. See *Hansard*, NSW Legislative Council, 19 June 2007, pp 1131-1134 per the Hon Ian Macdonald; 19 June 2007, pp 1166-1167 per the Hon Anthony Kelly; 20 June 2007, pp 1335-1339 per the Hon John Della Bosca; 26 June 2007, pp 1680-1683 per the Hon Ian Macdonald in reply.

22 Ruling: Budd, *Hansard*, NSW Legislative Council, 11 September 1975, p 1009.

23 Ruling: Johnson, *Hansard*, NSW Legislative Council, 27 February 1986, p 521.

24 Rulings: Willis, *Hansard*, NSW Legislative Council, 18 November 1992, pp 9095-9096; Primrose, *Hansard*, NSW Legislative Council, 23 October 2008, p 10468; Harwin, *Hansard*, NSW Legislative Council, 5999-6000; Ajaka, *Hansard*, NSW Legislative Council, 16 September 2018, p 33.

25 Ruling: Willis, *Hansard*, NSW Legislative Council, 17 November 1994, p 5188.

26 Ruling: Solomons (Deputy), *Hansard*, NSW Legislative Council, 12 October 1988, p 2057.

27 Ruling: Harwin, *Hansard*, NSW Legislative Council, 23 June 2015, p 1596.

A personal explanation also cannot be made during the course of a debate. If members believe that they have been misquoted or misunderstood or, in practice, misrepresented in debate, they should make an explanation of their speech under standing order 89.[28]

The House usually grants members leave to make a personal explanation. However, as with other procedures requiring leave of the House, an objection by any one member present prevents the making of a personal explanation. The practice of the House is that leave may be withdrawn at any time, and it is not uncommon for leave to be withdrawn after a member commences a personal explanation if the member contravenes the rules outlined above.[29]

The subject of the personal explanation may not be debated (SO 88).

Further detail on the giving of personal explanations is provided in the *Annotated Standing Orders of the New South Wales Legislative Council*.[30]

MANNER OF SPEECH

Remarks to be addressed through the Chair

Standing order 85(1) requires that a member speaking must address his or her remarks through the Chair. This must be done not only at the commencement of the member's remarks but throughout the speech. It is improper to direct remarks to other members in the chamber.

This rule has its origins in the English House of Commons, where the Speaker was originally the *Prolocutor* or spokesman of the Commons to the Crown. Where the Commons wished to express an opinion on taxes requested by the King, or to lay grievances before the King, the chief purpose of members was to make their meaning clear to the *Prolocutor* or Speaker, such that he might subsequently convey their message clearly to the King.[31]

In modern times, the rule is maintained in order to depersonalise debate in the House.[32] Rightly conducted, parliamentary debate is an opportunity to put forward opposing arguments reflecting different viewpoints, and to argue the merits of those viewpoints. It is not an opportunity to directly criticise the views of other members.

---

28 For further information, see the discussion earlier in this chapter under the heading 'Explanation of a speech'.

29 Rulings: Primrose, *Hansard*, NSW Legislative Council, 23 October 2008, p 10468; Ajaka, *Hansard*, NSW Legislative Council, 26 September 2018, p 33.

30 *Annotated Standing Orders of the New South Wales Legislative Council*, (n 8), pp 298-300.

31 J Redlich, *The Procedures of the House of Commons – A Study of its History and Present Form*, vol II, (Archibald Constable & Co Ltd, 1903), p 142.

32 *Hansard*, NSW Legislative Council, 24 August 2011, p 4527 per President Harwin.

To speak standing

Standing order 85(1) requires that members stand to speak in the House. Generally, members with the call stand and speak from one of the lecterns at the table of the House. Ministers and government members speak from the two lecterns on the government side of the table; opposition members speak from the two lecterns on the opposition side of the table. Cross-bench members speak from either side of the chamber, using the two lecterns at the end of the table.

In the past, in an exception to the practice of members speaking from the lecterns, members would sometimes ask questions during Question Time from their place on the benches. However, in recent times, the President has discouraged this practice.

A member unable to stand to speak because of sickness or infirmity may speak whilst seated (SO 85(2)). There were two occasions in the 1990s when the House allowed a member to speak whilst seated. The first was on 7 November 1993 when the Revd the Hon Fred Nile attended the House from hospital to speak to a bill which he strongly opposed. He addressed the House from a wheelchair, dressed in his pyjamas and dressing gown.[33] The second occasion was on 19 November 1996, when the Hon Elisabeth Kirkby spoke seated due to a temporary incapacity.[34]

In an earlier case, on 28 September 1967, the Hon Edna Roper was permitted to speak whilst seated.[35]

The injunction against reading of speeches

Members generally may not read speeches in their contribution to a debate. This is a longstanding rule of debate in all Westminster-style parliaments. Although the rule is not expressed in the standing orders, it is supported by various rulings of the Chair.[36]

The principal reason for this rule is that the reading of speeches destroys real debate, which is intended to be an exchange of views and arguments.[37] In addition there is a real danger that a member reading a speech may fail to debate the question before the House or may deliver to the House the views of another person who is not an elected member.

However, there are exceptions to the rule. It is accepted that a minister or member with carriage of a bill may read a second reading speech on the bill. Ministers may also read a ministerial statement, and members may read personal explanations. In both these latter

33 *Hansard*, NSW Legislative Council, 17 November 1993, p 5517 per President Willis.
34 *Hansard*, NSW Legislative Council, 19 November 1996, p 6081 per President Willis.
35 *Hansard*, NSW Legislative Council, 28 September 1967, p 1712.
36 Rulings: Peden, *Hansard*, NSW Legislative Council, 22 December 1936, p 1388; 20 August 1941, p 488; Solomons (Deputy), *Hansard*, NSW Legislative Council, 27 February 1990, p 163.
37 *Odgers*, 14th ed, (n 14), p 254.

two instances, there is no question before the House to be debated. It is also accepted that the first speech of a new member may be read.

Notwithstanding that speeches may generally not be read, it has been ruled that nothing in the standing orders prevents members from referring to copious notes in debate, and it is acceptable for members to refresh their memories by reference to their notes.[38] In addition, members referring to intricate or technical matters may also read parts of their contribution to debate.[39] Finally, members may also read reasonable lengths of extracts from books, newspapers, publications or documents, although particular rules apply to the reading of lists of names. This is discussed further below.

Quotation of documents

Standing order 91(4) provides that members may read reasonable lengths of extracts from books, newspapers and other publications during their contributions to debate.

There have been numerous rulings concerning the quotation of documents. In general, members are encouraged to give the authorship and page reference of books and articles from which they are quoting,[40] although they are not obliged to do so.[41] They are also encouraged to quote selectively from documents rather than to read large extracts onto the public record,[42] whilst quoting extensively from public documents which are readily accessible is strongly discouraged.[43] The normal rules of debate apply when a member quotes from a document.

Reading of lists of names

Standing order 91(5) provides that if a member seeks to read a list of names of individuals or organisations onto the parliamentary record, and another member objects, the member must confine his or her remarks to a statement of the comments or views of those individuals or organisations and the number of individuals or organisations.

This provision was introduced into the standing orders in response to the practice of members reading out extensive lists of names of people who had written to them

38 Rulings: Hay, *Hansard*, NSW Legislative Council, 16 July 1890, p 2085; Johnson, *Hansard*, NSW Legislative Council, 26 March 1981, p 5256.

39 Ruling: Peden, *Hansard*, NSW Legislative Council, 20 August 1941, p 488.

40 Rulings: Johnson, *Hansard*, NSW Legislative Council, 26 March 1980, p 5924; Willis (Deputy), *Hansard*, NSW Legislative Council, 13 June 1990, p 5530; Willis, *Hansard*, NSW Legislative Council, 24 March 1992, p 1715; 22 September 1992, p 6103; 18 June 1996, p 3013; Harwin, *Hansard*, NSW Legislative Council, 2 June 2011, p 1898.

41 Rulings: Johnson, *Hansard*, NSW Legislative Council, 26 May 1988, p 642; 27 February 1990, p 176.

42 Rulings: Willis (Deputy), *Hansard*, NSW Legislative Council, 13 June 1990, pp 5530, 5533; Willis, *Hansard*, NSW Legislative Council, 17 November 1993, pp 5506, 5539; 18 June 1996, p 3013, 28 May 1997, p 9356; Fazio (Deputy), *Hansard*, NSW Legislative Council, 15 November 2005, p 19628.

43 Rulings: Johnson, *Hansard*, NSW Legislative Council, 10 August 1989, p 9675; Willis, *Hansard*, NSW Legislative Council, 17 November 1993, p 5506.

opposing a bill.[44] This practice was the subject of conflicting rulings in 1991[45] and 2002,[46] prompting the House in 2002 to adopt a sessional order addressing the practice.[47] The sessional order was subsequently adopted as standing order 91(5) in 2004.

Incorporation of material in *Hansard*

Although not provided for in the standing orders, members often seek leave of the House to have the text of a document incorporated in *Hansard*, where it automatically becomes public. Ministers and parliamentary secretaries do this routinely when they seek leave of the House to incorporate their second reading speech on Assembly bills in *Hansard*, on the basis that the same speech has already been given in the Legislative Assembly on the introduction of the bill in that House.

The principal reason for incorporating material in *Hansard* is to save time. Another is that material such as columns of figures, graphs and charts are more easily comprehended visually than orally.

However, these benefits of incorporation must be balanced against the underlying principle that the *Hansard* record is a true record of what was said in the House. The incorporation of material in *Hansard* is a distinct departure from this principle. In agreeing to the incorporation of material in *Hansard*, members do not know what they have agreed to include in the record of debate, and are trusting that the member granted leave will not incorporate material which contains irrelevant material or defamatory, offensive or unparliamentary language.

Chairs have also raised the impact that incorporation of material in *Hansard* 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.[48] Chairs have also cautioned against seeking to incorporate material which is readily available elsewhere.[49]

The House has refused members leave to incorporate material in *Hansard* on various grounds, including that the material is already in the public domain and that the material should be read to the House, thus enabling members to debate the matters fully.[50]

In objecting to the incorporation of material in *Hansard*, members are not obliged to give reasons.[51]

---

44 On 27 June 2002, during the second reading debate on the Game Bill 2002, Ms Rhiannon read into *Hansard* 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. See *Hansard*, NSW Legislative Council, 27 June 2002, pp 3966-3971.

45 Ruling: Gay (Deputy), *Hansard*, NSW Legislative Council, 23 October 1991, p 3075.

46 Ruling: Kelly (Deputy), *Hansard*, NSW Legislative Council, 27 June 2002, p 3970.

47 *Minutes*, NSW Legislative Council, 29 August 2002, p 321.

48 Rulings: Johnson, *Hansard*, NSW Legislative Council, 15 August 1979, pp 150-151; Healey (Deputy), *Hansard*, NSW Legislative Council, 24 August 1983, p 403.

49 Ruling: Willis, *Hansard*, NSW Legislative Council, 19 June 1997, p 10714.

50 *Hansard*, NSW Legislative Council, 5 November 1975, pp 2273-2274; 24 March 1977, p 5643.

51 Ruling: Johnson, *Hansard*, NSW Legislative Council, 27 November 1979, p 3869.

Where leave is denied to a member to incorporate material in *Hansard*, it is within the prerogative of the member, subject to the operation of standing order 91(4) cited above, to read an entire document onto the record.[52]

This matter is discussed further in the *Annotated Standing Orders of the New South Wales Legislative Council*.[53]

Exhibits and props

Presidents have consistently ruled that it is unparliamentary for members to use exhibits and props during debate in the House,[54] on the basis that the House is a forum for prosecuting arguments in oral debate. The same principle is observed in the Australian Senate.[55] By contrast, in the Australian House of Representatives, members are permitted to display articles to illustrate speeches.[56]

Rules regarding the content of speeches

The rule of relevance

Standing order 92(1) provides that members must direct their contributions in debate to the question before the House; they may not digress from the question.

As is immediately apparent, this rule is fundamental to the proper conduct of debate in the House.

It is common for a point of order to be taken that a member speaking in debate is straying from the question before the House. If the Chair upholds the point of order, the Chair may order the member to return to the question before the House.

The rule of relevance has particular application to the various stages in the passage of a bill through the House. In general, members are given wide latitude in their contributions to debate on the second reading of a bill, as this is the stage at which the policy behind the bill and the broad legislative framework is considered.[57] By contrast, considerably less latitude is provided to members by the Deputy President and Chair of Committees

52 Ruling: Johnson, *Hansard*, NSW Legislative Council, 25 November 1980, p 3368.

53 *Annotated Standing Orders of the New South Wales Legislative Council*, (n 8), pp 157-158.

54 Rulings: Burgmann, *Hansard*, NSW Legislative Council, 21 September 2005, p 18012; Primrose, *Hansard*, NSW Legislative Council, 13 November 2007, p 3892; Fazio, *Hansard*, NSW Legislative Council, 25 February 2010, p 20908; Harwin, *Hansard*, NSW Legislative Council, 27 May 2015, p 843.

55 *Odgers*, 14th ed, (n 14), p 275.

56 DR Elder and PE Fowler (eds), *House of Representatives Practice*, 7th ed, (Department of the House of Representatives, 2018), pp 508-509.

57 Rulings: Fazio, *Hansard*, NSW Legislative Council, 1 December 2009, p 20179; Harwin, *Hansard*, NSW Legislative Council, 11 September 2014, p 311; Ajaka, *Hansard*, NSW Legislative Council, 16 May 2018, p 16.

in debating amendments to a bill in a Committee of the whole House.[58] At the third reading stage, debate must also be confined to the question that the bill be read a third time; there is no scope for further debate of the general merits of the bill.[59]

An exemption from the rule of relevance is provided in standing order 31(4)(b), which provides that any member may speak for five minutes on the motion for the adjournment of the House on matters not relevant to the question.

The rule of relevance is discussed further in the *Annotated Standing Orders of the New South Wales Legislative Council*.[60]

The rule of anticipation

Under standing order 92(1), members may not anticipate in their contribution to debate the discussion of any matter shown on the *Notice Paper*, except an item of private members' business,[61] 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 period of time.

This rule was only incorporated in the standing orders in 2004, but was observed in practice prior to then. In a significant ruling in 1980, President Johnson observed that it is contrary to the rules, customs and practices of the House to anticipate debate on an item of business expected to come before the House.[62]

The intention behind the rule is to protect matters which are on the *Notice Paper* for discussion and decision by the House from being pre-empted in debate.

However, there are certain caveats to the rule, other than the exclusion from its application of private members' business. The rule does not prevent debate on the Address-in-Reply to the Governor's speech on opening Parliament from canvassing any matter shown on the *Notice Paper* (SO 92(2)). Nor does it prevent questions on matters relating to the budget estimates or the budget papers (SO 65(4)), or questions concerning matters referred to a committee, where the matter is no longer before the House.[63]

---

58 Ruling: Khan (Deputy), *Hansard*, NSW Legislative Council, 21 October 2015, p 4724.

59 Ruling: Harwin, *Hansard*, NSW Legislative Council, 27 November 2013, p 26512.

60 *Annotated Standing Orders of the New South Wales Legislative Council*, (n 8), pp 309-312, 313-315.

61 Technically, standing order 92(1) applies to items of private members' business listed outside the order of precedence. However, with the suspension of the operation of standing orders 184 and 185, items of private members' business are no longer listed in and outside the order of precedence. That being the case, standing order 92(1) is interpreted as excluding from its operation all items of private members' business. For further information on standing orders 184 and 185, see the discussion in Chapter 10 (Conduct of proceedings) under the heading 'General or private members' business'.

62 Ruling: Johnson, *Hansard*, NSW Legislative Council, 11 September 1980, p 726.

63 However, the practice has been to allow only questions seeking information about the progress of proceedings in a committee which have not been reported to the House, but not so as to canvass

In addition, it is not anticipation to use a more effective form of procedure to raise a matter in the House than the procedure already set down on the *Notice Paper*. For example, the rule of anticipation does not prevent debate on a bill dealing with a particular matter, notwithstanding that a motion on the same matter is set down on the *Notice Paper* as an order of the day, as a bill is a more effective form of proceeding than a motion.[64]

Moreover, the rule of anticipation is generally interpreted liberally. Taken to its extreme, the rule could potentially enable members to prevent colleagues from debating a matter in the House by the simple expedient of placing a notice of motion concerning the matter on the *Notice Paper*. This is clearly not the intent of the rule. To prevent discussion on all matters that might be listed on the *Notice Paper* in one form or another would be too restrictive on the freedom of speech of members of the House. Generally, the rule is only invoked where a member speaking on another matter appears to be entering into debate on a bill or motion that is expected to come before the House within a reasonable period of time. Nor does the rule preclude incidental reference to a matter on the *Notice Paper*; its purpose is to prevent detailed discussion of substantive business on the *Notice Paper*.[65]

It is also notable that many other houses of parliament have moved to a similarly liberal interpretation of the rule of anticipation.[66]

However, that is not to say that the rule of anticipation is of no effect. In 2001, President Burgmann ruled that a motion for a judicial inquiry into the workers' compensation system anticipated the Workers Compensation Legislation Amendment Bill 2001 on the *Notice Paper* for that day. President Burgmann ruled:

> This motion is not one that allows for only incidental discussion. The motion is germane to the bill. While there are various rulings of the President that allow incidental references to business on the Notice Paper, it is not in order for members to go into detailed discussion of business on the Notice Paper.[67]

A subsequent motion by the Leader of the Opposition dissenting from the ruling of the President was negatived.[68]

The rule of anticipation is discussed further in the *Annotated Standing Orders of the New South Wales Legislative Council*.[69]

---

the findings of the committee which have not yet been reported. See Ruling: Burgmann, *Hansard*, NSW Legislative Council, 7 March 2001, p 12286.

64 Ruling: Burgmann, *Hansard*, NSW Legislative Council, 4 April 2001, pp 13075-13076.

65 Ibid.

66 See *Odgers*, 14th ed, (n 14), p 258; *House of Representatives Practice*, 7th ed, (n 56), pp 512-513.

67 Ruling: Burgmann, *Hansard*, NSW Legislative Council, 4 April 2001, p 13076.

68 *Minutes*, NSW Legislative Council, 4 April 2001, pp 923-924.

69 *Annotated Standing Orders of the New South Wales Legislative Council*, (n 8), pp 309-312.

Repetition

Under standing order 94(1), the President or other occupant of the Chair may call the attention of the House or a Committee of the whole House to continued irrelevance or repetition in debate, and in such cases may direct a member to cease speaking.[70]

In turn, standing order 94(2) provides that a member directed to cease speaking may request that the question be put: 'That the member be further heard.' The question must be put without amendment or debate.[71]

Reflections on votes of the House

Standing order 91(1) provides that a member may not reflect on any resolution or vote of the House, unless moving for its rescission. In 2003, President Burgmann ruled that the word 'reflect' in standing order 91(1) means to reflect adversely.[72]

This rule is intended to prevent adverse reflections on or criticisms of actions and decisions of the House such that the worth and effectiveness of the Legislative Council is impugned in the estimation of the public.[73] It has also been ruled that members must not reflect on the integrity of the House.[74]

However, in a significant ruling in 2017, President Ajaka noted with approval the position expressed in *Odgers* that, whilst the rule prevents 'gross abuse of past decisions of the Senate', the equivalent provision in the Senate is seldom invoked and that 'senators are not prevented in practice from saying that a decision of the Senate was wrong'.[75]

Reflections on rulings of the President or other occupant of the Chair

The decisions and rulings of the President or other occupant of the Chair may only be criticised by way of substantive motion. This may be a motion of dissent from a ruling of the President at the time it is given,[76] where comment must be limited to the specifics of the ruling. Alternatively, it may be by way of substantive motion, although there are no examples of such motions in the Legislative Council.

---

70 See, for example, *Hansard*, NSW Legislative Council, 20 March 1991, p 1380 per Deputy President Solomons; 1 March 1972, pp 4696-4697 per President Budd; 29 August 1906, p 1548 per Deputy President Trickett.

71 For further information, see the *Annotated Standing Orders of the New South Wales Legislative Council*, (n 8), pp 313-315.

72 Ruling: Burgmann, *Hansard*, NSW Legislative Council, 5 December 2003, p 6029.

73 *Annotated Standing Orders of the New South Wales Legislative Council*, (n 8), p 305.

74 Ruling: Harwin, *Hansard*, NSW Legislative Council, 2 June 2011, p 1734.

75 *Odgers*, 14th ed, (n 14), p 267. See also Ruling: Ajaka, *Hansard*, NSW Legislative Council, 28 March 2017, pp 23-24. For further information, see the *Annotated Standing Orders of the New South Wales Legislative Council*, (n 8), pp 305-306.

76 For further information, see the discussion later in this chapter under the heading 'Dissent from a ruling of the President'.

In a significant ruling in 2019, President Ajaka indicated that the use of social media in the House to reflect on a decision of the President or other occupant of the Chair is disorderly. Members may be called to order for such reflections.[77]

Offensive words, imputations and reflections

The House has the power to discipline members who, by their spoken word, offend the House. Spoken words may be so injurious, grossly defamatory or malicious as to amount to a contempt. This is discussed in detail in Chapter 3 (Parliamentary privilege in New South Wales).[78]

Consistent with this power, the standing orders and practice of the House dictate that certain institutions and office-holders, as well as certain categories of people, may not be referred to in an offensive manner, and may not be the subject of adverse imputations or reflections. They are:

- the Queen, Governor and Governor-General;
- both Houses of the Parliament, their members and officers; and
- members of the judiciary.

The prohibition on these institutions and office holders being referred to in an offensive manner, or being the subject of adverse imputations or reflections, is intended to ensure orderly and respectful debate in the House, to maintain comity between the Houses and the other arms of government and to protect the Legislative Council from being brought into disrepute. This is discussed further below.

References to the Queen, Governor or Governor-General

Standing order 91(2) specifies that members may not refer to the Queen or the Governor disrespectfully in debate, or for the purposes of influencing the House in its deliberations. Rulings of the President have extended the application of this rule to the Governor-General.[79]

This rule is founded on the need for mutual respect between the branches of government and between the Commonwealth and New South Wales, and on the requirement that the Monarch, Governor and Governor-General remain above political disputation. The rule is more restrictive than the injunction against the use of offensive words, imputations and reflections on the members of either House, discussed below.[80]

---

77 Ruling: Ajaka, *Hansard*, NSW Legislative Council, 21 August 2019, pp 2-3.

78 See the discussion under the heading 'Limitations imposed by the House on freedom of 'speech and debates''.

79 In 1975, the President upheld a point of order that a member was reflecting disrespectfully on the Governor-General in stating that he had made an 'infamous decision' and later 'was a party to a conspiracy'. See Ruling: Budd, *Hansard*, NSW Legislative Council, 12 November 1975, pp 2514, 2517; *Minutes*, NSW Legislative Council, 12 and 13 November 1975 am, p 179.

80 *Odgers*, 14th ed, (n 14), pp 267-268.

For example, in 1980 President Johnson ruled that to suggest that His Excellency the Governor was placed in an embarrassing situation by being required to make untrue comments in his Opening Speech to Parliament must be withdrawn.[81]

Separately, the prohibition in standing order 91(2) on references to the Queen or Governor 'for the purposes of influencing the House in its deliberations' is intended to prevent the making of statements seeking to assert the supposed support or opposition of the Queen or Governor (or by extension the Governor-General) to a cause. It could also cover such things as citing the Governor as an example to be avoided.[82]

It is in order to ask a question relating to the Queen, Governor or Governor-General, provided that the question does not cast reflections on their conduct.

Reflections on the Legislative Council, the Legislative Assembly, members and officers

Standing order 91(3) provides that a member may not use offensive words against either House of the Parliament, or any member of either House, and that all imputations of improper motives and all personal reflections on either House, members or officers will be considered disorderly.

The *Annotated Standing Orders of the New South Wales Legislative Council* summarises the distinction between offensive words, imputations of improper motives and personal reflections as follows:

- Offensive words are words that are offensive to the common person, or that a member personally claims to have found offensive.
- Imputations of improper motives are statements or references that imply improper motives such as implying that a member has acted for the wrong reason, such as for political gain. The words used in the implication may not be offensive in their everyday use.
- Personal reflections are comments or statements that reflect negatively on a member's character or reputation in some way. An example might be a suggestion that a member is lazy or appears to have been affected by alcohol.[83]

Exactly what constitute offensive words, imputations of improper motives and adverse personal reflections is left to the determination of the President or other occupant of the Chair. In a significant ruling in 1987, President Johnson observed:

> In judging what is an offensive remark 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

81 Ruling: Johnson, *Hansard*, NSW Legislative Council, 17 September 1980, p 1040.

82 *Odgers*, 14th ed, (n 14), p 268.

83 *Annotated Standing Orders of the New South Wales Legislative Council*, (n 8), p 306.

> personal way. The same view should be applied to the meaning of 'improper motives' and 'personal reflections' as used in the standing order. Here again, when a person is in public life and a member of Parliament, the risk of being criticized in a political way must be taken. Politics is not an area for sensitive persons. In the course of debate when members canvass the opinions and conduct of their opponents, they must expect criticism.[84]

Various rulings have also established that words are only offensive if they are made about individuals rather than a group.[85]

Presidents' rulings have also established that objection to any words used in debate must be taken at the time they are spoken and not some time afterwards.[86] If a member states that he or she did not say what is alleged, the member's word must be accepted.

The Chair may compel a member to withdraw an offensive remark without qualification or reservation.[87] Members have been called to order when they have failed to withdraw an offensive remark at the direction of the President and removed from the chamber for gross disorder, either by order of the House or the President.[88]

The conduct of a member of the House may only be debated on a substantive motion moved for that purpose for decision of the House.[89] Members may not make accusations or raise allegations against another member by way of amendment or on the motion for the adjournment of the House.[90] Nor is it appropriate to include such an allegation within the context of debate on a broader motion, or to raise it in reply to a question.

Members should refer to other members respectfully. A member may be referred to by title, for example 'The Honourable [name of member]', or by the office the member holds, such as 'The Honourable Minister for …' or 'The Honourable Leader of the Opposition'. In some instances, members have requested that they not be referred to in the House as 'The Honourable', in which case they should be referred to by their title. This long-established mode of referring to members respectfully is consistent with the requirement that members should address their remarks through the Chair and helps guard against any tendency to lapse into offensive language.

---

84 Ruling: Johnson, *Hansard*, NSW Legislative Council, 31 March 1987, pp 9586-9587.

85 Rulings: Johnson, *Hansard*, NSW Legislative Council, 20 October 1988, p 2684; Harwin, *Hansard*, NSW Legislative Council, 15 June 2011, p 2297; Ajaka, *Hansard*, NSW Legislative Council, 11 April 2018, p 34.

86 Rulings: Johnson, *Hansard*, NSW Legislative Council, 31 March 1987, pp 9586-9587; Ajaka, *Hansard*, NSW Legislative Council, 18 October 2018, p 6.

87 Ruling: Johnson, *Hansard*, NSW Legislative Council, 31 March 1987, p 9586.

88 *Minutes*, NSW Legislative Council, 18 October 1989, p 977; 14 November 1991, pp 268-269; 21 June 2007, p 145.

89 Rulings: Hay, *Hansard*, NSW Legislative Council, 8 May 1889, p 1105; Johnson, *Hansard*, NSW Legislative Council, 31 March 1987, pp 9586-9587; Willis, *Hansard*, NSW Legislative Council, 1 June 1995, p 555; Burgmann, *Hansard*, NSW Legislative Council, 5 June 2002, p 2584; Ajaka, *Hansard*, NSW Legislative Council, 11 April 2018, p 34.

90 Ruling: Hay, *Hansard*, NSW Legislative Council, 8 May 1889, p 1105.

It has also been ruled that imputations against officers of the House and the Parliament are improper and should be withdrawn.[91]

References to judges

Although not specified in the standing orders, Presidents' rulings have clearly established that members may not reflect adversely in debate on the conduct of judicial officers except by way of substantive motion.[92] For example, members may not comment on judges in respect of motives, capacity or character,[93] and references in debate implying political motive or interference in the actions of a judge have been ruled out of order.[94]

The basis of this rule is 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 and confidence in the judiciary.[95]

However, members may comment on the law itself and its operation, and may make observations about a court.[96] The rule also does not prevent criticism of the judgments or decisions of courts.[97]

According to section 53 of the *Constitution Act 1902*, the House may debate a motion for an Address to the Governor seeking the removal from office of a judicial officer, on receipt of a report from the Conduct Division of the Judicial Commission of New South Wales. This is discussed further in Chapter 23 (Relations with the Judiciary).[98]

Reference in debate to committees

Standing order 224(1) provides that 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. There are various Presidents' rulings supporting this.[99] However, this restriction does not apply to certain evidence and documents, such as submissions authorised to be made public by the committee and proceedings of the committee open to the public (SO 224(2)).[100]

---

91 Ruling: Johnson, *Hansard*, NSW Legislative Council, 30 May 1990, p 4715.
92 Ruling: Willis, *Hansard*, NSW Legislative Council, 23 September 1997, p 303; Chadwick, *Hansard*, NSW Legislative Council, 24 September 1998, p 7965.
93 Ruling: Hay, *Hansard*, NSW Legislative Council, 4 May 1880, p 2136.
94 Ruling: Farrar (Deputy), *Hansard*, NSW Legislative Council, 25 February 1941, pp 1500-1501.
95 *Odgers*, 14th ed, (n 14), p 268.
96 Ruling: Harwin, *Hansard*, NSW Legislative Council, 6 March 2012, p 8937.
97 *Odgers*, 14th ed, (n 14), p 268.
98 See the discussion under the heading 'Removal of judicial officers'.
99 Rulings: Johnson, *Hansard*, NSW Legislative Council, 20 October 1988, p 2677; Burgmann, *Hansard*, NSW Legislative Council, 7 March 2001, pp 12282, 12286, 12301.
100 Rulings: Burgmann, *Hansard*, NSW Legislative Council, 7 March 2001, p 12286; Forsythe (Deputy), *Hansard*, NSW Legislative Council, 22 September 2004, p 11248.

The principal purpose of this rule is to prevent members from seeking to interfere with or influence proceedings of a committee through debate in the House. It also serves to avoid inefficient use of the time of the House in debating a matter which is under consideration by a committee.

References to committee proceedings in questions is discussed in Chapter 14 (Questions).[101]

The *sub judice* convention

Although the Houses of the Parliament of New South Wales have the right to debate any matter within the Parliament's legislative power, and indeed sometimes debate matters outside the Parliament's legislative power, a convention has developed whereby members of the House refrain from making reference in debate, motions, questions or committee proceedings to matters before the courts where this could prejudice proceedings or harm specific individuals. This is known as the *sub judice* convention.[102] The convention is a restriction which the House voluntarily imposes on itself through practice and rulings of the President, rather than a specific standing order which must be followed.

As outlined in *Odgers*, there are a number of principles guiding the application of the *sub judice* convention:

- First, there should be an assessment of whether there is a real danger of prejudice to legal proceedings, in the sense of either creating an atmosphere where a jury would be unable to deal fairly with the evidence put before it, or possibly affecting the evidence a future witness might give. The Chair should err in favour of further discussion unless it is clear that to do otherwise could prejudice the legal proceedings.
- Second, the danger of prejudice must be weighed against the public interest in the matters under discussion. The Chair may determine that the public interest in discussion of the matter outweighs possible prejudice.
- Third, the danger of prejudice is considered greater when a matter is actually before a magistrate or a jury. Greater weight also applies in criminal than civil proceedings.[103]

In 1990, these principles were articulated in a significant ruling on the *sub judice* convention given by President Johnson, in which he observed:

- The House has an absolute privilege to debate matters and is not bound by the rules of contempt of court or even the laws of defamation, both of which

101 See the discussion under the heading 'Questions must not refer to debates in the current session or committee proceedings'.

102 *Sub judice* is a Latin term meaning 'under consideration'.

103 *Odgers*, 14th ed, (n 14), p 262.

are applicable to comments made outside Parliament. However, in practice the House observes the *sub judice* convention.

- The onus falls upon the Chair to adjudge whether any matter raised in the House is *sub judice*. The Chair may decide to intervene at the Chair's own discretion or may be called upon to decide whether a matter is *sub judice* on a point of order brought to the Chair's attention.
- In deciding whether the *sub judice* convention should be applied in a particular debate, the Chair is required to weigh the competing public interest in debate against possible prejudice to the case. The integrity of the judicial process should not be prejudiced by debate in the House. However, the Chair should be guided in the first instance by a presumption for discussion rather than against it. 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. Such an interpretation would be too restrictive of the rights of members. Nor should the Chair automatically exclude discussion in the House on matters of public interest which are already being freely ventilated in the media. The Chair should also take into account that there are limits to which debate in the House can be seen as affecting the proceedings in a court. There 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 Parliament.[104] A jury is more likely to be prejudiced than a judge.
- The *sub judice* convention is much stricter in relation to criminal matters than civil matters. In criminal matters, the convention may be applied from the moment a charge is brought until the announcement of the verdict and sentence. It becomes relevant again if a notice of appeal is lodged until the appeal is decided. By contrast, in civil matters, the convention may only apply from the time the case has been set down for trial or otherwise brought before the court.[105]

The President or other occupant of the Chair is the final arbiter of the *sub judice* convention and has absolute discretion in making a ruling to prevent or allow debate on a matter that may be before the courts, subject to the House dissenting from any such ruling.

***Sub judice* and Royal Commissions and similar bodies**

On the face of it, the *sub judice* convention has no application to executive-appointed bodies such as Royal Commissions and similar ongoing bodies, such as the Independent Commission Against Corruption (ICAC). Primarily this is because the proceedings of such bodies are not judicial proceedings. Whilst criminal prosecutions may follow from evidence taken before a commission of inquiry, it may be argued that until such

104 AR Browning (ed), *House of Representatives Practice*, 2nd ed, (Australian Government Publishing Service, 1989), p 493.

105 Ruling: Johnson, *Hansard*, NSW Legislative Council, 16 May 1990, pp 3364-3369.

prosecutions commence the *sub judice* convention does not arise.[106] In addition, it is unlikely that a Royal Commissioner would be influenced by parliamentary debates.

However, in 1990, in a precedent to the contrary, the Deputy President ruled that the *sub judice* convention did apply to an investigation before ICAC. This ruling is of doubtful validity. It was based on a mistaken belief that the matter had been referred to ICAC by the Parliament when it had not.[107] In giving his ruling, the Deputy President cited a resolution of the UK House of Commons concerning the *sub judice* convention:

> 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.[108]

Ultimately, the application of the *sub judice* convention to Royal Commissions and similar bodies is a matter for the President and the House. On the face of it the convention is of doubtful application. Of note, the right of the Council to debate a matter before ICAC is enshrined in section 122 of the *Independent Commission Against Corruption Act 1988*.

CURTAILMENT OF SPEECHES AND DEBATE

Time limits on debates and procedures

Under the standing and sessional orders, time limits apply to the majority of debates and procedures in the Legislative Council. These are listed in Appendix 11 (Time limits on debates and speeches in the Legislative Council).

Time limits for certain types of debate were first introduced in the Legislative Council with the adoption of the 1895 standing orders.[109] However, it is only since the 1980s that time limits have been extended to the majority of debates and procedures in the Legislative Council.

The widespread adoption of time limits in the House has largely gone without comment. However, there is one exception to this: the adoption of time limits for debate on government bills.

In 1987 the House adopted a sessional order which for the first time imposed time limits on debate on all bills.[110] At the time the opposition and cross-bench strongly opposed the

106 The same view is taken in the Senate and the Western Australian Legislative Council. See *Odgers*, 14th ed, (n 14), p 265 and Ruling: Sir Harold Sneddon, President, *Hansard*, Western Australian Legislative Council, 3 December 1947, pp 2346-2347. By contrast, the opposite position is adopted in the House of Representatives. See *House of Representatives Practice*, 7th ed, (n 56), pp 521, 524.

107 The Deputy President, in his ruling, incorrectly stated that the matter at hand had been referred to ICAC.

108 CJ Boulton (ed), *Erskine May's Treatise on The Law, Privileges, Proceedings and Usage of Parliament*, 21st ed, (Butterworths, 1989), p 378.

109 See standing orders 13 and 102.

110 *Minutes*, NSW Legislative Council, 13 October 1987, pp 1112-1114.

provision, arguing that Council members should not be unduly constrained in the time available to them to debate important pieces of government legislation. Amendments to refer the proposal to the Standing Orders Committee and to exempt cross-bench members from the time limit were negatived and the sessional order was agreed to.[111] In the event, the sessional order only operated for 18 days until the end of the session before lapsing. It was not reintroduced in the next session following a change of government.

The matter was revisited following the passage through the House in May and June 2011 of the Industrial Relations Amendment (Public Sector Conditions of Employment) Bill 2011. During the course of debate on the bill, the government repeatedly accused the opposition and cross-bench of filibustering to delay passage of the bill, there being no time limits on debate at the time.[112] In response, the government used the closure motion on three separate occasions to guillotine debate and force the bill through the House.[113] Subsequently, on 3 August 2011, on the motion of the Leader of the House, the House adopted by way of sessional order time limits for debate on government bills both in the House and in committee.[114] The motion was adopted despite strong dissent from members of the opposition and cross-bench who again argued that the time available to them to debate important pieces of government legislation should not be unduly constrained.[115]

Since then, time limits for debate on government bills have continued to be adopted by the House in each session by way of sessional order without demur.[116]

The motion that a member 'Be no longer heard'

Standing order 98(1) provides that any member, except a member who has already spoken in a debate, may move without notice that a member who is speaking 'Be no

111 *Hansard*, NSW Legislative Council, 13 October 1987, pp 14228-14247.

112 During the debate, Mr Shoebridge delivered the longest continuous speech in the House on record of 5 hours and 58 minutes, with another member, Dr Kaye, delivering a speech only a few minutes shorter. See *Hansard*, NSW Legislative Council, 2-4 June 2011, p 1863 per President Harwin. It is believed that the longest interrupted speech delivered in the House (over 8 hours) was delivered by the Hon Sir Julian Salomons. See *Hansard*, NSW Legislative Council, 28 July 1897, pp 2321-2351.

113 *Minutes*, NSW Legislative Council, 2-4 June 2011, pp 181, 184; *Hansard*, NSW Legislative Council, 2-4 June 2011, p 2052.

114 *Minutes*, NSW Legislative Council, 2 August 2011, pp 292-293, 294; 3 August 2011, pp 296-298.

115 *Hansard*, NSW Legislative Council, 2 August 2011, pp 3343-3349, 3378-3388; 3 August 2011, pp 3448-3464, 3476-3480.

116 *Minutes*, NSW Legislative Council, 9 September 2014, p 11; 6 May 2015, p 59; 8 May 2019, pp 72-73. For further information on the impact of the introduction of time limits on debate on government legislation, see D Blunt, 'Three unusual and dramatic recent "sitting days" in the New South Wales Legislative Council and the impact of the introduction of time limits on debate on government legislation in August 2011', Paper presented to the 43rd Conference of Presiding Officers and Clerks, Honiara, Solomon Islands, July 2012.

longer heard'. This is one of the few circumstances in which a member may interrupt a member speaking.[117] The motion is colloquially known as the 'gag'.[118]

The motion that a member 'Be no longer heard' (the 'gag') may not be debated or amended (SO 98(2)). Before putting the question that a member 'Be no longer heard', the Chair is to advise the House to consider whether the member speaking has had ample opportunity to debate the question, whether the member speaking is abusing the standing orders or conventions of the House, or is obstructing business, and whether the motion, if carried, would take away the rights of the minority (SO 98(3)).

The last occasion the 'gag' was moved in the Legislative Council was on 23 November 2011 when the Opposition Whip moved during Question Time that the Minister for Finance and Services, and Minister for the Illawarra, in answering a supplementary question, be no longer heard. The motion was negatived.[119]

Prior to the adoption of the current standing orders in 2004, the form of the 'gag' was that a member 'Be not further heard'. This motion was moved on two occasions in 1995,[120] and prior to that in 1901[121] and 1900.[122] On each occasion, it was negatived.

The only time the 'gag' motion has been moved successfully in the Council was in 1897 under former standing order 75, when it was moved successfully on multiple occasions during debate on the Australasian Federation Enabling Act Amendment Bill 1897.[123]

The Senate does not allow a motion to be moved that a senator be no longer heard.[124]

INTERRUPTION OF THE MEMBER SPEAKING

A member may not interrupt another member speaking except to:

- take a point of order that proceedings are not being conducted according to the rules and orders of the House (SO 95(1)(a));
- raise a matter of privilege (SO 95(1)(a));
- call attention to the lack of a quorum (SO 95(1)(b));

117 For further information, see the discussion later in this chapter under the heading 'Interruption of the member speaking'.

118 A member may also move the closure of debate under standing order 99, which if carried not only curtails the speech of the member speaking, but curtails the entire debate and prevents any further speakers. This is colloquially known as the 'guillotine' and is discussed separately in Chapter 12 (Motions and decisions of the House) under the heading 'The closure motion'.

119 *Minutes*, NSW Legislative Council, 23 November 2011, p 616.

120 *Hansard*, NSW Legislative Council, 15 December 1995, p 474.

121 *Minutes*, NSW Legislative Council, 28 November 1901, p 180.

122 *Minutes*, NSW Legislative Council, 5 September 1900, p 113.

123 'Report of divisions in Committee of the Whole', *Journals,* NSW Legislative Council, 1897, vol 56, pt 1, pp 253-257.

124 *Odgers*, 14th ed, (n 14), p 273.

- move that a member 'Be no longer heard' (the 'gag') (SO 98(1)); and
- move 'That the question be now put' (the closure motion or 'guillotine') (SO 99(1)).

By far the most common way in which a member speaking is interrupted is on a point of order being taken that proceedings are not being conducted according to the rules and orders of the House. The President or other occupant of the Chair may also interrupt a member to call attention to proceedings not being conducted according to the rules and orders of the House. In such circumstances, business then under consideration is suspended until the matter has been dealt with, and the member speaking must resume his or her seat until the President or other occupant of the Chair has ruled on the matter. The taking of points of order is discussed in detail later in this chapter.[125]

In most circumstances where speeches are time limited, there is no concession granted to a member whose time for speaking is curtailed by the taking of a point of order or interruption from the Chair, even when the member's remaining speaking time may be entirely consumed in dealing with the point of order. Such circumstances used to occur in particular in Question Time.[126] However, since 2015, at the direction of the President, it has become practice for the clock to be stopped on the taking of a point of order during Question Time.[127] This practice is not applied in any other circumstances, except at the discretion of the President or other occupant of the Chair.

Interruption of a speaker to draw attention to a matter of privilege,[128] the lack of a quorum,[129] to move that a member 'Be no longer heard',[130] or to move 'That the question be now put'[131] are discussed separately.

Members speaking in debate are also routinely interrupted by the operation of standing and sessional orders for the calling on of other items of business, such as the sessional order for the calling on of Question Time each sitting day. This is also discussed separately.[132]

---

125 See the discussion under the heading 'Points of order and rulings'.

126 *Hansard*, NSW Legislative Council, 5 June 2001, p 14279 per President Burgmann; 21 March 2002, p 911 per President Burgmann.

127 The first occasion this occurred was in 2007 at the instigation of President Primrose. See *Hansard*, NSW Legislative Council, 30 May 2007, p 413. It has subsequently been adopted as routine practice by Presidents Harwin and Ajaka.

128 See the discussion in Chapter 3 (Parliamentary privilege in New South Wales) under the heading 'Raising a matter of privilege'.

129 See the discussion in Chapter 9 (Meetings of the Legislative Council) under the heading 'Quorum'.

130 See the discussion earlier in this chapter under the heading 'The motion that a member 'Be no longer heard''.

131 See the discussion in Chapter 12 (Motions and decisions of the House) under the heading 'The closure motion'.

132 For further information, see the discussion in Chapter 10 (The conduct of proceedings) under the heading 'Interruption of business'.

Interjections

Interjections are remarks interposed in debate by members who do not have the call. Other than in the circumstances outlined above, where members may interrupt a member speaking, all such interruptions of the member speaking are disorderly. In particular, Presidents have consistently ruled that members should not interject solely for the purpose of preventing another member from expressing a point of view.[133]

In practice, interjections which are not disruptive of proceedings are tolerated by the House if they facilitate the exchange of views and argument in debate.

However, interjections are always disorderly during certain types of business such as during debate on condolence motions,[134] during a member's first speech,[135] during the giving of a personal explanation,[136] and during the giving of notices of motions.[137]

POINTS OF ORDER AND RULINGS

Raising a point of order

Standing order 95(3) provides that the President or other occupant of the Chair may intervene at any time in debate when, in his or her opinion, the member speaking is contravening the rules of debate of the House. It is the duty of the President or other occupant of the Chair to maintain order in the House.

If the President or other occupant of the Chair does not intervene when a breach of the rules of debate may have occurred, it is the right of any member who thinks that such a breach has occurred to take a point of order (SO 95(2)). To do so, the member rises in his or her place and states to the President or other occupant of the Chair: 'Point of order.'[138] In doing so, the member may interrupt the member speaking. On taking a point of order, a member must draw the attention of the President or other occupant of the Chair to the potential breach of the rules and orders of the House.

---

133 Rulings: Primrose, *Hansard*, NSW Legislative Council, 24 September 2009, p 18093; Harwin, *Hansard*, NSW Legislative Council, 3 June 2015, p 1246; Ajaka, *Hansard*, NSW Legislative Council, 17 October 2018, p 30.

134 Ruling: Khan (Deputy), *Hansard*, NSW Legislative Council, 15 May 2014, p 28876.

135 Ruling: Johnson, *Hansard*, NSW Legislative Council, 23 November 1982, p 2731.

136 Ruling: Willis, *Hansard*, NSW Legislative Council, 23 October 1996, p 5205.

137 Rulings: Harwin, *Hansard*, NSW Legislative Council, 15 November 2012, p 16888; Ajaka, *Hansard*, NSW Legislative Council, 20 November 2018, p 21.

138 A member raising a point of order during a division must remain seated and be 'covered', for example by holding a piece of paper above his or her head (SO 117). This practice is based on past practice in the House of Commons, although that House has since abolished the practice, in favour of members simply approaching the Chair to explain the matter. See M Jack (ed), *Erskine May's Treatise on The Law, Privileges, Proceedings and Usage of Parliament*, 24th ed, (LexisNexis, 2011), p 431.

On a point of order being taken, the business under consideration of the House is suspended until the question of order is determined (SO 95(4)). Any member speaking at that time or called to order must sit down (SO 95(5)).

The President or other occupant of the Chair may choose to hear argument on a point of order from the floor of the House. There is no limit to the number of members who may speak to a point of order, or the number of times an individual member may speak to a point of order. However, there is no requirement to hear argument and it is at the discretion of the President or other occupant of the Chair at any time to intervene and give a ruling, even if further members wish to speak to the point of order (SO 95(7)).

It is an abuse of the forms of the House to take a point of order merely to contradict a statement made in debate[139] or to make a personal explanation.[140]

The President also will not deal with hypothetical points of order or points of order that have already been determined.[141] Presidents have also ruled that they cannot decide constitutional questions or questions of law.[142]

It has been the practice of the House that a second point of order cannot be raised whilst one is already before the House, although the Chair has allowed points of order to be taken on a member who is speaking to a point of order.[143]

Rulings

If the President or other occupant of the Chair intervenes in debate to call attention to a breach of the rules and orders of the House, or if a point of order is taken drawing attention to a supposed breach of the rules and orders, the President or other occupant of the Chair usually gives a ruling on the matter immediately, as most matters on which a ruling is required are straightforward. Alternatively, as discussed above, the President may choose to hear argument on the question first before giving a ruling, although there is no obligation to do so.

However, on more complex or unusual matters, the President may choose to reserve his or her ruling, in order to consider the matter further and to seek further advice from the Clerk (SO 95(6)). In addition, where the precise words used by a member in debate are at issue, the President may reserve his or her ruling in order to be able to review the transcript of debate once available. In both such instances, the President gives a considered ruling at a later time.

---

139 Rulings: Burgmann, *Hansard*, NSW Legislative Council, 2 March 2006, p 20919; Fazio (Deputy), *Hansard*, NSW Legislative Council, 2 December 2008, p 12193.

140 Ruling: Burgmann, *Hansard*, NSW Legislative Council, 1 December 2005, p 20420.

141 *Odgers*, 14th ed, (n 14), p 276.

142 Ruling: Steele (Deputy), *Hansard*, NSW Legislative Council, 5 December 1951, pp 4800-4801; Ajaka, *Hansard*, NSW Legislative Council, 5 June 2019, p 39.

143 Ruling: Burgmann, *Hansard*, NSW Legislative Council, 3 December 2003, p 5659.

A ruling of the President or other occupant of the Chair must be complied with. It is the equivalent of an order of the House.[144] It is of force unless immediately dissented from by the House or until it is superseded by a subsequent ruling or order of the House.

The principles to be followed by the President or other occupant of the Chair in giving rulings are discussed in more detail in Chapter 8 (The basis of Legislative Council procedure).[145]

The Deputy President and Chair of Committees has the same authority to make rulings in a Committee of the whole House as the President has in the House (SO 173(7)).

Dissent from a ruling of the President

All rulings of the President or other occupant of the Chair are subject to appeal to the House. Under standing order 96(1)), on the President or other occupant of the Chair giving a ruling, any member may dissent from that ruling by motion moved immediately without notice: 'That the House dissent from the ruling of the President.' In 1932, the President declined to accept a motion of dissent moved without notice as it had not been 'at once made'.[146]

If a motion of dissent from a ruling is not moved immediately, there is nothing in the standing orders to prevent a motion being moved on notice in the usual way to seek to overturn the ruling, or alternatively to change the procedure or standing order on which the ruling is based.

A motion of dissent from a ruling of the President or other occupant of the Chair moved under standing order 96 may be debated forthwith, or may be adjourned, without amendment, until a later hour of the sitting or to the next sitting day (SO 96(2)). The greatest possible latitude of discussion is allowed in debate on a dissent motion,[147] and the President may participate in the discussion in order to clarify the ruling or respond to points which have been made.

Motions of dissent against rulings of the President or other occupant of the Chair are not common, and it is even less common for them to be upheld by the House. The most recent dissent motion against a ruling of the President that was upheld by the House was in 1999.[148] Prior to that, dissent motions were upheld against a ruling of the Deputy President in 1991,[149] and a ruling of the President in 1960.[150]

---

144 *Odgers*, 14th ed, (n 14), p 152.

145 See the discussion under the heading 'Rulings from the Chair'.

146 *Hansard*, NSW Legislative Council, 11 May 1932, pp 9238-9240 per President Peden; *Minutes*, NSW Legislative Council, 11 May 1932, p 536.

147 *Odgers*, 14th ed, (n 14), p 227.

148 *Minutes*, NSW Legislative Council, 8 September 1999, p 35. The dissent motion related to a ruling that a question was out of order.

149 *Minutes*, NSW Legislative Council, 2 May 1991, pp 186-188. The dissent motion related to a ruling on the reading of lengthy excerpts from a court judgment.

150 *Minutes*, NSW Legislative Council, 13 April 1960, pp 230-233. The dissent motion related to a ruling that the House could not consider a message from the Governor.

Further information is provided in the *Annotated Standing Orders of the New South Wales Legislative Council*[151] and in the first edition of *New South Wales Legislative Council Practice*.[152]

If a member dissents from a ruling of the Deputy President and Chair of Committees in a Committee of the whole House, this must be reported to the House if the committee so resolves. This is discussed in more detail in Chapter 16 (Committee of the whole House).[153]

DISORDER IN THE HOUSE

It is the role of the President or other occupant of the Chair to maintain order in the House (SO 83(1)).

In the normal course of events, the President or other occupant of the Chair is usually able to maintain order by calling the House to order. When necessary, the President or other occupant of the Chair may also rise in his or her place during debate to restore order, whereupon all members must resume their seats, including the member with the call, and the House must be silent whilst the President speaks (SO 83(2)).[154]

However, more serious cases of disorder are dealt with under standing orders 190 to 194. This is discussed below.

The role of the Deputy President and Chair of Committees in maintaining order in a Committee of the whole House (SO 173(7)) is discussed separately in Chapter 16 (Committee of the whole House).[155]

Member called to order and removed from the chamber (SO 192)

Under standing order 192, if the President or other occupant of the Chair in the House or in committee calls a member to order three times in the course of any one sitting day for a breach of order, that member by order of the Chair may be removed from the chamber by the Usher of the Black Rod for a period of time as the Chair determines, but not beyond the termination of the sitting.

The majority of occasions on which a member called to order three times has been removed from the chamber for disorderly conduct under standing order 192 have occurred during Question Time. On most such occasions, the President has ordered that the member be removed from the chamber until the conclusion of Question Time,

151 *Annotated Standing Orders of the New South Wales Legislative Council*, (n 8), pp 318-320.

152 L Lovelock and J Evans, *New South Wales Legislative Council Practice*, 1st ed, (Federation Press, 2008), pp 328-330.

153 See the discussion under the heading 'Dissent from a ruling of the Chair'.

154 For further information, see the *Annotated Standing Orders of the New South Wales Legislative Council*, (n 8), pp 285-287.

155 See the discussion under the heading 'Disorder'.

although on occasion members have been suspended until a later hour or until the termination of the sitting.[156]

Standing order 192 also provides for a member who conducts himself or herself in a grossly disorderly manner to be removed from the chamber by order of the President or other occupant of the Chair without having been called to order three times. Members have been removed for gross disorder during Question Time until the end of Question Time[157] and until the end of the sitting.[158]

In 2014, in response to a report of the Procedure Committee,[159] President Harwin made a statement to the House advising that grossly disorderly conduct under standing order 192 included inappropriate behaviour as a result of intoxication by alcohol or any other substance.[160]

The predecessor to standing order 192 was standing order 261.[161] During the period 1916-1922, a member of the House, the Hon James Wilson, was removed from the chamber under the provisions of standing order 261 on five separate occasions, on the last occasion colourfully calling the President 'a bigger skunk than I thought'.[162] Subsequently, the President made a statement to the House concerning the conduct of Mr Wilson, with a view to having steps taken to protect the dignity of the House. On a motion moved by the Vice-President of the Executive Council under 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.[163]

---

156 See, for example, *Minutes*, NSW Legislative Council, 1 May 2018, p 2458; 16 August 2018, p 2905.

157 *Minutes*, NSW Legislative Council, 21 June 2007, p 145; *Hansard*, NSW Legislative Council, 21 June 2007, pp 1464, 1467. The member removed was the Hon Michael Costa. He was removed for refusing to withdraw offensive words.

158 *Minutes*, NSW Legislative Council, 19 June 2014, p 2620; *Hansard*, NSW Legislative Council, 19 June 2014, p 29883. The member removed was Mr Jeremy Buckingham. He was removed for remarks concerning the President.

159 Procedure Committee, *Deadlines for government bills; Regulation of the consumption of alcohol by members during sitting hours; Government responses to petitions*, Report No 8, March 2014, pp 13-14.

160 *Minutes*, NSW Legislative Council, 4 March 2014, p 2315; *Hansard*, NSW Legislative Council, 4 March 2014, p 26911.

161 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.' The Chairman of Committees is today known as the Deputy President and Chair of Committees.

162 *Minutes*, NSW Legislative Council, 23 March 1916, p 276; 21 September 1916, p 113; 21 October 1920, p 74; 24 August 1922, p 56; 12 October 1922, p 102.

163 *Minutes*, NSW Legislative Council, 12 October 1922, p 102; *Hansard*, NSW Legislative Council, 12 October 1922, pp 2507-2508.

A member removed under standing order 192 is excluded from the chamber and the galleries (but not from the parliamentary precincts),[164] and may not serve on or attend any proceedings of a committee of the House during the period of suspension. If a member is removed when speaking in debate the member may not resume speaking after the period of exclusion has expired.[165] In addition, questions on notice are not accepted from a member during a period of suspension from the service of the House.

Member named by the President and suspended by the House (SOs 190 and 191)

Under standing order 190, the House may of its own authority suspend a member guilty of an offence if the member, after warning by the President:

- continues to obstruct the business of the House;
- continues to abuse the rules of the House;
- refuses to comply with an order of the Chair;
- refuses to comply with the standing orders;
- continues to disregard the authority of the Chair; or
- otherwise obstructs the orderly conduct of business of the House.

A member who has committed one of these offences may be reported to the House by the President (SO 190(1)). This is known as 'naming' the member.

A member named by the President for an offence 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 whilst the House considers the matter. If it is considered necessary, a motion may then be moved without notice that the member be suspended from the service of the House. The motion for suspension cannot be debated or amended (SO 190(3)). 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 (SO 191(2)).

The key difference between the power of the House to suspend a member under standing orders 190 and 191 and the power of the President or other occupant of the Chair to suspend a member under standing order 192, discussed above, is that the House may suspend a member indefinitely, subject to any limitations on the common law power of the House to suspend a member, whereas the President or other occupant of the Chair may only suspend a member until the termination of a sitting.

---

164 In accordance with the decision of the New South Wales Court of Appeal in *Egan v Willis and Cahill* (1996) 40 NSWLR 650 at 672 per Gleeson CJ, at 684-686 per Mahoney P, and at 693 per Priestley JA, a member of the Legislative Council suspended from the service of the House is not excluded from the parliamentary precincts.

165 Ruling: Harwin, *Minutes*, NSW Legislative Council, 8 May 2013, p 1689.

The power of the House to suspend a member has been exercised infrequently. Other than the case of Mr Wilson in 1922, cited above, members have been suspended under the predecessors to standing orders 190 and 191 on only two occasions, in 1989[166] and 1991.[167] In both instances, a point of order was raised that the member concerned had used offensive words. The President upheld the point of order and called on the member to withdraw. Having refused to comply with the President's order, the member was named by the President under then standing order 259, adjudged guilt of contempt by the House, and suspended from the service of the House, in the first case for 24 hours, in the second case for the remainder of the sitting.

The effect of suspension under standing orders 190 and 191 is the same as under standing order 192, as discussed above.

Suspension of a sitting (SO 193)

In cases of serious disorder in the House, the President on his or her own initiative may suspend a sitting of the House for a time to be stated or may adjourn the House until the next sitting day (SO 193). For example, on 2 May 1996, the Treasurer and Leader of the Government in the Legislative Council, the Hon Michael Egan, was adjudged guilty of contempt for his failure to comply with an order of the House for the production of State papers and suspended from the service of the House for the remainder of the sitting day. Following Mr Egan'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.[168]

CONDUCT OF MEMBERS IN THE CHAMBER

As well as the rules of debate, there are also established rules and practices relating to the conduct of members and decorum in the chamber. Some of these rules are contained in the standing orders, whilst others rely on rulings of the President and the good sense and common courtesy of members.[169] This is discussed further below.

Entering, moving about and leaving the chamber

At the beginning of each sitting day, members stand when the Usher of the Black Rod announces the President to the House, and remain standing until after the prayers have been read (SO 28). On the first sitting day of each week members also remain standing after the prayers are read until the President has acknowledged the Gadigal clan of the Eora nation, the traditional owners of the land on which the Parliament meets.

---

166 *Minutes*, NSW Legislative Council, 18 October 1989, pp 977-978; *Hansard*, NSW Legislative Council, 18 October 1989, pp 11370-11374, 11379-11381. The member was the Hon Marie Bignold.

167 *Minutes*, NSW Legislative Council, 14 November 1991, pp 268-269; *Hansard*, NSW Legislative Council, 14 November 1991, pp 4572-4574. The member was the Hon Elisabeth Kirkby.

168 *Minutes*, NSW Legislative Council, 2 May 1996, p 118.

169 Ruling: Willis, *Hansard*, NSW Legislative Council, 14 October 1992, p 6793.

A member may not enter or leave the chamber when the President is proposing a question (SO 83(3)), although in practice this rule is not strictly enforced.

When entering or leaving the chamber, members should bow their head to the Chair as a gesture of respect (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)). This rule ensures that the ability of members to address their remarks through the Chair is not impeded, and that the ability of the Chair to seek and receive advice from the Clerk is not hindered.[170]

Conversations and other activities in the chamber

When not speaking in debate, members may not converse aloud or make any noise or disturbance (SO 84(3)), although in practice quiet conversations are tolerated, provided they do not disturb the member speaking. Members have been called to order for conversing with people in the public gallery.[171]

The reading of newspapers and magazines in the chamber is deemed unacceptable and disorderly.[172]

Dress

The Legislative Council has not adopted standing orders concerning members' dress. Rather, dress is left to the good sense and judgement of members, subject to rulings by the President.

The standard of dress in the chamber arose in 2001, when a point of order was taken that a member was not wearing a jacket whilst addressing the House. The member defended himself on the grounds that women members did not have to wear a jacket, and protested that he was unable to get his jacket as it was in his office. However, the acting Deputy President upheld the point of order, and refused to let the member continue his speech.[173] Although a female member removed her jacket and offered it to the member, he declined to continue.

The following sitting week another member came into the chamber wearing a deep purple long-sleeved shirt and jeans. A point of order was taken that the member was

170 For further information, see the *Annotated Standing Orders of the New South Wales Legislative Council*, (n 8), pp 288-289.

171 *Hansard*, NSW Legislative Council, 12 September 1996, p 4071 per President Willis; 21 October 1998, p 8709 per Deputy President Gay; 20 September 2012, p 15527 per President Harwin.

172 Rulings: Willis, *Hansard*, NSW Legislative Council, 8 June 1995, p 899; Chadwick, *Hansard*, NSW Legislative Council, 21 May 1998, p 4990; Burgmann, *Hansard*, NSW Legislative Council, 7 June 2006, p 683; Harwin, *Hansard*, NSW Legislative Council, 27 June 2013, p 22048; Ajaka, *Hansard*, NSW Legislative Council, 20 September 2017, pp 5-7.

173 Ruling: Nile (Deputy), *Hansard*, NSW Legislative Council, 27 March 2001, pp 12569-12570.

not upholding standards of dress and conduct in the chamber. The President did not uphold the point of order and ruled that members should use their own discretion as to the way they dress.[174]

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

> 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.[175]

Since then the expectations of the House in relation to members' attire have continued to evolve and it is now common for male members to speak in the chamber whilst wearing a jacket but no tie.

In the past, Presidents of the Legislative Council wore formal dress, including wig and gown, when presiding in the House. In more recent years, Presidents have chosen not to wear such formal attire, although some have chosen to wear a black academic gown. The Clerks also traditionally wore formal dress with wig and gown but since 1998 have worn standard business attire.

Badges and items of clothing displaying political slogans

Another issue which has caused some disagreement in the chamber in the past is the wearing of badges. In 1996, a point of order was taken concerning the wearing by members in the chamber of badges displaying political slogans. The Chairman of Committees (today known as the Deputy President and Chair of Committees) ruled that it was inappropriate for members to attend the chamber wearing articles of clothing or items of decoration which reflected political views, commercial interests or similar things, and that only lapel badges the size of, or smaller than, members' official Council badge[176] could be worn in the chamber.[177]

This issue has been revisited on many occasions since. For example, in 2006 a point of order was taken that a member was wearing a T-shirt displaying a political slogan. The President upheld the earlier rulings that badges, signs or displays worn by members must not be larger than members' official Council badge and required the member to leave the chamber until she could comply with the ruling.[178]

---

174 Ruling: Burgmann, *Hansard*, NSW Legislative Council, 5 April 2001, p 13299.

175 *Hansard*, NSW Legislative Council, 10 April 2001, p 13377.

176 When they are first sworn in, members are given an official Council badge which fits in the lapel of a jacket. The badge is returned when they cease to be a member.

177 Ruling: Gay (Deputy), *Hansard*, NSW Legislative Council, 3 December 1996, pp 6872-6873.

178 *Hansard*, NSW Legislative Council, 6 April 2006, p 22193 per President Burgmann.

However, in 2017, President Ajaka departed from these previous rulings. He indicated that in future, if a point of order were taken concerning a badge worn by a member, he would rule on the appropriateness of the badge based not only on its size but also on whether, in essence, it was modest, inoffensive and in keeping with the dignity of the House.[179]

Use of electronic devices in the House

The use of electronic devices in the House is generally permissible, provided their use does not interrupt or disturb proceedings. Members may use mobile phones, tablets, laptops and similar devices in the chamber for work purposes, provided they are set to silent and that they are not used to take or receive calls or to take photographs, including 'selfies', in the House.[180]

179 Ruling: Ajaka, *Hansard*, NSW Legislative Council, 20 September 2017, pp 1-2.

180 Rulings: Primrose, *Hansard*, NSW Legislative Council, 5 March 2009, p 13014; Fazio, *Hansard*, NSW Legislative Council, 10 November 2010, p 27415; Harwin, *Hansard*, NSW Legislative Council, 15 October 2015, p 4329.

CHAPTER 14

QUESTIONS

Questions, both questions without notice asked in Question Time and questions on notice placed on the *Questions and Answers Paper*, are one of the mechanisms of executive government accountability to Parliament. Questions allow members of the House to ventilate issues, bring to light perceived deficiencies in government administration and expose mismanagement. The capacity of members to raise issues through questions promotes probity in public administration, judicious exercise of legislative power and good policy making.

THE HISTORY OF QUESTIONS IN THE LEGISLATIVE COUNCIL

The asking and answering of questions in the Legislative Council has a long history. The *Journals of the Legislative Council* indicate that the first question without notice was asked in the House on 24 September 1856. However, questions without notice were rare events in the nominee Council, and remained relatively uncommon until the 1960s.[1] It was not until 1984 that provision was made for a dedicated Question Time,[2] and it was not until 2001 that the House adopted a sessional order establishing rules for questions and answers.[3] Those rules are now replicated in largely similar terms in standing orders 64 (as amended by sessional order) and 65.[4]

Similarly, the asking and answering of questions on notice in the Legislative Council dates back to 1856. Since that time, the process has changed from a predominantly oral process in the House to an entirely written one. From 1856 to 1922, questions on notice were lodged during the call for notices, listed on the *Notice Paper* in the order received and answered on a subsequent sitting day in the order listed on the *Notice Paper*. In 1922,

---

1 D Clune and G Griffith, *Decision and Deliberation: The Parliament of New South Wales 1856-2003*, (Federation Press, 2006), pp 119-120.

2 *Minutes*, NSW Legislative Council, 16 August 1984, p 36. Previously, questions without notice were usually asked at the commencement of a sitting.

3 *Minutes*, NSW Legislative Council, 30 May 2001, pp 978-980, 981-986.

4 For further information on the adoption of rules for questions, see S Want and J Moore, edited by D Blunt, *Annotated Standing Orders of the New South Wales Legislative Council*, (Federation Press, 2018), pp 212-214.

provision was made for questions to be handed to the Clerks rather than being given during the call for notices. However, it was not until 1984 that provision was made for questions on notice and answers to be published in a separate *Questions and Answers Paper*, thereby restricting questions on notice to a written process only.[5]

QUESTIONS WITHOUT NOTICE: QUESTION TIME

Question Time is the most obvious and publicly recognisable demonstration of the accountability of the executive government to Parliament. It is conducted almost every sitting day, and is an opportunity for members to ask ministers, but also on occasion parliamentary secretaries, committee chairs and private members, questions without notice. It is usually the best attended item of business of the House each day and regularly attracts media interest and visitors in the public gallery.

Erskine May describes Question Time in the House of Commons in Westminster as an opportunity for seeking information or pressing for action.[6] The same is true in the Legislative Council. The clear presumption of the various rules for questions set out in the standing and sessional orders of the Legislative Council is that questions should be interrogatory in nature and that answers should be responsive and relevant. At the commencement of the 57th Parliament in May 2019, the House adopted a number of reforms to the operation of Question Time, notably the requirement that an answer be 'directly relevant' to a question, designed to reinforce this presumption.[7]

However, it is also the case that Question Time, as it has evolved in the Legislative Council and in other Australian parliamentary chambers, entails an element of political theatre. In the seeking of information and pressing for action, opposition members regularly seek to embarrass the government and highlight failings in its operation whilst government members reflect on government policies and announcements in a positive light.[8]

Whilst this is a departure from the intent and purpose of Question Time as expressed in *Erskine May*, there is an expectation that ministers answer questions effectively during

5 For further information, see the *Annotated Standing Orders of the New South Wales Legislative Council*, (n 4), pp 223-225.

6 D Natzler KCB and M Hutton (eds), *Erskine May's Treatise on The Law, Privileges, Proceedings and Usage of Parliament*, 25th ed, (LexisNexis, 2019), para 22.11.

7 The adoption of these reforms followed two reviews in previous Parliaments of the operation of Question Time. See Procedure Committee, *Report relating to private members' business, the sitting pattern, Question Time and petitions*, Report No 6, November 2011; and Procedure Committee, *Report relating to the rules for notices of motions, the rules for questions, e-petitions and two new sessional orders*, Report No 10, November 2017.

8 DR Elder and PE Fowler (eds), *House of Representatives Practice*, 7th ed, (Department of the House of Representatives, 2018), p 543. This chapter makes extensive reference to the discussion of Question Time in the House of Representatives in *House of Representatives Practice*, reflecting both the significance of Question Time in that House but also the comprehensive nature of the discussion in *House of Representatives Practice*.

Question Time in order to maintain the confidence of the House, their colleagues and the public.

The timing of Question Time

As indicated in Chapter 10 (The conduct of proceedings), according to a sessional order adopted at the commencement of the 57th Parliament in May 2019, Question Time commences at 4.00 pm on Tuesdays and at 12.00 noon on Wednesdays and Thursdays, unless the House decides otherwise.[9] It is very rare for a sitting day to pass without a Question Time.

Time limits for questions and answers are listed in Appendix 11 (Time limits on debates and speeches in the Legislative Council). In summary:

- A member has one minute to ask a question (SO 64, as amended by sessional order).[10]
- The relevant minister has three minutes to answer the question. The minister may seek leave to extend this time by a further one minute (SO 64, as amended by sessional order).
- At the discretion of the President, the member asking the original question has an additional minute to ask a supplementary question (SO 64, as amended by sessional order).
- The minister has two minutes to answer the supplementary question (SO 64, as amended by sessional order).
- At the discretion of the President, another non-government member has an additional minute to ask a further supplementary question to elucidate the original answer (SO 64, as amended by sessional order).

A member who wishes to ask a supplementary question or further supplementary question must rise and seek the call immediately after the minister concludes his or her answer.

If a point of order is taken during the asking or answering of a question, the electronic timing system in the chamber recording the time taken to ask or answer the question is stopped until the matter is resolved. This practice was instituted in 2015 by President Harwin.[11] Question Time is the only proceeding during which the clock is stopped for points of order as a matter of routine.

---

9 *Minutes*, NSW Legislative Council, 8 May 2019, p 69. Under the sessional order, whenever the House adjourns to a day and time later than the time appointed for Question Time, questions are to commence 30 minutes after the time appointed for the meeting of the House. For further information, see the discussion in Chapter 10 (The Conduct of Proceedings) under the heading 'Question Time'.

10 *Minutes*, NSW Legislative Council, 8 May 2019, p 78.

11 Ruling: Harwin, *Hansard*, NSW Legislative Council, 12 May 2015, p 338.

Allocation of the call to ask a question without notice

By default, questions without notice in Question Time are always asked by private members. Whilst there is no standing order preventing it, it is accepted practice that ministers and the President do not ask questions. Standing order 25, as amended by sessional order at the commencement of the 57th Parliament in 2019, also provides that parliamentary secretaries may not ask questions without notice.[12]

The allocation of the call to private members to ask questions is within the President's discretion. However, it is current practice that the President gives the first question each Question Time to the Leader of the Opposition, the second to a government member, and the third to the Deputy Leader of the Opposition. This third question given to the Deputy Leader of the Opposition then commences a pattern of opposition, cross-bench and government questions, in that order, for the remainder of Question Time.[13]

A member may ask a question on behalf of another member who is not in the chamber.[14]

There is no limit on the number of questions that a member may ask during Question Time. Nor is there any limit on the total number of questions that may be asked in any one Question Time in the time available, usually one hour. Typically, between 15 to 20 questions are asked each Question Time.

Direction of questions without notice

The vast majority of questions without notice asked in Question Time are directed to ministers. However, they may also be directed to parliamentary secretaries in relation to various matters, to private members in relation to any bill, motion or other business on the *Notice Paper* of which they have charge and to the chair of a committee relating to the activities of that committee.

Questions to ministers

Questions without notice may be directed to ministers in relation to their portfolio responsibilities (SO 64, as amended by sessional order)[15] and the portfolio responsibilities of ministers in the Assembly whom they represent. If a question is directed to the wrong minister, the minister may answer the question, or advise the member asking the question to redirect the question.

Questions without notice may also be directed to the Leader of the Government in the Legislative Council, in his or her capacity representing the Premier, in relation to any matter of government responsibility.[16]

12 *Minutes*, NSW Legislative Council, 8 May 2019, p 77.
13 Ruling: Ajaka, *Hansard*, NSW Legislative Council, 24 October 2019, p 22.
14 Ruling: Burgmann, *Hansard*, NSW Legislative Council, 22 September 2005, p 18151.
15 *Minutes*, NSW Legislative Council, 8 May 2019, p 78.
16 Ruling: Harwin, *Hansard*, NSW Legislative Council, 10 September 2014, p 127.

Where a question involves the portfolios of several ministers, the question should be directed to the minister most responsible.[17] It is routine practice for the minister to whom the question is directed to take the question on notice and coordinate a response from the other responsible ministers. Alternatively, the question may be directed to the Leader of the Government in the Legislative Council in his or her capacity representing the Premier.

Where a question relates to the portfolio of an assistant minister, the assistant minister may respond directly to the question.[18] However, assistant ministers should not be asked a question ranging across a whole portfolio in the manner that a principal minister may be asked.[19]

Questions may not be put to ministers in regard to their former portfolio responsibilities.

Questions to parliamentary secretaries

Questions may be put to parliamentary secretaries relating to public affairs with which they are officially connected, to public affairs connected with the portfolios of the ministers to whom they are connected, to proceedings pending in the House, or to any other matter of administration for which they are responsible (SO 64, as amended by sessional order).[20]

Provision for questions to parliamentary secretaries was only adopted by way of sessional order at the commencement of the 57th Parliament in May 2019. Prior to that, there was no provision for parliamentary secretaries to be asked questions without notice (SO 25).

Questions to private members

Questions may be put to private members relating to any bill, motion or other business on the *Notice Paper* of which they have charge (SO 64, as amended by sessional order).[21] However, under standing order 65(4), any such question must not anticipate discussion upon an order of the day or other matter on the *Notice Paper*, except an item of private members' business[22] or an order of the day relating to the budget estimates.

---

17 In 1994, President Willis ruled that a question must relate to the responsibilities of a single minister, and that matters within the responsibility of another minister must be the subject of a separate question. See Ruling: Willis, *Hansard*, NSW Legislative Council, 30 November 1994, p 5953. This ruling is seldom observed in practice.

18 See, for example, *Hansard*, NSW Legislative Council, 25 February 2004, p 6496.

19 M Harris and D Wilson (eds), *McGee Parliamentary Practice in New Zealand*, 4th ed, (Oratia Books, 2017), p 647.

20 *Minutes*, NSW Legislative Council, 8 May 2019, p 78. See also Ruling: Ajaka, *Hansard*, NSW Legislative Council, 30 May 2019, p 29.

21 *Minutes*, NSW Legislative Council, 8 May 2019, p 78.

22 Technically, standing order 65(4) applies to items of private members' business listed outside the order of precedence. However, with the suspension of the operation of standing orders 184 and 185, items of private members' business are no longer listed in and outside the order of

There have been very few questions without notice asked of private members in the Council. Of those few, most have been ruled out of order. Questions to private members that have not been ruled out of order have been restricted to questions of timing or procedure concerning a notice of motion or bill on the *Notice Paper*. For example, on 10 May 2006, the Hon Catherine Cusack asked the Hon Peter Breen whether he would bring on the second reading debate on a bill standing in his name during private members' business the next day.[23] On 29 March 2012, Mr Jeremy Buckingham asked the Hon Charlie Lynn a question concerning the meaning of a clause in a notice standing in Mr Lynn's name on the *Notice Paper*.[24] On 20 November 2014, Mr Buckingham attempted to ask the Leader of the Opposition a question concerning the introduction of a bill for the protection of water catchments.[25]

Questions to private members that have been ruled out of order have concerned matters outside of the House, such as a member's membership of a political party or other body. For example, on 3 May 1990, the President ruled that a question to a government backbencher in relation to her alleged appointment as the Legislative Council representative on the Board of Governors of the University of Western Sydney should instead be directed to the Minister for Family and Community Services, representing the Minister for Education and Youth Affairs.[26] In another example, on 3 July 2001, the President upheld a point of order objecting to a question to the Deputy Leader of the Opposition concerning the operation of the Electricity Tariff Equalisation Fund.[27]

In the House of Representatives, questions to private members have been ruled out of order where they have sought confirmation of reporting of a private member's statements in the newspapers, comment on statements made both inside and outside the House, and comment on the platform of a member's political party. It is also not in order to question a private member in relation to his or her past actions as a minister. Such matters may, however, be explored in other proceedings such as in debate on a substantive motion in the House or a committee inquiry.[28]

Questions to the chair of a committee

Questions may be put to the chair of a committee relating to the activities of that committee, but the question must not attempt to interfere with the committee's work or anticipate its report (SO 64, as amended by sessional order).[29]

---

precedence. That being the case, standing order 65(4) is interpreted as excluding from its operation all items of private members' business. For further information on standing orders 184 and 185, see the discussion in Chapter 10 (Conduct of proceedings) under the heading 'General or private members' business'.

23 *Hansard*, NSW Legislative Council, 10 May 2006, pp 22845-22846.

24 *Hansard*, NSW Legislative Council, 29 March 2012, p 10156.

25 *Hansard*, NSW Legislative Council, 20 November 2014, pp 3213-3214.

26 Ruling: Johnson, *Hansard*, NSW Legislative Council, 3 May 1990, p 2334.

27 Ruling: Burgmann, *Hansard*, NSW Legislative Council, 3 July 2001, pp 16104-16106.

28 *House of Representatives Practice*, 7th ed, (n 8), pp 550-551.

29 *Minutes*, NSW Legislative Council, 8 May 2019, p 78.

In a significant ruling in 1996, President Willis ruled that a member may ask the chair of a committee a question relating to the committee's procedures and practices, however a member may not canvass the findings of a committee on a matter upon which the committee is yet to report.[30] This position has been reiterated in many subsequent rulings. A question to the chair of a committee in relation to the possible reference of a matter to the committee has also been permitted.[31]

Questions to the chair of a committee have been ruled out of order where the question clearly did not relate to a member's role as the committee chair,[32] and where the question related to a report of the committee that had already been tabled and was set down for debate.[33]

In the House of Representatives, a question to the chair of a committee asking when a report would be tabled has been permitted, but questions concerning statements by a committee chair have not been permitted.[34]

Questions to the President

The standing orders are silent on whether questions may be directed to the President. However, in a significant ruling in 1995, President Willis observed:

> As I have indicated on previous occasions, I do not regard the administration and domestic affairs of the Department of the Legislature or the Parliament as falling within the ambit of Standing Order No. 29.[35] In this regard I refer, under Standing Order No 2, to page 285 of the twenty-first edition of *May's Parliamentary Practice*. In making this point I make it clear that there is nothing in our standing orders governing questions to the Chair, and I have just elaborated the ambit of Standing Order No 29. However, I do admit that in recent years in this House a practice has developed of asking questions of the President concerning the administration of the Parliament. As *May* quite clearly states, in the House of Commons the Speaker does not allow this. *May* states quite clearly that questions to the Speaker are addressed by private notice. Written or oral questions to the Speaker are not permitted. I do not believe that members of the House should henceforth direct any written or oral questions to the President relating to the administration of the Legislature and in particular the Department of the Legislative Council, and I rule accordingly. Honourable members, however, may be assured that any questions which are addressed to me in accordance

30 Ruling: Willis, *Hansard*, NSW Legislative Council, 30 May 1996, p 1776.

31 *Hansard*, NSW Legislative Council, 7 May 2008, p 7059. By contrast, such a question has been ruled out of order in the House of Representatives. See *House of Representatives Practice*, 7th ed, (n 8), p 552.

32 Ruling: Burgmann, *Hansard*, NSW Legislative Council, 29 November 2000, p 11098.

33 Ruling: Willis, *Hansard*, NSW Legislative Council, 21 September 1995, p 1258.

34 *House of Representatives Practice*, 7th ed, (n 8), p 552.

35 Now standing order 64. Standing order 29 provided that: 'Questions may be put to Ministers of the Crown relating to public affairs; and to other Members, relating to any Bill, Motion, or other public matter connected with the business of the House, in which such Member may be concerned, and the Clerk shall enter upon the Minutes of Proceedings the Questions of which formal notice shall have been given, and the answers returned to the same.'

> with *May's Parliamentary Practice* either orally or in writing will be promptly, fully and frankly answered. I take the view that question time is too precious for questions of that nature to occupy any part of its time. I will henceforth require all honourable members to abide by this rule.[36]

Subsequent further rulings by President Willis[37] and President Burgmann[38] confirmed this position.

However, there have been occasions on which the President has responded to questions in Question Time. These include instances where a number of statements attributed to the President had appeared in the media,[39] where the question concerned the President's position as chair of a committee,[40] where the media contained reports of a threat to the safety of the President,[41] and where the question related to a demonstration outside Parliament House.[42]

Rules governing questions without notice

Standing order 64, as amended by sessional order, and standing order 65 set out specific rules governing the content of questions without notice. Questions must also comply with other standing orders such as those relating to the rules of debate. Additional rules concerning the content of questions without notice have also been established by rulings of the President.

In 1986, two years after the commencement of a formal Question Time in the Legislative Council, President Johnson gave the following significant ruling concerning the rules for questions:

> For a question to be admissible it must comply, *inter alia*, with Standing Orders 29 and 32A.[43] Those standing orders provide, first, that to be in order a question addressed to a Minister must relate to public affairs. This implies that a question must relate to a matter within the government's responsibility or which could be dealt with by an administrative or legislative action. Second, a question should not give more information than is necessary to explain the question itself and should not contain argument or express opinions. Questions should be concise and not contain any material, quotations or statements of fact unless it is strictly necessary to the asking of the question. Third, questions should be interrogatory in nature and should not be used as a means of indulging in debate of an issue.

36 Ruling: Willis, *Hansard*, NSW Legislative Council, 11 October 1995, p 1541.
37 Rulings: Willis, *Hansard*, NSW Legislative Council, 25 October 1995, p 2269; 17 September 1997, p 52.
38 Rulings: Burgmann, *Hansard*, NSW Legislative Council, 31 October 2000, pp 9326, 9328; 1 November 2000, p 9451.
39 *Hansard*, NSW Legislative Council, 1 June 1999, pp 645-646 per President Burgmann.
40 *Hansard*, NSW Legislative Council, 26 November 1968, p 2755 per President Budd; 25 October 1997, pp 542-543 per President Willis.
41 *Hansard*, NSW Legislative Council, 25 October 1997, p 544 per President Willis.
42 *Hansard*, NSW Legislative Council, 23 October 1997, pp 1303-1304 per President Willis.
43 Now standing orders 64 and 65.

> Apart from these rules there are a number of other rules concerning the content of questions that need to be brought to the attention of members. A question should not, in effect, be a short speech or mainly limited to giving information. Questions may not contain inferences or imputations, epithets, ironical or offensive expressions. In addition, a question may not contain hypothetical matter and may not ask for an expression of an opinion or a legal opinion. Lengthy or involved questions and questions outside the immediate knowledge of Ministers should be placed on the *Notice Paper*. … members will appreciate that the principal object of questions is to seek information, or press for action by a Minister.[44]

House of Representatives Practice observes that questions without notice, by their very nature, raise significant issues for the Chair, due to the necessity to make instant decisions on the application of various rules, whilst at the same time managing the political implications of those decisions. Members and ministers also place considerable importance on their opportunity to ventilate issues during Question Time. Accordingly, it is not uncommon for the Chair to be lenient in the application of rules relating to questions without notice, so as not to restrict members unnecessarily when asking or answering questions.[45] As was observed by President Primrose in 2008:

> In accordance with the traditions of this House I always extend the maximum latitude possible to members during question time. A more strict legalistic approach would likely result in few questions being asked and answered, and even fewer members being present in the Chamber to listen to either.[46]

This latitude in Question Time in turn may result in rulings from the Chair taking different approaches to similar issues depending upon the context.[47] However, it is generally accepted that this is part of the 'cut and thrust' of Question Time.

The rules governing questions without notice are discussed in more detail below, with only those rulings of continuing relevance cited.

Questions must relate to a minister's or parliamentary secretary's public responsibilities

Standing order 64, as amended by sessional order, provides that questions may be put to ministers relating to public affairs with which they are officially connected, to proceedings pending in the House, or to any matter of administration for which they are responsible.[48] Since the commencement of the 57th Parliament in May 2019, similar rules have also applied to parliamentary secretaries.

---

44 Ruling: Johnson, *Hansard*, NSW Legislative Council, 22 October 1986, pp 5094-5095.

45 *House of Representatives Practice*, 7th ed, (n 8), p 547.

46 *Hansard*, NSW Legislative Council, 15 May 2008, p 7647.

47 *Hansard*, NSW Legislative Council, 15 May 2008, p 7647 per President Primrose. See also *House of Representatives Practice*, 7th ed, (n 8), p 547.

48 Prior to the adoption of standing order 64 in 2004, standing order 29 provided that questions may be put to ministers relating to public affairs.

A question to a minister or parliamentary secretary must seek information or press for action within the minister's or the parliamentary secretary's responsibility.[49]

In a significant ruling in 1986, President Johnson ruled that the requirement that a question relate to public affairs implies that the question must relate to a matter within the government's responsibility which can be dealt with by an administrative or legislative action.[50] Matters within the government's responsibility have been ruled to include questions relating to the affairs of a minister's department or office.[51] It has also been ruled that pecuniary interests disclosed by members and published in the 'Register of Disclosures by Members of the Legislative Council' are a matter of public affairs, and that ministers may be questioned about their pecuniary interests.[52]

However, the following questions to ministers have been ruled out of order as falling outside of ministers' public responsibilities:

- questions concerning the affairs or policies of political parties;[53]
- questions concerning the administration by ministers of previous portfolios;[54]
- questions concerning the public affairs of other jurisdictions,[55] including statements of members of parliament in other jurisdictions;[56]
- questions concerning the completion of forms relating to parliamentary entitlements;[57] and
- questions of a private nature, including the initiation of defamation proceedings,[58] financial dealings with a bank[59] and the actions of family members.[60]

In other jurisdictions, questions have also been ruled out of order concerning events in party rooms; party leadership issues; the policies of opposition parties in the House; the policies of previous governments; statements in the House by other members; statements by people outside the House, including statements reported in the press;

49 R Laing (ed), *Odgers' Australian Senate Practice*, as revised by H Evans, 14th ed, (Department of the Senate, 2016), p 630.
50 Ruling: Johnson, *Hansard*, NSW Legislative Council, 22 October 1986, pp 5094-5095.
51 Ruling: Burgmann, *Hansard*, NSW Legislative Council, 2 November 2000, p 9589.
52 Ruling: Burgmann, *Hansard*, NSW Legislative Council, 19 October 1999, p 1469.
53 Rulings: Burgmann, *Hansard*, NSW Legislative Council, 2 November 2000, p 9589; Primrose, *Hansard*, NSW Legislative Council, 1 April 2009, p 14177; Harwin, *Hansard*, NSW Legislative Council, 22 October 2013, p 24339.
54 Ruling: Burgmann, *Hansard*, NSW Legislative Council, 23 November 2006, p 4709.
55 Rulings: Willis, *Hansard*, NSW Legislative Council, 14 May 1997, p 8535; Primrose, *Hansard*, NSW Legislative Council, 31 March 2009, p 14025.
56 Ruling: Burgmann, *Hansard*, NSW Legislative Council, 13 May 2004, p 8962.
57 Ruling: Fazio, *Hansard*, NSW Legislative Council, 20 October 2010, p 26296.
58 Ruling: Burgmann, *Hansard*, NSW Legislative Council, 30 November 1999, p 3829.
59 Ruling: Burgmann, *Hansard*, NSW Legislative Council, 31 August 2000, pp 8549-8551.
60 Ruling: Burgmann, *Hansard*, NSW Legislative Council, 24 October 2002, pp 5850-5851.

the attitude, behaviour or actions of members or their staff; and the internal affairs of another country.[61]

These are often matters of judgement for the Chair, as Question Time, as mentioned above, is an important aspect of ministerial responsibility to Parliament. Matters relating to the integrity of ministers are relevant to the confidence of the House and colleagues which they need to maintain.

Questions must not contain statements of fact unless strictly necessary

Standing order 65(1)(a) provides that questions must not contain statements of fact unless they are strictly necessary to render the question intelligible and can be authenticated.

It is established practice in the Council for questions to contain some preamble. However, an extended statement of fact as a preamble to a question suggests that the purpose of the question is not to seek information or press for action, but rather to make a debating point. In a ruling in 1995, President Willis observed:

> Honourable members are reminded that the purpose of questions without notice is to elicit information from Ministers of the Crown concerning the public administration of the State. Although it is customary for members to preface questions with a setting for their questions, such prefaces should be contained and not [provide] information that is otherwise publicly available.[62]

In 2011, President Harwin observed that a preamble to a question should not take more than half the time of the overall question.[63]

The onus is on the member asking a question to be able to attest to the authenticity of any facts cited, as it is not possible for the President to determine the veracity of facts presented by members in questions.[64] However, in a ruling in 2003, President Burgmann observed that where the facts are of sufficient moment, the President may seek from the member *prima facie* proof of their authenticity.[65]

Questions must not contain argument, inference or imputation

Standing order 65(1)(b)-(f) provides that questions must not contain arguments, inferences, imputations, epithets or ironical expressions.

Once again, the basis for this rule is that Question Time is for seeking information and pressing for action. Questions which engage in argument undermine this purpose.

---

61 See *House of Representatives Practice*, 7th ed, (n 8), pp 553-554; and *Erskine May*, 25th ed, (n 6), paras 22.11-22.22.

62 Ruling: Willis, *Hansard*, NSW Legislative Council, 21 September 1995, p 1528.

63 Ruling: Harwin, *Hansard*, NSW Legislative Council, 26 August 2011, p 4832.

64 Ruling: Primrose, *Hansard*, NSW Legislative Council, 15 November 2007, pp 4214-4215.

65 Ruling: Burgmann, *Hansard*, NSW Legislative Council, 20 November 2003, pp 5391-5392. See also *Erskine May*, 25th ed, (n 6), para 22.13.

In 2009, President Primrose indicated to the House that questions should ideally be framed in interrogative terms: 'what, where, will, why, when, does, is …?'. Questions should not be phrased to contain argument or imputation. For example, commencing a question with the words 'Is it a fact …' suggests that the question is giving information or seeking an opinion.[66]

However, the reality of Question Time is that many questions contain an element of argument, imputation or invite the drawing of inferences. The attitude of Presidents has generally been not to intervene where the imputation or inference has been directed at matters of policy difference. Nevertheless, there are limits to this, and there are numerous examples of questions being ruled out of order on the basis that they contain argument, imputations or inferences, especially where the imputation or inference is of a personal nature. On some occasions, parts of questions that contained argument have been ruled out of order whilst the remainder of the question has been allowed.[67]

Questions must not ask for an expression of opinion, or for a legal opinion

Standing order 65(2)(a) and (c) provides that questions must not ask for an expression of opinion, or for a legal opinion.

A member may not ask a minister or parliamentary secretary for a personal opinion on any aspect of government action or decision, such as its success or appropriateness.[68] Such a question is not consistent with the purpose of questions, namely seeking information or pressing for action. However, a question requesting that a minister or parliamentary secretary explain the rationale behind an action or decision is in order.[69] A question may also ask if an evaluation of a government policy has been undertaken and, if so, the results of that evaluation.

Questions seeking a legal opinion, such as the interpretation of a statute or of a minister's powers, are also not in order. The interpretation of statutes is properly a matter for the courts. However, ministers may be asked under what statutory authority they or their department have acted in a particular instance.[70]

In the House of Representatives, it has been ruled that in response to a question dealing with the law a minister may provide any facts, as opposed to legal opinions, the minister may wish to give. Examples of questions that have been permitted include whether legislation existed on a specified subject, whether an agency was entitled to take a

66 Ruling: Primrose, *Hansard*, NSW Legislative Council, 12 March 2009, p 13348.
67 Rulings: Fazio, *Hansard*, NSW Legislative Council, 10 March 2010, p 21136; Harwin, *Hansard*, NSW Legislative Council, 19 March 2013, p 18759.
68 Rulings: Harwin, *Hansard*, NSW Legislative Council, 9 May 2011, p 419; Harwin, *Hansard*, NSW Legislative Council, 22 June 2011, p 3061.
69 Ruling: Primrose, *Hansard*, NSW Legislative Council, 18 June 2009, p 16279.
70 *Erskine May*, 25th ed, (n 6), para 22.17.

particular action, whether an act provided certain protections and whether certain actions were in breach of regulations.[71]

Whilst a member cannot ask a question seeking an opinion, it has been ruled that a minister can express an opinion in an answer if he or she wishes.[72]

Questions must not ask for an announcement of government policy

Standing order 65(2)(b) provides that questions must not ask for a statement or announcement of government policy.

There has been some confusion in the application of this rule, sometimes leading to the inference that all questions relating to government policy are out of order. This is not the case.

A question which directly asks a minister to announce new government policy is out of order,[73] as is a question asking for the government's response to matters in the public domain, such as court decisions or a report of a public inquiry.[74] However, in 2009, President Primrose observed that a question may seek an explanation of existing government policy, ask a minister about the effects of a proposal on the minister's portfolio, ask about the government's intentions and the reasons for those intentions, or seek clarification of statements made by ministers.[75]

Whilst a member cannot ask a question seeking an announcement of government policy, it has been ruled that a minister can nevertheless make such an announcement in his or her answer.[76]

Questions must not raise a hypothetical matter

Standing order 65(1)(g) provides that a question must not raise a hypothetical matter.

Once again, the basis for this restriction is that a hypothetical question is not consistent with the purpose of questions, namely seeking information or pressing for action. In 2008, President Primrose ruled out of order a question speculating on the outcome of the 2011 general election.[77] In 2011, President Harwin ruled out of order a question asking

71 *House of Representatives Practice*, 7th ed, (n 8), pp 558-559.

72 Rulings: Burgmann, *Hansard*, NSW Legislative Council, 17 October 2001, p 17377; Primrose, *Hansard*, NSW Legislative Council, 29 October 2009, p 18948; Fazio, *Hansard*, NSW Legislative Council, 18 May 2010, p 22819.

73 Rulings: Primrose, *Hansard*, NSW Legislative Council, 10 May 2007, p 177; Harwin, *Hansard*, NSW Legislative Council, 20 November 2014, p 3221.

74 Ruling: Burgmann, *Hansard*, NSW Legislative Council, 28 June 2004, p 10279.

75 Ruling: Primrose, *Hansard*, NSW Legislative Council, 12 March 2009, p 13358. President Primrose based this ruling on Senate practice, as articulated at the time in the 12th edition of *Odgers*. For the current edition, see *Odgers*, 14th ed, (n 49), p 627.

76 Ruling: Burgmann, *Hansard*, NSW Legislative Council, 7 May 2002, p 1537.

77 Ruling: Primrose, *Hansard*, NSW Legislative Council, 18 June 2008, p 8595.

what would be the impact on police priorities if the police had to enforce a new brothel licensing scheme.[78]

Questions must not contain names of persons unless strictly necessary

Standing order 65(1)(a) provides that questions must not contain names of persons unless they are strictly necessary to render the question intelligible and they can be authenticated.

Using a question to name a person in Parliament can have a significant impact on the reputation of the person. It is better to identify a person by office rather than name. However, where strictly necessary to render the question intelligible, a question naming an individual may be permitted.[79]

Questions must not anticipate business

Standing order 65(4) provides that 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[80] or an order of the day relating to the budget estimates.[81]

This rule clearly prevents any question that anticipates debate on an order of the day on the *Notice Paper*, for example debate on a government bill.[82] Equally, however, the rule should not be applied to private members' business or the budget estimates debate. The application of the rule in other circumstances requires consideration as to whether the anticipated debate is likely to come before the House within a reasonable period of time.[83] In 1993, President Willis observed:

> … I would direct honourable members to page 328 of *Erskine May*, which refers to the fact that when considering whether to permit a question the Speaker of the House of Commons must have regard to the probability of the matter anticipated being brought before the House within a reasonable time.[84]

Overly strict interpretation of the rule against anticipation could potentially prevent questions on a wide range of subjects, depending on the matters for discussion listed

78 Ruling: Harwin, *Hansard*, NSW Legislative Council, 13 October 2011, p 6140.

79 See, for example, *Hansard*, NSW Legislative Council, 15 November 2007, p 4209.

80 Technically, standing order 65(4) applies to items of private members' business listed outside the order of precedence. However, with the suspension of the operation of standing orders 184 and 185, items of private members' business are no longer listed in and outside the order of precedence. That being the case, standing order 65(4) is interpreted as excluding from its operation all items of private members' business. For further information on standing orders 184 and 185, see the discussion in Chapter 10 (Conduct of proceedings) under the heading 'General or private members' business'.

81 For further information on the rule of anticipation, see the discussion in Chapter 13 (Debate) under the heading 'The rule of anticipation'.

82 Ruling: Johnson, *Hansard*, NSW Legislative Council, 1 November 1979, p 2412.

83 Ruling: Burgmann, *Hansard*, NSW Legislative Council, 26 May 2005, p 16222.

84 Ruling: Willis, *Hansard*, NSW Legislative Council, 28 April 1993, p 1660.

on the *Notice Paper*. This would be overly restrictive of the right of members to ask questions. Governments could effectively shut down discussion of particular topics by the pre-emptive giving of notices of motions.

Questions must not refer to debates in the current session or committee proceedings

Standing order 65(3)(a) provides that questions must not refer to debates in the House in the current session. This rule does not preclude the asking of questions relating to the broad subject matter of a debate, such as the government's education policy. Rather it precludes specific reference to a statement made or matter raised in the House as part of a debate.

Standing order 65(3)(b) provides that questions must not refer to proceedings in committee not yet reported to the House.[85] In the Senate the rule strictly refers to proceedings in a committee of the whole, although the same principle is applied to other committees.[86] In the Council, the rule is applied to all committees. The rule, however, is interpreted broadly, as narrow interpretation might block questions on a wide variety of subjects under consideration by committees.[87]

In 2012, President Harwin ruled that where a matter is in the public domain, the fact that the House has established a committee to inquire into it does not necessarily act to constrain the House's discussion of the matter.[88] However, the rule has been applied in certain limited circumstances.[89]

Questions must not relate to the Legislative Assembly or to other members

It is a well-established principle that the Council does not take notice of proceedings in the other House. Accordingly, questions must not refer to or seek information on the procedures or business of the Legislative Assembly.

As a matter of practice, questions should also not reflect on the conduct of members of either House.[90]

85 See also Rulings: Willis, *Hansard*, NSW Legislative Council, 30 May 1996, p 1776; Burgmann, *Hansard*, NSW Legislative Council, 20 September 2001, p 16922.

86 *Odgers*, 14th ed, (n 49), p 626.

87 For example, in 2012, questions concerning matters raised in the proceedings of the Joint Select Committee on the NSW Workers Compensation Scheme were answered by the Minister for Financial Services with no point of order being taken. See *Hansard*, NSW Legislative Council, 24 May 2012, pp 11937-11947. Many of the questions related to statements made in the published transcript of a public hearing of the committee.

88 Ruling: Harwin, *Hansard*, NSW Legislative Council, 22 May 2012, p 11616.

89 For example, in 2001, a question in relation to women in prison was ruled out of order on the basis that the matter was before the Select Committee on the Increase in Prisoner Population. See Ruling: Burgmann, *Hansard*, NSW Legislative Council, 20 September 2001, pp 16921-16922.

90 *Odgers*, 14th ed, (n 49), p 627.

Questions and the *sub judice* convention

The *sub judice* convention is discussed in more detail in Chapter 13 (Debate).[91] The convention applies as much to questions without notice as to other proceedings in the House.

It is for the President to determine whether a question or answer may touch on matters before or due to come before a court, and whether in that case the question or answer should be the subject of the *sub judice* convention. This is the same as the application of the convention in debate.

Questions that are overly lengthy or complicated

Presidents have consistently observed that questions that are extremely lengthy or complicated or which request detailed, technical or statistical information which a minister could not be expected to have at his or her command during Question Time should be placed on the *Questions and Answers Paper*.[92]

In 1999, President Burgmann made a statement to the House indicating that she was concerned about the excessive length of many questions asked during Question Time. Accordingly, she indicated that if members asked questions which were excessively lengthy or included too much detailed information, she would rule that they be placed on the *Questions and Answer Paper*.[93]

Questions and unparliamentary (offensive) language

The provisions of standing order 91(3) relating to unparliamentary language equally apply to questions.[94] Standing order 65(7) provides that the President may direct that the language of a question be changed if it is unbecoming or not in conformity with the rules for questions.

Rules governing answers to questions without notice

Answers to questions without notice in the House during Question Time are given orally and immediately by the minister, parliamentary secretary, private member or committee chair to whom the question is directed. Alternatively, the question may be

91 See the discussion under the heading 'The *sub judice* convention'.

92 Rulings: Willis, *Hansard*, NSW Legislative Council, 14 September 1994, pp 2930-2931; Gay (Deputy), *Hansard*, NSW Legislative Council, 22 September 1994, p 3508.

93 *Hansard*, NSW Legislative Council, 28 October 1999, pp 2203-2204 per President Burgmann.

94 For further information on unparliamentary language, see the discussion in Chapter 13 (Debate) under the heading 'Rules regarding the content of speeches'.

taken on notice.[95] It is also accepted that the Leader of the Government in the Legislative Council may answer any question directed to ministers.[96]

Rulings of Presidents have established that ministers cannot be compelled to answer a question,[97] as is the case in the House of Commons and the House of Representatives, although outright refusal to answer a question is rare.

Where ministers choose to answer a question, the rules outlined below apply.[98]

Answers must be 'directly relevant'

At the commencement of the 57th Parliament in May 2019, the House amended standing order 65(5) by sessional order to require that an answer to a question be 'directly relevant'. As originally adopted by the House in 2004, standing order 65(5) only required that an answer be 'relevant'. The requirement that an answer be 'directly relevant' was adopted by the House in an attempt to make answers to questions by ministers more germane to the question.[99]

The matter was the subject of a significant ruling by President Ajaka on the first day of its application on 28 May 2019. President Ajaka ruled:

> Answers have always been required to be relevant; that is, they have been required to bear upon or be connected to or pertinent to the subject or parts of the question asked. Now they also are required to be directly relevant; that is, they are required to go straight to the point in a direct manner without ambiguity.
>
> I believe that the meaning of direct relevance is just as subjective as is the meaning of generally relevant, which is the test that has been applied in question times in this House for the past 20 years. Applying the new test should mean that some answers given in the past will not meet the test of direct relevance. A specific question requires a specific answer. A very broad question, or a question framed in terms of political pointscoring, does not require a more specific answer than is contained in the question.
>
> When considering the past rulings of past Presidents in this Chamber, the following still applies: It is not for the Chair to direct how the Minister should answer a question. The Chair cannot compel the Minister to answer a question other than in the way he or she wishes. It is not for the Chair to direct what part of the question a Minister should answer. A Minister may indicate they do not wish to answer the question. A Minister cannot provide an answer to a question

95 For further information, see the discussion later in this chapter under the heading 'Taking a question on notice'.

96 Ruling: Burgmann, *Hansard*, NSW Legislative Council, 16 September 2003, p 3282.

97 Ruling: Harwin, *Hansard*, NSW Legislative Council, 11 November 2011, p 7423.

98 *Minutes*, NSW Legislative Council, 8 May 2019, pp 77-78.

99 The adoption of a requirement for answers to be 'directly relevant' had previously been considered on two occasions by the Procedure Committee in 2011 and 2017. See Procedure Committee, *Report relating to private members' business, the sitting pattern, Question Time and petitions*, Report No 6, November 2011, pp 14-15; and Procedure Committee, *Report relating to the rules for notices of motions, the rules for questions, e-petitions and two new sessional orders*, Report No 10, November 2017, p 11.

> ruled out of order. In answering a question, a brief preamble is possible. When answering a question the Minister must demonstrate a nexus between comments made and the original question.
>
> The specific question should always be the focus of the Minister's answer. A Minister should not add material to their answers that is not, according to past rulings, generally relevant to the question asked and requires an even more stringent answer to be directly relevant as opposed to being merely relevant. A Minister should resume his or her seat if they do not have the information to answer the question.[100]

It is common for the President to uphold points of order contesting the direct relevance of an answer, for example by bringing ministers back to the question or inviting ministers to resume their seat if they have no further relevant information to offer.[101]

However, it is also accepted that ministers may give some preamble in a reply.[102] In addition, even though a question may invite a 'yes' or 'no' answer, members cannot demand that an answer be in such terms, and the President cannot compel a minister to answer a question other than in the way the minister chooses.[103] In a further ruling on 5 June 2019, President Ajaka observed:

> The following still applies: It is not for the Chair to direct how a Minister should answer a question. The Chair cannot compel a Minister to answer a question in a certain way or direct what part of the question a Minister should answer, but the answer must be directly relevant. The Minister was being directly relevant to a part of the question that she was asked. It is up to the Minister how she continues her answer.[104]

It is also not for the President to determine whether an answer to a question is correct.[105]

Answers cannot debate the question

Presidents have consistently ruled that a minister in answering a question must not criticise the question itself,[106] and must not compare a question with another question.[107]

100 Ruling: Ajaka, *Hansard*, NSW Legislative Council, 28 May 2019, pp 17-18.

101 The House has not adopted the Victorian Legislative Council model whereby the President is required to rule whether or not a minister has properly answered a question and, if not, order the minister to provide a written answer the following day.

102 Ruling: Ajaka, *Hansard*, NSW Legislative Council, 17 September 2019, p 17.

103 Rulings: Budd, *Hansard*, NSW Legislative Council, 16 August 1972, p 18; Solomons (Deputy), *Hansard*, NSW Legislative Council, 12 October 1988, p 2053; Johnson, *Hansard*, NSW Legislative Council, 20 October 1988, p 2704; Burgmann, *Hansard*, NSW Legislative Council, 7 June 2001, p 14588; Primrose, *Hansard*, NSW Legislative Council, 12 March 2009, p 13348.

104 Ruling: Ajaka, *Hansard*, NSW Legislative Council, 5 June 2019, p 13.

105 *Odgers*, 14th ed, (n 49), p 631.

106 Ruling: Ajaka, *Hansard*, NSW Legislative Council, 29 May 2019, p 13.

107 Ruling: Burgmann, *Hansard*, NSW Legislative Council, 21 October 2004, p 11774.

However, it has also been ruled that whilst ministers may not debate a question, they are not restricted from debating the issues to which a question refers.[108]

Other rules relating to answers

Whilst the standing orders include only two specific rules for answers to questions, as outlined above, the rules of debate as articulated in the standing orders also apply to answers. It has been ruled that answers should not contain imputations of improper motives and personal reflections.[109] Equally, in answering a question, a minister cannot anticipate a matter that is to come before the House.[110]

Taking a question on notice

A minister may respond to a question without notice by taking the question 'on notice'. This generally occurs either where the question concerns the portfolio of a minister in the Legislative Assembly whom the minister represents in the Council, or where the question necessitates a detailed response.

Under standing order 66, as amended by sessional order adopted at the commencement of the 57th Parliament in May 2019,[111] where a minister takes a question on notice, the minister is required to provide the answer to the House within 21 calendar days.[112]

In practice, where the question relates to the minister's own portfolio, and was only taken on notice because it required a more detailed response, it is not uncommon for the minister to come back with an answer at the end of Question Time or the following day. Answers to questions taken on notice relating to the portfolio of a minister in the Legislative Assembly often take longer to be provided.[113]

Answers to questions without notice taken on notice may be delivered to the Clerk when the House is not sitting, and are deemed to be made public under the authority of the House (SO 66, as amended by sessional order). The answers are published in *Hansard* on the next sitting day.

If an answer is not provided within 21 calendar days, the President informs the House on the next sitting day and the minister must explain the reason for non-compliance. If, after explanation in the House, an answer is not submitted within a further three

108 Rulings: Primrose, *Hansard*, NSW Legislative Council, 13 November 2008, p 11341; 29 October 2009, p 18948.

109 Ruling: Primrose, *Hansard*, NSW Legislative Council, 26 June 2008, p 9414.

110 Ruling: Burgmann, *Hansard*, NSW Legislative Council, 1 June 1999, p 23.

111 *Minutes*, NSW Legislative Council, 8 May 2019, pp 84-86.

112 Prior to the adoption of the sessional order in May 2019, ministers were required to provide answers within 35 calendar days.

113 For further information on the arrangements under standing order 66, see the *Annotated Standing Orders of the New South Wales Legislative Council*, pp 219-221.

sitting days, the minister is again called on to explain. This procedure continues until an answer is provided.

In cases where answers are not provided within 21 calendar days, but are provided to the Clerk out of session before the next sitting day along with an explanation of the reasons for the lateness, the President does not report the initial non-compliance to the House. However, if the answer is not accompanied by a written explanation, the matter is reported and the minister must provide an explanation.

Under standing order 66, as amended by sessional order, on prorogation, the Clerk is also required to publish answers to questions without notice received since the last sitting of the House. A separate *Answers to Questions without Notice* paper, distinct from the *Questions and Answers Paper*, is published.

Allocation of the call to ask a supplementary question without notice

Standing order 64, as amended by sessional order adopted at the commencement of the 57th Parliament in May 2019, provides that at the conclusion of an answer, at the discretion of the President:

- a supplementary question may immediately be asked by the member who asked the original question; and
- at the conclusion of the further answer, a further supplementary question may immediately be asked by another non-government member.[114]

President Ajaka subsequently ruled that the member asking a further supplementary question must not be the member who asked the original supplementary question.[115] In addition, it is only after a supplementary question has been asked that a further supplementary question may be asked by another non-government member.[116]

Members who wish to ask a supplementary question or further supplementary question must rise and seek the call immediately the answer is concluded.[117]

Prior to the adoption of these arrangements at the commencement of the 57th Parliament, standing order 64 only provided for one supplementary question to be asked by the member who asked the original question.

Rules governing supplementary questions without notice

Presidents' rulings have established that a supplementary question is an opportunity to ask a question arising out of the answer just given. It is not an opportunity to repeat

114 *Minutes*, NSW Legislative Council, 8 May 2019, p 78.
115 Ruling: Ajaka, *Hansard*, NSW Legislative Council, 29 May 2019, p 11.
116 Ruling: Ajaka, *Hansard*, NSW Legislative Council, 30 May 2019, p 28.
117 Ruling: Burgmann, *Hansard*, NSW Legislative Council, 24 June 2003, p 1843.

the original question, either in full or in part.[118] Nor is it an opportunity to ask another, unrelated, question.[119] Nor can it introduce new material.[120]

It is not in order to ask a supplementary question following a purely procedural answer, such as referring the matter to another minister or taking the question on notice.[121]

In 2019, President Ajaka gave the following further guidance in relation to supplementary questions:

> … for a supplementary question to be in order it must satisfy three aspects: it must be actually and accurately related to the original question; it must relate to or arise from the answer given by the Minister; and it must seek to elucidate a part of the answer given.[122]

Presidents have also ruled that using the word 'elucidate' in a supplementary question that contains additional information and which is not seeking further information in relation to an aspect of a minister's answer does not make the question a supplementary question.[123] In 2017, President Ajaka observed:

> As ruled by President Primrose in 2009 and President Harwin in numerous rulings, supplementary questions must be directly related to the answer given by a Minister and must seek to elucidate – that is, make the answer clearer. As ruled by President Fazio in 2010, using the word 'elucidate' in a question, then repeating part of the original question, does not make it a supplementary question. Just as the use of the word 'elucidation' does not mean that a supplementary question is in order, the use of words other than 'elucidate' does not automatically mean that a supplementary question is out of order. Rather, the test of a true supplementary question is that it must seek to make clearer an aspect of an answer given.[124]

Supplementary questions cannot be used to provide a minister who had failed to finish an answer with an opportunity to complete it.[125]

---

118 Rulings: Willis, *Hansard*, NSW Legislative Council, 23 June 1997, p 10909; Primrose, *Hansard*, NSW Legislative Council, 17 June 2008, p 8411; Harwin, *Hansard*, NSW Legislative Council, 19 September 2012, p 15374.

119 Rulings: Burgmann, *Hansard*, NSW Legislative Council, 4 April 2000, p 3971; Harwin, *Hansard*, NSW Legislative Council, 6 November 2014, p 2241.

120 Rulings: Burgmann, *Hansard*, NSW Legislative Council, 23 November 2000, p 10690; Harwin, *Hansard*, NSW Legislative Council, 16 October 2012, p 15640.

121 Rulings: Willis, *Hansard*, NSW Legislative Council, 21 November 1995, p 3531; Harwin, *Hansard*, NSW Legislative Council, 26 June 2013, p 22017.

122 Ruling: Ajaka, *Hansard*, NSW Legislative Council, 28 May 2019, p 21.

123 Rulings: Harwin, *Hansard*, NSW Legislative Council, 24 June 2015, p 1715; Ajaka, *Hansard*, NSW Legislative Council, 15 September 2016, p 34.

124 Ruling: Ajaka, *Hansard*, NSW Legislative Council, 8 March 2017, p 6.

125 This scenario sometimes arises where a government backbencher asks a pre-arranged question of the minister, commonly known as a 'Dorothy Dixer', and the minister fails to complete his or her answer in the time available. A 'Dorothy Dixer' is a reference is to the American advice columnist Dorothy Dix's reputed practice of making up her own questions to allow her to publish more interesting answers.

Otherwise, the rules governing supplementary questions are the same as those governing questions.[126]

SUPPLEMENTARY QUESTIONS REQUIRING WRITTEN RESPONSE FOLLOWING QUESTION TIME

By sessional order adopted at the commencement of the 57th Parliament in May 2019,[127] at the conclusion of Question Time, members may, at the discretion of the President, put supplementary questions to ministers to elucidate answers given during Question Time. Each party and any independent member is limited to one supplementary question. The rules for questions without notice equally apply to such supplementary questions.

Ministers must lodge answers to such supplementary questions with the Clerk by 10.00 am the next working day. On receipt, the answers are incorporated in *Hansard* when the House next sits.

If an answer is not received by 10.00 am the next working day, the President informs the House on the next sitting day and the minister must explain the reason for non-compliance. If, after explanation in the House, an answer is not submitted within a further three sitting days, the minister is again called on to explain. This procedure continues until an answer is provided.

The adoption of this provision at the commencement of the 57th Parliament was intended to give members, having considered an answer given earlier in Question Time, and perhaps having consulted further, the opportunity to ask a follow-up question.[128]

QUESTIONS ON NOTICE ON THE *QUESTIONS AND ANSWERS PAPER*

Standing order 67, as amended by sessional order adopted at the commencement of the 57th Parliament in May 2019, provides that members may lodge with the Clerk written questions on notice to ministers.[129] Prior to the adoption of the sessional order in May 2019, members were restricted to lodging written questions on notice to ministers on sitting days only. However, this restriction was not included in the sessional order, with the result that members may now lodge written questions on notice to ministers on any working day.

126 Ruling: Burgmann, *Hansard*, NSW Legislative Council, 31 March 2004, p 7763. See, for example, Ruling: Burgmann, *Hansard*, NSW Legislative Council, 5 December 2002, p 7756 in relation to a supplementary question of a hypothetical nature. See also Ruling: Burgmann, *Hansard*, NSW Legislative Council, 13 November 2003, p 4908 in relation to a supplementary question seeking an expression of opinion.

127 *Minutes*, NSW Legislative Council, 8 May 2019, pp 75-76.

128 *Hansard*, NSW Legislative Council, 8 May 2019, pp 30-31 per Mr David Shoebridge.

129 Unlike questions without notice, there is no capacity for questions on notice to be directed to committee chairs or private members.

Written questions on notice to ministers must be signed by the member. There is no limit on the number of written questions a member may place on notice.[130]

Written questions on notice to ministers lodged with the Clerk by 4.00 pm are published in the *Questions and Answers Paper* on the next working day.[131] Each question is allocated a number which it retains until an answer is provided.

Ministers are required to provide to the Clerk answers to written questions on notice within 21 calendar days. Whilst rulings of the President have established that a minister may decline to respond to a question without notice asked during Question Time, there is no such latitude with respect to questions on notice.[132]

Answers received by the Clerk are published in the *Questions and Answers Paper* on the next working day. Answers are also published on the Parliament's website on the questions and answers database, which enables tracking of answers by the member who asked the question, its number, portfolio and subject matter. Today, most members access answers to questions on notice through the Parliament's website.

If an answer is not provided within 21 calendar days, the President informs the House on the next sitting day and calls on the minister to explain the reason for non-compliance. If, after explanation to the House, an answer is not submitted within a further three sitting days, the minister is again called on to explain. This procedure continues until an answer is provided.

The requirement for ministers to answer questions on notice within a set period, now 21 calendar days, was first introduced by sessional order in 1995.[133] To date, ministers and their offices have always met the deadline; there has not been an occasion on which a minister has been called on to explain failure to provide an answer.

Rules governing questions on notice

The rules for questions on notice are the same as those for questions without notice (SO 67, as amended by sessional order).[134] In practice, however, the rules are applied more strictly to questions on notice, since the clerks have an opportunity to examine the questions more closely to ensure that they conform with the standing orders before their

130 On 30 April 2013, following a large number of questions on notice lodged in 2012 and at the start of 2013, the Leader of the Government in the Legislative Council gave a notice of motion of a sessional order to limit the number of questions that may be lodged. See *Notice Paper*, NSW Legislative Council, 1 May 2013, p 8322. The motion was debated on 7 and 8 May 2013 and then remained on the *Notice Paper* until it was withdrawn on 4 March 2014.

131 For further information, see the discussion in Chapter 11 (Publication of and access to the proceedings of the Legislative Council) under the heading 'The *Questions and Answers Paper*'.

132 This contrasts with the House of Representatives, where there is no obligation on ministers to answer written questions. See *House of Representatives Practice*, 7th ed, (n 8), p 571.

133 *Minutes*, NSW Legislative Council, 24 May 1995, p 34.

134 See the discussion earlier in this chapter under the heading 'Rules governing questions without notice'.

publication in the *Questions and Answer Paper*. The clerks will make minor grammatical changes to questions to put them in the proper interrogative form and to adapt them to the style of the *Questions and Answers Paper* without reference to the member who lodged the question. However, where significant changes are required to ensure that a question conforms with the standing orders, these changes are discussed with the member involved. No question is amended so as to alter its sense without the member's consent. A question which does not comply with the rules for questions may not be placed on the *Questions and Answers Paper*.

In submitting questions, members are required to identify which minister the question is directed to. Members need to take care to ensure that questions correctly nominate the minister who will be able to provide the information sought.[135] The rule that questions should only relate to the responsibilities of a single minister, and that matters relating to the responsibilities of another minister should be the subject of a separate question, is more strictly adhered to than in the case of questions without notice.

Rules governing answers to question on notice

The requirement under standing order 65(5), as amended by sessional order,[136] that an answer must be 'directly relevant' to a question is of equal application to answers to written questions on notice.

Since adoption of the requirement that answers be 'directly relevant' at the commencement of the 57th Parliament, the relevance of answers to questions on notice has been canvassed by members through the 'take note' debate on answers given to questions,[137] private members' statements[138] and the adjournment debate.[139] They may also be canvassed through a specific motion.

THE 'TAKE NOTE' DEBATE ON ANSWERS

The 'take note' debate on answers to questions without notice during Question Time, any deferred answers and any answers to written questions or supplementary questions is considered in Chapter 10 (The conduct of proceedings).[140]

135 On occasion, ministers' offices have advised the clerks that a question has been misdirected. In that instance, it is open to the minister's office to provide a response to that effect, although on many occasions the responsible minister's office has agreed to provide a response in the requisite time frame.

136 *Minutes*, NSW Legislative Council, 8 May 2019, pp 77-78.

137 *Hansard*, NSW Legislative Council, 6 August 2019, pp 28-29; 20 August 2019, p 24; 22 October 2019, p 30.

138 *Hansard*, NSW Legislative Council, 19 September 2019, pp 35-36.

139 *Hansard*, NSW Legislative Council, 14 November 2019, pp 81-82 per the Hon Peter Primrose.

140 See the discussion under the heading 'The 'take note' debate on answers'.

CHAPTER 15

LEGISLATION

This chapter examines the passage of legislation through the Legislative Council. It considers the power of the Parliament of New South Wales to make laws, the different categories of bills, the preparation and structure of bills, the various stages in the Legislative Council's consideration of bills, the resolution of disagreements and deadlocks between the Legislative Council and the Legislative Assembly, the assent process and the commencement of acts. Consideration of bills in detail in a Committee of the whole House is considered in the following Chapter 16 (Committee of the whole House).

THE POWER OF THE PARLIAMENT TO MAKE LAWS

As indicated in Chapter 1 (The New South Wales system of government), the general legislative power of the Parliament of New South Wales is contained in part 2 of the *Constitution Act 1902*. Section 5 of part 2 provides as follows:

> **5 General legislative powers**
>
> The legislature shall, subject to the provisions of the Commonwealth of Australia Constitution Act, have power to make laws for the peace, welfare, and good government of New South Wales in all cases whatsoever –
>
> Provided that all Bills for appropriating any part of the public revenue, or for imposing any new rate, tax or impost, shall originate in the Legislative Assembly.

The legislative power of the Parliament of New South Wales is also provided for in section 2(2) of the *Australia Acts* of 1986:

> It is hereby further declared and enacted that the legislative powers of the Parliament of each State include all legislative powers that the Parliament of the United Kingdom might have exercised before the commencement of this Act for the peace, order and good government of that State but nothing in this section confers on a State any capacity that the State did not have immediately before the commencement of this Act to engage in relations with countries outside Australia.

The Commonwealth Constitution also confers on the States certain specific powers to make and consent to laws.[1] By contrast to the powers of the Commonwealth, the legislative powers of the States are not enumerated in the text of the Australian Constitution. Instead, the States retain what is known as plenary power, meaning that they can legislate with respect to any matter other than those matters over which the Commonwealth has exclusive power. This is discussed further below.

Restrictions on the power of the Parliament to make laws

Whilst the Parliament of New South Wales has broad plenary power to make laws 'for the peace, welfare, and good government of New South Wales in all cases whatsoever', this power is constrained in certain respects. This is discussed below.

Territorial connection with New South Wales

Under the wording of section 5 of the *Constitution Act 1902*, the law-making power of the Parliament is restricted in its application to the State of New South Wales. In other words, laws passed by the Parliament must have a territorial connection to New South Wales.[2]

The Commonwealth Constitution

The law making power of the Parliament of New South Wales is restricted by the Commonwealth Constitution. Section 106 of the Commonwealth Constitution makes State constitutions, including the New South Wales *Constitution Act 1902*, subject to the Commonwealth Constitution.

The powers of the Commonwealth and the States under the Commonwealth Constitution fall into three categories: exclusive, concurrent and residual.[3] Exclusive powers of the Commonwealth in turn fall into three categories: a limited number of powers expressly granted to the Commonwealth under sections 52,[4] 90,[5] 111 and 122[6] of the Commonwealth Constitution; an equally limited number of powers which are withdrawn from the States by prohibition directed to the States under sections 114[7]

1 For further information, see A Twomey, *The Constitution of New South Wales*, (Federation Press, 2004), pp 171-173.

2 The territory of New South Wales is defined in section 4 of the *Constitution Act 1902*. In relation to the territorial connection, see *Clayton v Heffron* (1960) 105 CLR 214 at 250 per Dixon CJ, McTiernan, Taylor and Windeyer JJ, and *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51 at 66 per Brennan CJ, at 76 per Dawson J.

3 For a more extensive discussion, see G Moens and J Trone, *Lumb and Moens' The Constitution of the Commonwealth of Australia Annotated*, 7th ed, (Butterworths, July 2007), pp 396-399.

4 For example, the power to make laws with respect to the seat of Government (s 52(i)) and the power to make laws with respect to any department of the Commonwealth public service (s 52(ii)).

5 The power to make laws imposing duties of customs and excise and granting boundaries.

6 The power to make laws with respect to Commonwealth territories.

7 The power to raise and maintain military forces for the defence of the Commonwealth.

and 115;[8] and powers under section 51 which are nominally concurrent powers but which by their nature are exclusive to the Commonwealth.[9]

Concurrent powers are powers listed in section 51, other than those which by their nature are exclusive to the Commonwealth.[10] These powers are concurrent in the sense that they may be exercised by both the Commonwealth and the States, although in the event of inconsistency, the Commonwealth law shall prevail by virtue of section 109. In some cases, the Commonwealth has 'covered the field' in relation to these individual powers, for example the power over immigration and emigration (section 51(xxvii)). However, in other cases, the States may still legislate, for example in relation to the marriage power (section 51(xxi)).[11]

Residual powers are those powers not listed in the Commonwealth Constitution which nominally remain the responsibility of the States. Traditionally, State legislative power has encompassed a range of subjects such as agriculture and forestry, education, health, land, law and order and transport.

Whilst the residual powers are nominally the responsibility of the States, there are two avenues by which the Commonwealth may seek to intervene in areas that have traditionally been thought to be the responsibility of the States:

- First, in recent years, the Commonwealth has made increasing use of the external affairs power (section 51(xxix)), the corporations power (section 51(xx)) and the incidental matters power (section 51(xxxix)) to legislate in areas traditionally the preserve of the States.[12]
- Second, the Commonwealth has also used the power under section 96 of the Commonwealth Constitution to grant money to the States 'on such terms and

8 The power with respect to coinage.

9 For example, the power to borrow money for the public credit of the Commonwealth (s 51(iv)) and the power to acquire property for Commonwealth purposes (s 51(xxxi)). In *Lumb and Moens' The Constitution of the Commonwealth of Australia Annotated*, 7th ed, (n 3), Moens and Trone list 10 heads of power under section 51 which are by their nature exclusive to the Commonwealth.

10 In total, section 51 contains 39 heads of power. Some of the most important heads of power are the power over trade and commerce with other countries and amongst the States (s 51(i)), the taxation power (s 51(ii)), the defence power (s 51(vi)), the corporations power (s 51(xx)), and the external affairs power (s 51(xxix)). Section 51(xxxvii), the referral power, allows State parliaments to refer powers to the Commonwealth.

11 Prior to 1961, before the Commonwealth passed the *Marriage Act 1961* (Cth), the States and Territories administered marriage law. However, the States retain responsibility for the registration of marriages, in New South Wales under the *Births, Death and Marriages Registration Act 1995*.

12 Perhaps the most notable example of this in recent years was the Commonwealth Government's use of the corporations power in 2005 to legislate to create a national industrial relations system under the Commonwealth *Workplace Relations Amendment (Work Choices) Act 2005*. The validity of this move was challenged in the High Court in *New South Wales v Commonwealth* (2006) 231 ALR 1 (the *WorkChoices Case*). In the event, a majority of the High Court held that the WorkChoices legislation was a valid exercise of constitutional power by the Commonwealth, with elements of the legislation supported by either the corporations power or the conciliation and arbitration power (s 51(xxxv)). A minority (Kirby and Callinan JJ) dissented.

conditions as the Parliament thinks fit' (meaning the Commonwealth Parliament) to gain influence over State policy matters such as public hospitals and schools. In effect, the Commonwealth can make financial grants, known as tied grants, to the States subject to the States implementing particular policies advocated by the Commonwealth. The capacity of the Commonwealth to do this reflects the strong financial position of the Commonwealth with respect to the States, founded on the Commonwealth's monopoly over income taxation since 1942.[13]

The *Australia Acts* of 1986

Section 2(2) of the *Australia Acts* of 1986 affirmed the legislative power of the State parliaments as including all the powers that the British Parliament might have exercised prior to the commencement of the acts. Section 3 further provided that no State law made after the commencement of the *Australia Acts* shall be void or inoperative on the grounds that it is repugnant to the laws of England.[14]

However, a restriction on State legislative power is found in section 5 of the *Australia Acts* which provides that the States may not enact provisions which repeal, amend or are repugnant to the *Australia Acts*, the Commonwealth Constitution, the *Commonwealth of Australia Constitution Act* or the *Statute of Westminster 1931* (UK).

Various other limitations on State legislative power are also included in the *Australia Acts*: section 11 prevents the reintroduction of appeals to the Privy Council and section 7 provides that Her Majesty's representative in each State shall be the Governor, which may be interpreted as preventing the States from severing their ties with Her Majesty.

In addition, section 6 of the *Australia Acts* prevents the States from amending certain entrenched provisions in the *Constitution Act 1902* without complying with 'manner and form' provisions.[15] In New South Wales, 'manner and form' provisions are found in sections 7A and 7B of the *Constitution Act 1902*. This is discussed later in this chapter.[16]

ACTS

An act of the Parliament of New South Wales is a declaration made by the Sovereign, usually with the advice and consent of both Houses of the Parliament, the effect of which is either to declare the law in a particular respect, change the law, or to do both. In practice, acts of the Parliament of New South Wales are assented to by the Governor, who is Her Majesty's representative in the State.[17]

---

13 For further information, see L Lovelock and J Evans, *New South Wales Legislative Council Practice*, 1st ed, (Federation Press, 2008), Appendix 1.

14 Section 34A of the *Interpretation Act 1987* applies this provision of the *Australia Acts* to acts enacted before 1986.

15 For further information, see Twomey, (n 1), pp 174-175.

16 See the discussion under the heading ''Manner and form' restrictions on bills to amend the *Constitution Act 1902*'.

17 *Australia Acts* of 1986, s 7(1).

Whilst acts of the Parliament of New South Wales are usually made with the advice and consent of both Houses of the Parliament, in certain circumstances, prescribed in sections 5A and 5B of the *Constitution Act 1902*, the Governor may assent to a bill agreed to by the Legislative Assembly only should the Legislative Council fail to pass a bill sent to it by the Legislative Assembly. This is discussed later in this chapter.[18]

BILLS

A bill is a draft of an act that has been introduced into the Parliament. It continues to be known as a bill until such time as it has been passed by Parliament and has been assented to by the Governor, at which point it becomes an act,[19] even if it has not yet commenced.

There are three categories of bills: public bills which deal with matters affecting public interests, private bills which deal with matters affecting private interests, and hybrid bills, which deal with both. These three categories are discussed below.

Public bills

A public bill is one which deals with a matter affecting public interests. A short history of the development of public bills in England is provided in the first edition of *New South Wales Legislative Council Practice*.[20]

There are two types of public bills: government bills and private members' bills.

Government bills

Government bills are bills brought before the Parliament by a minister, or a parliamentary secretary on behalf of a minister, as part of the government's legislative program. The government's legislative program is discussed further below.[21]

Private members' bills

Private members' bills are bills brought before the Parliament by a private member (or a parliamentary secretary acting in a private capacity). Procedurally they are treated in the same way as government bills, with certain variations in relation to time limits.

The capacity of private members to introduce private members' public bills is an important aspect of the work of the Legislative Council and the Parliament more generally. The Council is not confined to the consideration of bills brought forward by

18 See the discussion under the heading 'The resolution of deadlocks on bills introduced in the Assembly'.

19 *Constitution Act 1902*, s 8A(1)(b).

20 *New South Wales Legislative Council Practice*, 1st ed, (n 13), pp 341-342.

21 See the discussion under the heading 'Preparation of public bills'.

the government. There are some important acts of the Parliament that commenced as private members' bills, either in the Council or the Assembly. A list of private members' bills introduced in the Council that have received assent and become law since the reconstitution of the Council in 1978 is provided in Appendix 12 (Private members' bills introduced in the Legislative Council that have received assent since 1978).

Private bills and hybrid bills

A private bill, as distinct from a private member's public bill discussed above, is a bill dealing with matters of private interest. Traditionally, such private interests have included the incorporation of banks and companies, land title matters, the establishment of churches and schools, marriage settlements and trustees of estates.

Private bills were a prominent feature of the work of the Parliament in the 19th century, and remained a feature of the work of the Council in the 20th century, with all private bills originating in the Council between 1910 and 1992.[22] However, in modern times, governments routinely assist local community organisations, such as churches and clubs, in the passage of ostensibly private bills through Parliament as public bills, thus relieving them of the expenses involved in promoting, advertising, drafting, printing and securing the passage of a private bill through Parliament.[23] In addition, changes introduced as part of the *Local Government Act 1993* removed the need for private bills to be introduced to sell or exchange public lands.[24] As a result, the last private bill passed by the Council was the Tamworth Tourist Information Centre Bill in 1992.[25]

Nevertheless, there remains a considerable number of private bills on the statute book.

The standing orders of the Council deal with private bills in detail in standing orders 164 to 171. They entail special procedures for the passage of private bills. In short, the cost involved in the preparation and passing of a private bill must be paid for by the parties applying for it (SO 166). Intention to apply for a private bill has to be advertised in advance in the *Government Gazette* and daily newspapers, and the bill is initiated by way of a petition (SOs 164 and 165). On introduction, the bill must be referred to a select committee before it can proceed to a second reading (SO 168). If the select committee reports in favour of the bill, a future day will be appointed for its second reading and the bill may subsequently proceed in the same manner as a public bill (SO 169).

A hybrid bill is a bill which affects both public and private interests. In general terms, hybrid bills are treated the same way as private bills. However, the Council has not been

22 D Clune and G Griffith, *Decision and Deliberation: The Parliament of New South Wales 1856-2003*, (Federation Press, 2006), pp 42, 340, 520.

23 See, for example, the Methodist Church of Samoa in Australia Property Trust Bill 1998, the Saint Andrew's College Bill 1998 and the Saint John's College Bill 2018.

24 Historically, many private bills were introduced to overcome the restriction in the former *Local Government Act 1919* on a council selling or exchanging any public reserve, public place, cemetery or land subject to a trust.

25 *Minutes*, NSW Legislative Council, 27 November 1992, p 497.

called upon to consider a bill ruled by the President to be a hybrid bill since the East Maitland Racecourse Enabling Bill 1920. Before that, only three other bills have ever been treated as hybrid bills in the Council.[26]

Further information on private bills and hybrid bills is provided in the first edition of *New South Wales Legislative Council Practice*[27] and in the *Annotated Standing Orders of the New South Wales Legislative Council*.[28] However, given that virtually all bills now considered by the Parliament are public bills, the primary focus of the remainder of this chapter is on public bills.

Preparation of public bills

Government bills

Government bills are prepared in accordance with the government's legislative program. Twice a year, the Premier asks ministers to submit legislative proposals they intend to bring to Cabinet in the next 12 months. The Premier then considers all proposals and approves listing on the legislative agenda.[29]

Following approval by Cabinet of a legislative proposal, draft bills are prepared by the Parliamentary Counsel's Office, in conjunction with relevant departmental staff. The preparation and drafting of bills may take several months and draft bills may go through many revisions. A draft bill may subsequently be approved for presentation to Parliament by either the Cabinet's Standing Committee on Legislation or the full Cabinet, if the final draft of the bill differs substantially from Cabinet's initial approval.[30]

Prior to the introduction of a government bill into the Parliament, ministers report the bill to their party room.

Private members' bills

Private members' bills are also prepared by the Parliamentary Counsel's Office under instruction from the member.[31]

---

26 For further information, see *New South Wales Legislative Council Practice*, 1st ed, (n 13), p 345.

27 *New South Wales Legislative Council Practice*, 1st ed, (n 13), pp 342-345.

28 S Want and J Moore, edited by D Blunt, *Annotated Standing Orders of the New South Wales Legislative Council*, (Federation Press, 2018), pp 540-560.

29 Department of Premier and Cabinet, *Cabinet Practice Manual*, Version 1.3, March 2017, p 7.

30 Ibid, p 12.

31 This arrangement was developed in 1991 in response to the 'Memorandum of Understanding between the Hon Nick Greiner MP, Premier, For and on behalf of the Liberal/National Party Government and Mr John Hatton MP, Ms Clover Moore MP, and Dr Peter Macdonald MP'. A copy of the memorandum is at *Hansard*, NSW Legislative Assembly, 31 October 1991, pp 4004-4033. The memorandum specifically required: 'Provision of Parliamentary Counsel services to Parliament for the use of non-Ministerial Members as decided by Parliament through the Parliamentary Appropriations Bill'.

Full details of these arrangements are set out in the *Manual for the Drafting of Non-Government Legislation* published by the Parliamentary Counsel's Office.[32] A set limit of hours is allocated by the Parliamentary Counsel's Office to the drafting of bills and amendments to bills for non-government parties, groups and members on a six-monthly basis.[33] In the 57th Parliament the allocation is 250 hours for the opposition and 25 hours for each other non-government member, with the hours of parties and groups aggregated across both Houses.[34]

Private members seeking the preparation of a draft bill should make that request in writing to the Parliamentary Counsel by email.[35]

The form of a bill

A bill is prepared in the form of the act it is intended to become. It takes the form described below, although not all the elements, such as a preamble, are essential to a bill.

Table of contents page

The first page of a bill is the table of contents page which always begins with the State Coat of Arms. Since 1986, all bills (and acts) have borne the State Coat of Arms on the title page. Previously the Royal Coat of Arms ('St Edward's Crown') was used.

Below the State Coat of Arms, the table of contents page provides the short title of the bill. The short title of the bill is a convenient name to assist with its identification and registration in the statute book. It is also contained in clause 1 of the bill.

The short title must describe the content of the bill in a straightforward and factual manner. An argumentative title or slogan is not permitted.[36]

Following the short title, the table of contents page provides the table of contents of the bill, listing the respective clauses and schedules, including chapters, parts and divisions as necessary.[37]

---

32 Parliamentary Counsel's Office, *Manual for the Drafting of Non-Government Legislation*, 12th ed, May 2019.

33 The six-monthly period recommences on 1 January and 1 July each year. Unused hours are not transferable to the following six-monthly period.

34 *Manual for the Drafting of Non-Government Legislation*, 12th ed, (n 32), May 2019, p 2.

35 Further information on the drafting process is available in the *Manual for the Drafting of Non-Government Legislation*, 12th ed, (n 32), pp 4-5.

36 Ruling: Harwin, *Hansard*, NSW Legislative Council, 5 March 2014, pp 27017-27018. See also D Natzler KCB and M Hutton (eds), *Erskine May's Treatise on The Law, Privileges, Proceedings and Usage of Parliament*, 25th ed, (LexisNexis, 2019), para 26.6.

37 Clauses are the fundamental building blocks of a bill. They are numbered sequentially and may be divided into chapters, parts, divisions, sub-divisions and schedules, all of which are also numbered sequentially. When a bill has become an act – that is, after it has received assent – clauses are referred to as sections.

Long title page

Following the table of contents page (or pages), the next page of a bill is the long title page.

The long title page again begins with the State Coat of Arms and the short title.

Underneath this the long title page includes provision for the Clerk to number the bill on its return from the Governor following assent.

The long title page then provides the long title of the bill, which sets out in brief terms the purpose of the bill and may provide a short description of its scope. The words commencing the long title are usually 'A Bill for An Act to …' or 'A Bill for An Act relating to …'.

The long title of a bill introduced in the House must agree with the notice for the bill's presentation, and all the clauses in the bill must come within the scope of the bill as described in the long title. The long title is also relevant to the question of the admissibility of amendments to the bill.[38] A corollary is that where the content of a bill is amended beyond the leave of the bill, the long title must be amended in committee to take that into account. For a bill to pass the House, the long title must be agreed to.

The practice of confining the scope of a bill to its description in the long title is discussed in detail by Twomey.[39] In short, it derives from a Royal Instruction to the Governor of 1855 which required the Governor 'as much as possible, to observe, in passing of all Laws, that each different matter be provided for by a different law'. At the time, this was of practical importance in enabling the British Government to review colonial laws. In modern times, the rule remains relevant. It ensures discipline in the parliamentary legislative process, helping to maintain the cohesion of the statute book. It is also relevant to the application of section 5A(3) of the *Constitution Act 1902* which prevent 'tacking' of provisions to appropriation bills 'for the ordinary annual services of the Government'.[40]

Preamble, enacting words and preliminary clauses page

The page following the long title page of a bill is numbered the second page of the bill.

The second page may begin with a preamble. A preamble is a comparatively rare incorporation in a public bill.[41] It is used in bills of special significance or constitutional importance to state the reasons why the proposed enactment is desired. Preambles are

38 For further information, see the discussion in Chapter 16 (Committee of the whole House) under the heading 'The admissibility of amendments'.

39 Twomey, (n 1), pp 213-214.

40 For further information, see the discussion in Chapter 17 (Financial legislation) under the heading 'Tacking'.

41 By comparison, all private bills are required to contain a preamble reciting the circumstances in which the bill is founded and the matters in reference to, or by reason of which, the bill is necessary (SO 167). For further information, see the *Annotated Standing Orders of the New South Wales Legislative Council*, (n 28), pp 548-549.

preceded by the use of the word 'WHEREAS'. For example, the Aboriginal Languages Bill 2017 included a preamble acknowledging that the languages of the first peoples are an integral part of the world's oldest living culture, are part of the cultural heritage of all people in New South Wales, and that Aboriginal people are the custodians of Aboriginal languages.[42]

Following any preamble are the bill's words of enactment. The usual form is: 'The Legislature of New South Wales enacts: …'.[43]

Following the enacting words, the second page of a bill invariably contains various preliminary clauses:

- Clause 1 of a bill is always the short title of the bill. Clause 1 can be amended to reflect any substantial amendments to the bill.
- Clause 2 of a bill is usually the commencement clause, indicating when the act will come into force. If a bill does not contain a commencement clause it will commence 28 days after assent. Commencement of acts is discussed in detail later in this chapter.[44]
- Clause 3 of a bill is often a definition or interpretation clause, setting out the meaning or interpretation of certain words in the context of the bill. Section 21 of the *Interpretation Act 1987* contains definitions for commonly used words and expressions in acts and instruments generally. Sometimes words and expressions are also defined in a glossary at the end of a bill.

Substantive provisions

The substantive provisions of a bill are contained in the remaining clauses, chapters, parts, divisions, sub-divisions and schedules of the bill.

In 'parent' or 'original' legislation where the Parliament is being asked to enact a new principal act governing an area of public affairs, the substantive provisions are usually contained in further clauses of the bill.

However, where a bill is amending an existing act or acts, the practice of the Parliamentary Counsel's Office is to include the amending clauses in separate schedules, often with a different schedule for each act to be amended.

42 For previous preambles, see the *Australia Acts (Request) Act 1985*, the *Community Relations Commission and Principles of Multiculturalism Act 2000* and the *Intergovernmental Agreement Implementation (GST) Act 2000*.

43 This wording was adopted in 1988. Previously the wording was: 'BE it enacted by the Queen's Most Excellent Majesty, by and with the advice and consent of the Legislative Council and Legislative Assembly of New South Wales in Parliament assembled, and by the authority of the same, as follows:'.

44 See the discussion under the heading 'Commencement of acts'.

However, it is also possible for schedules to be used in 'parent' or 'original' legislation, for example to include a specific regulation making power[45] or to establish oversight bodies.[46]

Explanatory notes

Although not formally part of a bill, bills are accompanied by explanatory notes providing a brief and simple explanation of the objects and provisions of the bill. Explanatory notes are also drafted by the Parliamentary Counsel's Office.

THE PASSAGE OF BILLS THROUGH THE HOUSE

As noted earlier in this chapter, the general legislative power of the Parliament of New South Wales is contained in part 2 of the *Constitution Act 1902*. Of note, section 5 provides the general legislative power of the Parliament 'to make laws for the peace, welfare, and good government of New South Wales', subject to certain restrictions.

Section 8A of the *Constitution Act 1902* further provides that '[e]xcept as otherwise provided', every bill 'shall be presented to the Governor for Her Majesty's assent after its passage through the Legislative Council and the Legislative Assembly'.[47] Bills must be passed in identical terms by both Houses before they may be sent to the Governor for assent,[48] with the exception of a bill passed by the Assembly only pursuant to the deadlock provisions of sections 5A and 5B of the *Constitution Act 1902*.[49] Certain bills also require agreement at a referendum before they can be presented for assent pursuant to sections 7A and 7B of the *Constitution Act 1902*.[50]

Beyond these provisions, the *Constitution Act 1902* gives no further guidance as to the passage of legislation through the Parliament. Accordingly, the procedures for the passage of bills through the Houses are left almost entirely to the standing orders of each House.

The standing orders of the Council provide for various stages in the passage of a bill through the House. In summary, a bill is introduced in the Council or received from the Assembly and given its first reading. Subsequently the principles of the bill are considered at the second reading debate, at which point the bill may be defeated.

---

45 See, for example, the Biosecurity Bill 2015, sch 5.

46 See, for example, the Aboriginal Languages Bill 2017, sch 1.

47 Section 8A was only adopted in 1987 following passage of the *Australia Acts* of 1986. Prior to that, the provision requiring assent to bills was found in section 31 of the *Australian Constitutions Act (No 1) 1842*, 5 & 6 Vic, c 76 (Imp). See Twomey, (n 1), p 216.

48 Under section 3 of the *Constitution Act 1902*, the Sovereign acts with the advice and consent of both Houses.

49 For further information, see the discussion later in this chapter under the heading 'The resolution of deadlocks on bills introduced in the Assembly'.

50 For further information, see the discussion later in this chapter under the heading ''Manner and form' restrictions on bills to amend the *Constitution Act 1902*'.

If the second reading of the bill is agreed to, the bill may be considered in detail in a Committee of the whole House, which is the stage at which amendments to the bill may be moved and debated. Following the second reading and, if necessary, consideration in committee, the bill is read a third time, which is the final stage of approval of the bill. If the third reading is agreed to the bill is taken to have passed the House. Similar procedures are adopted in the Legislative Assembly.

As emphasised by Twomey, these procedural requirements for the passage of bills through the Houses are not just technical in nature. They have been judicially recognised as giving rise to substantial safeguards in the legislative process. However, failure to observe the procedures under the standing orders does not necessarily prevent a bill from being enacted.[51]

Although not specifically stated in the standing orders, it is established parliamentary practice that only one stage in the passage of a bill through the House may be dealt with on any one sitting day. However, there are various means which are used routinely to expedite the passage of bills through the House. This is discussed later in this chapter.

Bills may be initiated in either the Legislative Council (a Council bill) or the Legislative Assembly (an Assembly bill), with the exception of 'Bills for appropriating any part of the public revenue, or for imposing any new rate, tax or impost' (so called 'money bills'), which must originate in the Legislative Assembly under section 5 of the *Constitution Act 1902*.

A bill agreed to in one House must be forwarded by message to the other House for concurrence. Following consideration in that House, the bill is returned to the originating House, with or without amendments, again by message. This process may continue several times until there is agreement between the two House over the provisions of the bill, until the deadlock provisions of sections 5A and 5B are invoked[52] or until the bill is abandoned. Bills which have been agreed to by both Houses are forwarded by the Clerk of the originating House on behalf of its Presiding Officer to the Governor for assent.

The arrangements for the passage of Council and Assembly bills through the Legislative Council are discussed in detail below.

---

51 In *Namoi Shire Council v Attorney-General (NSW)* [1980] 2 NSWLR 639, an attempt was made to have an act declared invalid on the basis that its passage through the Legislative Assembly contravened certain standing orders. However, McLelland J held that compliance with standing orders is not a condition of the validity of an act. See also Twomey, (n 1), p 243.

52 Assuming the bill originated in the Legislative Assembly.

Bills originating in the Legislative Council[53]

Bills originating in the Legislative Council (Council bills) may be initiated either by government ministers, usually in relation to the ministers' portfolio responsibilities (government bills),[54] or by private members (private members' bills).

Introduction on motion for leave to bring in a bill and first reading

A Council bill is initiated in the House by a member, either a minister or a private member, giving a notice of motion for leave to bring in the bill. The notice states 'That leave be given to bring in a bill for an Act to [insert long title]' (SO 136(1)).

On a subsequent sitting day, at the appropriate time in the order of business, the minister or private member may move the motion for leave to bring in the bill. The question may be debated (although the scope of debate is limited)[55] before being agreed to or negatived.[56] Time minister or private member limits apply to debate on the question that leave be given to bring in a private member's bill (SO 187(1)).[57] However most commonly the House agrees to the question without amendment or debate.

Where leave is granted to bring in a bill, the minister or private member must present a copy of the bill to the House (SO 136(2)). There is no time frame specified for the presentation of the bill, and there are many examples of the introduction of bills being delayed, or not presented at all.[58] However, usual practice is for the bill to be presented

---

53 Since the advent of responsible government in 1856, the initiation of public bills in the Council has waxed and waned. The very first public bill originating in the Council was introduced on 29 October 1856. They were a routine part of the work of the Council during the 19th century, with a spike at the turn of the 20th century: no fewer than 184 public bills originated in the Council between 1901 and 1904. During the first Labor administration from 1910 to 1913, 24 public bills were initiated in the Council. However, over the next 20 years up until reconstitution of the Council in 1934, only a further 174 public bills originated in the Council. In the period of the indirectly elected Council between 1934 and 1978, the number of public bills initiated in the Council reached its nadir, with only 18 bills introduced during that period, including only 12 government-initiated bills. It was not until 1984, when the Council finally became a fully elected House, that the initiation of bills in the Council again became a regular feature of the work of the Council. See *Hansard*, NSW Legislative Council, 2 May 1984, p 48. The first government bill to originate in the reconstituted Council was the Dairy Industry Amendment Bill 1984, introduced on 8 May 1984. Since then, the initiation of bills in the Council by the government and by private members has remained a regular feature of the work of the House. See Clune and Griffith, (n 22), pp 103, 121, 182, 340, 521, 636.

54 Although bills which relate to an Assembly minister's portfolio are also sometimes originated in the Council.

55 For further information, see the *Annotated Standing Orders of the New South Wales Legislative Council*, (n 28), pp 430-431.

56 For further information, including examples where leave was not granted to introduce a bill, see the *Annotated Standing Orders of the New South Wales Legislative Council*, (n 28), pp 431-432, 435.

57 See Appendix 11 (Time limits on debates and speeches in the Legislative Council).

58 For further information, see the *Annotated Standing Orders of the New South Wales Legislative Council*, (n 28), pp 429-430.

immediately following the granting of leave to bring in the bill.[59] The long title of the bill as presented to the House must accord with the order of leave; any bill which is not in accordance with the order of leave will be ordered to be withdrawn (SO 136(3) and (4)).[60]

A bill presented to the House under these arrangements is called the 'first print' of the bill. The bill is henceforth publicly available.

The minister or private member with carriage of the bill then moves: 'That this bill be now read a first time and printed'.[61] Standing orders 137(1) and 187(2) provide that the question is to be put by the President immediately and determined without amendment or debate. However, whilst this restriction is applied to Assembly bills, past rulings of the President and the practice of the House make it clear that the question that a Council bill be now read a first time can be debated, amendments can be moved, and the mover can speak in reply in accordance with standing order 90.[62]

If the House agrees to the question that the bill be read a first time and printed, the Clerk reads the short title of the bill and indicates that the bill has been read a first time.

Although not prescribed in the standing orders, it is expected that ministers introducing a government bill related specifically to their portfolio responsibilities will give the notice of motion for leave to bring in the bill and subsequently will present the bill and move its first reading and printing.

Whilst the House has the opportunity to negative a Council bill at the first reading stage,[63] in practice the first reading is normally passed without opposition and is regarded as a purely formal stage.

---

59 On 11 October 2017, on the motion for leave to bring in the Aboriginal Languages Bill 2017 being agreed to, in accordance with an earlier resolution of the House, the President immediately left the Chair until the conclusion of a welcome to country and smoking ceremony in the Parliament House forecourt, followed by a message stick ceremony in the chamber. See *Minutes*, NSW Legislative Council, 11 October 2017, pp 1951-1952, 1959.

60 On 11 August 2016, following the presentation and first reading of the Abortion Law Reform (Miscellaneous Acts Amendment) Bill 2016, it was found that the final word in the long title of the bill presented to the House was different from the final word in the order of leave to bring in the bill. On 23 August 2016, the President, following advice from the Clerk and Parliamentary Counsel, gave a ruling that the bill would be allowed to stand, on the basis that the change to the long title did not take the bill outside or beyond the leave agreed to by the House, but cautioned members introducing bills that they need to comply with the requirements of the standing orders. See Ruling: Harwin, *Hansard*, NSW Legislative Council, 23 August 2016, pp 4-5.

61 The motion that a bill be printed is a legacy of former days when the printing and circulation of a bill could take some time.

62 For further information, see the *Annotated Standing Orders of the New South Wales Legislative Council*, (n 28), pp 438-440.

63 Ibid, p 438.

Government bills declared urgent under standing order 138

Following its first reading, a minister may declare a government bill introduced in the Council to be an urgent bill,[64] provided that copies have been circulated to members (SO 138(1)).[65] The question that the bill be considered an urgent bill is put immediately without amendment or debate (SO 138(2)). If urgency is agreed to, the second reading debate and subsequent stages may proceed immediately or at any time (SO 138(3)).[66] This is effectively a means of expediting the passage of the bill through the House.[67]

Cut-off dates on government bills introduced in the Council

At the commencement of the 57th Parliament in May 2019, the Council adopted a sessional order setting a cut-off date for the introduction of government bills in the budget and spring sitting periods.[68] The sessional order provides that if a government bill is introduced by a minister or received from the Assembly within the last two sitting weeks of either period, the debate on the motion for the second reading of the bill (discussed below) is to be adjourned at the conclusion of the speech of the minister moving the motion, and resumption of the debate is to be made an order of the day for the first sitting day of the next sitting period.[69] The intention behind this is to prevent the Council from being overwhelmed by the volume of bills in the final weeks of a sitting period.

---

64 The provisions of standing order 138 for declaring a bill an urgent bill are not specific to either a Council bill or an Assembly bill. In practice, however, standing order 138 is only used in relation to Council bills in order to expedite their passage through the House. The passage of Assembly bills is routinely expedited through the suspension of standing orders. For further information, see the *Annotated Standing Orders of the New South Wales Legislative Council*, (n 28), pp 446, 447-448.

65 For an instance in August 2011 when a point of order was taken that copies of a bill declared urgent had not been circulated to members, see the *Annotated Standing Orders of the New South Wales Legislative Council*, (n 28), p 446.

66 For further information, see the *Annotated Standing Orders of the New South Wales Legislative Council*, (n 28), pp 446-448.

67 As indicated previously, parliamentary practice is for only one stage in the passage of a bill through the House to be dealt with on any one sitting day. The declaration of government bills as urgent, allowing them to progress through all remaining stages during any one sitting of the House, dates back to the adoption of a sessional order dealing with Council bills in May 1988. Prior to that, Council bills were routinely expedited by suspension of standing orders in the same way as Assembly bills, or with the concurrence of the House (which is still used to expedite the third reading of Council bills not declared urgent). For further information, see the *Annotated Standing Orders of the New South Wales Legislative Council*, (n 28), pp 445, 447-448.

68 *Minutes*, NSW Legislative Council, 8 May 2019, p 59. Prior to the 57th Parliament, from 2002 until the end of the 56th Parliament, sessional orders applying cut-off dates had been adopted spasmodically and for individual sitting periods only.

69 See, for example, the Marine Pollution Bill 2011, *Minutes*, NSW Legislative Council, 23 November 2011, p 612; and the Criminal Case Conferencing Trial Repeal Bill 2011, *Minutes*, NSW Legislative Council, 24 November 2011, p 639. In both of these cases, the bill was set down for further consideration on the first sitting day of 2012 after the first reading of the bill, without the minister or parliamentary secretary moving that the bill be read a second time or giving a second reading speech.

However, the sessional order also provides that a minister may declare a bill introduced in the Council after the cut-off date to be an urgent bill. The question that the bill be considered an urgent bill is to be decided without amendment or debate, except for statements by the relevant minister and the Leader of the Opposition or a member nominated by the Leader of the Opposition not exceeding 10 minutes, and by two cross-bench members not of the same party, each not exceeding 5 minutes.[70] If urgency is agreed to, the second reading debate and subsequent stages may proceed forthwith or at any time during any sitting of the House, including during the remainder of the sitting period.[71]

This process for declaring a Council bill urgent under the sessional order stipulating cut-off dates on government bills is separate from the process described above for declaring a government bill urgent under standing order 138. However the effect is the same in allowing the expedited passage of the bill through the House during the present or any one sitting of the House.

Second reading

After the first reading of a Council bill, the second reading may be moved immediately by the minister or private member with carriage of the bill,[72] or the second reading may be made an order of the day for a later hour or for a future day (SO 137(3)).

Debate on the second reading of a Council bill commences when the minister or private member with carriage of the bill moves: 'That this bill be now read a second time' (SO 140(1)(a)).

Normal practice of the House is for the second reading of a bill to be moved immediately after its first reading, and for the mover to give the second reading speech in support of the bill. Debate on the question that the bill be read a second time must then be adjourned until a future day which must be at least five calendar days ahead[73] (SOs 137(3) and 187(4)),[74] unless the bill has been declared an urgent bill under standing order 138 or the sessional order dealing with cut-off dates, in which case the second reading debate may proceed immediately. Adjournment of the debate for five calendar days allows time for other members of the House to familiarise themselves with the contents of the bill,

70 The provision for cross-bench members to contribute has varied since the sessional order was first adopted in 2002.

71 For further information, see the *Annotated Standing Orders of the New South Wales Legislative Council*, (n 28), p 447.

72 This is an exception to the parliamentary practice that only one stage in the passage of a bill through the House may be dealt with on any one sitting day.

73 This means that debate on the bill cannot be resumed until after five clear days. The day that debate is adjourned is not counted as one of those five days. For example, if debate is adjourned on a Wednesday, debate cannot resume until the following Tuesday. Legislative Assembly standing order 188 is in similar terms. See the *Interpretation Act 1987*, s 36(1).

74 Although standing orders 137(3) and 187(4) provide that debate may be adjourned for a period longer than five calendar days, the invariable practice of the House is for the minimum period of five calendar days to be moved and adopted.

together with the second reading speech of the mover, and to consider their response. The question that the debate be adjourned may be debated, although this is rare.[75]

The second reading debate is the stage at which the general principles of a bill are considered and when lengthy debate often occurs, particularly on controversial bills.

The speech of the minister or private member with carriage of a bill, but also of other members during the second reading debate, form part of the body of material which may be considered in the interpretation of the act resulting from the passage of the bill or any statutory rule made under the act.[76]

Although not prescribed in the standing orders, there is a general expectation that ministers will take a Council bill which relates specifically to their portfolio responsibilities through the second reading debate, although in some instances this role is undertaken by a parliamentary secretary.

Time limits apply to speakers in the debate on the second reading of both government bills and private members' bills (sessional order and SO 187(3)). These time limits are listed in Appendix 11 (Time limits on debates and speeches in the Legislative Council).

Under standing order 140(2)(a), a 'this day six months' amendment may be moved to the question that a bill be read a second time. A 'this day six months' amendment, if carried, is fatal to the progress of the bill during the session and no fresh bill in substantially the same terms can be introduced in the same session (SO 140(3)). A reasoned amendment which also has the effect of defeating the bill may also be moved, as may an amendment to refer the bill to a standing or select committee for inquiry and report (SO 140(2)(b)).[77]

The second reading debate is also the stage in the passage of a bill through the House to which dilatory or superseding motions are most frequently proposed (SOs 105 and 107).[78]

The second reading debate is concluded when the minister or private member with carriage of a bill speaks in reply (SO 90(1) and (2)). This is an opportunity to address the issues raised by other members in the second reading debate.[79]

---

75 For an example, see *Minutes*, NSW Legislative Council, 21 February 2013, p 1478.

76 *Interpretation Act 1987*, s 34(2)(f).

77 For further information, see the discussion later in this chapter under the heading 'Amendments to the second or third reading of a bill'.

78 For further information, see the discussion later in this chapter under the heading 'Dilatory motions to the second or third reading of a bill'. See also the *Annotated Standing Orders of the New South Wales Legislative Council*, (n 28), pp 454-455.

79 In an unusual instance in 2009, as a matter of privilege, the President allowed a member to give his second reading speech after the parliamentary secretary had delivered his second reading speech in reply and after the bill had been read a second time. The member had been prevented from entering the chamber during the second reading debate by a locked door. See *Minutes*, NSW Legislative Council, 23 June 2009, p 1261; Ruling: Primrose, *Hansard*, NSW Legislative Council, 23 June 2009, p 16468.

Following the speech in reply, the President puts the question on any amendments and then if applicable the question: 'That this bill be now read a second time.' The House may divide on the question. If a bill is to be rejected by the House, it is usually at this point. Procedurally, the rejection of the question that a bill be 'now' read a second time is not absolute; it is open to any member to seek to have the bill restored to the *Notice Paper* by motion on notice and to have the second reading set down again for a future date.[80] However, in modern practice, rejection of the question that a bill be now read a second time is usually taken to be an absolute rejection of the bill.[81]

If the House agrees to the question that a bill be now read a second time, the Clerk reads the short title, and indicates that the bill has been read a second time. Acceptance of the question that a bill be now read a second time indicates the House's acceptance of the principles of the bill, or at least its willingness to allow the bill to continue to consideration of any amendments to the bill in a Committee of the whole House.

Following the second reading of a Council bill, a motion may be moved without notice to refer the bill to a standing or select committee, or for an instruction to a Committee of the whole House in relation to its consideration of the bill (SO 141, as amended by sessional order).[82]

Consideration in committee or leave to proceed to the third reading forthwith

If the House agrees to the second reading of a Council bill, the President may inquire whether leave is granted to proceed to the third reading of the bill forthwith (SO 141(1)(a)). The President usually does so where no amendments to the bill have been circulated, and the House generally grants leave in such circumstances.[83] However, if leave is not granted, or if amendments to the bill have been circulated, the minister or private member with carriage of the bill may move immediately that the President leave the Chair and the House resolve into a Committee of the whole House for consideration of the bill in detail. The question may not be debated or amended (SO 141(1)(b)). Alternatively, a later hour or future day may be appointed for consideration of the bill in a Committee of the whole House (SO 141(1)(c)). The question may be debated and amended.[84]

The provision of leave to proceed to the third reading of a bill forthwith, circumventing the requirement that each bill be considered in committee, was first introduced

80 For further information, see the discussion later in this chapter under the heading 'Restoration of bills negatived at the second or third reading'.

81 A Council bill which has been negatived at the second reading stage is listed at the back of the *Notice Paper* for the remainder of the session.

82 For further information, see the discussion in Chapter 16 (Committee of the whole House) under the heading 'Instructions to a committee'. See also the *Annotated Standing Orders of the New South Wales Legislative Council*, (n 28), p 467.

83 For further information, see the *Annotated Standing Orders of the New South Wales Legislative Council*, (n 28), p 465.

84 For further information, see the discussion in Chapter 16 (Committee of the whole House) under the heading 'Committal of bills to a committee'. See also the *Annotated Standing Orders of the New South Wales Legislative Council*, (n 28), pp 466, 467-469.

by sessional order in 1991. Prior to that, all bills were required to be considered in a Committee of the whole House, even if no amendments were proposed.[85]

The consideration of amendments in committee, together with instructions to a committee and the recommital of bills to committee, is discussed in more detail in Chapter 16 (Committee of the whole House).

Having been considered in committee, the Chair of Committees reports the bill to the House with or without amendments. The President repeats the report of the Chair of Committees to the House. The minister or private member with carriage of the bill then usually immediately moves a motion for the adoption of the report, although adoption of the report may also be set down as an order of the day for a future day (SOs 146(3) and 177(3)).[86] This is the point at which the House formally responds to the report of the committee. Whilst usual practice is for the House to agree to the report of the committee without debate, under standing order 177(3), the House may:

- disagree to the report of the committee, with the result that the bill drops from the *Notice Paper*;
- agree to the report, with amendments, such as referring the bill to a select committee; or
- recommit the bill to committee, in whole or in part.[87]

For detailed discussion of these options, see the *Annotated Standing Orders of the New South Wales Legislative Council*.[88]

The House does not take notice of proceedings in committee until the bill is reported (SO 145).[89] Consequently, it is irregular to refer in the House to the committee proceedings on a bill before it has been reported back to the House.[90]

Third reading

Following its second reading and, if necessary, consideration in committee, a Council bill may be read a third time.

---

85 For further information, see the *Annotated Standing Orders of the New South Wales Legislative Council*, (n 28), pp 468-469.

86 For an example where adoption of the report was made an order of the day for the next sitting day, see the Community Protection Bill 1994, *Minutes*, NSW Legislative Council, 16 November 1994, pp 375-376.

87 For further information, see the discussion in Chapter 16 (Committee of the whole House) under the heading 'Reconsideration of clauses or other parts of a bill'. See also the *Annotated Standing Orders of the New South Wales Legislative Council*, (n 28), pp 485-486.

88 *Annotated Standing Orders of the New South Wales Legislative Council*, (n 28), pp 575-578.

89 For further information, see the *Annotated Standing Orders of the New South Wales Legislative Council*, (n 28), pp 479-481.

90 *Erskine May*, 25th ed, (n 36), para 28.120. See also Ruling: Hay, *Hansard*, NSW Legislative Council, 29 May 1890, p 827.

When leave has been granted to proceed to the third reading of the bill forthwith after its second reading (SO 141(1)(a)),[91] or alternatively when the bill has been considered in committee but not amended, the minister or private member with carriage of the bill routinely moves the third reading of the bill immediately. To do so requires the concurrence (or leave) of the House.[92] If concurrence is not granted, the third reading of the bill must be set down for the next sitting day. However, the concurrence of the House is not required where the bill was previously declared urgent, either under the provisions of standing order 138 or according to the sessional order dealing with cut-off dates for government bills.[93]

In practice, after their second reading and any proceedings in committee, virtually all Council bills which have not been amended in committee proceed immediately to the third reading, either with the concurrence of the House or where the bill has been declared urgent.

When a bill is amended in committee, the amendments are incorporated in a revised 'second print' of the bill which is prepared by the Parliamentary Counsel's Office. This can take some time to prepare, often several hours. In such circumstances, the appropriate course of action is for the third reading of the bill to be set down for the next sitting day (SO 148(1)), in which case it is automatically listed as formal business the next day.[94]

Debate on the third reading of a Council bill commences when the minister or private member with carriage of the bill moves: 'That this bill be now read a third time' (SO 148(2)).

Debate on the motion for the third reading is the final opportunity for members to speak either in support of or against a bill. In some instances, members may change their position on a bill where amendments in committee either have or have not been successful.[95] However, attempts by members to engage at this point in extended discussion of the provisions of a bill or to introduce new matters have been ruled out of order by successive Presidents or other occupants of the Chair.[96]

---

91 That is to say, without proceeding to consideration of the bill in committee.

92 For further information, see the *Annotated Standing Orders of the New South Wales Legislative Council*, (n 28), pp 442-443, 465.

93 See also the *Annotated Standing Orders of the New South Wales Legislative Council*, (n 28), p 455.

94 See, for example, *Minutes*, NSW Legislative Council, 23 August 2012, p 1162; 18 October 2017, p 1999. However, this practice is not always followed. Ministers and private members with carriage of a bill which has been amended in committee have sought and received the concurrence of the House to move the third reading of the bill immediately after the conclusion of committee proceedings, notwithstanding that a second print of the bill has not been available. Technically, this course of action is in breach of standing order 148(4), which requires the President to report to the House that the bill is in accordance with the bill as reported from committee.

95 Ruling: Harwin, *Hansard*, NSW Legislative Council, 13 November 2013, p 25502.

96 Rulings: Lackey, *Hansard*, NSW Legislative Council, 15 March 1892, p 6452; Johnson, *Hansard*, NSW Legislative Council, 4 May 1989, p 7452; Willis (Deputy), *Hansard*, NSW Legislative Council, 4 May 1989, p 7451; Burgmann, *Hansard*, NSW Legislative Council, 29 June 2001, p 15934; Forsythe

Time limits apply to speakers in the debate on the third reading of both government bills and private members' bills (sessional order and SO 187(3)). These time limits are listed in Appendix 11 (Time limits on debates and speeches in the Legislative Council).

Under standing order 148(3)(a), a 'this day six months' amendment may be moved to a motion for the third reading of a bill. Although not contemplated by standing order 148, amendments to refer a bill to a standing or select committee and reasoned amendments may also be moved to the third reading.[97]

In addition, dilatory or superseding motions may be moved on the third reading of a bill.[98]

A superseding motion may also be moved that the bill, either as a whole or in part, be recommitted to committee for further consideration (SO 149).[99]

The third reading debate is concluded when the minister or private member with carriage of a bill speaks in reply (SO 90(1) and (2)).

Before the President puts the question on the third reading of a bill which was considered in committee, the President announces receipt of the certificate signed by the Chair of Committees that the bill is in accordance with the bill as reported from the committee (SO 148(4)).

If the House agrees to the question that a bill be now read a third time, the Clerk reads the short title, and indicates that the bill has been read a third time. The bill is then deemed to have passed the House (SO 151(2)).

Forwarding of a Council bill to the Assembly for concurrence

Following the third reading of a Council bill, the Clerk signs and dates a certificate on the long title page of the bill which states: 'This public bill originated in the Legislative Council and, having this day passed, is now ready for presentation to the Legislative Assembly for its concurrence' (SO 151(1)).[100]

(Deputy), *Hansard*, NSW Legislative Council, 18 November 2003, p 5108; Harwin, *Hansard*, NSW Legislative Council, 27 November 2013, p 26512; Blair (Temporary Chair), *Hansard*, NSW Legislative Council, 25 September 2019, p 68.

97 For further information, see the discussion later in this chapter under the heading 'Amendments to the second or third reading of a bill'. See also the *Annotated Standing Orders of the New South Wales Legislative Council*, (n 28), p 488.

98 For further information, see the discussion later in this chapter under the heading 'Dilatory motions to the second or third reading of a bill'.

99 For further information, see the discussion in Chapter 16 (Committee of the whole House) under the heading 'Recommittal of a bill to a committee'. See also the *Annotated Standing Orders of the New South Wales Legislative Council*, (n 28), pp 490-491.

100 For further information, see the *Annotated Standing Orders of the New South Wales Legislative Council*, (n 28), pp 494-495.

The bill, along with a message signed by the President or other occupant of the Chair at the time that the bill was read a third time, is then forwarded to the Legislative Assembly for concurrence (SO 151(2)). The bill and accompanying message is delivered to a clerk in the Legislative Assembly by the Usher of the Black Rod or another officer of the Legislative Council.

The Assembly returns a Council bill without amendments

Where a Council bill is agreed to by the Assembly without amendment, the Assembly returns the bill to the Council by message signed by the Speaker. The message states: 'The Legislative Assembly having this day agreed to the Bill with the long title [insert long title] returns the bill to the Legislative Council without amendment.' The bill is henceforth taken to have passed both Houses, and is subsequently presented by the Clerk on behalf of the President to the Governor for assent,[101] having been certified by the Clerk accordingly (SO 160(1)), in accordance with section 8A of the *Constitution Act 1902*.

The message from the Assembly is reported to the House by the President at the earliest opportunity without interrupting business. However, in circumstances where the message is received after the House has risen, the bill may still be presented to the Governor for assent, notwithstanding it has yet to be reported to the House. Indeed, it is not unusual on the next sitting day for the President to announce receipt of a message from the Governor intimating assent to the bill before the President subsequently announces receipt of the message from the Assembly returning the bill.

The vast majority of government bills initiated in the Council and forwarded to the Assembly for concurrence are returned without amendment.

The Assembly does not return a Council bill

In the event that a Council bill, normally a private member's bill, is rejected by the Assembly, either by lapsing or the motion for the second reading being negatived, no message is received from the Assembly.[102] It is accepted parliamentary practice that where a House wishes to be acquainted with the proceedings of the other House in relation to the passage of a bill or any other matter, the official *Votes and Proceedings* or *Minutes of Proceedings* should be taken as evidence.[103]

---

101 For further information, see the discussion later in this chapter under the heading 'Assent to bills'.

102 See, for example, the Public Health Amendment (Registered Nurses in Nursing Homes) Bill 2016, *Votes and Proceedings*, NSW Legislative Assembly, 11 May 2017, pp 1214-1215; the Occupational Health and Safety Amendment (Liability of Volunteers) Bill 2008, *Votes and Proceedings*, NSW Legislative Assembly, 13 November 2008, pp 1040-1041; and the Save Orange Grove Bill 2004, *Votes and Proceedings*, NSW Legislative Assembly, 10 November 2006, p 1724. For a recent precedent to the contrary, see Minutes, NSW Legislative Council, 2 June 2020, p 965 (proof).

103 For further information, see the discussion in Chapter 22 (Relations with the Legislative Assembly) under the heading 'Seeking information on the proceedings of the other House'.

The Assembly returns a Council bill with amendments

The Assembly may return a Council bill with a schedule of amendments agreed to by that House and a message requesting the concurrence of the Council in the amendments.[104]

On reporting of the message by the President, a motion may be moved without notice that the message and amendments be considered in a Committee of the whole House, either immediately or on a day to be fixed (SO 152(1)), although in practice, consideration is also routinely set down for a later hour of the sitting. The motion may be debated and amended.[105] Alternatively, the House may order that the message and amendments be considered 'this day six months' (SO 152(1)), which disposes of the bill, or the bill may be laid aside (SO 152(2)).

On the House resolving into committee to consider the amendments, the usual scenario in the case of a government bill is for a minister to propose that the committee agree to the amendments of the Assembly. Other members may in turn move amendments to the motion of the minister, for example, to agree with some amendments only or to propose further amendments.

Standing order 152(3) allows for consideration of only those portions of the bill on which there is disagreement between the Houses. The remaining portions of the bill, having been already agreed to by both Houses, are not open to further amendment. This rule ensures that, when a Council bill is returned, further consideration is confined to the matters of disagreement between the Houses and attention is focused on attempting to secure agreement on those matters.[106]

Following consideration of the Assembly's message in committee, the proceedings are reported to the House, and the report adopted by the House (SO 146(3)). The report can be recommitted (SO 146(2) and 147).

Where the Council agrees to the Assembly amendments without further amendment, the Council sends a message informing the Assembly accordingly (SO 152(4)).[107] The

104 See, for example, the Law Enforcement and Other Legislation Amendment Bill 2007, *Minutes*, NSW Legislative Council, 5 December 2007, p 427; the Surrogacy Bill 2010, *Minutes*, NSW Legislative Council, 10 November 2010, pp 2211-2212; the Crown Lands Amendment (Multiple Land Use) Bill 2013, *Minutes*, NSW Legislative Council, 20 November 2013, p 2235; and a private member's bill, the Modern Slavery Bill 2018, *Minutes*, NSW Legislative Council, 21 June 2018, pp 2799-2800.

105 In 1993, the motion of the Leader of the Government in the Legislative Council that consideration of the Assembly's amendments to the Legal Profession Reform Bill 1993 be taken into consideration in committee at a later hour of the sitting was amended to set down consideration in committee forthwith. See *Minutes*, NSW Legislative Council, 19-20 November 1993, pp 444-445.

106 A similar provision is contained in standing order 158 in relation to Assembly bills. But note, amendments have been made in other parts of Assembly bills in certain special circumstances, discussed below under the heading 'The Assembly returns an Assembly bill disagreeing with Council amendments'.

107 See, for example, the Law Enforcement and Other Legislation Amendment Bill 2007, *Minutes*, NSW Legislative Council, 5 December 2007, p 429; and the Surrogacy Bill 2010, *Minutes*, NSW Legislative Council, 11 November 2010, pp 2225-2226. For an example where the Council agreed

bill is henceforth taken to have passed both Houses in the same terms. A second print of the bill incorporating the Assembly amendments is prepared by the Parliamentary Counsel's Office, and the bill is presented by the Clerk on behalf of the President to the Governor for assent, having been certified by the Clerk accordingly (SO 160(1)), in accordance with section 8A of the *Constitution Act 1902*.

Alternatively, the Council may:

- Disagree to the Assembly amendments,[108] in which case the bill is again forwarded to the Assembly with a message requesting the bill's reconsideration (SO 152(6)). The message must give written reasons for not agreeing to the Assembly's amendments (SO 152(7)). The reason may be adopted by motion at that time, or a committee may be appointed, on motion without notice, to draw up the reasons (SO 152(8)).
- Agree to the Assembly amendments, but with further amendments,[109] in which case the bill is again forwarded to the Assembly with a schedule of the further amendments and a message requesting the concurrence of the Assembly in the further amendments (SO 152(5) and (9)).
- Adopt a combination of the above two options, that is, agreeing to some Assembly amendments, with or without further amendments, and disagreeing to others.[110]
- Lay the bill aside (SO 152(2) and (6)).[111]

In the circumstances outlined above, with the exception where the Council lays the bill aside, the bill is again forwarded to the Assembly with a message. The Assembly in turn may simply agree to the further amendments made by the Council, or accept the Council's rejection of its original amendments, in which case the Assembly returns the bill to the Council and the bill is printed and presented by the Clerk on behalf of the President to the Governor for assent.

However, where the Assembly again returns the bill to the Council either insisting on its original amendments, disagreeing to the further amendments made by the Council to the Assembly amendments, or agreeing to those amendments but proposing further amendments, standing order 153 sets out a range of options open to the Council, designed to give the House the maximum flexibility.

---

to Assembly amendments, including amendments to the long and short title, without further amendment, see the Workers Compensation Legislation (Further Amendment) Bill, *Minutes*, NSW Legislative Council, 20 April 1994, pp 135-136.

108 See, for example, the Commissioner at Newcastle Appointment Bill 1861, *Minutes*, NSW Legislative Council, 17 April 1861, p 123.

109 See, for example, the Constitution (Further Amendment) Bill 1929, *Minutes*, NSW Legislative Council, 3 December 1929, pp 113-115.

110 See, for example, the District Courts Bill 1858, *Minutes*, NSW Legislative Council, 22 October 1858, p 91.

111 There are no records of a Council bill being laid aside on receipt of suggested amendments from the Assembly. For further information, see the *Annotated Standing Orders of the New South Wales Legislative Council*, (n 28), pp 498-499.

Standing order 153 is modelled on the equivalent standing order 127 in the Senate. There, the options under standing order 127 represent the final steps that may be taken by message in an attempt to reach agreement on a Senate bill.[112] Specifically, Senate standing order 127 provides that if a bill is again returned, the Senate 'shall order the bill to be laid aside, or request a conference'. The wording of standing order 153 is subtly different, indicating that the Council 'may order the bill to be laid aside, or request a conference', suggesting the possibility that a bill originating in the Council may continue to be passed between the Houses in an attempt to seek agreement. However, as it is, the *Annotated Standing Orders of the New South Wales Legislative Council* note that there is only one recorded precedent of the Assembly returning a Council bill a second time over continued disagreement, and that was in 1892.[113]

By contrast with bills initiated in the Assembly, which are subject to sections 5A and 5B of the *Constitution Act 1902*, there is no constitutional provision available for resolving deadlock on Council bills beyond the exchange of messages and conferences.

Bills originating in the Legislative Assembly

Bills originating in the Legislative Assembly (Assembly bills), having passed that House, may be introduced into the Council either by a government minister (government bills) or by a private member (private members' bills).

A very significant proportion of all bills considered in the Council are Assembly bills that have passed that House and which are introduced into the Council by a government minister for the concurrence of the Council.

Introduction on message from the Assembly and first reading

Consideration of an Assembly bill by the Council is initiated on the receipt of a message from the Speaker forwarding the bill to the Council for its concurrence. If the bill was amended in the Assembly during its passage through that House, a second (amended) print of the bill is sent to the Council.

On the President reporting receipt of a message from the Speaker forwarding an Assembly bill for concurrence, the minister or private member taking carriage of the bill in the Council moves without notice that the bill be read a first time and printed (SO 137(1)). By contrast with Council bills, the question that an Assembly bill be read a first time and printed is determined without amendment or debate (SO 137(1)).[114] If the House agrees to the question, the Clerk reads the short title of the bill.

As indicated, the majority of Assembly bills received by the Council are government bills, in which case the minister in the Council representing the responsible minister

112 R Laing (ed), *Annotated Standing Orders of the Australian Senate*, (Department of the Senate, 2009), p 400.

113 For further information, see the *Annotated Standing Orders of the New South Wales Legislative Council*, (n 28), p 503.

114 For further information, see the *Annotated Standing Orders of the New South Wales Legislative Council*, (n 28), pp 438-440.

in the Assembly generally takes carriage of the bill, although it is also routine for a parliamentary secretary to do so. However, where a private member's bill is received from the Assembly, a private member takes carriage of the bill,[115] unless the government wishes to take it over and progress the bill as a government bill.

As with Council bills, technically the House has the opportunity to negative an Assembly bill at its first reading, but in practice the first reading is normally agreed to without opposition and is regarded as a purely formal stage.[116]

Suspension of standing orders to allow the expedited passage of an Assembly bill

Following the introduction, first reading and printing of an Assembly bill, parliamentary practice dictates that the second reading of the bill be set down as an order of the day for a future sitting day. However, the minister or private member with carriage of the bill usually moves without notice according to sessional order the suspension of standing and sessional orders to allow the passing of the bill through all its remaining stages during the present or any one sitting of the House.[117] As with declaring Council bills urgent under standing order 138, this is effectively a means of expediting the passage of an Assembly bill through the House.

If the suspension of standing orders is agreed to, the order of the day for the second reading of an Assembly bill may be set down for a later hour or the next sitting day.[118] Alternatively the second reading of the bill may be moved forthwith.

Where the President has several Assembly bills, invariably government bills, to be reported to the House at the same time, the President may inquire of the House if leave is granted for the first reading, printing, suspension of standing orders where applicable, and fixing of the day for the second reading of the bills to be dealt with on one motion without formalities (SO 154, as amended by sessional order). If leave is granted, the

115 This can include a parliamentary secretary. For example, on 7 September 2010, the Hon Penny Sharpe, a parliamentary secretary, took charge of the Adoption Amendment (Same Sex Couples) Bill 2010 (No 2) received from the Assembly. See *Minutes*, NSW Legislative Council, 7 September 2010, pp 2023-2024.

116 It is notable, however, that in 1959 and 1960, on two separate occasions, on receipt of a message from the Assembly forwarding the Constitution Amendment (Legislative Council Abolition) Bill for concurrence, the motion for the first reading of the bills was superseded by a motion that the Council decline to consider the bills, on the basis that a bill seeking to abolish the Council should be introduced in the Council. See *Minutes*, NSW Legislative Council, 2 December 1959, p 137; 6 April 1960, p 203; *Hansard*, NSW Legislative Council, 2 December 1959, pp 2549-2561; 6 April 1960, pp 3631-3634. See also the *Annotated Standing Orders of the New South Wales Legislative Council*, (n 28), pp 438-439.

117 Formerly, the suspension was according to contingent notice. For further information, see the discussion in Chapter 10 (The conduct of proceedings) under the heading 'Suspension by motion moved without notice according to sessional order'.

118 For an instance in April 1992 where multiple bills were reported, but separate motions were moved to set the second reading of some bills down for a later hour and others for the next sitting day, see the *Annotated Standing Orders of the New South Wales Legislative Council*, (n 28), p 506.

minister with carriage moves the procedural motions for the first reading and printing of the bills, and subsequently the suspension of standing orders and the setting down of the second reading of the bills for a later hour or the next sitting day. If leave is not granted, the minister moves the procedural motions separately in respect of each bill.[119]

The practice of suspending standing orders to allow the expedited passage of bills has been a part of Council practice since 1856.[120] It is rare that the motion for suspension of standing orders in respect of Assembly bills is not moved[121] or is negatived.[122]

Cut-off dates on government bills received from the Assembly

The Council applies the same cut-off dates to bills received from the Assembly as it does to bills introduced in the Council.[123] The sessional order dealing with cut-off dates for government bills received from the Assembly provides that where the bill is received from the Assembly within the last two sitting weeks of the budget or spring sitting periods, debate on the second reading of the bill is to be adjourned at the conclusion of the speech of the minister moving the motion, and resumption of the debate is to be made an order of the day for the first sitting day of the next sitting period.[124] As with Council bills, the intention is to prevent the Council from being overwhelmed by the volume of bills in the final two sitting weeks of a sitting period. However, as with Council bills, a minister may declare an Assembly bill to be an urgent bill, which, if the House agrees, allows the second reading debate and subsequent stages to proceed forthwith or at any time during the sittings of the House.

In a variation to the provisions for Council bills, if the question of urgency is negatived or urgency is not sought, the sessional order makes clear that standing orders may nevertheless be suspended to allow the passing of the bill through all remaining stages in the next sitting period.[125] In such cases, if the minister moves the second reading of the bill, debate is to be adjourned at the conclusion of the minister's second reading speech, to be set down as an order of the day for the first sitting day in the next sitting period.

---

119 For further information, see the *Annotated Standing Orders of the New South Wales Legislative Council*, (n 28), pp 505-506.

120 Expediting the passage of bills through the House by means of suspension of standing orders is no longer used in relation to government bills originating in the Council, such bills instead being declared urgent under standing order 138. For further information on the history of expediting the passage of bills through the House, see the *Annotated Standing Orders of the New South Wales Legislative Council*, (n 28), pp 442-445, 505.

121 See, for example, *Minutes*, NSW Legislative Council, 27 February 2013, p 1498.

122 See, for example, *Minutes*, NSW Legislative Council, 23 September 2008, pp 759-760.

123 For further information, see the discussion earlier in this chapter under the heading 'Cut-off dates on government bills introduced in the Council'.

124 On 18 June 2014, the government rescinded a resolution of the House of the previous day that the second reading of the Rural Fires Amendment (Vegetation Clearing) Bill 2014 stand an order of the day for the first sitting day in the next sitting period. The bill was then declared urgent under the sessional order and later that day proceeded through all remaining stages and was returned to the Assembly. See *Minutes*, NSW Legislative Council, 18 June 2014, p 2597.

125 See, for example, the Child Protection Legislation Amendment Bill 2015, *Minutes*, NSW Legislative Council, 24 June 2015, p 233.

Second reading

Debate on the second reading of an Assembly bill commences when the minister or private member with carriage of the bill moves: 'That this bill be now read a second time' (SO 140(1)(a)).[126] When standing orders have been suspended, the motion may be moved immediately following the motion for the first reading and printing of the bill. Alternatively, the motion may be set down as an order of the day for a later hour that sitting day, or for the next sitting day.

The second reading of an Assembly bill differs from the second reading of a Council bill in that there is no requirement for debate on the bill to be adjourned for five calendar days after the mover's second reading speech. The principle behind this is that the bill, having already been circulated and considered in the Assembly, has already been in the public domain for some time, allowing members to familiarise themselves with the contents of the bill and consider their response. In reality of course, this is not always the case where the passage of the bill through the Assembly has been expedited.

Unlike Council bills, where there is an expectation that the responsible minister will take the bill through its second reading, it is routine for parliamentary secretaries to take Assembly bills through the House.

In other respects, the second reading debate on an Assembly bill proceeds in the same fashion as the second reading debate on a Council bill. It is again the stage at which the general principles of the bill are considered. As with Council bills, if an Assembly bill is to be rejected by the House, it is usually rejected on the motion for the second reading. The same time limits apply to individual speakers.[127] 'This day six months' amendments (SO 140(2)(a)), reasoned amendments, and amendments to refer the bill to a committee (SO 140(2)(b)) may be moved.[128] Dilatory or superseding motion may also be moved.[129]

The second reading debate on an Assembly bill is concluded when the minister or private member with carriage of the bill speaks in reply (SO 90(1) and (2)). The President subsequently puts the question on any amendments and then if applicable the question: 'That this bill be now read a second time.' If the House agrees to the question that the bill be now read a second time, the Clerk reads the short title, and indicates that the bill has been read a second time.

---

126 The minister or member with carriage also has the option of moving that the bill be discharged, which, if carried, removes the bill from the *Notice Paper* and any further consideration by the House (SO 140(1)(b)). For further information, see the *Annotated Standing Orders of the New South Wales Legislative Council*, (n 28), p 455. In such cases, a message is sent to the Assembly informing it of the action taken by the Council. For an example, see *Minutes*, NSW Legislative Council, 1 June 1999, p 114.

127 These time limits are listed in Appendix 11 (Time limits on debates and speeches in the Legislative Council).

128 For further information, see the discussion later in this chapter under the heading 'Amendments to the second or third reading of a bill'.

129 For further information, see the discussion later in this chapter under the heading 'Dilatory motions to the second or third reading of a bill'.

Although it happens rarely, on the House negativing an Assembly bill at the second reading stage, a message is not sent to the Assembly informing that House.[130] An Assembly bill which has been negatived at the second reading stage may be restored.[131]

As with Council bills, following the second reading of an Assembly bill, a motion may be moved without notice to refer the bill to a standing or select committee, or for an instruction to a Committee of the whole House in relation to its consideration of the bill (SO 141, as amended by sessional order).[132]

Attendance of a minister from the Legislative Assembly

Under section 38A of the *Constitution Act 1902* and standing order 163(1), any minister who is a member of the Legislative Assembly may, at any time, on motion agreed to by the Council, sit in the Council for the purpose of explaining the provisions of any bill relating to or connected with any department administered by that minister. Such a motion may be moved at any time without notice after a bill has been read a first time (SO 163(2)). The question must be decided without amendment or debate, except for a statement not exceeding 10 minutes by the mover in support of the motion (SO 163(3)). Whilst the Assembly minister may take part in debate or discussions, he or she may not vote (SO 163(4)), and the minister may only participate in the second reading of the bill and proceedings in committee, unless otherwise ordered (SO 163(5)). Only one minister who is a member of the Assembly may sit in the Council at any one time (SO 164(6)).

Although section 38A of the *Constitution Act 1902* and standing order 163(1) are not specific in their application to Assembly bills, in practice a motion under standing order 163(1) is far more likely to be moved in relation to an Assembly bill where the minister with primary responsibility for and knowledge of the bill sits in the Assembly.

The attendance of a minister from the Assembly has occurred on only one occasion: in 1990, on motion of the Hon Elisabeth Kirkby, the Minister for Industrial Relations and Employment, the Hon John Fahey, sat in the Council during debate in committee on the Industrial Relations Bill 1990 and cognate bills.[133]

---

130 On 20 November 1997, the House negatived the Drug Misuse and Trafficking Amendment Bill 1997, with no message sent to the Assembly. See *Minutes*, NSW Legislative Council, 20 November 1992, p 215. On 9 September 2009, the House negatived the Education Further Amendment (Publication of School Results) Bill 2009, again with no message sent to the Assembly. See *Minutes*, NSW Legislative Council, 9 September 2009, pp 1357-1358. An Assembly bill negatived at the second reading stage is listed at the back of the *Notice Paper* for the remainder of the session.

131 For further information, see the discussion later in this chapter under the heading 'Restoration of bills negatived at the second or third reading'.

132 For further information, see the *Annotated Standing Orders of the New South Wales Legislative Council*, (n 28), p 467.

133 *Minutes*, NSW Legislative Council, 4 June 1990, pp 275-276. The committee proceedings lasted over 10 days from 23 August to 10 October 1990, during which time the committee agreed to 484 amendments to the bill. For further information, including details on the procedures adopted for questioning the minister, see the *Annotated Standing Orders of the New South Wales Legislative Council*, (n 28), pp 535-539.

On a previous occasion in 1987, the Hon Ted Pickering moved in committee that the Minister for Education sit in the Council for the purposes of explaining the Education and Public Instruction Bill 1987. However, the motion was ruled out of order because another motion was already before the House.[134]

Consideration in committee or leave to proceed to the third reading forthwith

The arrangements that apply to the consideration of a Council bill in a Committee of the whole House, or alternatively for proceeding by leave to the third reading of the bill forthwith,[135] also apply to Assembly bills.

The consideration of amendments in committee, together with instructions to a committee and the recommital of a bill to a committee, is discussed in more detail in Chapter 16 (Committee of the whole House).

Third reading

Following its second reading and, if necessary, consideration in committee, an Assembly bill may be read a third time.

When leave has been granted to proceed to the third reading of the bill forthwith after its second reading (SO 141(1)(a)), or when the bill has been considered in committee but not amended, the member with carriage usually moves the third reading of the bill immediately. By contrast with Council bills, the concurrence of the House is not required when standing orders have been previously suspended in order to allow the bill to proceed through all remaining stages during any one sitting of the House. Concurrence is also not required where the bill was previously declared urgent under the sessional order dealing with cut-off dates for government bills. Alternatively, on adoption of the report of the committee, a future day may be fixed, without notice or debate, for the third reading of the bill (SO 148(1)), in which case it is automatically listed as formal business the next day (SO 44, as amended by sessional order).

In circumstances where amendments to an Assembly bill have been made in committee, the amendments are captured in a schedule of amendments (SO 155). By contrast with Council bills, a second print of the bill is not prepared and the bill can proceed to the third reading immediately, assuming standing orders have been suspended to allow that to happen or that the bill has been declared urgent under the cut-off arrangements. Alternatively, a future day may once again be fixed, without notice or debate, for the third reading of the bill (SO 148(1)).

In all other ways, debate on the third reading of an Assembly bill is the same as on a Council bill.

134 *Hansard*, NSW Legislative Council, 14 May 1987, pp 12122-12124.

135 That is to say, without proceeding to consider the bill in a Committee of the whole House.

If the House agrees to the question that the bill be now read a third time, the Clerk reads the short title, and indicates that the bill has been read a third time. The bill is then deemed to have passed the House (SO 151(2)).

Return of an Assembly bill to the Assembly

Where the Council agrees to the third reading of an Assembly bill, the Clerk signs and dates a certificate on the long title page of the bill which states: 'The Legislative Council has this day agreed to this Bill with/without[136] amendment' (SO 155(1)).[137]

The bill, along with a message signed by the President or occupant of the Chair at the time that the bill was read a third time, is then returned to the Legislative Assembly. If the bill was amended in committee, the message requests the concurrence of the Assembly in the amendments, which are included in a schedule of amendments, signed by the Chair of Committees and certified by the Clerk (SO 155(2)).[138] This contrasts with a Council bill, where a 'second print' of the bill is prepared incorporating the amendments in the body of the bill. The schedule of amendments includes reference to the page, clause and line of the bill and the theme or subject of the amendments proposed (SO 155(2)).[139] The bill, accompanying message and, if necessary, schedule of amendments is delivered to a clerk in the Assembly by the Usher of the Black Rod or another officer of the Legislative Council.[140]

If the bill was not amended by the Council, the bill is taken to have passed both Houses, and is subsequently printed and presented by the Clerk of the Legislative Assembly on behalf of the Speaker to the Governor for assent.

Alternatively, if the Council suggests amendments to the bill, and the Assembly subsequently agrees to those amendments, the Assembly informs the Council by message signed by the Speaker. The message states: 'The Legislative Assembly has this day agreed to the amendments made by the Legislative Council in the Bill with the long title [insert long title].' Once again, the bill is taken to have passed both Houses and is subsequently presented by the Clerk of the Legislative Assembly on behalf of the Speaker to the Governor for assent.

136 The Clerk strikes out the relevant words.

137 The form of this certificate is an abbreviation of the wording of standing order 155(1), which provides in full: 'When a bill has been passed by the Council with or without amendment, it will be returned to the Assembly by message, with the Clerk's certificate that the bill has been agreed to by the Council without amendment, or with the amendments indicated by the accompanying schedule, as the case may require, requesting the concurrence of the Assembly to the amendments.'

138 Although standing order 155 only requires the Clerk to certify the schedule of amendments, it has been the practice for the Chair to also signify that the amendments have been examined.

139 Since 2014, the schedule has also included reference to the original sheet of amendments prepared by the Parliamentary Counsel's Office.

140 For further information, see the *Annotated Standing Orders of the New South Wales Legislative Council*, (n 28), pp 508-509.

The majority of government bills initiated in the Assembly and forwarded to the Council for concurrence are dealt with in one of these two ways.

The Assembly returns an Assembly bill disagreeing with Council amendments

If the Council makes amendments to an Assembly bill and returns the bill to the Assembly with a schedule of amendments, the Assembly may again forward the bill to the Council with a message disagreeing to some or all of the Council amendments, proposing amendments to the Council amendments or proposing new amendments (SO 156(1)).[141] New amendments must relate to the matters of disagreement between the Houses and not to other substantive portions of the bill previously agreed to.

On reporting of the message by the President, a motion may be moved without notice that the message and amendments be considered in a Committee of the whole House, either immediately or on a future day. The motion may be debated and amended.[142] Alternatively, the House may order that the message and any amendments be considered 'this day six months', which disposes of the bill (SO 156(1)).

Assuming the bill is not disposed of, on the House resolving into committee to consider the Legislative Assembly's message, in the case of a government bill, a minister usually moves that the House 'not insist' on its amendments disagreed to by the Assembly, or agree to the new or further amendments proposed by the Assembly, as the case may be. Other members may move amendments to the motion, for example to insist on the Council's original amendments, to insist on some of the Council's original amendments and not others, to accept or not accept the Assembly amendments on the Council's amendments, or to adopt new amendments as an alternative to the Council's original amendments rejected by the Assembly.

Standing order 158 allows for consideration of only those portions of the bill on which there is disagreement. The remaining portions of the bill, having been already agreed to by both Houses, are not open to further amendment. This rule ensures that, when an Assembly bill is again forwarded to the Council, further consideration is confined to the matters of disagreement between the Houses. However, there have been instances where consequential amendments have been proposed in a part of a bill already agreed to.[143] In special circumstances, further amendments have also been proposed to a part of a bill already agreed to in order to resolve a disagreement, in which case the Houses have acknowledged that the action should not be considered a precedent.[144]

---

141 For examples, see the *Annotated Standing Orders of the New South Wales Legislative Council*, (n 28), p 511.

142 In 1993, the motion of the Leader of the Government in the Legislative Council that consideration of the Assembly's amendments to the Legal Profession Reform Bill 1993 be taken into consideration in committee at a later hour of the sitting was amended to set down consideration in committee forthwith. See *Minutes*, NSW Legislative Council, 19-20 November 1993, pp 444-445.

143 See, for example, the Workers' Compensation (Silicosis) Bill 1942, *Minutes*, NSW Legislative Council, 10 June 1942, p 211; 11 June 1942, p 216.

144 See, for example, the Jury (Amendment) Bill 1947, *Minutes*, NSW Legislative Council, 11 December 1947, pp 78-79; and the Timber Industry (Interim Protection) Bill 1992, *Minutes*, NSW Legislative Council, 11 March 1992, pp 54-58.

Following consideration of the Assembly's message in committee, the proceedings are reported to the House and the report adopted by the House (SO 146(3)). The report of the committee can be recommitted (SOs 146(2) and 147).[145]

Where the Council chooses not to insist on its original amendments (SO 156(2)(c)),[146] or agrees to the Assembly amendments to its original amendments (including with any consequential amendments) without further amendment (SO 156(2)(f)),[147] the Council again returns the bill to the Assembly with a message informing it accordingly. The bill is henceforth taken to have passed both Houses in the same terms, and is presented by the Clerk of the Legislative Assembly on behalf of the Speaker to the Governor for assent.

Alternatively, in circumstances where the Assembly disagrees to the Council's original amendments, the Council may:

- insist on its original amendments (SO 156(2)(c));[148]
- propose further amendments to the bill consequent on the rejection of its original amendments (SO 156(2)(d));
- not insist on its original amendments, but propose alternative amendments instead (SO 156(2)(e));[149]
- lay the bill aside (SO 156(2)(h));

or in circumstances where the Assembly agrees to the Council's original amendments, but with further amendments, or proposes alternative amendments, the Council may:

- agree to the Assembly's further amendments, but with its own further amendment to those amendments,[150] making consequential amendments to the bill if necessary (SO 156(2)(f));

145 For an example in 1989, see the *Annotated Standing Orders of the New South Wales Legislative Council*, (n 28), p 411.

146 See, for example, the Swimming Pools Bill 1992, *Minutes*, NSW Legislative Council, 30 June 1992, pp 207-208; the Local Government Amendment (Enforcement of Parking and Related Offences) Bill 2002, *Minutes*, NSW Legislative Council, 13 June 2002, p 226; and the Work Health and Safety Bill 2013, *Minutes*, NSW Legislative Council, 26 November 2013, p 2264.

147 See, for example, the Workers' Compensation (Silicosis) Bill 1942, *Minutes*, NSW Legislative Council, 11 to 16 June 1942, p 216; and the Independent Commission Against Corruption (Amendment) Bill 1994, *Minutes*, NSW Legislative Council, 5 December 1994, p 481.

148 See, for example, the Industrial Arbitration (Voluntary Unionism) Amendment Bill (No 2) 1991, *Minutes*, NSW Legislative Council, 10 April 1991, p 121; and the Crimes Amendment (Intoxication) Bill 2014, *Minutes*, NSW Legislative Council, 26 March 2014, p 2423.

149 See, for example, the Grain Handling Authority (Corporatisation) Bill 1989, *Minutes*, NSW Legislative Council, 21 September 1989, pp 919-922; and the Public Finance and Audit (Auditor-General) Bill 2001, *Minutes*, NSW Legislative Council, 13 November 2001, pp 1258-1259.

150 See, for example, the Constitution (Further Amendment) Bill 1929, *Minutes*, NSW Legislative Council, 3 December 1929, pp 113-115.

- disagree to the Assembly's further amendments and insist on its original amendments (SO 156(2)(g));[151]
- lay the bill aside (SO 156(2)(h)).

The Council may also adopt a combination of the above options, such as insisting on some amendments, not insisting on others, proposing alternative amendments and agreeing or disagreeing to further Assembly amendments. For example, following consideration of the Education Reform Bill 1990 on 24 May 1990, the Council sent a message to the Assembly insisting on certain amendments, not insisting on others but in some cases proposing alternative amendments as a consequence, proposing further amendments, and agreeing to certain Assembly amendments.[152]

Standing order 157(3) requires that in the specific circumstance where the Council agrees to Assembly amendments to its original amendments, but with its own further amendments to those amendments (SO 156(2)(f)), a schedule of the further amendments is to be prepared, which is certified by the Clerk, and accompanies the message again returning the bill to the Assembly.

Standing order 157(1) and (2) also requires that in the specific circumstance where the Council disagrees to amendments made by the Assembly to its original amendments (SO 156(2)(g)), the message returning the bill to the Assembly must contain reasons. The reasons may be adopted by motion at that time, or by a committee appointed, on motion without notice, to draw up the reasons (SO 157(2)).

The motion to appoint a committee to draw up reasons is usually moved by the member with carriage of the bill. The number of members to serve on and the procedures of the committee are governed by standing order 207. The committee is usually comprised of between 5 and 10 members, generally members who supported the original amendments of the Council.[153] The clerk to the Committee of the whole House acts as clerk to the committee and usually writes the report of the committee. The reasons for disagreement can usually be gleaned from the debates on the bill.

For many years, the Council adopted a practice, contrary to the standing orders, of also appointing a committee to draw up reasons on those occasions when it insisted on its original amendments to an Assembly bill (SO 156(2)(c)). There are many examples of this, the last during consideration of the Police Regulation (Reinstatement) Bill 1988.[154] However, as indicated, standing order 157[155] only requires a committee to be

151 See, for example, the State Planning Authority Bill 1963, *Minutes*, NSW Legislative Council, 5 December 1963, pp 352, 353-354.

152 *Minutes*, NSW Legislative Council, 23 and 24 May 1990 am, pp 236-242. For a record of all such options and variations upon them that have been adopted by the Council, see the *Annotated Standing Orders of the New South Wales Legislative Council*, (n 28), pp 512-515.

153 For further information on the reasons this procedure was adopted, see the *Annotated Standing Orders of the New South Wales Legislative Council*, (n 28), pp 517-518.

154 *Minutes*, NSW Legislative Council, 11 October 1988, p 130.

155 Former standing order 207 was in the same terms.

appointed to draw up reasons in the specific circumstance where the Council disagrees to amendments made by the Assembly to the Council's original amendments, provided that the alternative of immediately adopting the reasons by motion at that time is not taken.

There is no limit to the number of occasions an Assembly bill can be returned to the Assembly seeking the concurrence of that House in the actions of the Council. The *Annotated Standing Orders of the New South Wales Legislative Council* record an instance in 1976 and 1977 when the Dairy Industry Authority (Amendment) Bill passed between the Houses six times before the Assembly ultimately resolved 'not [to] further insist upon its disagreements from the Council's amendments still further insisted upon by the Council in the Bill'.[156]

In 2011, in a highly unusual instance, on the Assembly returning the Graffiti Legislation Amendment Bill 2011 to the Council with a message disagreeing to the amendments made by the Council in the bill,[157] the Council chose not to follow the provisions of standing orders 156 and 157, set out above for the resolution of disagreements between the Houses on Assembly bills, instead proposing a free conference on the bill.[158] This is the only time that the Council has proposed a free conference in respect of a bill. The proposal did not activate the provisions of section 5B of the *Constitution Act 1902* for resolving deadlocks between the Houses which require the holding of a free conference at the instigation of the Assembly.[159] Nevertheless, there was nothing to prevent the Council from requesting the free conference, in accordance with standing order 128 (Requests for conferences). In the event, on 21 August 2012, almost a year later, the Assembly rejected the Council's request for a free conference.[160] The matter was finally resolved when the Council chose not to insist on its original amendments and instead proposed further amendments,[161] to which the Assembly subsequently agreed.[162]

AMENDMENTS TO THE SECOND OR THIRD READING OF A BILL

Three different amendments may be moved to question on the second or third reading of a bill:[163] a 'this day six months' amendment, a reasoned amendment or an amendment to refer the bill to a standing or select committee. They may be moved at any point

156 For further information, see the *Annotated Standing Orders of the New South Wales Legislative Council*, (n 28), p 511.

157 *Minutes*, NSW Legislative Council, 26 August 2011, pp 387-388.

158 *Minutes*, NSW Legislative Council, 13 September 2011, pp 426-427.

159 For further information, see the discussion in Chapter 22 (Relations with the Legislative Assembly) under the heading 'Conferences between the Houses'. See also Twomey, (n 1), pp 257-258.

160 *Minutes*, NSW Legislative Council, 21 August 2012, p 1144.

161 Ibid, pp 1148-1149.

162 *Minutes*, NSW Legislative Council, 22 August 2012, p 1156.

163 There are also records of 'this day six months' amendments and reasoned amendments being moved to the first reading of a bill, mainly in the initial years after responsible government in 1856. For further information, see the *Annotated Standing Orders of the New South Wales Legislative Council*, (n 28), p 438.

during debate on the second or third reading of a bill by any member with the call, although the question on the amendment is not put to the House by the President or other occupant of the Chair until the conclusion of the debate.

'This day six months' amendments

Standing orders 140(2)(a) and 148(3)(a) provide that a 'this day six months' amendment may be moved to the question: 'That this bill be now read a second (or third) time'. The precise form of the amendment to the question is to omit the word 'now' and insert at the end 'this day six months', so that the question becomes: 'That this bill be read a second (or third) time this day six months'. A bill which has been ordered to be read 'this day six months' may not be considered again in the same session (SOs 140(3) and 148(3)(a)).

The form of the 'this day six months' amendment is based on practice inherited from the House of Commons. Traditionally, it was not customary to express opposition to a bill by a simple negative of the question that the bill be read a first, second or third time. Rather, the 'this day six months' amendment was adopted as a more courteous form of proceeding, the assumption being that after six months, the session would be over. Even if it were not, the assumption was acted upon, and the bill was deemed to have been rejected.[164]

'This day six months' amendments were a common feature of the work of the Council between the advent of responsible government in 1856 and the 1980s. However, the moving of 'this day six months' amendments, and even more so their adoption, has become infrequent in recent years. A 'this day six months' amendment was moved and negatived in 2019[165] and twice in 2016.[166] However, prior to that, it was previously moved in 2005,[167] and last agreed to by the House in March 1994.[168] In modern times, it is more common for the House to simply negative the question that a bill be now read a second time, particularly the question on a private member's bill, which, as discussed earlier, is usually taken to be a rejection of the bill. Alternatively, when governments bills face likely defeat at the second reading stage, the government often does not proceed with the bill rather than be defeated on the floor of the House. Accordingly, 'this day six

164 In earlier days in the House of Commons, more vigorous forms of rejection of a bill were adopted, including motions that a bill be torn up or tossed over the table. See J Redlich, *The Procedures of the House of Commons – A Study of its History and Present Form*, vol III, (Archibald Constable & Co Ltd, 1903), p 89.

165 *Minutes*, NSW Legislative Council, 21 August 2019, pp 370-371.

166 *Minutes*, NSW Legislative Council, 10 August 2016, pp 1035-1036; 16 November 2016, pp 1339, 1340-1341.

167 *Minutes*, NSW Legislative Council, 30 November 2005, pp 1797-1798.

168 *Minutes*, NSW Legislative Council, 8 March 1994, p 51. The bill in question was the Sydney Heliport Bill 1994. Separately, a 'this day twelve months' amendment, which was deemed to have the same effect as a 'this day six months' amendment, was moved successfully in May 1994. See *Minutes*, NSW Legislative Council, 12 May 1994, p 202. The bill in question was the Homefund Legislation (Amendment) Bill 1994.

months' amendments are more likely to be moved by parties opposed to a bill, but without the numbers to defeat it, as a means of registering opposition.

Whilst the standing orders in force since 2004 make it clear that a 'this day six months' amendment, if carried, finally disposes of a bill, the *Annotated Standing Orders of the New South Wales Legislative Council* record a curious precedent to the contrary in 1876 when a bill, having been disposed of through the adoption of a 'this day six month' amendment, was restored to the *Notice Paper*. In the event, the bill was once again disposed of through a second 'this day six months' amendment.[169]

Reasoned amendments

Although not provided for in the standing orders, a member may move a 'reasoned amendment' to the question: 'That this bill be now read a second time'. A reasoned amendment may also be moved to the question for the third reading of a bill, although this is very unusual.[170]

A reasoned amendment in the Legislative Council is usually used to record the House's opposition to the second (or third) reading of a bill by deleting all words after 'That' and inserting instead: 'this House declines to give a second (or third) reading to this bill because … [giving reasons]'.[171] In an unusual precedent in January 1978, the House agreed to a reasoned amendment to the question on the second reading of the Constitution and Parliamentary Electorates and Elections (Amendment) Bill 1978 to reject the bill and return it to the Assembly, with reasons.[172]

Alternatively, a reasoned amendment may propose that the second reading of a bill be delayed pending further action. For example, on 2 December 1998, the House agreed to a reasoned amendment moved by Mr Ian Cohen to the second reading of the Sydney Water Catchment Management Bill 1998 to refer the bill to Mr Peter McClellan QC for consideration, with the second reading to be taken the next day, or after the receipt of Mr McClellan's report, whichever occurred later.[173] There are also examples where the consideration of the second reading of a bill has been postponed until after consideration by a committee.[174]

Reasoned amendments have also been used in the House of Representatives to agree to a bill, with qualifications. Examples of words used are 'that whilst not opposing the

169 *Annotated Standing Orders of the New South Wales Legislative Council*, (n 28), p 456.

170 *Minutes*, NSW Legislative Council, 29 and 30 October 1991 am, pp 225-226. See also the *Annotated Standing Orders of the New South Wales Legislative Council*, (n 28), p 488; and *Erskine May*, 25th ed, (n 36), para 28.46.

171 See, for example, *Minutes*, NSW Legislative Council, 26 June 1997, pp 888, 892-893; 5 December 1989, p 1198.

172 *Minutes*, NSW Legislative Council, 11 January 1978, pp 740-743. The bill was ultimately the subject of a free conference between the Houses before being agreed to by the people at a referendum held pursuant to section 7A of the *Constitution Act 1902*.

173 *Minutes*, NSW Legislative Council, 2 December 1998, pp 1001-1002.

174 See, for example, *Minutes*, NSW Legislative Council, 28 June 2001, pp 1073-1074; 16 September 1915, pp 83-84.

provisions of the bill, the House is of the opinion that …' and 'that whilst not declining to give the bill a second reading, the House is of the opinion that …'.[175]

A 'reasoned amendment' must be relevant to the bill, and should not be a direct negative of the principle of the bill.[176]

Procedurally, the adoption of a reasoned amendment declining to give a bill a second reading is not an absolute rejection of the bill as the bill may be restored to the *Notice Paper*.[177] However, in modern practice, as with the rejection of the question that a bill be 'now' read a second time, adoption of a reasoned amendment that the House declines to give a bill a second (or third) reading may be taken as fatal to the bill.

Amendments to refer a bill to a standing or select committee

The House now routinely refers bills to committees for inquiry and report on the recommendation of the Selection of Bills Committee or on motion moved on contingent notice. This is discussed in detail below.[178] However, the standing orders still retain the traditional method for the reference of bills to committee during the legislative process.

Standing order 140(2)(b) provides that an amendment may be moved to the question that a bill be now read a second time to refer the bill to a standing or select committee. Amendments to refer a bill to a standing or select committee have also been moved to the question for the third reading of a bill.[179] The amendment typically takes the form of omitting all words after 'That' and inserting instead 'the bill be referred to [insert committee] for inquiry and report'. The House may specify matters which it wishes to have considered by the committee[180] and also a reporting date. When the committee reports on the bill, a future day may be fixed for the second reading of the bill, which is then restored to the *Notice Paper*, and the second reading moved again (SO 140(4)).[181] The

175 DR Elder and PE Fowler (eds), *House of Representatives Practice*, 7th ed, (Department of the House of Representatives, 2018), p 368. See also *Votes and Proceedings*, House of Representatives, 3 May 1989, p 1151.

176 *Erskine May*, 25th ed, (n 36), para 28.46; *House of Representatives Practice*, 7th ed, (n 175), p 366.

177 See the *Annotated Standing Orders of the New South Wales Legislative Council*, (n 28), pp 458-459 for the example of the Workers Compensation Legislation Amendment Bill (No 2) 2001, which was restored to the *Notice Paper* on 28 June 2001. See also R Laing (ed), *Odgers' Australian Senate Practice*, as revised by H Evans, 14th ed, (Department of the Senate, 2016), p 313. This contrasts with the situation in the UK House of Commons, where the adoption of a reasoned amendment is considered fatal to the bill. See *Erskine May*, 25th ed, (n 36), para 28.47.

178 See the discussion under the heading 'Procedures for regular referral of bills to committees'.

179 See, for example, *Minutes*, NSW Legislative Council, 24 October 1995, pp 255-256; 16 March 2016, pp 754-755. The standing orders are silent as to the implications of such a referral at the third reading stage. Should it occur, it seems likely that the procedures in relation to the referral of a bill at the second reading stage would be followed.

180 See, for example, *Minutes*, NSW Legislative Council, 7 March 1961, pp 148-149.

181 This is unlike the situation in the Senate, where Senate standing order 115(3) provides that a bill returned from a standing committee may be proceeded with at once if a reporting date has been

implication of standing order 140(4) is that, on referral of a bill to a standing or select committee, progress on the bill in the House is halted.[182]

Between 1856 and the mid-1900s, committal of a bill to a select committee during the legislative process was a routine feature of the work of the Council.[183] However, the practice subsequently fell into disuse, such that in modern times there are very few examples of the House referring a bill to committee for inquiry and report at the second reading stage, the committee subsequently reporting, and the bill thereafter proceeding through all remaining stages informed by the report of the committee. This is the case with both government bills[184] and private members' bills.[185] There are also certain limited examples of the House referring the 'provisions' of a bill to committee for inquiry and report at the second or third reading stage, whilst the bill itself nevertheless proceeded through its remaining stages.[186]

For many years, governments of all political persuasions generally did not support referral of their bills to a committee where it entailed possible delay of the legislative process, and there are many examples where the government successfully voted against referral of its bills to a committee at the second reading stage.[187]

However, whilst referral of bills to a committee during the legislative process via the traditional method of an amendment to the question that a bill be now read a second

---

fixed for the committee, or if there is no fixed reporting day, on the sitting day after the report is presented. See *Odgers*, 14th ed, (n 177), p 317.

182 The Council does not have the equivalent of Senate standing order 115(3), which provides that when a bill is referred to a committee at any stage, the bill may not be considered further until the committee has reported.

183 For further information, see the *Annotated Standing Orders of the New South Wales Legislative Council*, (n 28), pp 462-463.

184 In one example, on 7 May 1992, the House referred the Financial Institutions (New South Wales) Bill 1992 and a cognate bill to a select committee for inquiry and report. See *Minutes*, NSW Legislative Council, 7 May 1992, pp 188-191. On the committee reporting on 30 June 1992, the bill proceeded through all remaining stages and was returned to the Assembly without amendment. See *Minutes*, NSW Legislative Council, 30 June 1992, pp 202, 205; *Hansard*, NSW Legislative Council, 30 June 1992, pp 4649-4651.

185 In one example, on 11 November 2011, the House referred the Education Amendment (Ethics Classes Repeal) Bill 2011, a private member's bill, to General Purpose Standing Committee No 2 for inquiry and report. See *Minutes*, NSW Legislative Council, 11 November 2011, pp 585-586. The committee reported on 30 May 2012. See *Minutes*, NSW Legislative Council, 30 May 2012, p 1016. However, the second reading of the bill was never restored to the *Notice Paper*.

186 See, for example, the Home Building Amendment (Insurance) Bill 2002, the provisions of which were referred to the Standing Committee on Law and Justice at the third reading stage, *Minutes*, NSW Legislative Council, 9 May 2002, pp 164-166; and the Criminal Procedure Amendment (Pre-Trial Disclosure) Bill 2000, the provisions of which were referred to the Standing Committee on Law and Justice at the third reading stage, *Minutes*, NSW Legislative Council, 7 December 2000, pp 824-825.

187 See, for example, the Irrigation Corporations Bill 1994, *Minutes*, NSW Legislative Council, 13 May 1994, pp 210-212; and the Residential Tenancies and Housing Legislation Amendment (Public Housing – Antisocial Behaviour) Bill 2015, *Minutes*, NSW Legislative Council, 14 October 2015, pp 450-451.

(or third) time has not been a significant feature of the work of the Council for many years, in recent times the House has adopted new arrangements for the regular referral of bills to committees, as discussed below.

PROCEDURES FOR REGULAR REFERRAL OF BILLS TO COMMITTEES

Referral of bills on the recommendation of the Selection of Bills Committee

The resolution of the House for the appointment of the Selection of Bills Committee[188] provides a procedure for the House to refer any bill, other than an appropriation bill 'for the ordinary annual services of the Government' within the meaning of section 5A of the *Constitution Act 1902*, to a standing committee for inquiry and report. Under the resolution, on the Chair of the Selection of Bills Committee tabling a report of the committee recommending referral of a bill or bills to a committee for inquiry and report, the Chair moves a motion in accordance with that recommendation, specifying the committee to which the bill is referred, the stage in consideration of the bill at which it or its provisions[189] is to be referred and the reporting date of the committee. The motion may be debated and amended. A member is entitled to speak for not more than five minutes on the motion. If the debate is not concluded sooner, at the expiration of 30 minutes, the President is to interrupt proceedings to allow the mover of the motion to speak in reply for not more than five minutes. The President then puts every question necessary to dispose of the motion.[190]

Reports of the Selection of Bills Committee are routinely tabled and a motion adopted by the House implementing the recommendations of the committee at the commencement of each sitting week during formalities on Tuesdays.

The Selection of Bills Committee tends to recommend the referral of government bills to a committee for inquiry and report, although there are examples of private members' bills also being referred to a committee for inquiry and report.[191] On one occasion, a private member expressed disappointment that his bill was not referred for inquiry and report through this process. In response, members of the committee indicated that the process is to be used in respect of bills that have a reasonable chance of passing into law.[192]

---

188 *Minutes*, NSW Legislative Council, 8 May 2019, pp 97-100.

189 Referral of bills may take place at any stage. In the case of an Assembly bill still in the Legislative Assembly, the 'provisions' of such a bill, rather than the bill itself, are referred for inquiry and report.

190 The adoption of the Selection of Bills Committee and this procedure for the regular referral of bills to committee was in response to the report of the Select Committee on the Legislative Council Committee System, tabled on 28 November 2016, which cited 'broad consensus that Legislative Council committees should play a greater role in the *substantive* review of bills than is currently the case'. See Select Committee on the Legislative Council Committee System, *The Legislative Council committee system*, November 2016, p 1. The committee was trialled during 2018, before being re-appointed on 8 May 2019 for the duration of the 57th Parliament.

191 *Minutes, NSW Legislative Council, 6 August 2019, p 292; 16 June 2020, pp* 1035-1036 (proof).

192 *Hansard*, NSW Legislative Council, 4 June 2019, pp 2-4.

A bill referred to a committee under these procedures may not be further considered by the House until the committee has reported.

A common scenario under these new arrangements is for the House to refer the 'provisions' of an Assembly bill to a committee in advance of the bill itself being received by the House from the Assembly. If the provisions of the bill are still being considered by the committee when the bill itself is received from the Assembly, the President simply reports receipt of the message and indicates that the bill stands referred to the relevant committee. No further procedural motions are moved. It is only on receipt of the report of the committee that consideration of the bill by the House proceeds.

Referral of bills on contingent notice

Since the commencement of the 57th Parliament in May 2019, a procedure has been adopted by private members in the House for the referral of public bills standing in their name to a committee for inquiry and report. Under this procedure, members have given contingent notice that following their second reading speech, upon the second reading debate being adjourned for five calendar days in the usual way, they will move that the bill be referred to an appropriate committee for inquiry and report. Subsequently, at the requisite time, the member moves the motion, and if agreed by the House, the bill stands referred to the relevant committee.[193]

Dilatory motions to the second or third reading of a bill

Various dilatory motions – both superseding motions and the 'previous question' – may be moved to the question on the second or third reading of a bill to avoid the question being put.

Superseding motions

At any time during debate on the second or third reading of a bill, a member with the call may move without notice: 'That the debate be now adjourned' (SO 105), 'That further consideration of the bill be now adjourned',[194] or 'That the House do now adjourn'.[195]

193 For examples, see the Crimes (Appeal and Review) Amendment (Double Jeopardy) Bill 2019, *Minutes*, NSW Legislative Council, 30 May 2019, p 152; the Mining Amendment (Compensation for Cancellation of Exploration Licence) Bill 2019, *Minutes*, NSW Legislative Council, 6 June 2019, p 197; and the Uranium Mining and Nuclear Facilities (Prohibitions) Repeal Bill 2019, *Minutes*, NSW Legislative Council, 6 June 2019, pp 201-202.

194 The motion 'That further consideration of the bill be now adjourned' is taken from practice in the UK House of Commons. For further information, see the *Annotated Standing Orders of the New South Wales Legislative Council*, (n 28), p 343.

195 For further information, see the *Annotated Standing Orders of the New South Wales Legislative Council*, (n 28), p 343.

These motions supersede the question that a bill be now read a second or third time because they do not specify a time at which debate should resume, for example a later hour or the next sitting day.

Superseding motions are put to the House immediately they are moved, rather than being held over until the conclusion of the debate. If the question is agreed to, the original question (that is, that the bill be now read a second or third time) and any amendments to the question are disposed of, and the House proceeds immediately to the next item of business.[196] If a superseding motion is negatived, debate on the original question continues.[197]

The motion 'That the House do now adjourn' may be moved by a minister at any time (SO 31(2)), but not when the House is in committee.[198]

On 25 February 2010, a motion 'That the debate be now adjourned' was moved following the second reading speech of the Revd the Hon Fred Nile on the State Senate Bill 2010. The President ruled that a motion to supersede a question must be moved in a manner that makes it clear to the House the intention of the member moving the motion. In the event, the President ruled the motion out of order, as standing order 137(3) required that debate be adjourned for five calendar days.[199]

Superseding motions are discussed further in Chapter 12 (Motions and decisions of the House).[200]

The previous question

At any time during debate on the second or third reading of a bill, but not in committee (SO 107(2)), a member with the call may move without notice: 'That the question be *not* now put' (SOs 140(2)(c), 148(3)(b) and 107). This motion is called the previous question. The question may not be amended (SO 107(3)) but may be debated. In debating the previous question, the original question and any amendments may also be debated (SO 107(4)).

The effect of the previous question motion is to guillotine debate. If the previous question is agreed to, the original question (that is, that the bill be now read a second or third time), and any amendments to the question, are disposed of immediately, and

196 For example, on 6 August 1902, the House agreed to the motion that the House do now adjourn during debate on the Women's Franchise Bill 1902, effectively disposing of the bill. See *Minutes*, NSW Legislative Council, 6 August 1902, p 88.

197 For example, on 18 November 1993 am, a motion that debate on the Anti-Discrimination (Homosexual Vilification) Amendment Bill 1993 be now adjourned was negatived, and debate continued. See *Minutes*, NSW Legislative Council, 17 and 18 November 1993, p 411.

198 For further information, see the *Annotated Standing Orders of the New South Wales Legislative Council*, (n 28), p 344.

199 Ruling: Fazio, *Hansard*, NSW Legislative Council, 25 February 2010, pp 20921-20922; *Minutes*, NSW Legislative Council, 25 February 2010, p 1672.

200 See the discussion under the heading 'Superseding motions'.

the House proceeds immediately to the next item of business (SO 108(1)). If the previous question is negatived, the question that the bill be now read a second or third time and any amendments must be put and resolved immediately by the House without amendment or debate (SO 108(2)).[201]

Perhaps because of its dramatic and immediate effect, the previous question has not been moved on the second or third reading of a bill in the Council since the adoption of the current standing orders as sessional orders in 2003.

The previous question is discussed further in Chapter 12 (Motions and decisions of the House).[202]

COGNATE BILLS

Cognate bills are bills related to each other in subject matter which are presented to the Parliament as a package for simultaneous consideration. An example each year is the Appropriation Bill and the cognate Appropriation (Parliament) Bill.

Where cognate bills originate in the Council, they may be introduced on one motion for leave,[203] and subsequently proceed through all subsequent stages, except for consideration in committee, in a similar manner to a single bill (SO 139(1)). Where cognate bills are received from the Assembly, they are reported to the House by the President together and are so recorded in the *Minutes of Proceedings*. However no other special procedures are observed. They are subsequently read a first time and printed (SO 137(1)) in the usual way. Standing orders may then be suspended for remaining stages, and the bills proceed through all subsequent stages, except for consideration in a committee, in a manner similar to a single bill.

Whilst cognate bills proceed together, any member may request that the questions on either the second[204] or third[205] readings of cognate bills, or the questions on both,[206] be put separately (SO 139(2)).[207] This allows members to debate cognate bills concurrently, whilst still affording them the opportunity to vote differently on each bill or to move

201 The rationale for this is that by disagreeing to the question that the second or third reading be *not* now put, the House has in effect agreed to the question that the second or third reading be *now* put. For further information, see the *Annotated Standing Orders of the New South Wales Legislative Council*, (n 28), pp 347-351, 459-460.

202 See the discussion under the heading 'The previous question'.

203 For further information, see the discussion earlier in this chapter under the heading 'Introduction on motion for leave to bring in a bill and first reading'.

204 See, for example, the Appropriation Bill 2017 and cognate bills, *Minutes*, NSW Legislative Council, 22 June 2017, pp 1796-1797.

205 See, for example, the Parliamentary Electorates and Elections Amendment (Redistributions) Bill 2012 and cognate bill, *Minutes*, NSW Legislative Council, 20 November 2012, p 1393.

206 See, for example, the Workers Compensation Amendment Bill 2015 and cognate bill, *Minutes*, NSW Legislative Council, 12 August 2015, pp 290-292.

207 For further examples, see the *Annotated Standing Orders of the New South Wales Legislative Council*, (n 28), p 449.

amendments to individual bills such as to refer one of the bills to committee for inquiry and report.[208]

Prior to 1977, there was no provision for the simultaneous consideration of cognate bills. For details of the arrangements in place from 1977 until the adoption of the current standing orders in 2004, including an unusual occasion in 1989 when two bills, one a government bill and one a private member's bill, were considered together, see the first edition of *New South Wales Legislative Council Practice*[209] and the *Annotated Standing Orders of the New South Wales Legislative Council*.[210]

TWO OR MORE BILLS RELATING TO THE SAME SUBJECT

As noted in Chapter 12 (Motions and decisions of the House), the same question rule provides that a motion may not be proposed if it is the same in substance as a motion which has already been determined by the House during the same session, unless the order, resolution or vote on such motion was determined more than six months previously or has been rescinded. This rule is intended to prevent the time of the House being wasted on motions which the House has already decided.

The same question rule does not prevent two or more bills relating to the same subject and containing similar provisions being before the House at the same time. For example, from 27 November 2013 until the prorogation of the first session of the 55th Parliament on 8 August 2014, both the Crimes Amendment (Zoe's Law) Bill 2013, a private member's bill initiated in the Council by the Revd the Hon Fred Nile, and the Crimes Amendment (Zoe's Law) Bill (No 2) 2013, a private member's bill initiated in the Assembly and forwarded to the Council for concurrence, were listed on the *Notice Paper* as orders of the day.[211]

The same question rule also does not prevent a bill negatived at the second or third reading stage from being restored to the *Notice Paper* by motion on notice and the second or third reading proposed again. This is because the House previously only voted against the question 'That this bill be *now* read a second/third time'.

However, in circumstances where the House has made a decision on the provisions of a bill, for example to give or decline a bill a second reading, the same question rule may prevent a second bill containing substantially the same provisions from proceeding.[212] The matter arose in 2002 in relation to two bills concerning Callan Park. However, on

208 See, for example, the Appropriation (Budget Variations) Bill 2015 and cognate bills. The Leader of the Opposition moved that the Appropriation (Budget Variations) Bill 2015 be referred to a committee for inquiry and report but not the cognate Appropriation Bill 2015 or Appropriation (Parliament) Bill 2015. See *Minutes*, NSW Legislative Council, 25 June 2015, pp 250-251.

209 *New South Wales Legislative Council Practice*, 1st ed, (n 13), p 346.

210 *Annotated Standing Orders of the New South Wales Legislative Council*, (n 28), pp 451-453.

211 For further information, see the *Annotated Standing Orders of the New South Wales Legislative Council*, (n 28), pp 338-339.

212 *Erskine May*, 25th ed, (n 36), para 28.17.

that occasion, the second reading of the second bill did not proceed, and so the question as to whether the second bill could be properly considered was left undecided.[213]

The same question rule may also prevent a bill with substantially the same provisions as a bill already dealt with by the House from being introduced on a motion for leave.[214] The matter arose in 1934 in relation to two bills concerning the election of the City Council, but on that occasion President Peden gave a ruling that drew various distinctions between the two bills, allowing the introduction of the second bill to proceed.[215]

For an instance in 1989 where two bills, one a government bill and one a private member's bill, to amend the *Coroners Act 1980* were considered together, see the *Annotated Standing Orders of the New South Wales Legislative Council*.[216]

The short title of bills relating to the same subject

Bills dealing with matters in common and bearing an otherwise identical title may be distinguished with qualifying words contained in parenthesis within the short title.

Alternatively, where the short title of a bill would otherwise be the same as the title of another bill which is still before the Parliament, the bill is distinguished by the insertion of '(No 2)', '(No 3)' and so on after the year in the short title. For example, on 4 June 2008, the Electricity Industry Restructuring Bill 2008 was introduced in the Legislative Assembly, but did not proceed any further beyond that point. Meanwhile, a new version of the bill, the Electricity Industry Restructuring Bill 2008 (No 2) was introduced in the Legislative Council on 28 August 2008.[217] Should a second bill proceed beyond the stage at which a first bill of the same name stalled, the '(No 2)' at the end of the title is removed.

Where the short title of a bill would otherwise be the same as the title of a bill already enacted during that year, the bill is distinguished by the insertion of '(No 2)', '(No 3)' and so on before the year in the short title. For example, in each calendar year, there are usually two statute law bills dealing with miscellaneous provisions. Such bills may be distinguished as follows:

- Statute Law (Miscellaneous Provisions) Bill [YEAR], and
- Statute Law (Miscellaneous Provisions) Bill (No 2) [YEAR].

Once again, such an identifying description may be inserted, amended or removed during the progress of the bill through the Parliament.[218]

---

213 For further information, see *New South Wales Legislative Council Practice*, 1st ed, (n 13), pp 382-383.

214 *Erskine May*, 25th ed, (n 36), para 28.17.

215 Ruling: Peden, *Hansard*, NSW Legislative Council, 26 June 1934, p 1249.

216 *Annotated Standing Orders of the New South Wales Legislative Council*, (n 28), pp 450-451.

217 In the event, both versions of the bill were later withdrawn. For another example, see the Liquor Amendment (3 Strikes) Bill 2011 and the Liquor Amendment (3 Strikes) Bill 2011 (No 2), both introduced in the Legislative Assembly. Only the Liquor Amendment (3 Strikes) Bill 2011 (No 2) was progressed and became the *Liquor Amendment (3 Strikes) Act 2011*.

218 For further information, see the *Annotated Standing Orders of the New South Wales Legislative Council*, (n 28), p 493.

THE YEAR OF A BILL

The short title of a bill includes the year of the bill. When a bill is introduced in one calendar year, but its passage through the Houses extends into the following calendar year, the practice is to refrain from amending the year in the short title when the bill is transmitted by message between the Houses. The only exception to this practice is when a second print of a bill is prepared in the originating House, in which case the opportunity is taken to update the year. Otherwise, the year in the short title of the bill is only updated by the relevant Clerk when the bill is forwarded to the Governor for assent. In the Council this is done under standing order 150, which provides for amendments of a formal nature to be made to a bill. Any change is made by hand.[219]

DIVISION AND CONSOLIDATION OF BILLS

The House may instruct a Committee of the whole House to divide a bill into two or more bills (SO 179(2)).[220]

To date there have been three occasions on which the Council has divided a bill:

- On 28 June 2020, the Council divided the Industrial Relations Amendment Bill 2000 into two bills. The division of this bill is described in detail in the first edition of *New South Wales Legislative Council Practice*.[221]
- On 18 and 19 November 2014, the Council divided the Statute Law (Miscellaneous Provisions) Bill (No 2) 2014 into two bills.[222]
- On 10 May 2017, the Council divided the Statute Law (Miscellaneous Provisions) Bill 2017 into two bills.[223]

The division of the Statute Law (Miscellaneous Provisions) Bills of 2014 and 2017 into two bills was undertaken after non-government members expressed concern about certain provisions of the bills. Statute law review bills have traditionally been used by governments as a means of legislating non-controversial or minor updates to various acts at the end of a sitting period. When a member objects to provisions within such a bill, a convention has developed whereby the government will omit the contentious provisions during proceedings in committee. However, on the occasions cited in 2014 and 2017, the government took the further step of moving certain provisions of the original bills into new bills to allow more detailed consideration.[224]

---

219 Ibid, p 492.

220 For description of the steps involved in dividing a bill, see the *Annotated Standing Orders of the New South Wales Legislative Council*, (n 28), p 585.

221 *New South Wales Legislative Council Practice*, 1st ed, (n 13), pp 362-363.

222 *Minutes*, NSW Legislative Council, 18 and 19 November 2014 am, p 313; 19 November 2014, pp 342-343.

223 *Minutes*, NSW Legislative Council, 10 May 2017, pp 1596-1602.

224 *Hansard*, NSW Legislative Council, 18 November 2014, p 2904.

On the occasions in June 2000 and May 2017, the Assembly contested the power of the Council to divide the bills. On the division of the Industrial Relations Amendment Bill 2000, the Assembly by return message indicated that the division of a bill in the House in which the bill did not originate was highly undesirable.[225] In 2017, the Assembly indicated that its concurrence in the division of the bill was not to be taken as a precedent.[226]

There have been two further occasions when an instruction to a Committee of the whole House to divide a bill into two has been negatived.[227]

When a bill originates in one House but is divided into two or more bills in the other House, the new bills created by the division are taken to have originated in the House where the original bill commenced. To date, all bills that have been divided in the Council have been Assembly bills. Accordingly, the bills created were deemed to be Assembly bills too.

The House also has the power to instruct a Committee of the whole House to consolidate two or more bills into one bill (SO 179(2)). This power has not been used to date.

Control of bills

A Council bill is not before the House until the member with carriage of the bill introduces the bill according to notice. Accordingly, a notice of motion on the *Notice Paper* for leave to bring in a bill standing in the name of a member lapses and is removed from the *Notice Paper* should the member cease to be a member of the House, for example by resignation.[228]

However, once a bill, either a Council bill or an Assembly bill, is before the House, it may be considered and dealt with as the House decides. Accordingly, an order of the day for the second or third reading of a bill remains on the *Notice Paper* even when the member who introduced the bill ceases to be a member of the House. For example, in 2003, debate on the Family Impact Commission Bill 2003 continued despite the member who introduced the bill, the Revd the Hon Fred Nile, having resigned.[229]

Although extremely rare, there have been instances where bills have been taken out of the control of the member who introduced it. On 7 November 1900, following the adoption of amendments to the Early-closing (Amendment) Bill 1900, the responsible

225 *Minutes*, NSW Legislative Council, 29 June 2000, p 579.

226 *Minutes*, NSW Legislative Council, 24 May 2017, p 1643.

227 *Minutes*, NSW Legislative Council, 20 November 1990, pp 632-633; 27 May 2003, p 125. For further information, see *New South Wales Legislative Council Practice*, 1st ed, (n 13), pp 362-363.

228 In a very unusual instance, on 11 May 2006, the Hon Catherine Cusack, a member of the opposition, moved the suspension of standing orders to bring on a notice of motion standing in the name of the Hon Peter Breen for the introduction of the Casino to Murwillumbah Railway Service Bill. On the suspension being agreed to, Mr Breen declined to bring in the bill standing in his name, whereupon the notice of motion was deemed to have lapsed. See *Minutes*, NSW Legislative Council, 11 May 2006, p 2027.

229 *Minutes*, NSW Legislative Council, 31 August 2004, p 955; 21 October 2004, p 1059. The Revd the Hon Fred Nile was subsequently re-elected to the Council on 21 October 2004. See *Minutes*, NSW Legislative Council, 21 October 2004, p 1061.

government minister unsuccessfully sought the recommittal of the bill to committee and subsequently the withdrawal of the bill at its third reading stage. A private member then successfully moved the remaining stages of the bill, before withdrawing his final motion to forward the bill to the Assembly, which was moved by the minister.[230]

Another example occurred on 30 November 1977, when a member of the opposition successfully moved the adjournment of the Sydney Cricket and Sports Ground Bill 1977 until the first sitting day of 1978, against the wishes of the government.[231]

The management of bills has also on occasion been taken out of the hands of private members. On 28 October 1993, the Government Whip, the Hon John Jobling, moved, according to contingent notice, the suspension of standing orders to bring on resumption of the second reading debate on the South East Forests Protection Bill 1993, against the wishes of the member with carriage of the bill in the Council, the Hon Richard Jones. The suspension was agreed to on division, and the debate on the bill proceeded to its conclusion before the question that the bill be read a second time was negatived.[232]

RESTORATION OF BILLS NEGATIVED AT THE SECOND OR THIRD READING

Procedurally, rejection of the question that a bill be *now* read a second or third time is not an absolute rejection of the bill, although in modern practice it is usually taken as such. Technically, however, the only question that has been resolved by the House in the negative is the question that the bill be 'now' read a second or third time. Various Presidents have ruled that bills may be restored to the *Notice Paper* after they have been defeated on the second reading, and that the same question rule does not prevent this from occurring.[233] It has also been ruled that the House has not given its decision in the affirmative or negative on a bill until a final stage of a bill has been reached,[234] although there is also a ruling that a bill which has been negatived on the third reading and discharged may also be revived.[235]

Similarly, in the Senate, the rejection of the motion for the second reading of a bill is not an absolute rejection of the bill and does not prevent the Senate being asked subsequently to grant the bill a second reading.[236]

---

230 *Minutes*, NSW Legislative Council, 7 November 1900, pp 204-206; *Hansard*, NSW Legislative Council, 7 November 1900, pp 4840-4841, 4844.

231 *Minutes*, NSW Legislative Council, 30 November 1977, pp 690-691; *Hansard*, NSW Legislative Council, 30 November 1977, pp 10565-10576.

232 *Minutes*, NSW Legislative Council, 28 October 1993, pp 345-352.

233 Rulings: Trickett (Deputy), *Hansard*, NSW Legislative Council, 20 November 1901, p 3484; Flowers, *Hansard*, NSW Legislative Council, 11 December 1924, p 4459; Willis, *Hansard*, NSW Legislative Council, 16 September 1993, pp 3240-3241.

234 Rulings: O'Connor (Deputy), *Hansard*, NSW Legislative Council, 28 March 1916, pp 5814-5815; Flowers, *Hansard*, NSW Legislative Council, 26 September 1916, p 2033.

235 Ruling: Peden, *Hansard*, NSW Legislative Council, 25 November 1931, pp 7109-7111.

236 *Odgers*, 14th ed, (n 177), pp 311-312.

By contrast, in the UK House of Commons, defeat of a bill at the second or third reading stages is taken as fatal to the bill, on the basis that no future day is appointed for resumption of the debate.[237] Similarly, in the House of Representatives, it is accepted practice that a bill negatived at the second reading is not revived.[238]

Any member may give notice for and subsequently move the restoration to the *Notice Paper* of a bill negatived at the second or third reading.

Restoration of bills was once commonplace in the Council. The *Annotated Standing Orders of the New South Wales Legislative Council* lists many examples in the 1920s and 1930s.[239] However, the last occasion it occurred was in 1995.[240]

RESTORATION OF BILLS AFTER PROROGATION

On prorogation, all bills before the Council lapse. However, provided the prorogation was not for the purposes of a periodic Council election,[241] bills that have lapsed on prorogation may be restored to the *Notice Paper* in the next session at the stage they reached in the preceding session (SO 159(1)):

- A Council bill which was in the possession of the House at the time of prorogation may be restored to the *Notice Paper* at the stage reached in the previous session by motion on notice (SO 159(1)(a)).
- Where a Council bill was in the possession of the Assembly at the time of prorogation, a message may be sent to the Assembly by motion on notice or by leave requesting that consideration of the bill be resumed in that House (SO 159(1)(b)).
- If an Assembly bill was in the possession of the Council at the time of prorogation, the bill may be restored to the *Notice Paper* upon receipt of a message from the Assembly requesting that consideration of the bill be resumed (SO 159(1)(b)).[242]

A bill restored to the *Notice Paper* in accordance with these provisions may be proceeded with by the House as if prorogation had not intervened (SO 159(2)).

The majority of bills interrupted by prorogation are interrupted at the second reading stage, however bills have also been interrupted and restored at other stages.[243]

On restoration of a bill, the question before the House at the time of prorogation is usually moved again. For example, where a bill was interrupted at the second reading

237 *Erskine May*, 25th ed, (n 36), para 28.45.
238 *House of Representatives Practice*, 7th ed, (n 175), p 371.
239 *Annotated Standing Orders of the New South Wales Legislative Council*, (n 28), pp 454-455.
240 *Minutes*, NSW Legislative Council, 22 November 1995, p 346. The bill was the Conveyancers Licensing Bill 1995.
241 The basis of this exclusion is that a new Parliament, with new members, should not be in a position to consider business progressed in the previous Parliament.
242 See, for example, *Minutes*, NSW Legislative Council, 9 September 2014, pp 16-17.
243 For further information, see the *Annotated Standing Orders of the New South Wales Legislative Council*, (n 28), p 521.

stage and subsequently restored, the motion for the second reading is usually moved again. It is open to the minister or member with carriage of the bill to give a new second reading speech, or to refer members to his or her previous speech.[244]

If the motion to restore a bill is not agreed to, a new bill may be introduced and proceeded with in the ordinary manner (SO 159(3)).

Restoration of bills following prorogation was relatively common until the 1930s, after which time it fell into disuse for several decades. In more recent times, the House has taken different approaches to the restoration of business after prorogation and the commencement of a second or subsequent session.[245] On the most recent occasion of the commencement of the second session of a Parliament, that of the second session of the 55th Parliament in 2014, the House restored all bills to the *Notice Paper*. It also requested the restoration of all bills forwarded to the Assembly to the Assembly's *Business Paper*.[246]

DISCHARGE OF BILLS FROM THE *NOTICE PAPER*

When the member with carriage of a bill no longer wishes to proceed with it, the order of the day for consideration of the bill may be discharged from the *Notice Paper* and the bill withdrawn by motion moved without notice (SOs 81(4) and 140(1)(b)). If this occurs, the bill is removed from the *Notice Paper* and may not be considered further, for example by being restored.[247] If the bill is an Assembly bill, a message is forwarded to the Assembly advising of the actions taken by the Council.[248]

Initiation of a second Council bill under the original order of leave

If the order of the day for consideration of a Council bill is discharged from the *Notice Paper* and the bill withdrawn under the arrangements outlined above, a second bill

244 However, at the commencement of the second session of the 55th Parliament on 9 September 2014, a government bill and all private members' bills originating in the Council, and Assembly bills in the Council, were restored at the stage they had reached in the previous session, with the same adjournment status, member speaking and debate times. This was the first occasion on which this had happened. See *Minutes*, NSW Legislative Council, 9 September 2014, pp 12-13, 16-17. On this occasion, the House had been prorogued for only one day, facilitating the resumption of business in this manner. Nevertheless, it may become a precedent which is followed in the future.

245 For further information, see the discussion in Chapter 9 (Meetings of the Legislative Council) under the heading 'Current arrangements for the opening of a second session and subsequent sessions'.

246 *Minutes*, NSW Legislative Council, 9 September 2014, pp 12-15, 16-17.

247 A precedent to the contrary occurred in 1931, when the Finance (Greyhound-racing Taxation) Management Bill 1931, having been defeated on the third reading, was discharged, but was subsequently restored by suspension of standing orders. The bill was then read a third time and returned to the Assembly. See *Minutes*, NSW Legislative Council, 2 October 1931, pp 364-365; 25 November 1931, pp 378-380.

248 See, for example, the discharge of the Emergency Income Tax (Management) Bill 1931, *Minutes*, NSW Legislative Council, 30 June 1931, p 188; and the discharge of the Public Finance and Audit Amendment Bill 1999, *Minutes*, NSW Legislative Council, 1 June 1999, pp 114, 116.

may be introduced under the original order of leave (SO 136(6) and (7)).[249] Any new bill introduced under the original order of leave must have the same long title as the original bill.[250]

CONFERENCES ON BILLS

Where the exchange of messages has failed to resolve disagreement between the Houses on the provisions of a bill, a conference between representatives of the two Houses provides another mechanism for communication between the Houses in an attempt to reach agreement.

Conferences are discussed in detail in Chapter 22 (Relations with the Legislative Assembly).[251] In brief, they are an opportunity for the Houses to communicate directly through managers appointed by each House meeting and reconciling differences in a way that cannot be achieved through the exchange of messages alone.

Between 1856 and 1927, free conferences were proposed by the Assembly in respect of the following 23 bills, to which the Council almost always agreed:[252]

- the St Andrew's College Bill 1867;[253]
- the Lands Act Amendment Bill 1875;[254]
- the Parliamentary Powers and Privileges Bill 1879;[255]
- the Influx of Chinese Restriction Bill 1881;[256]
- the Crown Lands Act Amendment Bill of 1891-1892;[257]

249 See, for example, *Minutes*, NSW Legislative Council, 14 October 1993, p 305; 27 October 1993, p 331; 24 October 2002, p 430. For further information, see the *Annotated Standing Orders of the New South Wales Legislative Council*, (n 28), pp 433-434.

250 For further information, see the *Annotated Standing Orders of the New South Wales Legislative Council*, (n 28), p 435.

251 See the discussion under the heading 'Conferences between the Houses'.

252 The Assembly's request for a free conference on the Crown Lands Bill 1898 was declined by the Council owing to the lateness of the session. See *Minutes*, NSW Legislative Council, 7 July 1898, p 48.

253 *Minutes*, NSW Legislative Council, 16 October 1867, p 83; 23 October 1867, pp 87-88; 30 October 1867, p 91; 31 October 1867, pp 93-94; 14 November 1867, pp 101-102.

254 *Minutes*, NSW Legislative Council, 4 August 1875, p 156; 5 August 1875, p 157. It is notable that after the holding of a free conference on 5 August 1875 at the request of the Assembly, the Council on 6 August 1875 subsequently requested a second free conference, which was held that day. For further information, see the discussion in Chapter 22 (Relations with the Legislative Assembly) under the heading 'Requests for conferences'.

255 *Minutes*, NSW Legislative Council, 9 April 1879, p 166; 10 April 1879, p 169.

256 *Minutes*, NSW Legislative Council, 10 November 1881, p 122; 17 November 1881, p 130; 23 November 1881, pp 134-135.

257 *Minutes*, NSW Legislative Council, 24 September 1891, p 88; 30 September 1891, pp 94-95; 7 October 1891, p 103.

- the Crown Lands Bill of 1894-1895;[258]
- the Land and Income Tax Assessment Bill 1895;[259]
- the Mining Laws Amendment Bill 1896;[260]
- the Public Roads Bill 1897;[261]
- the Hunter District Water and Sewerage Act Amendment Bill 1897;[262]
- the Crown Lands Bill 1898;[263]
- the Australasian Federation Enabling Bill 1899;[264]
- the Sydney Corporation (Amending) Bill 1900;[265]
- the Industrial Arbitration Bill of 1911-1912;[266]
- the Gas Bill 1912;[267]
- the Fair Rents Bill of 1915-1916;[268]
- the Valuation of Land Bill (No 2) 1916;[269]
- the Eight Hours Bill of 1915-1916;[270]
- the Superannuation Bill of 1915-1916;[271]
- the Government Railways (Appeals) Bill 1916;[272]

---

258 *Minutes*, NSW Legislative Council, 25 April 1895, pp 184-185.
259 *Minutes*, NSW Legislative Council, 20 November 1895, pp 123-124; 21 November 1895, p 127; 22 November 1895, p 129; 26 November 1895, p 131; 27 November 1895, p 134.
260 *Minutes*, NSW Legislative Council, 27 October 1896, pp 183-184; 12 November 1896, pp 227-228, 229-230.
261 *Minutes*, NSW Legislative Council, 2 June 1897, p 38; 9 June 1897, p 44; 16 June 1997, pp 50-51.
262 *Minutes*, NSW Legislative Council, 6 October 1897, p 140; 13 October 1897, pp 153-154; 20 October 1897, pp 161-162.
263 *Minutes*, NSW Legislative Council, 7 July 1898, p 48.
264 *Minutes*, NSW Legislative Council, 23 March 1899, pp 31-32; 28 March 1899, p 34; 29 March 1899, p 35.
265 *Minutes*, NSW Legislative Council, 19 September 1900, p 134; 20 September 1900, pp 138-139; 26 September 1900, p 144.
266 *Minutes*, NSW Legislative Council, 22 March 1912, p 132; 25 March 1912, pp 135-136; 26 March 1912, pp 139-140.
267 *Minutes*, NSW Legislative Council, 2 December 1912, pp 154-155.
268 *Minutes*, NSW Legislative Council, 16 December 1915, pp 229-231.
269 *Minutes*, NSW Legislative Council, 8 March 1916, pp 252-253.
270 *Minutes*, NSW Legislative Council, 28 March 1916, p 287; 29 March 1916, p 293; 30 March 1916, p 300; 31 March 2016, pp 303-305.
271 *Minutes*, NSW Legislative Council, 13 April 1916, pp 345-347.
272 *Minutes*, NSW Legislative Council, 7 September 1916, pp 76-77.

- the Forestry Bill 1916;[273]
- the Workmen's Compensation Bill 1916;[274] and
- the Industrial Arbitration (Living Wage Declaration) Bill of 1926-1927.[275]

Of the 23 free conferences convened in respect of these bills, in most cases the holding of the free conference followed the following pattern: Assembly disagreement to amendments made by the Council to an Assembly Bill, followed by insistence by the Council on its amendments, leading to an Assembly request for a free conference. From this came the usual settlement: either one House no longer maintaining its stand or further amendments being agreed to, thus allowing the bill to pass. The only exceptions to this pattern were:

- The Lands Act Amendment Bill 1875, on which the Council requested a second free conference, the first free conference having been requested by the Assembly.[276] Subsequently, the Council received a message from the Assembly not insisting on disagreement to the Council's amendments and agreeing to further amendments.[277]
- The Parliamentary Powers and Privileges Bill 1879, on which the order of the day for consideration of the managers' report was discharged in the Council.[278]
- The Crown Lands Bill 1898, on which the Assembly's request for a free conference was declined by the Council owing to the lateness of the session.[279]
- The Australasian Federation Enabling Bill 1899, on which the managers reported that the free conference had failed to reach agreement. The report was adopted and no further action was taken before prorogation.[280] A further bill was later received and passed in the next session.[281]
- The Sydney Corporation (Amending) Bill 1900, on which the managers reported that the free conference had failed to reach agreement. The Committee of the whole House appointed to consider the report resolved to agree to the report of the managers. However, the motion for the House to adopt the committee's report was amended to indicate that, whilst the Council insisted on its amendments, it would be willing to consider any further proposal which

273 *Minutes*, NSW Legislative Council, 27 September 1916, p 129; 28 September 1916, pp 135-137.
274 *Minutes*, NSW Legislative Council, 23 November 1916, pp 197-200.
275 *Minutes*, NSW Legislative Council, 10 March 1927, pp 142-143; 11 March 1927, pp 147-148; 24 March 1927, p 160.
276 *Minutes*, NSW Legislative Council, 6 August 1875, pp 159-160.
277 *Minutes*, NSW Legislative Council, 6 August 1875, p 161.
278 *Minutes*, NSW Legislative Council, 20 May 1879, p 227.
279 *Minutes*, NSW Legislative Council, 7 July 1898, p 48.
280 *Minutes*, NSW Legislative Council, 28 March 1899, p 34.
281 For further information, see the *Annotated Standing Orders of the New South Wales Legislative Council*, (n 28), p 421.

> would have the effect of settling the matters in dispute.[282] Subsequently, the Assembly by message withdrew its objection to certain amendments, and the Council agreed not to insist on certain other amendments.[283]

It is notable that during the 1915-1916 session, far from spasmodic, the Parliament held conferences in respect of four bills, with a further three in the following 1916 session, with the issue at dispute being resolved on each occasion.

Yet despite the apparent success of conferences as a means of resolving disagreement between the Houses, their use did not always find favour with members. Commenting on the Sydney Corporation (Amending) Bill 1900, the Hon Sir Henry MacLaurin, former Vice-President of the Executive Council, observed:

> There have been a dozen conferences between these Houses since I came here, and nothing has been done by any of them which could not have been perfectly well done in the ordinary way by messages. I think we might advantageously follow more closely the example of the House of Lords and the House of Commons.[284]

The Hon Henry Dangar in turn observed:

> I can quite understand the desirability of having a conference on some great question; but I am opposed to having conferences upon such a tinpot question as that upon which we were engaged the other night. …
>
> *May* lays it down that messages now practically supersede conferences, and a very good job too. There is no limit to the nature of the messages you can send from one House to the other, and it is preferable for us to do our business in that way than by means of these most irksome and unsatisfactory conferences.[285]

Free conferences fell into disuse after 1927. It was not for want of controversial bills. The first session of the 29th Parliament (1930-1932) in particular saw many bills amended by the Council, lengthy messages passed between the Houses and major pieces of legislation lost through disagreement.

A further request for a free conference was not made by the Legislative Assembly until 7 April 1960 in respect of the Constitution Amendment (Legislative Council Abolition Bill) of 1959-1960.[286] In the event, the Council declined the request.[287]

---

282 *Minutes*, NSW Legislative Council, 26 September 1900, pp 144, 145. For further information, see the *Annotated Standing Orders of the New South Wales Legislative Council*, (n 28), p 420.

283 *Minutes*, NSW Legislative Council, 27 September 1900, p 148.

284 *Hansard*, NSW Legislative Council, 26 September 1900, p 3184.

285 *Hansard*, NSW Legislative Council, 26 September 1900, p 3188. In 1900, the then current edition of *Erskine May*, (10th ed), stated at page 414: 'Messages have now practically superseded conferences in relation to bills.'

286 *Minutes*, NSW Legislative Council, 7 April 1960, pp 213-215.

287 Ibid. As discussed in Chapter 2 (The history of the Legislative Council), the Governor subsequently convened a joint sitting of the two House on 20 April 1960 which only government (Labor) members from the Council attended.

It was not until 1978 that a free conference was held again, on this occasion to consider the Constitution and Parliamentary Electorates and Elections (Amendment) Bill 1978, a bill to reconstitute the Council. The outcome of this free conference is discussed in detail in Chapter 2 (The history of the Legislative Council).[288]

There have also been two more recent attempts to establish free conferences on bills:

- On 29 June 2000, the President reported the receipt of a message from the Assembly insisting on its disagreement to amendments made by the Council to the Dairy Industry Bill 2000. In response, the Deputy Leader of the Opposition in the Legislative Council, the Hon Duncan Gay, sought leave to suspend standing orders to allow a motion to be moved forthwith to request a free conference with the Assembly. However, leave was not granted and the matter was taken into consideration in committee forthwith.[289] Later during the sitting, the Council adopted a report from committee that the Council did not insist on its amendments in the bill. A message was forwarded to the Assembly accordingly.[290]
- On 13 September 2011, the Council requested a free conference on the Graffiti Legislation Amendment Bill 2011 under standing order 128,[291] after the Assembly had disagreed to Council amendments to the bill by message on 26 August 2011. Almost 12 months later on 21 August 2012, the Assembly rejected the Council's request for a free conference.[292] The matter was finally resolved when the House chose not to insist on its original amendments and instead proposed further amendments,[293] to which the Assembly subsequently agreed.[294]

THE RESOLUTION OF DEADLOCKS ON BILLS INTRODUCED IN THE ASSEMBLY

When the exchange of messages and the option of a conference have failed to resolve disagreement between the Houses on the provisions of a bill introduced in the Assembly, sections 5A and 5B of the *Constitution Act 1902*, inserted into the *Constitution Act 1902* in 1933,[295] provide a mechanism for resolving the deadlock.

---

288 See the discussion under the heading '1978: Direct election and reconstitution from 60 to 45 members'.

289 *Minutes*, NSW Legislative Council, 29 June 2000, pp 575-576.

290 Ibid, p 580.

291 *Minutes*, NSW Legislative Council, 13 September 2011, pp 426-427.

292 *Minutes*, NSW Legislative Council, 21 August 2012, p 1144.

293 Ibid, pp 1448-1449.

294 *Minutes*, NSW Legislative Council, 22 August 2012, p 1156. For further information, see the discussion earlier in this chapter under the heading 'The Assembly returns an Assembly bill disagreeing with Council amendments'.

295 The act that inserted sections 5A and 5B into the *Constitution Act 1902*, the *Constitution Amendment (Legislative Council) Act 1932*, was approved by the electors in accordance with section 7A of the *Constitution Act 1902* on 13 May 1933 and assented to on 22 June 1933.

There is no equivalent provision in the *Constitution Act 1902* for the resolution of deadlocks on bills introduced in the Council.

Bills under section 5A of the *Constitution Act 1902*

Section 5A of the *Constitution Act 1902* deals with deadlock between the Houses on any bill introduced in the Assembly 'appropriating revenue or moneys for the ordinary annual services of the Government'. Under section 5A(1) of the *Constitution Act 1902*, whilst it is open to the Council to reject, fail to pass or suggest any amendment to such a bill, notwithstanding the actions of the Council, the Assembly may direct that the bill, with or without any amendment suggested by the Council, be presented to the Governor for assent.

The operation of section 5A is discussed in detail in Chapter 17 (Financial legislation).[296]

Where a bill is forwarded to the Governor for assent by the Assembly in accordance with section 5A of the *Constitution Act 1902*, the words of enactment in the bill are varied in accordance with section 5C of the *Constitution Act 1902* as follows:

> **BE** it enacted by the Queen's Most Excellent Majesty, by and with the advice and consent of the Legislative Assembly of New South Wales in Parliament assembled, in accordance with the provisions of section 5A of the *Constitution Act 1902*, as amended by subsequent Acts, and by the authority of the same, as follows:[297]

This form of words was adopted in the only bill ever passed under the provisions of section 5A of the *Constitution Act 1902*: the Appropriation (Parliament) Bill 1996.[298]

Bills under section 5B of the *Constitution Act 1902*

Section 5B of the *Constitution Act 1902* deals with deadlocks between the Houses on all bills initiated in the Assembly other than a bill to which section 5A applies, that is, a bill 'appropriating revenue or moneys for the ordinary annual services of the Government'. Section 5B provides in part:

> **5B Disagreements—referendum**
>
> (1) If the Legislative Assembly passes any Bill other than a Bill to which section 5A applies, and the Legislative Council rejects or fails to pass it or passes it with any amendment to which the Legislative Assembly does not agree, and if after an

296 See the discussion under the heading 'Sections 5A: Appropriation bills 'for the ordinary annual services of the government''.

297 Section 5C as enacted refers to the King's Most Excellent Majesty. Section 13 of the *Interpretation Act 1987* provides that 'a reference to the Sovereign (whether the words "Her Majesty" or "His Majesty" or any other words are used) is a reference to the Sovereign for the time being'.

298 There is a very strong argument that section 5A was wrongly applied to the Appropriation (Parliament) Bill 1996. For further information, see the discussion in Chapter 17 (Financial legislation), under the heading 'Parliamentary appropriations'.

interval of three months the Legislative Assembly in the same Session or in the next Session again passes the Bill with or without any amendment which has been made or agreed to by the Legislative Council, and the Legislative Council rejects or fails to pass it or passes it with any amendment to which the Legislative Assembly does not agree, and if after a free conference between managers there is not agreement between the Legislative Council and the Legislative Assembly, the Governor may convene a joint sitting of the Members of the Legislative Council and the Members of the Legislative Assembly.

The Members present at the joint sitting may deliberate upon the Bill as last proposed by the Legislative Assembly and upon any amendments made by the Legislative Council with which the Legislative Assembly does not agree.

No vote shall be taken at the joint sitting.

(2) After the joint sitting and either after any further communication with the Legislative Council in order to bring about agreement, if possible, between the Legislative Council and the Legislative Assembly, or without any such communication the Legislative Assembly may by resolution direct that the Bill as last proposed by the Legislative Assembly and either with or without any amendment subsequently agreed to by the Legislative Council and the Legislative Assembly, shall, at any time during the life of the Parliament or at the next general election of Members of the Legislative Assembly, be submitted by way of referendum to the electors qualified to vote for the election of Members of the Legislative Assembly.

…

(3) If at the referendum a majority of the electors voting approve the Bill it shall be presented to the Governor for the signification of His Majesty's pleasure thereon and become an Act of the Legislature upon the Royal Assent being signified thereto, notwithstanding that the Legislative Council has not consented to the Bill.

(4) For the purposes of this section the Legislative Council shall be taken to have failed to pass a Bill if the Bill is not returned to the Legislative Assembly within two months after its transmission to the Legislative Council and the Session continues during such period.

…[299]

In summary of the operation of section 5B:

- If the Assembly passes any bill other than a bill to which section 5A applies, and the bill is forwarded to the Council for concurrence, the Council may reject or fail to pass the bill,[300] or pass it with any amendment to which the Assembly subsequently does not agree (s 5B(1)). The Council is taken to have failed to have passed the bill if the bill is not returned to the Assembly within two months of its transmission to the Council and the session continues during such period (s 5B(4)).[301]

299 For further information on section 5B, see Twomey, (n 1), pp 249-254.

300 For discussion of the meaning of 'rejects or fails to pass', as considered in the Supreme Court in *Clayton v Heffron* (1960) 77 WN (NSW) 767 and the High Court in *Clayton v Heffron* (1960) 105 CLR 214, see Twomey, (n 1), pp 258-259.

301 The Council is not deemed to have rejected or to have failed to pass a bill where the Parliament is prorogued within the two months. See Solicitor General, 'Constitution Act 1902, s 5B', 7 December 1994, pp 3-4.

- After an interval of three months,[302] whether in the same session or the next session, the Assembly may again pass the bill, with or without any amendment suggested by the Council, and again forward it to Council for concurrence (s 5B(1)). The Council may again reject the bill or fail to pass it, or pass it with any amendment to which the Assembly does not agree (s 5B(1)). The Council is again taken to have failed to have passed the bill if the bill is not returned to the Assembly within two months of its transmission to the Council and the session continues during such period (s 5B(4)).
- If there is still disagreement, a free conference of managers of both Houses may then be held at the initiative of the Assembly[303] in an attempt to reach agreement.[304] The Governor may also convene a joint sitting of the members of both Houses to deliberate upon the bill as last proposed by the Assembly and any amendments made by the Council with which the Assembly does not agree. No vote shall be taken at the joint sitting (s 5B(1)).[305] There is no quorum requirement for the joint sitting.[306]
- If there is continued disagreement, after any joint sitting and either with or without any further communication with the Council to bring about agreement, the Assembly may direct that the bill as last proposed by the Assembly, with or without any amendment subsequently agreed to by both Houses, be submitted to a referendum of electors at any time during the life of the Parliament or at the next general election (s 5B(2)). Where the bill in question is a bill to which section 7A of the *Constitution Act 1902* applies concerning amendments to the *Constitution Act 1902* with respect to the Legislative Council, special arrangements, discussed further below, apply.
- If a majority of electors voting approve the bill at the referendum it may be presented by the Assembly to the Governor for assent and becomes an act, notwithstanding that the Council has not consented to the bill (s 5B(3)).

A notable feature of section 5B is that the initiative for bringing in a bill twice, for seeking a free conference on the bill, for seeking the convening of a joint sitting, for any further communication between the Houses, and for directing that the bill be submitted to a referendum lies with the Assembly. After the Council has twice rejected or failed to pass

302 For further information, see Twomey, (n 1), p 260.

303 There is no obligation for a free conference to be held, as otherwise the request for the free conference may be declined by the Council in order to invalidate any statute enacted under section 5B. See *Clayton v Heffron* (1960) 105 CLR 214 at 247-248 per Dixon CJ, McTiernan, Taylor and Windeyer JJ. See also Twomey, (n 1), pp 262-265.

304 Under standing order 133, when the Assembly requests a free conference on a bill under the provisions of section 5B, the Council must agree to the conference being held without delay. The Council must appoint the time and place for holding the free conference.

305 However, the requirement that no vote be taken on the bill does not prevent votes being taken on matters necessary for the conduct of the joint sitting. See Crown Solicitor, 'Constitution Amendment (Legislative Council Abolition) Bill', 13 April 1960, pp 3-4.

306 Ibid, p 3.

a bill originating in the Assembly, the remaining steps towards the enactment of the bill under section 5B are in the hands of the Assembly.[307]

Another notable feature of section 5B is that it applies to all bills originating in the Assembly, other than a bill 'appropriating revenue or moneys for the ordinary annual services of the Government'. That includes bills falling under the provisions of section 7A of the *Constitution Act 1902* to amend and entrench provisions of the *Constitution Act 1902* with respect to the Legislative Council. However, whereas the date for a referendum under section 7A is usually set by the Parliament by way of a bill passed by both Houses,[308] this is obviously unsuitable where the referendum is required as a result of a deadlock between the Houses under section 5B. Accordingly, section 5B(5)(b) provides that the referendum shall be held on a day appointed by the Governor, presumably acting on the advice of the executive government, and section 5B(5)(c) further provides that the referendum be held on a day during the life of the Parliament and not sooner than two months after the Assembly has passed a resolution directing the conduct of the referendum.[309]

Only one bill, the Constitution Amendment (Legislative Council Abolition) Bill 1959-1960, has been submitted to the people at a referendum in accordance with section 5B, in the face of strident opposition from the Council. The events surrounding the bill are discussed in detail in Chapter 2 (The History of the Legislative Council).[310] In the event, after a spirited campaign by conservative parties opposed to the bill and the abolition of the Council, the bill was overwhelmingly rejected at a referendum held on 29 April 1961 by 1,089,193 votes (57.5 per cent) to 802,512.

When a bill is passed by the Assembly in accordance with section 5B of the *Constitution Act 1902*, the enactment words of the bill are varied in accordance with section 5C of the *Constitution Act 1902* as follows:

> **BE** it enacted by the Queen's Most Excellent Majesty, by and with the advice and consent of the Legislative Assembly of New South Wales in Parliament assembled, with the approval of the electors, in accordance with the provisions of section 5B of the *Constitution Act 1902*, as amended by subsequent Acts, and by the authority of the same, as follows:[311]

This form of words would presumably have been adopted had the Constitution Amendment (Legislative Council Abolition) Bill of 1959–1960 been approved by the people at the referendum held on 29 April 1961.[312]

---

307 *Clayton v Heffron* (1960) 77 WN (NSW) 767 at 788 per Evatt CJ and Sugerman J.

308 *Constitution Act 1902*, s 7A(3).

309 For further information, see Twomey, (n 1), pp 256-257.

310 See the discussion under the heading '1934–1961: Labor's further attempts to abolish the Council'.

311 Section 5C as enacted refers to the King's Most Excellent Majesty. Section 13 of the *Interpretation Act 1987* provides that 'a reference to the Sovereign (whether the words "Her Majesty" or "His Majesty" or any other words are used) is a reference to the Sovereign for the time being'.

312 Extracts of the bill, but not the words of enactment, were included in the formal documentation prepared by the Electoral Commissioner for the referendum. See Electoral Commissioner for New South Wales, *Referendum on Constitution Amendment (Legislative Council Abolition) Bill: Extracts*

'MANNER AND FORM' RESTRICTIONS ON BILLS TO AMEND THE *CONSTITUTION ACT 1902*

As indicated previously, section 5 of the *Constitution Act 1902* gives the Parliament of New South Wales broad legislative power, subject to the provisions of the Commonwealth Constitution, to make laws 'for the peace, welfare, and good government of New South Wales in all cases whatsoever'. This legislative power was originally supported by section 5 of the *Colonial Laws Validity Act 1867* (Imp), which provided that:

> Every representative legislature shall have … full powers to make laws respecting the constitution, powers and procedures of such legislature; providing that such laws shall have been passed in such manner and form as may from time to time be required by any … colonial law for the time being in force in the said colony.

In 1986, upon the repeal of the *Colonial Laws Validity Act 1867* (Imp) with respect to the States of Australia, the effect of section 5 was preserved by section 6 of the *Australia Acts* of 1986.

The legislative power of the Parliament extends to the *Constitution Act 1902* itself, which may be amended by the passage of legislation through the Parliament in the ordinary way. However, two specific sections of the *Constitution Act 1902* impose 'manner and form' restrictions (drawing on the wording of section 5 of the *Colonial Laws Validity Act 1867* (Imp) cited above) on bills that seek to amend the *Constitution Act 1902*: sections 7A and 7B.[313] These sections 'entrench' or purport to 'entrench' not only various other sections, divisions, parts, schedules and provisions of the *Constitution Act 1902*, but also themselves. These entrenched provisions of the *Constitution Act 1902* (including sections 7A and 7B themselves) may not be amended or repealed, except in such 'manner and form' as sections 7A and 7B specify; namely following approval of an amending bill at a referendum. As such, these entrenched provisions restrict the legislative power of the Parliament.

Section 7A provides that a bill must be given approval at a referendum, held not sooner than two months after its passage through the Parliament, before being presented to the Governor for assent where the purpose of the bill is:

- to abolish or dissolve the Legislative Council, or to alter its powers;
- to either expressly or impliedly amend section 11A (elections to be held pursuant to writs), division 2 of part 3 (sections 22G [President], 22H [quorum], 22I [determination of questions] and 22J [resignation of seats in the Legislative Council] excepted), the Sixth Schedule or *this section* (meaning section 7A of the *Constitution Act 1902* itself);

---

from the Constitution Further Amendment (Referendum) Act 1930, as Amended and the Constitution Amendment (Legislative Council Abolition) Bill, For the use of Deputy Returning Officers. See also Twomey, (n 1), pp 266-267.

313 Manner and form restrictions were once also contained in section 7, and its predecessor, section 6, of the *Constitution Act 1855*. These restrictions, not being double entrenched, were later repealed.

- to make any provision with respect to the persons capable of being elected or of sitting and voting as Members of either House of Parliament; or
- to make any provision with respect to the circumstances in which the seat of a member of either House of Parliament becomes vacant.

As indicated in Chapter 2 (The history of the Legislative Council), section 7A was inserted into the *Constitution Act 1902* in 1930 by the conservative Bavin Ministry to safeguard the existence of the Council following the Lang Ministry's first attempt to abolish it.[314] The section was subsequently altered significantly in both 1932 and 1978.[315]

In turn, section 7B provides similar referendum provisions for bills in respect of the Legislative Assembly which:

- expressly or impliedly repeal or amend sections 11B, 26, 27, 28 or 29, part 9, the Seventh Schedule or *this section* (meaning section 7B of the *Constitution Act 1902* itself); or
- contain any provision to reduce or extend, or to authorise the reduction or extension of, the duration of any Legislative Assembly or to alter the date required to be named for the taking of the poll in the writs for a general election.

The predecessor to section 7B, section 24A, was inserted into the *Constitution Act 1902* in 1950. Section 7B was adopted at the time that the term of the Assembly was extended to fixed four-year terms in 1981.[316]

As noted, sections 7A and 7B are 'double entrenched'; that is they 'entrench' or purport to 'entrench' not only various other sections, divisions, parts, schedules and provisions of the *Constitution Act 1902*, but also themselves through the use of the words 'this section'. In other words, sections 7A and 7B cannot themselves be amended or repealed as a way of getting around the 'manner and form' restrictions they impose except by a bill also approved at a referendum.[317]

Manner and form restrictions of the type contained in sections 7A and 7B can be adopted only in respect of bills concerning the 'constitution, powers or procedures' of the legislature, as originally required under section 5 of the *Colonial Laws Validity Act 1867* (Imp). High Court decisions have confirmed that laws that do not directly relate to the 'constitution, powers and procedures' of parliament cannot be 'entrenched' by 'manner and form' provisions.[318] On this basis, some commentators have expressed doubts as to whether sections 7A and 7B legitimately 'entrench' certain provisions of the *Constitution Act 1902*, namely part 9 concerning the independence of the judiciary,

314 See the discussion under the heading '1928–1930: Entrenchment of the Council and further failed reform'.

315 For further information, see Twomey, (n 1), pp 300-302.

316 For further information, see Twomey, (n 1), pp 308-309.

317 Sections 7A(1)(b) and 7B(1)(a).

318 In particular, see *South Eastern Drainage Board (SA) v Savings Bank of South Australia* (1939) 62 CLR 603.

section 11A concerning the issue of writs by the Governor, section 11B concerning compulsory voting and section 22 concerning the eligibility to vote in Council elections.[319]

In applying the 'constitution, powers and procedures' test, Twomey emphasises that it is the amending bill itself, rather than the 'manner and form' provision of the *Constitution Act 1902*, or the provision that it purportedly entrenches, that needs to be a law respecting the 'constitution, powers or procedure' of the Parliament if force is to be given to the manner and form requirement.[320]

The leading cases in relation to the application of manner and form provisions are the *Trethowan* cases, brought in response to Premier Lang's second attempt to abolish the Council, in which the Full Bench of the New South Wales Supreme Court,[321] the High Court of Australia[322] and ultimately the Privy Council in London[323] granted and upheld an injunction preventing the presentation to the Governor by the Lang Labor Government of two bills to abolish the Legislative Council, on the grounds that their presentation for assent without first securing the assent of the voters at a referendum would be a contravention of section 7A of the *Constitution Act 1902*. Significantly, the Privy Council upheld the injunction on the basis that the bills for the abolition of the Legislative Council dealt with the 'constitution, powers or procedures' of the legislature, in keeping with the wording of section 5 of the *Colonial Laws Validity Act 1867* (Imp).

A bill which sought to abolish or dissolve the Council, or to reconstitute it, would clearly be a law respecting the 'constitution' or 'powers' of the Parliament, and would need to meet the requirements of section 7A before receiving assent. On 17 June 1978, the Constitution and Parliamentary Electorates and Elections (Amendment) Bill 1978 to reconstitute the Council was submitted to the people at a referendum in accordance with section 7A.

The application of section 7A to the enactment of privileges legislation by the Parliament is discussed in Chapter 3 (Parliamentary privilege in New South Wales).[324]

Manner and form restrictions of the type in sections 7A and 7B have on occasion been criticised because, once adopted, they are binding on all future parliaments, contrary to the Westminster principle that one parliament should not bind its successors.[325]

PROTESTS AGAINST THE PASSING OF A BILL

Standing order 161 provides that any member who objects to the passing of a bill by the House may have a protest entered in the *Minutes of Proceedings*, copies of which are forwarded to the Governor by the President.

---

319 For further information, see Twomey, (n 1), pp 310-312.

320 A Twomey, 'Manner and form limitations on the power to amend State Constitutions', *Public Law Review*, (Vol 15, No 3, September 2004), p 182.

321 *Trethowan v Peden* (1930) 31 SR (NSW) 183.

322 *Attorney-General (NSW) v Trethowan* (1931) 44 CLR 394.

323 *Attorney-General (NSW) v Trethowan* [1932] AC 526.

324 See the discussion under the heading 'The insertion in 1930 of section 7A into the *Constitution Act 1902*'.

325 For further information, see the discussion in J Elkind, 'A new look at Entrenchment', *The Modern Law Review*, (Vol 50, March 1987), pp 163-166. See also Twomey, (n 1), pp 313-314.

The form of a protest against a bill usually states the long title of the bill, together with a statement of reasons for the protest, with the name of the member or members signing the protest listed underneath. In 1890, President Hay ruled that every member has the right to protest against any vote, and it is not for the Chair to say whether it is exercised properly or not. However, if a protest contains a statement which is known to be inconsistent with fact, it is the duty of the Chair to point out to the member, through the Clerk, that it is necessary to correct the statement.[326]

A protest against the passing of a bill may be lodged with the Clerk as soon as the bill has passed the House. There is no requirement, as there was prior to the adoption of the current standing orders in 2004, for the bill to have passed both Houses before the protest may be lodged.[327] In 1887, President Hay ruled that a protest against a bill could have no effect unless it was lodged before the next sitting day.[328]

A protest is inscribed by hand in the Clerk's 'Protest Book' and a copy sent to the Governor by the Clerk, on behalf of the President, as soon as possible. The President also informs the House of the receipt of a protest, whereupon it is entered in the *Minutes of Proceedings*. The President also reports the receipt of any message from the Governor or Official Secretary to the Governor acknowledging receipt of the protest.

The first protest in the Council was lodged on 11 February 1857 by the Hon Alfred Lutwyche against the third reading of the 'Loan bill, £150,000'.[329] It was lodged based on practice in the Imperial Parliament. The standing orders did not make provision for the recording of protests until April 1860,[330] following an occasion when the Governor by message accompanying the Pastoral Lands Assessment and Rent Bill 1860 indicated that he had not been aware that a protest had been lodged against the bill at the time he gave assent. The standing order was adopted on the recommendation of the Standing Orders Committee,[331] based on the model in the House of Lords.[332]

During the 19th century, protests were a relatively common feature of the work of the Council. Between 1857 and 1899, a total of 39 protests were lodged. The Hon Leopold Fane De Salis, a member of the Council for 23 years, was moved to protest on no less than seven occasions. The Hon Sir Terence Murray, when President of the Council, protested

---

326 Ruling: Hay, *Hansard*, NSW Legislative Council, 10 July 1890, pp 1987-1988.

327 For further information, see the *Annotated Standing Orders of the New South Wales Legislative Council*, (n 28), p 529.

328 Ruling: Hay, *Hansard*, NSW Legislative Council, 16 June 1887, p 2117. For further information, see the *Annotated Standing Orders of the New South Wales Legislative Council*, (n 28), pp 529-530.

329 *Minutes*, NSW Legislative Council, 11 February 1857, p 63.

330 *Minutes*, NSW Legislative Council, 12 April 1960, pp 71-72.

331 See 'Report from the Standing Orders Committee of the Legislative Council in reference to the protests against the passing of any bill', *Journals*, NSW Legislative Council, 1859-1860, vol 5, part 1, pp 169-172.

332 However, it is notable that in the House of Lords, protests are solely recorded in the Journals of that House. They are not forwarded to the Monarch. For further information on protests, see the *Annotated Standing Orders of the New South Wales Legislative Council*, (n 28), pp 530-532; and *New South Wales Legislative Council Practice*, 1st ed, (n 13), pp 384-385.

on two occasions.[333] However, after 1899, the practice fell into disuse for the better part of a century. It was revived in 1986 when three separate protests were signed by members of the opposition and cross-bench against the Judicial Officers Bill 1986,[334] and revived again in 2005 when several cross-bench members signed a protest against the Terrorism (Police Powers) Amendment (Preventative Detention) Bill 2005.[335] Since then protests have again become a relatively routine feature of the work of the Council.[336]

There would not appear to be any discretion for the Governor to delay or negate the passage of a bill upon receipt of a protest. This is discussed further below.

ASSENT TO BILLS

A bill, after it has passed both Houses of the Parliament,[337] can only become an act once it has been assented to by the Governor in accordance with section 8A of the *Constitution Act 1902*. The Lieutenant-Governor or Administrator of the State may act on behalf of the Governor where the Governor is unavailable.[338]

In giving assent to a bill, the Governor is acting as a constituent part of the Legislature,[339] on the advice of the two Houses.[340] Aside from the formal provision of legal advice from the Solicitor General through the Attorney General that there is no objection to assent, discussed below, the government and the Executive Council play no role in this process and cannot prevent a bill duly passed by the Houses from being submitted to the Governor for assent.[341] This is the case even where the government may not support the bill, as may occur for example where the government is in a minority in the Assembly.[342]

Standing order 160(1) provides that a bill originating in the Council and passed by both Houses will be printed and presented by the President to the Governor for assent, having been certified by the Clerk accordingly.[343] A similar provision is contained in standing order 239 of the Legislative Assembly for bills originating in the Assembly.

---

333 *Minutes*, NSW Legislative Council, 11 March 1869, p 56; 27 February 1873, p 81.

334 *Minutes*, NSW Legislative Council, 13 November 1986, pp 468-469.

335 *Minutes*, NSW Legislative Council, 1 December 2005, p 1809.

336 See, for example, recent protests against the passing of the Environmental Planning and Assessment Amendment Bill 2008, *Minutes*, NSW Legislative Council, 18 June 2008, p 675; the Industrial Relations Amendment (Public Sector Conditions of Employment) Bill 2011, *Minutes*, NSW Legislative Council, 14 June 2011, p 197; the Retail Trading Amendment (Boxing Day) Bill 2017, *Minutes*, NSW Legislative Council, 21 September 2017, p 1926; and the Reproductive Health Care Reform Bill 2019, *Minutes*, NSW Legislative Council, 26 September 2019, pp 476-477.

337 Except where passed under the provisions of sections 5A or 5B of the *Constitution Act 1902*.

338 *Constitution Act 1902*, s 9C.

339 Section 3 of the *Constitution Act 1902* provides: 'The Legislature means His Majesty the King with the advice and consent of the Legislative Council and Legislative Assembly.'

340 Twomey, (n 1), p 223.

341 Ibid, pp 217-218, 223.

342 Ibid, pp 225-226.

343 For further information, see the *Annotated Standing Orders of the New South Wales Legislative Council*, (n 28), pp 524-527.

In practice, the Parliamentary Counsel's Office prepares and prints a vellum copy[344] of the bill, which the relevant Clerk certifies is in the form agreed to by both Houses before signing and dating it.[345] An amendment to the year of the bill, if necessary, may be made at this point by hand. The bill is then sent by the Clerk, on behalf of the President, to the Governor. A second vellum is also provided to the Governor for archival purposes.

At the same time as sending the vellum to the Governor, the Clerk of the originating House according to longstanding practice also forwards a copy of the bill to the Solicitor General.[346] The Solicitor General provides a legal opinion to the Attorney General as to whether there is any objection to the Governor assenting to the bill. The Attorney General countersigns it and then formally provides it to the Governor.[347] The advice is in the form 'There is no objection to His/Her Excellency the Governor giving his/her assent to the Bill'. Whilst there is no statutory provision requiring a legal opinion on a bill, the Governor does not assent to any bill until the Solicitor General's opinion has been received.[348] On receipt of the Solicitor General's legal opinion, the Governor signs and dates a certificate at the end of the bill which states: 'In the name and on behalf of Her Majesty, I assent to this Bill.'

There is little or no discretion for the Governor to withhold the giving of assent. Section 31 of the *Australian Constitutions Act (No 1) 1842* (Imp)[349] formerly provided that 'the Governor shall declare according to his discretion', subject to the act and any Royal Instructions, 'that he assents to such Bill in Her Majesty's Name, or that he withholds Her Majesty's Assent, or that he reserves such Bill for the Signification of Her Majesty's Pleasure thereon'. However, this discretion was removed by the combined passage of the *Australia Acts* of 1986 and the repeal of section 31. The reservation of certain matters for assent by the Sovereign was also removed following the passage of the *Australia Acts*

344 The bill is printed on paper akin to vellum, from which it derives the title of the 'vellum'.

345 The Clerk signs and dates a certificate that is attached to the bill to indicate that the bill has passed both Houses. In the case of a Council bill, the certificate states: 'I certify that this PUBLIC BILL, which originated in the LEGISLATIVE COUNCIL, has finally passed the LEGISLATIVE COUNCIL and the LEGISLATIVE ASSEMBLY of NEW SOUTH WALES.'

346 Traditionally, this step was taken by the Governor's Office on receipt of the vellum.

347 The practice of seeking such a legal opinion was initiated in colonial times, but its precise derivation is not known. It may possibly have originated through a request of a cautious Governor to the then Attorney General for a memorandum that he was justified in assenting to a bill of a controversial nature. See Crown Solicitor, 'Bills for royal assent – Origin of Attorney General's certificate to Governor', 3 March 1927. In 1986, the decision was taken to continue the practice, despite the passage of the *Australia Acts* of 1986 which rendered inoperative the requirement that bills be withheld for royal assent. See Twomey, (n 1), p 219.

348 See Twomey, (n 1), p 220 for an instance in 1988 and 1989 when the Attorney General withheld from the Governor the Solicitor General's certificate at the request of the government, prompting the President of the Council to issue a press release claiming the government's failure to submit the bill to the Governor was against the principles of the Westminster parliamentary system. Ultimately the government backed down, the certificate was provided to the Governor and the bill assented to.

349 5 & 6 Vic, c 76 (Imp).

of 1986.[350] As a result, it is now generally accepted that the Governor has no discretion to refuse assent to a bill upon policy grounds alone.[351] This includes on receipt of a protest against the bill.

However, there is one circumstance in which the Governor may still have discretion to withhold assent: in circumstances where the Solicitor General has provided advice that the 'manner and form' provisions of either section 7A or section 7B of the *Constitution Act 1902* have not been fully complied with.[352]

Once a bill has been assented to, a message is forwarded to both Houses by the Governor's Office signifying assent and returning the original signed vellum to the Clerk of the House in which the act originated. The act, as it has now become, is numbered by the relevant Clerk on the long title page, with the date of assent added after the title. A new series of numbers is commenced from January of each year (SO 162(1)).

After numbering, the relevant Clerk enrols the act in a public repository of State documents in accordance with section 8A(3) of the *Constitution Act 1902*. Current practice is for acts to be enrolled by the Clerks of the two Houses and stored at Parliament House, before being sent to State Records for long-term storage and preservation as a historical record.[353] This ensures that, should questions ever arise whether a bill has been correctly reprinted, the original copy of the bill is available for reference.

Bills that have been assented to are notified on the NSW legislation website maintained by the Parliamentary Counsel's Office. The assent is also communicated by the President to the House when it next sits.

There is no restriction on the Governor assenting to bills after prorogation,[354] and there are numerous examples of this occurring.[355] There is also no apparent restriction on the Governor assenting to bills after the expiry of the Assembly at the end of a Parliament, and there is at least one example of a bill being assented to after the expiry of the Assembly.[356] Whilst there is an argument that the Legislature cannot function when the

350 The reservation of certain bills for assent by the Sovereign was originally set out in section 31 of the *Australian Constitutions Act (No 1) 1842*, 5 & 6 Vic, c 76 (Imp) and later section 1 of the *Australian States Constitution Act 1907* (Imp), together with clause (x) of the Royal Instructions of 1879 and the Royal Instructions of 1900. However, these provisions were removed following the passage of the *Australia Acts* of 1986. The *Australian States Constitution Act 1907* was formally repealed with respect to New South Wales in 1987, and the Royal Instructions were formally revoked by additional Royal Instructions to the Governor dated 13 February 1986. See Twomey, (n 1), pp 230-238.

351 Twomey, (n 1), p 222.

352 Ibid, pp 221-222.

353 Formerly the acts were kept enrolled at the Registrar General's Department.

354 *Attorney-General v Marquet* (2003) ALJR 105 at [85] per Gleeson CJ, Gummow, Hayne and Heydon JJ and at [115]-[118] per Kirby J. See also Crown Solicitor, 'Effect of prorogation and dissolution of Parliament on bills passed through both Houses and not then assented to', 25 May 1932.

355 For further information, see Twomey, (n 1), pp 227-228.

356 The Public Service (Amendment) Bill 1910 was assented to by the Governor on 11 October 1910 after the expiry of the Assembly at the end of the 21st Parliament on 14 September 1910. See *Minutes*, NSW Legislative Council, 16 November 1910, p 8.

Assembly is not in existence,[357] this argument was rejected in the New Zealand case of *Simpson v Attorney-General*.[358] Such an argument would also be inconsistent with the provisions of sections 5B, 7A and 7B of the *Constitution Act 1902*, which permits bills to be put to a referendum at a general election, and subsequently to go to the Governor for assent, after expiry of the Assembly.

COMMENCEMENT OF ACTS

A bill becomes an act when it is assented to by the Governor, but it does not necessarily come into effect as a law at that time.

Under section 23(1) of the *Interpretation Act 1987*, a bill which has been assented to by the Governor and is now an act is deemed to commence 28 days after the date of assent, unless the bill provides otherwise. Some bills specify the day of assent as the day of commencement and some specify a particular date, however many bills provide that their provisions are to commence on a day or days to be appointed by proclamation.

Although commencement of acts by proclamation is administratively convenient, allowing the government to delay the commencement of a law until administrative arrangements or regulations are in place, it effectively places in the hands of the executive government the power to withhold from commencement a law duly passed by Parliament. As such, it has been argued that commencement by proclamation is an inappropriate delegation of power by the Parliament to the executive.[359]

Concern about the delay in the commencement of certain legislation arose in the Council on 11 October 1990, when the House agreed to a motion moved by the Hon Elisabeth Kirkby that on or before 31 May and 30 November each year a list be tabled in the House showing details of laws which had not commenced, a statement of reasons for non-proclamation and details of proposed proclamation dates.[360] No return was presented before the prorogation of the session in February 1991.

The matter arose again in 1996. On 22 October 1996, the Leader of the Opposition, the Hon John Hannaford, moved to censure the Attorney General and Minister for Industrial Relations, the Hon Jeff Shaw, for his failure to proclaim the commencement of section 322(3) and schedule 5.4 of the *Industrial Relations Act 1996*. These provisions had been inserted into the act by the Council on 23 May 1996, despite the opposition of the government.[361] An amendment moved by Mr Cohen moderated the censure to a motion expressing concern, but also including a requirement that the Attorney General table on the second sitting day of each month a list of all legislation not proclaimed 90 days after assent.[362]

---

357 EM Mitchell, Counsel Assisting the Crown Solicitor, Opinion, 31 May 1932.

358 [1955] NZLR 271.

359 For further information, see A Stedman, 'Unproclaimed legislation – the delegation of legislative power to the executive', *Australasian Parliamentary Review*, (Vol 28, No 1, Autumn 2013), pp 83-96.

360 *Minutes*, NSW Legislative Council, 11 November 1990, pp 461-462.

361 *Hansard*, NSW Legislative Council, 23 May 1996, pp 1427-1429.

362 *Minutes*, NSW Legislative Council, 22 October 1996, pp 379-380.

This provision was modelled on a similar requirement adopted by the Senate in 1988. The first such return was presented on 13 November 1996.[363]

The provision was subsequently re-adopted in sessional orders before being incorporated into the current standing orders in 2004. Standing order 160(2) now requires that, on the second sitting day of each month, a minister table a list of all legislation that has not been proclaimed 90 days after assent.

The matter arose again in 1999, when the Council adopted an amendment moved by the Hon Helen Sham Ho to clause 60(6) of the Motor Accidents Compensation Bill 1999, later renumbered clause 61(6).[364] Following assent, various provisions of the act were proclaimed to commence on 13 September 1999 and 5 October 1999, with the exception of section 61(6). The matter was subsequently the subject of a question without notice in the House on 23 September 1999,[365] and a further motion in the House on 16 November 1999 calling on the minister to proclaim the commencement of section 61(6).[366] Ultimately the Minister introduced the Motor Accidents Compensation Amendment (Medical Assessments) Bill 2000 on 3 May 2000 to clarify the provisions of section 61.

In 2010, both Council and Assembly members of the Joint Select Committee on Parliamentary Procedure recommended that the government should include in the list of unproclaimed legislation tabled separately in both Houses an explanation of the reasons why legislation has not been proclaimed.[367] To date this recommendation has not been acted on.

Most recently, the matter arose again in 2019 and 2020 after the government failed to proclaim the commencement of the *Modern Slavery Act 2018*, following its assent on 27 June 2018. The act originated in the Council as a private member's bill introduced by the Hon Paul Green on 8 March 2018. The government attributed its failure to proclaim commencement of the act to defects in the legislation, including some provisions which, as drafted, the government believed were inoperable, or which were open to the risk of a constitutional challenge. The government also noted the Commonwealth Parliament's passage of its own *Modern Slavery Act 2018* (Cth) since the act's assent.[368] An inquiry by the Standing Committee on Social Issues, undertaken at the request of the responsible minister, recommended that the government introduce amendments to the *Modern Slavery Act 2018* with the aim of the act commencing on or before 1 January 2021.[369]

In the Australian Parliament, the government has now adopted a standard commencement provision in all bills which provides that if a statute specified to

363 *Minutes*, NSW Legislative Council, 13 November 1996, p 442.
364 *Hansard*, NSW Legislative Council, 29 June 1999, p 155.
365 *Hansard*, NSW Legislative Council, 23 September 1999, pp 1133-1135.
366 *Minutes*, NSW Legislative Council, 16 November 1999, pp 219-220.
367 Joint Select Committee on Parliamentary Procedure, *Reforms to parliamentary processes and procedures*, October 2010, pp 26, 58.
368 *Hansard*, NSW Legislative Council, 1 June 2019, pp 17-18 per the Hon Don Harwin.
369 Standing Committee on Social Issues, *Modern Slavery Act 2018 and associated matters*, Report No 56, March 2020, recommendation 1.

commence by proclamation has not commenced within 6 or 12 months of assent, it commences automatically. Provisions for acts to commence by proclamation at any time after assent are now not included in bills unless there is some special reason for doing so.[370]

Odgers also notes various instances where the Senate has amended the commencement provisions of bills.[371] In addition, since 2003, all proclamations have also been tabled in the Senate.[372]

370 *Odgers*, 14th ed, (n 177), p 356. In 2010, Council members of the Joint Select Committee on Parliamentary Procedure stopped short of advocating the adoption of a similar approach in New South Wales, pending implementation of its recommendation that the list of unproclaimed legislation tabled separately in both Houses explain the reasons why legislation has not been proclaimed. See Joint Select Committee on Parliamentary Procedure, *Reforms to parliamentary processes and procedures*, October 2010, p 59.

371 *Odgers*, 14th ed, (n 177), p 356.

372 Ibid, p 357.

CHAPTER 16

COMMITTEE OF THE WHOLE HOUSE

This chapter examines the consideration of bills and other matters by the House in a Committee of the whole House. A Committee of the whole House consists, as its name implies, of all members of the House, sitting as a committee in the Council chamber.[1] It is chaired by the Deputy President and Chair of Committees instead of the President (SO 17(2)), and provides members with an opportunity to consider a matter in detail, with multiple opportunities to speak and move amendments.

The House resolves into a Committee of the whole House when required by the standing orders to consider a bill in detail, including any amendments (SOs 141(1) and 144(6)), or to consider messages from the Legislative Assembly concerning amendments to a bill. The House has also on rare occasions resolved into a Committee of the whole House to consider other matters.[2]

CONSIDERATION OF BILLS IN COMMITTEE

Committal of bills to a committee

Standing order 141 provides that after a bill has been read a second time, unless it is referred to a standing or select committee or leave is granted to proceed to the third reading of the bill forthwith,[3] the House will immediately resolve into a Committee of the whole House for consideration of the bill in detail, or a future day may be appointed on motion for its consideration in committee (SO 141(b) and (c)).

Where the minister or private member with carriage of a bill wishes to proceed to its consideration in a committee immediately, the following form of words is used:

---

1 For discussion of the origins of Committee of the whole House, see J Redlich, *The Procedures of the House of Commons – A Study of its History and Present Form*, vol II, (Archibald Constable & Co Ltd, 1903), pp 203-214. See also L Lovelock and J Evans, *New South Wales Legislative Council Practice*, 1st ed, (Federation Press, 2008), pp 442-443 and S Want and J Moore, edited by D Blunt, *Annotated Standing Orders of the New South Wales Legislative Council*, (Federation Press, 2018), p 563.

2 For further information, see the discussion later in this chapter under the heading 'Consideration of other matters in committee'.

3 An instruction to a committee or a 'this day six months' amendment may also be moved.

'Mr/Madam President, I move that you do now leave the chair and the House resolve itself into a committee of the whole to consider the bill in detail.' There is no amendment or debate of the question.[4] In 1986, the President ruled out of order an attempt to debate the question,[5] although in 2000 the House granted leave for a number of members to speak to the question.[6] If the question is negatived, the bill drops from the *Notice Paper*.[7]

Alternatively, where the minister or private member with carriage of a bill wishes to set its consideration down for a future time, the following form of words is used: 'Mr/Madam President, I move that consideration of the bill in a committee of the whole stand an order of the day for a later hour[8]/next sitting day/[a named day].' The question may be debated and amended, giving members an opportunity to propose an alternate time for consideration of the bill in committee.[9]

Where the House agrees to the question that a bill be considered in committee immediately, or an order of the day is read for consideration of a bill in committee (SO 172(2)), the House immediately resolves into committee. The President leaves the President's Chair and the Deputy President and Chair of Committees or one of the Temporary Chairs[10] takes the seat reserved for the Chair of Committees between the clerks at the table of the House.[11] This signifies that the House is in committee. The Chair

4 This restriction was imposed with the adoption of the 1895 standing orders. Standing order 171 adopted in 1895 provided that the motion 'shall admit of no debate or amendment'. Prior to that, debate or amendment of the motion to resolve into committee was common. For further information, see the *Annotated Standing Orders of the New South Wales Legislative Council*, (n 1), pp 466, 468.

5 Ruling: Johnson, *Hansard*, NSW Legislative Council, 29 October 1986, p 5668.

6 *Hansard*, NSW Legislative Council, 23 November 2000, pp 10714-10716.

7 See, for example, *Minutes*, NSW Legislative Council, 27 July 1875, p 139.

8 Standing order 141(1)(c) only provides for consideration to be set down for a 'future day', however the practice has developed of setting down consideration for a later hour as well, based no doubt on the practice of the House under standing order 45 of postponing business to a later hour.

9 For further information, see the *Annotated Standing Orders of the New South Wales Legislative Council*, (n 1), p 466.

10 Standing order 17(2) provides that the Chair of Committees is to take the Chair at the table in *all* committees. However, in practice, it is common for an available Temporary Chair to also preside over proceedings in committee. For further information, see the *Annotated Standing Orders of the New South Wales Legislative Council*, (n 1), pp 55-56.

11 On 4 August 1948 an interesting situation arose in the House when neither the Chairman of Committees (today known as the Deputy President and Chair of Committees) nor any Temporary Chairs were available when the House resolved to go into committee to consider the Landlord and Tenant (Amendment) Bill 1948 in detail. Whilst the standing orders provided for the Chairman of Committees, when in committee, to appoint another member to take the Chair in the absence of the Temporary Chairs, there was no provision for the President to do so whilst the House was sitting. In the absence of the Chairman of Committees and the three Temporary Chairs, the President left the Chair at 8.30 pm to consult with the Hon Robert Downing, the Hon Sir Henry Manning, and the two whips in his chambers. On resuming the Chair at 9.00 pm, the President stated that, in the absence of the Chairman of Committees and the three Temporary Chairs, he would retain the President's Chair in the House. The House then resolved on the motion of the Hon Robert Downing that the necessary action consequent upon the passing of the resolution that

of Committees then announces the short title of the bill or bills if cognate, and proceeds to consideration of the bill or bills in detail. Unlike in the Legislative Assembly and House of Commons, where the Mace is removed from the table to signify that the House is in committee,[12] the Black Rod remains on the table of the House.

A Committee of the whole House can only consider those matters referred to it by the House (SO 173(1)).

Instructions to a committee

Standing orders 180, 141(2) and 172(2), as amended by sessional orders,[13] provide that an instruction to a Committee of the whole House may be moved without notice:

- before the House resolves into committee;
- on the order of the day being read for the consideration of a bill in committee; or
- on the order of the day being read for the resumption of consideration of a bill in committee.[14]

The majority of instructions to committees concern the admissibility of amendments to bills.[15] Amendments must be relevant to the subject matter of a bill (SO 144(1)). Where they are not, the House may give an instruction to a committee to consider the amendments, provided that they are relevant to the subject matter of the act which the bill proposes to amend (SO 179(3)).[16] However, an instruction cannot empower a committee to consider amendments that would effectively reverse the principle of a bill as read a second time. Nor may an instruction be used to introduce into a bill a subject which should properly constitute a separate bill.[17]

---

the House resolve into committee to consider the bill in detail be postponed and stand an order of the day for a later hour of the sitting. The President then left the Chair again at 9.01 pm until 12.30 am when, a Temporary Chair being present, the House was able to resolve into committee to consider the bill. See *Minutes*, NSW Legislative Council, 4 August 1948, p 178; *Hansard*, NSW Legislative Council, 4 August 1948, p 3572.

13 *Minutes*, NSW Legislative Council, 8 May 2019, p 61.

14 Standing orders 141(2) and 181(1) as adopted in 2004 require an instruction to committee to be moved on notice. For many years, this requirement was circumvented by the use of a contingent notice. However, since 2015, the adoption of a sessional order amending standing orders 141(2) and 180(1) has removed the requirement for notice. For further information, see the *Annotated Standing Orders of the New South Wales Legislative Council*, (n 1), pp 588-592.

15 For recent examples, see *Minutes*, NSW Legislative Council, 24 June 2015, p 233; 14 October 2015, p 449 and 22 June 2017, pp 1172-1173. By contrast, in other Houses such as the House of Commons and the Senate, instructions to a committee are relatively rare, perhaps because those Houses take a less restrictive view of relevance. See *Erskine May*, 25th ed, (n 12), paras 28.69 and 28.81; and R Laing (ed), *Odgers' Australian Senate Practice*, as revised by H Evans, 14th ed, (Department of the Senate, 2016), pp 325-326.

16 For further information, see the discussion later in this chapter under the heading 'The admissibility of amendments'. See also the *Annotated Standing Orders of the New South Wales Legislative Council*, (n 1), p 584.

17 *Erskine May*, 25th ed, (n 12), para 28.75.

Instructions to committees on a bill may also be used to extend or restrict the authority of a committee in other ways (SO 179(1)). For example:

- An instruction may require a committee to divide a bill into two or more bills, or to consolidate several bills into one (SO 179(2)).[18]
- An instruction may set out the procedures to be followed by a committee in considering a bill. For example, an instruction on the Industrial Relations Amendment (Public Sector Conditions of Employment) Bill 2011 required the committee to apply certain time limits to debate on the bill, together with other measures to expedite consideration of the bill.[19]

On 21 August 2012, the House gave an instruction to a committee to enable it to reconsider a message received from the Legislative Assembly almost a year earlier on 26 August 2011 disagreeing with the Council's amendments to the Graffiti Legislation Amendment Bill 2011, concurrent with a later message received from the Legislative Assembly that day further rejecting the Council's request for a free conference on the bill.[20] The instruction also gave the committee express power to consider any further amendments which directly arose from disagreement of the Assembly to the Council's amendments.[21]

A motion for an instruction may be debated. In keeping with the normal rules of debate that prevent debate on a procedural question anticipating the substantive motion, debate must be relevant to the instruction, must not refer to the objects of the bill to which the instruction relates, and must not anticipate discussion of a clause in the bill (SO 181).[22]

An instruction to a committee may be rescinded.[23]

Amendments to bills

Amendments to bills can only be made in a Committee of the whole House (SO 144(6)). Amendments may:

- omit certain words;
- omit certain words and insert or add other words; or

18 For further information, see the discussion in Chapter 15 (Legislation) under the heading 'Division and consolidation of bills'.

19 *Minutes*, NSW Legislative Council, 2-4 June 2011, pp 182-185.

20 For further information, see the discussion in Chapter 22 (Relations with the Legislative Assembly) under the heading 'Requests for conferences'.

21 *Minutes*, NSW Legislative Council, 21 August 2012, p 1148.

22 For further information, see the *Annotated Standing Orders of the New South Wales Legislative Council*, (n 1), pp 592-593.

23 For an example, see *Minutes*, NSW Legislative Council, 30 November 1988, pp 296, 299.

- insert or add words (SO 109(1)).[24]

An amendment may also be moved to an amendment (SO 109(2)).

The preparation and lodgment of amendments

Amendments to bills are prepared by the Parliamentary Counsel's Office under instruction from the member proposing the amendments.[25]

Chairs of Committees have consistently ruled that amendments to a bill must be prepared in written form, signed by the mover (SO 109(7)), and lodged with the clerks and circulated prior to the House resolving into a committee to consider the bill in detail.[26] Administrative practice in the House is for the clerks to record in writing when members indicated that amendments they have lodged can be circulated to other members. Ideally amendments should be circulated at the earliest opportunity to allow other members time to consider their effect, and to enable them to be checked and marshalled by the clerks to assist in their orderly consideration. To ensure that amendments are marshalled correctly, on their receipt from a member, they are stamped and signed by the clerks with the date and time of receipt.[27]

Amendments received after the House has resolved into a committee are accepted only at the discretion of the Chair.[28] Equally, it is at the discretion of the Chair whether to accept an amendment moved without having been previously circulated in written form.

Consideration of a bill under standing orders 142, 143 and 144

Standing orders 142, 143 and 144 deal with the arrangements for considering bills in a Committee of the whole House, including any amendments. Under these standing orders, bills are required to be considered from beginning to end, with the exception of the long title of the bill and any preamble, which are considered last to enable them to be amended consequent on any other amendments agreed to by a committee (SOs 142(1) and 143(1)(e) and (f)). In moving through the bill from beginning to end, the Chair puts the following question on each clause and schedule as it occurs in a bill: 'That

24 Standing order 109 regulates the moving of amendments both in the House and in a Committee of the whole House.

25 Parliamentary Counsel's Office also drafts all bills, including private members' bills, and all regulations. For further information on drafting services provided by the Parliamentary Counsel's Office to non-government members, see the discussion in Chapter 15 (Legislation) under the heading 'Preparation of public bills'. See also Parliamentary Counsel's Office, *Manual for the Drafting of Non-Government Legislation*, 12th ed, (May 2019).

26 Rulings: Fazio (Deputy), *Hansard*, NSW Legislative Council, 26 May 2005, p 16251; 17 October 2006, pp 2641-2644; Khan (Deputy), *Hansard*, NSW Legislative Council, 10 November 2015, p 5498.

27 This has been the subject of memorandums circulated by successive Chairs of Committee to members at the commencement of Parliaments.

28 This has also been the subject of memorandums circulated by successive Chairs of Committee to members at the commencement of Parliaments.

the clause (or schedule), as read, stand a clause (or schedule) of the bill' (SO 142(2)).[29] The consideration of a clause (or schedule) may be postponed, and returned to later (SOs 142(5) and 143(1)(b)). Large bills may, by leave, be taken by part or division, rather than clause by clause (SO 142(6)).[30]

Amendments may occur at any point in a bill. On a committee reaching a clause or schedule in a bill to which an amendment has been circulated, the member with carriage of the amendment may move it, whereupon debate may ensue. At the conclusion of the debate, the Chair puts the question: 'That the amendment of [member] be agreed to.' The Chair then puts the further question: 'That the clause (or schedule), as read/as amended (as the case may be), stand a clause of the bill' (SOs 142(2) and 144(4)). Putting this further question allows the committee an opportunity to consider the clause (or schedule) in its final form. If need be the question may be further debated.

When an amendment is under consideration in committee, another member may move an amendment to the amendment (SO 109(2)). Following any debate, the Chair puts the question: 'That the amendment of [member] to the amendment of [member] be agreed to.' Once that question is dealt with, the Chair puts the original amendment, as moved or as amended. The Chair then puts the question on the clause or schedule in its final form.

With the leave of a committee, members may move related amendments as a package to be considered together, known as moving amendments *in globo*, although members have also sought leave to move unrelated amendments *in globo*.

At the conclusion of consideration of the body of a bill, the Chair puts the question on any preamble and on the title of the bill, before finally putting the question that the bill, as read or as amended, be agreed to.

Cognate bills are considered separately, unless a committee unanimously agrees otherwise (SO 139(3)). The committee deals with the principal bill first, followed by the cognate bill or bills. If there are no amendments to one of the bills, with the leave of the committee, the bill is usually dealt with on one question: 'That the clauses, schedules and title be agreed to' (SO 142(6)).

These arrangements for the consideration of bills in committee under standing orders 142, 143 and 144 are discussed in more detail in the first edition of *New South Wales Legislative Council Practice*[31] and in the *Annotated Standing Orders of the New South Wales Legislative Council*.[32]

29 In putting the question on each clause or schedule, it is sufficient for the Chair to read the number of the clause or schedule only (SO 142(3)).

30 It is for the Chair to initiate such consideration by part or division. As the leave of the committee is required, any member may object to consideration of a bill by parts or divisions.

31 *New South Wales Legislative Council Practice*, 1st ed, (n 1), pp 356-357.

32 *Annotated Standing Orders of the New South Wales Legislative Council*, (n 1), pp 470-473.

Consideration of a bill as a whole

Whilst the arrangements outlined above under standing orders 142, 143 and 144 for the consideration of amendments to a bill in a Committee of the whole House remain in place, since 2014, the House has routinely adopted alternative procedures for the consideration of bills in committee, based on Senate practice. Under these procedures, on a committee commencing its consideration of a bill, the Chair inquires of the committee whether leave is granted to consider the bill as a whole. If leave is granted, the Chair no longer needs to move clause by clause through the bill, and amendments may be moved in any order and to any part of the bill, although the default position remains that members move amendments in the order in which they occur in the bill, unless there is a reason to proceed otherwise.[33] If an amendment or amendments are adopted, the Chair does not put the further question that the clause (or part, division or schedule), as amended, stand a clause (or part, division or schedule) of the bill. Rather, the committee considers only one final question once all amendments have been dealt with: 'That the bill, as read/as amended (as the case may be), be agreed to'. Subsequently the Chair puts the question on any preamble to the bill (SOs 142(1) and 143(1)(e)), followed lastly by consideration of the title (SO 143(1)(f)).

These arrangements were adopted to streamline consideration of bills in committee by facilitating more free-flowing debate on amendments grouped by theme without requiring the Chair to put the question on each clause and schedule. However, a committee is still at liberty to use the procedures set out under standing orders 142, 143 and 144. There is one instance in 2014 of a committee doing so, notwithstanding the adoption of the alternative procedures.[34]

Whilst the granting of leave to take a bill as a whole allows a committee to consider a bill more flexibly, other standing orders governing the consideration of bills in committee, such as those dealing with the admissibility of amendments, continue to apply. This is discussed further below.

These new arrangements for the consideration of bills as a whole are discussed in further detail in the *Annotated Standing Orders of the New South Wales Legislative Council*.[35]

The admissibility of amendments

It is the responsibility of the Chair, with advice from the Clerk, to determine the admissibility of amendments to a bill in a Committee of the whole House.

An amendment may be made to any part of a bill (SO 144(1)), subject to certain rules governing the admissibility of amendments:

- An amendment may not be moved if it reverses the principle of a bill, as read a second time (SO 144(3)). A committee is bound by the decision of the House

33 Ruling: Mallard (Temporary Chair), *Hansard*, NSW Legislative Council, 24 September 2019, p 3.

34 *Hansard*, NSW Legislative Council, 19 November 2014, p 3073. The bill was the Ombudsman and Public Interest Disclosures Legislation Amendment Bill 2014.

35 *Annotated Standing Orders of the New South Wales Legislative Council*, (n 1), pp 472-473, 479.

agreeing to the principle of a bill at its second reading. It is therefore out of order to amend the bill in a manner that is destructive of or reverses the principle of the bill, or equates to a negative of the bill.[36] However, *Erskine May* observes that there is nothing to prevent an amendment being moved that would have the effect of nullifying the bill or rendering the bill meaningless, for example by omitting large parts of the bill.[37]

- An amendment must be relevant to the subject matter of a bill (SO 144(1)), and no clause may be inserted into a bill which is irrelevant to its long title (SO 136(3)).[38] As discussed in Chapter 15 (Legislation), the subject matter of a bill may generally be determined by reference to its long title, which sets out the purpose of the bill. When the House gives leave for the introduction of a bill, the House is agreeing to the introduction of a bill with the purpose as set out in its long title. However, while the long title is taken as indicative of the purpose of a bill, it does not conclusively determine its subject matter and scope.[39] Reference may also be had to the clauses and schedules of the bill, the minister's second reading speech and the explanatory memorandum.

  The relevance of amendments to the subject matter of a bill is generally interpreted broadly to provide members with the maximum freedom to move amendments. However, where amendments are determined as outside the leave of a bill, or otherwise at variance with the rules and conventions of the House, they may still be moved where the House gives a committee the power to consider the amendments by way of an instruction.[40] If an amendment is made in a bill which does not come within the long title, the long title must be amended, and the amended title specifically reported to the House (SOs 144(5) and 146(1)).

---

36 For practical examples of the application of this standing order, see Rulings: Peden, *Minutes*, NSW Legislative Council, 27 September 1932, pp 44-45; 8 December 1937, p 98; Farrar (Deputy), *Hansard*, NSW Legislative Council, 30 September 1941, pp 1386-1390; Gay (Deputy), *Hansard*, NSW Legislative Council, 5 June 1996, pp 2482-2483. See also *Erskine May*, 25th ed, (n 12), para 28.105.

37 *Erskine May*, 25th ed, (n 12), para 28.80.

38 The inclusion in the long title of a bill of words such as 'and for related purposes' or 'and for other purposes' does not open the bill to the introduction of any amendment whatsoever, and cannot be used as a means of circumventing the intention of the standing orders. See DR Elder and PE Fowler (eds), *House of Representatives Practice*, 7th ed, (Department of the House of Representatives, 2018), p 376.

39 *Erskine May* comments that in the House of Commons, the scope of a bill, particularly a bill with several purposes, may be wider than its long title, although the long title may help to determine the scope. Conversely, a bill with a single purpose may have a narrower scope than the long title. See *Erskine May*, 25th ed, (n 12), para 28.81.

40 For further information, see the discussion earlier in this chapter under the heading 'Instructions to a committee'.

- An amendment may not be moved to words already agreed to in a bill, except for the addition of other words (SO 110). Although the House has adopted alternative procedures for the consideration of bills in committee since 2014 which are designed to provide greater flexibility to members in the moving of amendments, it is still a fundamental principle of procedure that a decision in committee on a provision of a bill cannot be revisited without due process, for example reconsideration or recommittal.[41] Without the application of this rule, there would be nothing to prevent members from moving amendments concerning matters already dealt with in a bill as a way of frustrating proceedings.[42]
- An amendment may not be moved if it is substantially the same as one already negatived, or which is inconsistent with a previous decision of a committee, unless a recommittal of the bill has intervened (SOs 144(2) and 173(2)), or unless the amendment is part of a different package of amendments.[43] Equally, an amendment may not be moved if it is governed by or dependent on an amendment which has already been negatived.[44]
- An amendment may not be moved to a former part of a clause if a later part has been amended, or is proposed to be amended, except if a proposed amendment has been withdrawn by leave (SO 109(3)). However, in the Council, this rule does not generally arise due to the practice of amendments being considered concurrently.[45]
- An amendment may not be moved if it is vague, trifling or tendered in a spirit of mockery,[46] if it would make a clause unintelligible or ungrammatical, if it is incoherent and inconsistent with the context of the bill, or if it is offered in the wrong place in a bill.[47]

Under the arrangements used before 2014, and still available for use today, amendments could only be considered to a clause or schedule in an earlier part of a bill if consideration of the clause or schedule had been postponed under standing orders 142 and 143. A committee could not go back to an earlier part of a bill if a decision had already been reached on a later part, except to make consequential amendments. However, with the

41 Ruling: Mallard (Temporary Chair), *Hansard*, NSW Legislative Council, 24 September 2019, pp 3-4.

42 For further information, see the *Annotated Standing Orders of the New South Wales Legislative Council*, (n 1), pp 355-356.

43 *Hansard*, NSW Legislative Council, 19 September 2019, p 3 per the Hon Shayne Mallard (Temporary Chair). See also *Odgers*, 14th ed, (n 15), p 241.

44 Ruling: Healey (Deputy), *Hansard*, NSW Legislative Council, 25 November 1985, p 10429. See also *Erskine May*, 25th ed, (n 12), para 28.105.

45 For further information, see the discussion later in this chapter under the heading 'Conflicting amendments'. See also the *Annotated Standing Orders of the New South Wales Legislative Council*, (n 1), pp 354-355.

46 Rulings: Griffin (Deputy), *Hansard*, NSW Legislative Council, 20 October 2010, p 26361; Khan (Deputy), *Hansard*, NSW Legislative Council, 10 November 2015, p 5498; 25 August 2016, p 18.

47 *Erskine May*, 25th ed, (n 12), para 28.105.

move since 2014 to considering a bill as a whole, this rule is no longer applied, and a committee may move forwards and backwards in a bill as necessary.

Certain other constraints on amendments also arise in relation to particular types of bills.

As discussed in Chapter 17 (Financial legislation), the Council may only *suggest* amendments to bills 'appropriating revenue or moneys for the ordinary annual services of the Government' pursuant to section 5A(1) of the *Constitution Act 1902*.[48]

Issues may also arise in relation to bills that give effect to agreements between the Commonwealth and State Governments, so called inter-governmental or national scheme legislation. Amendments to such bills may result in legislation enacted in New South Wales being inconsistent with legislation passed in other Australian jurisdictions. This challenge was articulated by Dr John Kaye in June 2008 in debate on the National Gas (New South Wales) Bill 2008:

> The bill represents both the strengths and weaknesses of a Council of Australian Governments approach. National consistency has huge benefits. Unfortunately it means Parliament is largely shut out from the process. Our capacity to amend the bill is restricted by the fact that the South Australian Parliament is the lead regulator and amendments to the bill would effectively take New South Wales out of the national system. While in principle that can lead to good outcomes, it leaves us with the problem that the Westminster system of democracy is effectively excluded as a result of this State losing sovereignty over its own gas supplies.[49]

Whilst inter-governmental or national scheme legislation undoubtedly poses a challenge to legislators, there is no procedural impediment to prevent members moving amendments to such bills, or rejecting them outright, although there may be financial or other penalties to New South Wales in doing so. For example, amendments were moved to the Human Cloning and Other Prohibited Practices Amendment Bill 2007 which, if agreed to, would have placed New South Wales out of step with other jurisdictions. In the event, the amendments were negatived.[50]

Conflicting amendments

Where there are conflicting amendments which occur at the same point in a bill, the practice is to allow the amendments to be moved and debated concurrently, to give members maximum opportunity to debate their merits.

---

48 See, for example, amendments to the Appropriation (Parliament) Bill 1996, *Hansard*, NSW Legislative Council, 26 June 1996, pp 3710-3713. In this instance, the proceedings were no different to proceedings on any other bill, except that the amendment to the bill was moved and recorded as a 'suggested' amendment. As discussed in Chapter 17 (Financial legislation), it is doubtful whether the Appropriation (Parliament) Bill 1996 was a bill 'appropriating revenue or moneys for the ordinary annual services of the Government' pursuant to section 5A(1) of the *Constitution Act 1902*. However, on 26 June 1996 it was treated as such.

49 *Hansard*, NSW Legislative Council, 18 June 2008, p 8664.

50 *Hansard*, NSW Legislative Council, 26 June 2007, pp 1684-1693.

When debate has concluded, the Chair observes established rules in putting the question on the conflicting amendments:

- Where two or more amendments overlap, the Chair puts the question on the amendments in the order in which they occur in the bill. In certain circumstances, if the first amendment is agreed to, the second amendment may lapse.
- Where two or more conflicting amendments occur at the exact same point in a bill, the Chair first puts the question on any amendments from the member with carriage of the bill, and then the question on any other amendments according to the order in which they were received by the clerks. Once again, if the first amendment is agreed to, the second amendment may lapse.

Whilst it is established practice that conflicting amendments are moved and debated concurrently before being put according to the arrangements outlined above, under the alternative procedures for the consideration of bills in place since 2014, a committee may allow a package of amendments to be moved and determined even if their adoption would prevent other amendments being moved. As an example, on 9 August 2017, a committee chose to deal first with a package of Greens' amendments to the Environmental Planning and Assessment and Electoral Legislation Amendment (Planning Panels and Enforcement) Bill 2017, in the knowledge that if the amendments were agreed to, certain opposition amendments could not be moved.[51] A similar approach was adopted on 21 November 2017 in relation to amendments to the Natural Resources Access Regulator Bill 2017.[52] Such an approach is only possible when supported by all members present.

Voting 'no' to a clause, part, division or schedule

An amendment to omit a clause, part or division of or schedule to a bill has traditionally been considered not to be in order.[53] This derives from the principle that as the House has agreed to a bill at the second reading stage, members in committee should seek to amend the provisions of the bill so that they are agreeable to a majority of members before rejecting them. If agreement cannot be reached, the question that a clause, part or division of or schedule to a bill 'stand' a part of the bill can be negatived and the relevant provision omitted from the bill.[54]

Under the arrangements in place since 2014 for the consideration of a bill as a whole, if a bill is intended to be taken as a whole and a member wishes to vote 'no' to a clause, part or division of or schedule to the bill, the practice has been for the Chair to ask

51 *Minutes*, NSW Legislative Council, 9 August 2017, pp 1842-1843. For a statement by the Temporary Chair in relation to this matter, see *Hansard*, NSW Legislative Council, 9 August 2017, p 73.

52 *Minutes*, NSW Legislative Council, 21 November 2017, pp 2142-2143. For a statement by the Chair of Committees in relation to this matter, see *Hansard*, NSW Legislative Council, 21 November 2017, p 47.

53 Ruling: Fazio (Deputy), *Hansard*, NSW Legislative Council, 24 June 2009, p 16726.

54 By contrast, an amendment to omit or amend *part* of a schedule to a bill has always been considered to be in order.

the committee if there is any objection to the bill being taken as a whole with the exception of the relevant provision. Subsequently, on reaching the relevant provision in the committee's consideration of the bill, the Chair puts the question on the provision separately.

However, in recent times, amendments to omit clauses, parts or divisions of or schedules to a bill have been allowed by the Chair and committees.[55] This is likely to become more common place.

Withdrawing amendments

A member who has circulated amendments is not obliged to move them and is not required to withdraw them if they have not been moved. However, once an amendment has been moved, it can only be withdrawn by the mover, or in the absence of the mover with the mover's authority, by leave of a committee (SO 109(5)).[56]

Debate

Except as otherwise provided in the standing orders, the same rules of debate apply in a Committee of the whole House as apply in the House.[57] Members must speak standing and address the Chair, who has the same authority as the President in the House for the preservation of order (SO 173(7)).[58] The proceedings are recorded in *Hansard* and the *Minutes of Proceedings*.[59]

The most important difference between proceedings in a committee and in the House is that in a committee members may speak more than once to the question before the Chair (SOs 87(2) and 173(5)), and may move any number of amendments to the same question (subject to the rules for the admissibility of amendments, discussed above). This is the essence of proceedings in a committee: it is designed to provide every opportunity for the thorough and detailed consideration of a bill, and that consideration is ongoing

55 See, for example, amendments moved to the Environmental Planning and Assessment Amendment (Sydney Drinking Water Catchment) Bill 2017, *Minutes*, NSW Legislative Council, 11 October 2017, p 1966. On this occasion, the Chair made a statement in committee explaining the approach, *Hansard*, NSW Legislative Council, 11 October 2017, p 74. See also amendments moved to the Natural Resources Access Regulator Bill 2017, *Minutes*, NSW Legislative Council, 21 November 2017, p 2142; and amendments moved to the State Revenue and Other Legislation Amendment Bill 2019, *Minutes*, NSW Legislative Council, 20 June 2019, pp 262-264.

56 For an example, see *Minutes*, NSW Legislative Council, 21 November 2017, p 2138.

57 This is the case whether a committee is considering a bill or another matter, as discussed later in this chapter under the heading 'Consideration of other matters in committee'.

58 Subject to the restriction that disorder in committee may only be censured by the House. For further information, see the discussion later in this chapter under the heading 'Disorder'.

59 Proceedings in committee have been recorded in the *Minutes of Proceedings* since the commencement of 2016. Prior to that, they were recorded in a separate bound journal called the *Legislative Council Proceedings in Committee of the Whole*. For further information, see the discussion in Chapter 11 (Publication of and access to the proceedings of the Legislative Council) under the heading 'The *Journals of the Legislative Council*'.

until such time as members do not wish to speak any further or move any further amendments.[60]

The corollary of the extensive opportunity provided to members to debate and amend any aspect of a bill in committee is that they must confine their remarks to the clause or amendment before the committee (SOs 142(4) and 173(5)). Successive Chairs have ruled that members must address only the amendments under consideration; they especially may not seek to revisit the second reading debate or the merits of the bill in principle.[61]

Debate on a particular question in committee may be curtailed by the moving of a dilatory motion 'That the question be now put' (SOs 173(6) and 99). This is discussed further in Chapter 12 (Motions and decisions of the House).[62]

Since 2011, the House has adopted a sessional order applying time limits to debate in a committee on government bills. Members may speak for 15 minutes at any one time, and may seek leave to speak for a further 15 minutes.[63] However, because members may speak on more than one occasion in a committee, and often make multiple contributions on an amendment, these time limits have not unduly restricted members in debate.[64] There are no equivalent time limits applying to debate in a committee on private members' bills.

The President and Deputy President and Chair of Committees may take part in debate in a Committee of the whole House but must do so from the floor of the House (SO 86). It is rare for the President to do so,[65] and even rarer for the Chair of Committees to do so.[66]

If the Deputy President and Chair of Committees wishes to leave the Chair at any time whilst in committee, he or she may appoint one of the Temporary Chairs to take the Chair, or if none is present, any other member (SO 174).[67]

Disorder

The Deputy President and Chair of Committees has the same authority in a Committee of the whole House as the President has in the House for the preservation of order,[68]

60 *Odgers*, 14th ed, (n 15), p 425. See also the *Annotated Standing Orders of the New South Wales Legislative Council*, (n 1), p 565.

61 Rulings: Fazio (Deputy), *Hansard*, NSW Legislative Council, 29 October 2003, p 4291; 8 June 2005, p 16594; 25 March 2009, p 13704; Gardiner (Deputy), *Hansard*, NSW Legislative Council, 2-4 June 2011, p 2099; 2 May 2012, p 10892; Khan (Deputy), *Hansard*, NSW Legislative Council, 20 October 2015, p 4515; 10 November 2015, p 5495.

62 See the discussion under the heading 'The closure motion'.

63 *Minutes*, NSW Legislative Council, 3 August 2011, pp 296-298; 9 September 2014, p 11; 6 May 2015, p 59; 8 May 2019, pp 72-73.

64 For further information, see the *Annotated Standing Orders of the New South Wales Legislative Council*, (n 1), p 474.

67 For further information, see the *Annotated Standing Orders of the New South Wales Legislative Council*, (n 1), pp 568-569.

68 For further information, see the discussion in Chapter 13 (Debate) under the heading 'Disorder in the House'.

except that in certain instances, disorder in a committee may be censured only by the House on receiving a report from the committee (SO 173(7)).

The Deputy President and Chair of Committees has authority under standing order 192 to call a member to order three times for any breach of the standing orders, or for conducting himself or herself in a grossly disorderly manner in a committee. A member so called to order three times may be removed from the chamber by the Usher of the Black Rod on direction by the Chair of Committees for a period of time as the Chair determines, but not beyond the termination of the sitting.[69]

However, the Deputy President and Chair of Committees does not have authority to deal with disorder in more serious cases under the provisions of standing orders 190 and 191. Rather, such disorder must be reported to and dealt with by the House under the terms of standing orders 173(7), 175 and 190(2). Standing order 175 provides that the Chair may name a member as guilty of a wilful or vexatious breach of the standing orders or for interrupting the orderly conduct of business (SO 175(1)), whereupon the Chair will leave the chair and report such action to the President (SO 175(2)). After the House has dealt with the named member the committee resumes (SO 175(3)).

If significant disorder arises in a Committee of the whole House, the President may resume the Chair without any question being put, and may leave the chair in the same manner, after which committee proceedings will resume (SO 175(4)).

As it is, almost all instances of disorder in a committee are dealt with by the Chair under the provisions of standing order 192. There has only been one instance, and that in 1915, of disorderly conduct in a committee being reported to the House.[70]

Dissent from a ruling of the Chair

In maintaining order in a Committee of the whole House, the Deputy President and Chair of Committees may give rulings or rule on points of order in the same way as the President does in the House.

Under standing order 178, if a member objects to a ruling of the Chair, the objection must be taken at once. The member must give reasons in writing to the Chair. A pro-forma script is available from the clerks. The member then moves a motion to report the matter to the House so that the matter may be laid before the President.[71] The question may be amended and debated. If the question is negatived, proceedings in the committee

69 There is no record of the Deputy President and Chair of Committees ever ordering a member to be removed from the chamber under the authority of standing order 192 or its predecessor. For further information, see the discussion in Chapter 13 (Debate) under the heading 'Member called to order and removed from the chamber (SO 192)'. See also the *Annotated Standing Orders of the New South Wales Legislative Council*, (n 1), pp 628-630.

70 For further information, see the *Annotated Standing Orders of the New South Wales Legislative Council*, (n 1), p 571.

71 The motion is: 'That you [referring to the Chair] do now leave the Chair and report such objection to the House so that the matter may be laid before the President.'

continue. If the question is agreed to, the Chair leaves the chair and places the matter before the President, who may hear further argument before ruling on the matter. The President then leaves the chair without any question being put and proceedings in the committee are resumed.[72]

As noted in the *Annotated Standing Orders of the New South Wales Legislative Council*, while objections to rulings of former Chairmen of Committees were once relatively common, since the adoption of the current standing orders in 2004, there have been only two such occurrences. In each instance the motion to report the matter to the House was negatived.[73]

Quorum

The quorum in a Committee of the whole House is the same as that in the House: eight members in addition to the Deputy President and Chair of Committees or other member presiding (SO 176(1)).

Quorum in committee, including the procedures to be followed when notice is taken of the absence of a quorum, is discussed in more detail in Chapter 9 (Meetings of the Legislative Council).[74]

Determination of questions

Questions in a Committee of the whole House are decided in the same manner as in the House (SO 173(2)). Members are entitled to call for a division on any question, which is determined by a majority of votes cast with the 'ayes' or the 'noes'.

Divisions in a Committee of the whole House are taken in the same manner as in the House (SO 119).[75] As with the President in the House, the Chair exercises a casting vote only in committee, and any reasons stated by the Chair when giving a casting vote may be entered in the *Minutes of Proceedings* (SO 116).[76] The principles guiding the Chair's exercise of a casting vote in a committee are the same as those guiding the President in the House.[77]

72 For further information, see the *Annotated Standing Orders of the New South Wales Legislative Council*, (n 1), pp 579–582.

73 *Annotated Standing Orders of the New South Wales Legislative Council*, (n 1), p 581.

74 See the discussion under the heading 'Absence of a quorum in a Committee of the whole House'.

75 For further information, see the discussion in Chapter 12 (Motions and decisions of the House) under the heading 'Determining a question'.

76 For an example, see *Minutes*, NSW Legislative Council, 20 September 2017, p 1920.

77 For further information, see the discussion in Chapter 12 (Motions and decisions of the House) under the heading 'Casting vote of the Chair'.

Reporting progress

If a Committee of the whole House has only partly completed its consideration of a bill but wishes to postpone further consideration until a later hour, the committee may report progress to the House. To do so, any member may move that the Chair report progress and seek leave to sit again at a later hour/on the next sitting day/[on a stated day] (SOs 173(6), 177(1) and (2)).

The Chair puts the question that the committee report progress without amendment or debate (SO 173(6)).[78] If the question is agreed to,[79] the Chair leaves the chair, reports progress to the President and seeks leave to sit again at the time specified by the committee. The President verbally repeats the report to the House, whereupon the minister or member in charge of the bill moves a motion for the adoption of the report, to enable the House to respond to the report, if it so wishes, according to the options set out under standing order 177(3).[80] If the report of the committee is adopted, further consideration of the bill in committee is set down as an order of the day for the time agreed to.

Interruption of proceedings

Consideration of a bill in a Committee of the whole House may be interrupted by the operation of standing and sessional orders, such as those for the calling on of Question Time at a certain time each sitting day.

Under standing order 46, as amended by sessional order, when the House is in a committee at the time appointed for another category of business, the Chair interrupts proceedings and reports progress to the House. The President subsequently fixes further consideration of the bill in committee as an order of the day for a later hour of the sitting without any question being put.[81] If a division is in progress at the time specified for the interruption of business, the vote is completed and the question determined before the Chair reports progress to the House.

Under standing order 32(2)(b), as amended by sessional order, when the House is in committee at the time appointed for the interruption of business to permit a minister to move the adjournment of the House, the Chair enquires of the minister whether he or she wishes to move the adjournment motion. If the minister indicates that he or she does wish to move the adjournment, the Chair reports progress, and resumption of the interrupted debate is again set down as an order of the day without any question being

78 Ruling: Trickett (Deputy), *Hansard*, NSW Legislative Council, 28 July 1910, p 1207.

79 If the question is negatived, consideration of the bill in the committee continues. For examples, see *Hansard*, NSW Legislative Council, 17 June 2009, p 16151; 12 September 2012, p 15003.

80 For further information, see the *Annotated Standing Orders of the New South Wales Legislative Council*, (n 1), pp 576-577.

81 This sessional order was first adopted on 8 May 2019. See *Minutes*, NSW Legislative Council, 8 May 2019, p 63.

put. If the minister indicates that he or she does not wish to move the adjournment, proceedings in the committee simply continue.

Similar arrangements apply when the House is in a committee at the time appointed for the automatic adjournment of the House at midnight, although in such cases the Chair simply interrupts and reports progress, without consulting a minister.[82]

In the unlikely event that a bill before a committee is interrupted by the lack of a quorum and subsequent adjournment of the House, the resumption of the committee is set down as an order of the day for the next day of sitting, and when the order is called on, is resumed at the point where the proceedings were interrupted (SO 176(4)).[83]

A member speaking when proceedings in committee are interrupted may continue speaking when proceedings are resumed (SO 46(3)).

Dilatory motions

A bill cannot be withdrawn in a Committee of the whole House. The House has the ultimate authority in relation to any matter it refers to a committee, and only the House may discharge an order of the day for consideration of a bill in committee from the *Notice Paper*.[84] However, proceedings in a committee can be terminated and a bill effectively set aside by other means.

Proceedings on a bill in a committee may be terminated by adoption of the dilatory motion: 'That you (referring to the Chair) do now leave the Chair' (SO 177(4)). If the question is agreed to, the Chair simply leaves the chair without making a report to the House, the President resumes the Chair of the House and the House proceeds to the next item of business, with the result that the bill drops from the *Notice Paper*. Between 1856 and 1896 there were many occasions on which this occurred,[85] but the practice has since fallen into disuse. It was last used in 1989, when a government minister terminated consideration of two cognate bills when amendments were made to one of the bills that were unacceptable to the government.[86] Such lapsed proceedings in a committee can be revived by the House by motion on notice (SO 177(5)).[87]

---

82 For further information, see the discussion in Chapter 9 (Meetings of the Legislative Council) under the heading 'Hard adjournments'.

83 Prior to the adoption of the 2004 standing orders, such a lapsed question had to be resumed by motion upon notice. See, for example, the restoration of the Family Impact Commission Bill 1998 for consideration in committee on 30 April 1998, *Minutes*, NSW Legislative Council, 30 April 1998, pp 402-403.

84 See, for example, *Minutes*, NSW Legislative Council, 30 January 1879, p 96; 3 July 1879, p 278.

85 See, for example, *Minutes*, NSW Legislative Council, 19 July 1877, p 129; 20 December 1894, p 122. This latter example was remarkable in that the bill in question was the annual Appropriation bill, although the bill was later restored and passed.

86 *Minutes*, NSW Legislative Council, 2 May 1989, p 620; *Hansard*, NSW Legislative Council, 2 May 1989, pp 7044-7045.

87 *Minutes*, NSW Legislative Council, 21 December 1894, p 124.

Proceedings on a bill in a committee may also be terminated by the committee agreeing to the question that the Chair leave the chair, report progress and seek leave to sit again 'this day six months', thus preventing the item from being considered again in the same session.[88] However, the question that leave be given to sit again 'this day six months' may be amended by the House to set down consideration for another time, such as a later hour or the next sitting day, thereby preventing the bill from lapsing.[89]

A motion for the 'previous question' to supersede a question may not be moved in a committee (SO 173(4)).[90]

Conclusion of proceedings

Under the procedures followed by the House since 2014, at the conclusion of the consideration of a bill in a Committee of the whole House, the Deputy President and Chair of Committees puts the final question that the bill, as read or as amended, including any amendment to the long title (as the case may be), be agreed to.[91]

If the question is negatived, the committee has, in effect, rejected the bill. The committee would then report its resolution to the House which would have the option of adopting the report, thereby agreeing to the committee's conclusion and disposing of the bill, or recommitting the bill for further consideration.

If the question is agreed to, the minister or member with carriage of the bill further moves that the Chair leave the chair and report the bill to the House without amendment/with amendment/with amendments, including an amendment to the long title (as the case may be) (SOs 144(5) and 146(1)).

If this question is agreed to, the Chair signs a certificate that the bill is in accordance with the bill as reported from the committee (SO 148(4)). The Chair then reports the bill to the House, as outlined below.

If the question is negatived, consideration of the bill in the committee resumes.

Reconsideration of clauses or other parts of a bill

At the conclusion of a committee's consideration of a bill, the committee may choose to revisit any clauses or other parts of the bill by adoption of an amendment to the question

88 See, for example, *Minutes*, NSW Legislative Council, 27 January 1859, p 11; 6 May 1886, p 98.

89 In 1877, during consideration of the Employment of Females Bill 1877, on the Chair reporting progress to the House and seeking leave to sit again 'this day six months', an amendment was successfully moved to omit the words 'this day six months' and insert 'tomorrow'. The amended question was subsequently agreed to. See *Minutes*, NSW Legislative Council, 27 June 1877, p 116.

90 For further information, see the *Annotated Standing Orders of the New South Wales Legislative Council*, (n 1), p 565.

91 In the traditional manner for considering amendments to bills under standing orders 142, 143 and 144, the final question is 'That the title, as read/amended, stand the title of the bill'.

that the bill be reported to instead provide that the relevant clauses or other parts of the bill be reconsidered (SO 146(2)).[92]

The report of the Chair to the House

If the question in committee that the Deputy President and Chair of Committees report a bill to the House is agreed to, the President resumes the President's Chair and the Chair of Committees reports the outcome of the committee's consideration of the bill to the President. The form or words used is 'Mr/Madam President, the Committee reports the bill to the House without amendment/with amendment/with amendments, including an amendment in the long title' (as the case may be). The President verbally repeats the report to the House. The member with carriage of the bill then usually immediately moves a motion for the adoption of the report, although it may be set down for a future day (SO 146(3)). The House then has an opportunity to consider the report from the committee on the bill according to the options set out under standing order 177(3).[93] One of those options is recommittal of the bill to the committee, as discussed further below. However, in the great majority of cases, the House agrees to the report of the committee, after which the bill invariably proceeds to the third reading, as discussed further in Chapter 15 (Legislation).

Recommittal of a bill to a committee

A bill reported from a Committee of the whole House may be recommitted for further consideration, either in whole or in part. The standing orders provide two opportunities for bills to be recommitted to a committee:

- On the Deputy President and Chair of Committees reporting a bill to the House and the member with carriage moving that the House adopt the report, an amendment may be moved to recommit the bill, in whole or in part (SO 147).[94] The amendment may include an instruction to the committee to enable it to consider amendments that would otherwise be inadmissible (SO 180, as

92 This provision, based on Senate practice, was first adopted as a sessional order in 2003 to allow for reconsideration of a bill before it is reported out of committee. See, for example, the National Competition Policy Health and Other Amendments (Commonwealth Financial Penalties) Bill 2004, *Hansard*, NSW Legislative Council, 22 June 2004, pp 9764-9765; the Energy Services Corporations Amendment (Distributor Efficiency) Bill 2013, *Hansard*, NSW Legislative Council, 29 May 2013, p 21072; and the Reproductive Health Care Reform Bill 2019, *Minutes*, NSW Legislative Council, 25 September 2019, p 466. For further information, see the *Annotated Standing Orders of the New South Wales Legislative Council*, (n 1), pp 482-483.

93 For further information, see the *Annotated Standing Orders of the New South Wales Legislative Council*, (n 1), pp 576-577.

94 See, for example, the Homefund Restructuring Bill 1993, *Minutes*, NSW Legislative Council, 15 and 16 December 1993 am, pp 462-464; the Crimes Legislation Amendment (Parole) Bill 2003, *Minutes*, NSW Legislative Council, 24 June 2003, p 158; and the Deer Bill 2006, *Minutes*, NSW Legislative Council, 25 October 2006, p 308.

amended by sessional order).[95] The amendment may be debated and amended. There is no provision to set a recommitted bill down for a future day.[96]

- When the order for the third reading of a bill is called on, a superseding motion may be moved that the bill be recommitted for further consideration (SO 149).[97] Although not provided for in the standing orders, once again the recommittal of the bill may be accompanied by an instruction to the committee to enable it to consider amendments otherwise outside the long title of the bill.[98]

Prior to the adoption of the current standing orders in 2004, the recommittal of a bill on the third reading was moved as an amendment to the motion for the third reading, rather than as a superseding motion.[99] There are many examples prior to 2004 of amendments to the motion for the third reading being moved to recommit a bill.[100] However, a superseding motion has not been used since the adoption of the current standing orders in 2004.

Bills have been recommitted for various reasons, including to allow further consideration of the bill as a whole,[101] to allow reconsideration of specific clauses and schedules,[102] to allow reconsideration of amendments previously made,[103] and to enable a committee to make amendments consequential on an amendment previously made.[104]

If a bill is recommitted for consideration in committee, the entire bill is considered again in full. Where specific clauses or schedules are recommitted, only those specific portions

---

95 Such an amendment with an instruction was moved unsuccessfully on 18 September 1996 in relation to the Sydney Organising Committee for the Olympic Games Further Amendment Bill 1996. See *Minutes*, NSW Legislative Council, 18 September 1996, p 328. For further information, see the *Annotated Standing Orders of the New South Wales Legislative Council*, (n 1), pp 484, 590.

96 For further information, see the *Annotated Standing Orders of the New South Wales Legislative Council*, (n 1), pp 485-486.

97 For further information, see the *Annotated Standing Orders of the New South Wales Legislative Council*, (n 1), pp 490-491.

98 On 7 June and 9 June 1893, on the recommittal of the Municipal Loans Extension Bill 1893 and the Small Debts Recovery Act Amending Bill 1893 on the motion for the third reading of each bill, the House further adopted instructions to the committee to enable consideration of certain amendments to the bills. See *Minutes*, NSW Legislative Council, 7 June 1893, p 334; 9 June 1893, p 347.

99 For an example, see *Minutes*, NSW Legislative Council, 6 June 1877, p 101.

100 See, for example, the Anti-Discrimination Bill 1977, *Minutes*, NSW Legislative Council, 29 March 1977, pp 352-353; and the Freedom of Information Bill 1988, *Minutes*, NSW Legislative Council, 13 December 1988, p 380.

101 See, for example, the Egg Industry (Repeal and Deregulation) Bill 1989, *Minutes*, NSW Legislative Council, 2 and 3 August 1989, p 803; and the Education Reform Bill 1990, *Minutes*, NSW Legislative Council, 22 May 1990, p 201.

102 See, for example, the Residential Tenancies (Amendment) Bill 1988, *Minutes*, NSW Legislative Council, 30 November 1988, pp 303-304; and the Electricity Legislation Amendment Bill 1995, *Minutes*, NSW Legislative Council, 8 June 1995, p 129.

103 See, for example, the Crimes Legislation Amendment (Parole) Bill 2003, *Hansard*, NSW Legislative Council, 24 June 2003, pp 1885-1886.

104 See, for example, the Independent Commission Against Corruption Bill (No 2) 1988, *Hansard*, NSW Legislative Council, 14 June 1988, p 1891; and the Workers Compensation (Benefits) Amendment Bill 1989, *Hansard*, NSW Legislative Council, 2 August 1989, p 9115.

of the bill are reconsidered. The procedures in a committee on recommittal of a bill are the same as when considering a bill the first time (SO 143(2)).

When a bill has been reconsidered in committee the bill is reported a second or subsequent time to the House (SO 146(1)). The report of the committee and adoption of the report are dealt with in the same way as any other report.

A bill may be recommitted as often as the House thinks fit. Bills have been recommitted twice, and even up to three,[105] four[106] and on rare occasions five times.[107] The last time a bill was recommitted was in 2006.[108]

Correction of clerical or typographical errors

Following consideration of a bill in a Committee of the whole House, amendments of a formal nature and corrections of clerical or typographical errors may be made by the Deputy President and Chair of Committees or the Clerk (SO 150).

CONSIDERATION OF OTHER MATTERS IN COMMITTEE

Whilst the great majority of matters referred to a Committee of the whole House are bills and messages relating to bills, the House may also refer other matters to a committee for detailed consideration. In the past, these matters have included reports of standing committees, reports of joint estimates committees, resolutions establishing the Library Committee and matters concerning the federation. However, such referrals are not common. The most recent referral of a matter other than a bill to a committee was the House's referral of a message from the Assembly concerning a proposed Parliamentary Management Board in 1994.[109]

This contrasts with the Senate, where other matters, notably documents laid before the Senate such as reports of the Senate Procedure Committee recommending changes to Senate procedure, are routinely referred to a committee for consideration.[110]

---

105 See, for example, the Workers Compensation (Benefits) Amendment Bill 1989, *Minutes*, NSW Legislative Council, 2 August 1989, p 808; and the Homefund Restructuring Bill 1993, *Minutes*, NSW Legislative Council, 15 December 1993, pp 463-464.

106 See, for example, the Hunter District Water and Sewerage (Amendment) Bill 1924, *Minutes*, NSW Legislative Council, 3 September 1924, p 56; and the Greater Newcastle Bill 1937, *Minutes*, NSW Legislative Council, 13 December 1937, pp 109-110.

107 See, for example, the Crown Lands Alienation Bill 1861, *Minutes*, NSW Legislative Council, 6 May 1861, p 168; and the Lands Acts Amendment Bill 1875, *Minutes*, NSW Legislative Council, 22 July 1875, pp 128-129.

108 *Minutes*, NSW Legislative Council, 25 October 2006, p 308. The previous occasion was in 2003. See *Minutes*, NSW Legislative Council, 24 June 2003, pp 157-158.

109 For further information, see the discussion in *New South Wales Legislative Council Practice*, 1st ed, (n 1), pp 443-444. See also the *Annotated Standing Orders of the New South Wales Legislative Council*, (n 1), pp 561-562.

110 *Odgers*, 14th ed, (n 15), p 423.

Standing orders 172 to 178 dealing with the appointment of and proceedings in a Committee of the whole House apply to any matter referred to a committee for detailed consideration, not just bills. However, there are some procedural variations in the referral of matters other than bills to a committee. Whereas under standing order 172, a motion to commit a bill to a committee cannot be debated or amended, a motion to commit a matter other than a bill to a committee may be debated and amended.[111] In addition, whereas bills may be reconsidered in a committee (SO 146(2)) or may be recommitted to a committee (SOs 147 and 149), there is no equivalent provision applying to reports from a committee on matters other than bills. Such reports may only be revisited on a motion moved under standing order 177(3) for recommittal to a committee.[112]

111 For further information, see the *Annotated Standing Orders of the New South Wales Legislative Council*, (n 1), p 562.

112 Ibid, p 578.

CHAPTER 17

FINANCIAL LEGISLATION

Fundamental to the system of government in New South Wales is the capacity of the executive government to impose taxation for the purposes of raising revenue and to appropriate that revenue for the provision of public services and the implementation of government policies. Both taxation and appropriation require the legislative authority of the Parliament through the passage of 'money bills'.

The chapter examines the public accounts, types of money bills and the powers of the Council in relation to money bills.

THE PUBLIC ACCOUNTS

The New South Wales Government has traditionally operated a fund system for managing its public accounts. The current public accounts are the Consolidated Fund and the Special Deposits Account.[1]

The Consolidated Fund

The Consolidated Fund is the main State fund.[2] It is established under section 39 of the *Constitution Act 1902*:

> **39 Consolidated Fund**
>
> (1) Except as otherwise provided by or in accordance with any Act, all public moneys (including securities and all revenue, loans and other moneys whatsoever) collected, received or held by any person for or on behalf of the State shall form one Consolidated Fund.

---

1 Until 1982, the public accounts comprised the Consolidated Revenue Account, the General Loan Account and the Special Deposits Account. In 1982, the Consolidated Revenue Account and the General Loan Account were consolidated and renamed the Consolidated Fund. For further information, see the discussion later in this chapter under the heading 'Appropriations for capital works'.

2 For further information, see A Twomey, *The Constitution of New South Wales*, (Federation Press, 2004), p 562.

> (2) Without limiting the generality of subsection (1), all territorial, casual and other revenues of the Crown (including all royalties), from whatever source arising, within New South Wales, and as to the disposal of which the Crown may otherwise be entitled absolutely, conditionally or in any other way shall form part of the Consolidated Fund.

The Consolidated Fund is the account into which the government deposits State taxes and duties, royalties, fines and penalties, some regulatory fees, Commonwealth grants and income from Crown assets such as from the lease of Crown land.

Section 45 of the *Constitution Act 1902* in turn provides that the Consolidated Fund may 'be appropriated to such specific purposes as may be prescribed by any Act on that behalf'. As such, the Consolidated Fund is the account from which the government withdraws the money it requires to cover its expenditure including the salaries of ministers and public sector employees, other recurrent expenses and capital works. Such appropriations require an act of Parliament.[3]

The Special Deposits Account

The *Constitution Act 1902* does not require that all revenue received by the government be paid into the Consolidated Fund.[4] The Parliament may legislate to establish separate funds, such as the Special Deposits Account.

Section 4.15 of the *Government Sector Finance Act 2018* provides that:

> (2) The Special Deposits Account is to consist of:
>
> (a) all accounts of money that the Treasurer is, under statutory authority, required to hold otherwise than for or on account of the Consolidated Fund, and
>
> (b) all accounts of money that are directed or authorised to be paid to the Special Deposits Account by or under legislation.

In practice, the Special Deposits Account is made up of sub-accounts held in the name of various government authorities. As contemplated under section 4.15 above, there are a number of statutes which establish these sub-accounts within the Special Deposits Account.[5]

---

3 In addition to section 45 of the *Constitution Act 1902*, which refers to appropriation to such specific purposes 'as may be prescribed by any Act in that behalf', section 4.6(1) of the *Government Sector Finance Act 2018* provides that '[m]oney must not be paid out of the Consolidated Fund except under the authority of an Act'. Section 4.10 in turn determines the circumstances in which payments from the Consolidated Fund lapse. Section 4.7 also provides authority for the appropriation to the responsible minister of a government sector finance agency of 'deemed appropriation money', sometimes referred to as own-source monies. For further information, see Twomey, (n 2), pp 545-546.

4 As indicated above, section 39(1) of the *Constitution Act 1902* states: '*Except as otherwise provided by or in accordance with any Act*, all public moneys (including securities and all revenue, loans and other moneys whatsoever) collected, received or held by any person for or on behalf of the State shall form one Consolidated Fund.' (emphasis added).

5 See, for example, the *Restart NSW Fund Act 2011*, s 5; the *Victims Rights and Support Act 2013*, s 14; and the *Social and Affordable Housing NSW Fund Act 2016*, s 4.

In addition, under section 4.17 of the *Government Sector Finance Act 2018*, a 'Government Sector Finance' agency may, in circumstances permitted by regulations, establish and operate a working account in the Special Deposits Account in respect of the working account money received by the agency. Such money does not include money appropriated to the agency under an annual appropriation act.

Section 4.16 of the *Government Sector Finance Act 2018* sets out the records and other information that the responsible manager must keep in respect of a working account in the Special Deposit Account.

MONEY BILLS

The term 'money bills' refers to two types of bills: appropriation bills appropriating public funds and taxation bills imposing a tax, rate or impost.

Appropriation bills

Appropriation bills appropriate public funds from the Consolidated Fund.[6] No particular words are required for an appropriation by Parliament in an appropriation bill so long as the intention is clear. It is a matter of discerning the intention of the provision.[7]

There are two basic types of appropriation bills: the annual appropriation bills (together with temporary supply bills) and special (or standing) appropriation bills.

The annual appropriation bills

There are currently two annual appropriation bills introduced into the Parliament each year:

- The main appropriation bill, which includes appropriations for the recurrent services of the government as well as appropriations for capital works.[8] The bill is divided into separate sections making appropriations to each minister for the purposes of both recurrent services and capital works.[9] It also includes an

6 As indicated earlier in this chapter, section 45 of the *Constitution Act 1902* provides that the Consolidated Fund may 'be appropriated to such specific purposes as may be prescribed by any Act on that behalf'. However, section 45 only applies to appropriations from the Consolidated Fund. Payments from other public accounts, notably the Special Deposits Account, are administered under a series of sub-accounts set out in various legislation or instruments. See *Government Sector Finance Act 2018*, s 16(1).

7 Twomey, (n 2), p 542.

8 This contrasts with the situation in the Commonwealth, where the annual appropriations have been split into two bills since 1965: the first for the ordinary annual services of government (which may not be amended by the Senate), and the second for the construction of public works and buildings, capital expenditure and grants to the States (which may be amended by the Senate).

9 Division 4.1 of the *Government Sector Finance Act 2018* sets out the information that must be provided in the budget papers.

'Advance to the Treasurer', to be used for unforeseen and urgent expenditure.[10] This amount is available for both recurrent services and capital works.

- The cognate appropriation (parliament) bill, which contains the appropriations for the recurrent services of the Parliament for the forthcoming financial year as well as appropriations for capital works.[11]

As required under constitutional arrangements discussed below, the annual appropriation bill and appropriation (parliament) bill, together with any other cognate money bills, are introduced by the Treasurer into the Legislative Assembly, usually in advance of each financial year, to provide for expenditure in that year.[12] The key events in the annual budget process in the Council are set out in Appendix 13 (Key events in the annual budget process in the Legislative Council).[13]

The sum appropriated by the Parliament in an appropriation bill must be a specific amount: either a precise figure, or a figure that can be calculated by reference to a specific formula. The 1993 decision of the High Court in *Northern Suburbs General Cemetery Trust v Commonwealth* makes it clear that there is no scope for the Parliament to appropriate the government an open-ended sum.[14]

Section 45 of the *Constitution Act 1902* also requires that an appropriation bill be for 'such specific purposes as may be prescribed by any Act on that behalf'. In 1990 in *Brown v West*,[15] the High Court determined, in relation to the Commonwealth, that a bill appropriating revenue or moneys is one that contains specific words appropriating the Consolidated Fund or other public revenue for the specific purpose or purposes set out in the bill.

---

10 Details of the funds expended under the Advance to the Treasurer are subsequently included in the Appropriation Bill of the following financial year, or in a Budget variation bill enacted before the end of the financial year. This ensures that the expenditure ultimately has the approval of Parliament.

11 Before 1993, appropriations for the recurrent services and capital works of the Parliament were included in the general Appropriation Bill. However, since 1993 (with the exception of 2011-2012) appropriations for the Legislature have been included in the separate, but cognate, Appropriation (Parliament) Bill. The separate bill was introduced in response to the 'Memorandum of Understanding between the Hon Nick Greiner MP, Premier, For and on behalf of the Liberal/ National Party Government and Mr John Hatton MP, Ms Clover Moore MP, and Dr Peter Macdonald MP', 1991. A copy of the memorandum is at *Hansard*, NSW Legislative Assembly, 31 October 1991, pp 4004-4033. The memorandum specifically required: 'Making the annual appropriation for the Legislature a separate Bill.'

12 Section 4.4 of the *Government Sector Finance Act 2018* requires the budget to be presented to the Parliament before the end of the previous financial year unless the Assembly is not sitting in the two months before that date or there is an election in the financial year before the budget year. In such cases, the budget papers are to be tabled as soon as possible within the budget year.

13 For further information on the budget estimates take note debate, see the discussion in Chapter 10 (The conduct of proceedings) under the heading 'Budget estimates 'take note' debate'. For further information on the budget estimates process, see the discussion in Chapter 20 (Committees) under the heading 'Budget estimates'.

14 *Northern Suburbs General Cemetery Trust v Commonwealth* (1993) 176 CLR 555 at 582 per Brennan J.

15 (1990) 91 ALR 197.

In their joint judgment, Mason CJ, Brennan, Deane, Dawson and Toohey JJ explained the necessity for such bills to specify the purpose for which the money is to be expended:

> Historically, the need of the Executive Government to seek annual appropriations of the Consolidated Revenue Fund 'for the service of the year' or 'in respect of the year' has been the means, and it remains one of the critical means, by which the Parliament retains an ultimate control over the public purse strings …
>
> An appropriation, whether annual or standing, must designate the purpose or purposes for which the moneys appropriated might be expended. The principle was stated by Latham CJ in *Attorney General (Vic) v Commonwealth*, at 253:
>
> '… there cannot be appropriations in blank, appropriations for no designated purpose, merely authorizing expenditure with no reference to purpose.'
>
> And see *New South Wales v Commonwealth* ('the *Surplus Revenue* Case') (1908) 7 CLR at 200, where Isaacs J said:
>
> 'Appropriation of money to a Commonwealth purpose' means legally segregating it from the general mass of the Consolidated Fund and dedicating it to the execution of *some purpose which either the Constitution has itself declared, or Parliament has lawfully determined*, shall be carried out.' (emphasis added.)
>
> The principle is of long standing, having its origin in the vote of 'an enormous supply' in 1665 which was subjected to a statutory proviso requiring that the money raised should be applicable only to the purposes of the Dutch war: see Hallam, *Constitutional History of England*, new ed (1884), vol ii, p 357; and Taswell-Langmead's *English Constitutional History*, 11th ed (ed TFT Plucknett) (1960), pp 428-9.[16]

Historically, appropriation bills in New South Wales itemised expenditure and its purpose in some detail. However, in 1982 the government phased in a system of 'program' budgeting, under which funds were appropriated for particular programs rather than for specific purposes. This changed again in 1998 to appropriations made to a minister in relation to specific departments and agencies. In his report to Parliament in 1998, the Auditor General observed:

> There is a concern however, that the Parliament, seemingly without appreciating the matter, freely ceded to the Government further powers relating to Parliament's constitutional obligation to hold the Government accountable for its use of taxpayers' funds and resources.[17]

As stated by Twomey, the changes have provided greater flexibility for ministers in the administration of their agencies, with freedom to move funds between programs. But they also mean reduced scrutiny and oversight of expenditure.[18]

---

16 *Brown v West* (1990) 91 ALR 197 at 204-205 per Mason CJ, Brennan, Deane, Dawson and Toohey JJ.

17 *Auditor-General's Report to Parliament*, 1998, p 9.

18 Twomey, (n 2), p 544. See also GPSC No 1, *Appropriation and expenditure*, Report No 13, December 2000. It is notable that similar concerns about the transparency of appropriations have been raised in the Commonwealth Parliament, notably following the decision in *Combet v Commonwealth* (2005) 80 ALJR 247 concerning the legality of government expenditure on

The annual budget appropriation bills, when passed by both Houses and assented to by the Governor, become the law authorising the expenditure of the sums shown in the estimates for the financial year.[19] As indicated earlier, with certain exceptions, the authority for the appropriation expires on 30 June of that financial year.[20] Payments made out of the Consolidated Fund under the authority of an appropriation bill are administered by the Treasury.

If an appropriation bill is not enacted before the end of a financial year, for example if delayed after an election, section 4.10 of the *Government Sector Finance Act 2018* provides that the Treasurer may authorise payment from the Consolidated Fund for up to three months of an amount not exceeding one quarter of the previous annual appropriations, adjusted for changes in consumer prices as provided by regulation.

Where an urgent need for additional funds arises during a financial year, for example to deal with a natural disaster, section 4.13 of the *Government Sector Finance Act 2018* further provides that the 'Treasurer may, with the approval of the Governor, determine that additional money is to be paid out of the Consolidated Fund during the annual reporting period for the NSW Government in anticipation of appropriation by Parliament if it is required to meet any exigencies of Government'.

In 2020, in very unusual circumstances caused by the COVID-19 pandemic, as a result of which the budget was not anticipated to be handed down until many months after the end of the 2019-2020 financial year, the Parliament passed emergency legislation, the *COVID-19 Legislation Amendment (Emergency Measures – Treasurer) Act 2020* to amend the *Government Sector Finance Act 2018* to authorise an amount equivalent to 75 per cent of the amount appropriated in the *Appropriation Act 2019* (adjusted for consumer prices) to be appropriated after the end of the 2019-2020 financial year until the passage of the 2020-2021 budget bills.

In previous years, it was the practice for the government towards the end of a financial year to also introduce an Appropriation (Budget Variations) Bill. This bill included adjustments to the 'Advance to the Treasurer' for that financial year, and also appropriated certain additional sums of money from the Consolidated Fund for recurrent services in accordance with section 22 of the *Public Finance and Audit Act 1983*, the forerunner to section 4.13 of the *Government Sector Finance Act 2018*. However, in recent years, these items have been captured in the appropriation bill introduced in advance of the next financial year.

Special (or standing) appropriation bills

Standing appropriation bills are bills which provide for ongoing appropriations from the Consolidated Fund, until such time as Parliament may legislate further. Such bills

---

advertising. See also L Lovelock and J Evans, *New South Wales Legislative Council Practice*, 1st ed, (Federation Press, 2008), pp 398-400.

19 *Government Sector Finance Act 2018*, s 4.6(1).

20 Ibid, s 4.10(1).

are used where it is not appropriate or necessary for Parliament to debate an ongoing appropriation each year in the budget bill.

An example of a standing appropriation is the *Parliamentary Remuneration Act 1989*. This act includes provisions relating to the remuneration to be paid to members of Parliament, ministers and certain office holders in Parliament. It is a permanent appropriation because it is convenient that it continue to apply over the long term without being revisited at the commencement of each financial year through new legislation.

As was observed previously, in its 1990 decision in *Brown v West*,[21] the High Court noted that the annual appropriation process is one of the key mechanisms by which the Parliament retains control over public finances. Special appropriations, to the extent that they remove annual scrutiny by the Parliament of appropriations, weaken the control of the Parliament over public revenue.

Deemed appropriations

In 2018, the *Government Sector Finance Act 2018* introduced a further mechanism for permitting expenditure of money from the Consolidated Fund: deemed appropriations. Regulations made under this statute define what constitutes deemed appropriation money. A deemed appropriation provides for the responsible minister for a government sector finance agency to be given an appropriation out of the Consolidated Fund, at the time the agency receives or recovers money of a kind prescribed by the regulations. Unlike an appropriation under an annual appropriation act, which lapses at the end of the financial year, a deemed appropriation will not lapse unless the regulations specify otherwise.[22]

Taxation bills

Taxation bills are the 'flip side' of appropriation bills. A bill to appropriate revenue is meaningless if the government does not have means of raising revenue to fund that appropriation.[23]

In 1994 in *Commissioner of State Revenue (Vic) v Royal Insurance Australia Ltd*, Mason CJ stated that it is a 'fundamental principle of public law that no tax can be levied by the government without parliamentary authority, a principle which traces back to the *Bill of Rights 1688* (Imp)'.[24]

---

21 (1990) 91 ALR 197.

22 *Government Sector Finance Act 2018*, s 4.7.

23 Twomey, (n 2), p 548.

24 *Commissioner of State Revenue (Vic) v Royal Insurance Australia Ltd* (1994) 182 CLR 51 at 69 per Mason CJ. See also Twomey, (n 2), pp 548-549.

THE POWERS OF THE COUNCIL CONCERNING MONEY BILLS UNDER THE *CONSTITUTION ACT 1902*

The Council's powers concerning money bills have been disputed since the beginning of responsible government in New South Wales in 1856. The Assembly places a wide interpretation on the provisions of the *Constitution Act 1902* concerning money bills, in particular the requirements of section 5A dealing with deadlocks over appropriation bills 'for the ordinary annual services of the Government', section 5 dealing with the initiation of money bills, and section 46 concerning messages from the Governor in relation to money bills.

By contrast, the Council has adopted a much narrower construction of the provisions of the *Constitution Act 1902*. Whilst the financial prerogative undoubtedly rests with the executive government and the Assembly, the Council does not admit any limitations on its powers in relation to money bills other than as follows: under section 5 such bills must originate in the Assembly; under section 5A the Council may only suggest by message to the Assembly amendment to a bill 'appropriating revenue or moneys for the ordinary annual services of the Government'; and under section 5A such a bill may be presented by the Assembly to the Governor for assent, notwithstanding that the Council has not consented to the bill. Deadlocks between the Houses on all other money bills are dealt with under section 5B of the *Constitution Act 1902*. This is discussed further below.

Ultimately, however, in the absence of statutory interpretation by the courts, the view taken by each House about the constitutional framework regulating money bills is a matter for each House.

Section 5A: Appropriation bills 'for the ordinary annual services of the Government'

Sections 5A of the *Constitution Act 1902*, together with section 5B of the *Constitution Act 1902*, came into force in 1933, following approval by the people at a referendum.[25] Together, they deal with disagreement and deadlock between the two Houses on bills, both money bills and other bills. Prior to the enactment of section 5A, the passage of the annual appropriation bills was routinely delayed in the Council, causing considerable frustrations to government.[26]

Section 5A deals with disagreement and deadlock between the Houses on any bill 'appropriating revenue or moneys for the ordinary annual services of the Government'. Section 5A(1) provides in part:

---

25 The act that inserted sections 5A and 5B into the *Constitution Act 1902*, the *Constitution Amendment (Legislative Council) Act 1932*, was approved by the electors in accordance with section 7A of the *Constitution Act 1902* on 13 May 1933 and assented to on 22 June 1933.

26 Twomey, (n 2), p 564.

5A Disagreement between the two Houses—appropriation for annual services

(1) If the Legislative Assembly passes any Bill *appropriating revenue or moneys for the ordinary annual services of the Government* and the Legislative Council rejects or fails to pass it or returns the Bill to the Legislative Assembly with *a message suggesting any amendment* to which the Legislative Assembly does not agree, the Legislative Assembly may direct that the Bill with or without any amendment suggested by the Legislative Council, be presented to the Governor for the signification of His Majesty's pleasure thereon, and shall become an Act of the Legislature upon the Royal Assent being signified thereto, notwithstanding that the Legislative Council has not consented to the Bill.[27] (emphasis added)

The effect of section 5A(1) is that whilst it is open to the Council to reject, fail to pass or suggest any amendment[28] to a bill 'appropriating revenue or moneys for the ordinary annual services of the Government',[29] notwithstanding the actions of the Council, the Assembly may direct that such bill, with or without any amendments suggested by the Council, be presented to the Governor for assent.

Section 5A(2) further provides that the Council is taken to have failed to have passed a bill 'appropriating revenue or moneys for the ordinary annual services of the Government' if it is not returned to the Assembly within one month after its transmission to the Council and the session continues during such period.[30] The effect of this section is to prevent the Council, by inactivity, frustrating the wishes of the Assembly in respect of any such bill.[31]

Since its insertion into the *Constitution Act 1902* in 1933, the general consensus has been that section 5A applies solely to the appropriation bills put forward each year in the budget, although that position is subject to some important caveats.[32]

Section 5B of the *Constitution Act 1902* deals with disagreement and deadlock between the Houses on all other bills; that is to say, all bills to which section 5A does not apply. This includes all other money bills.[33] There is no restriction on the Council amending or rejecting such bills.

---

27 For further information on section 5A, see Twomey, (n 2), pp 249-254.

28 For further information, see the discussion later in this chapter under the heading 'The meaning of 'a message suggesting any amendment''.

29 For further information, see the discussion later in this chapter under the heading 'The meaning of 'for the ordinary annual services of the Government''.

30 That is to say, the Parliament is not prorogued.

31 Twomey, (n 2), pp 249-254, 564.

32 There is a very strong argument that parliamentary appropriations, now included in a separate annual appropriation (parliament) bill cognate with the annual appropriation bill, are not appropriations 'for the ordinary annual services of the Government'. For further information, see the discussion later in this chapter under the heading 'Parliamentary appropriations'. There is also a strong argument that appropriations for capital works, now included in the annual appropriation bill introduced at budget time, are also not appropriations 'for the ordinary annual services of the Government'. For further information, see the discussion later in this chapter under the heading 'Appropriations for capital works'.

33 For further information on section 5B of the *Constitution Act 1902*, see the discussion in Chapter 15 (Legislation) under the heading 'Bills under section 5B of the *Constitution Act 1902*'.

The meaning of 'a message suggesting any amendment'

As cited above, section 5A(1) of the *Constitution Act 1902* provides that the Assembly, on passing a bill 'appropriating revenue or moneys for the ordinary annual services of the Government', may receive from the Council 'a message suggesting any amendment to which the Legislative Assembly does not agree'.

This wording of section 5A(1), which does not explicitly give the Council the power to amend or suggest amendments to an appropriation bill 'for the ordinary annual services of the Government', appears to be a consequence of the compromise reached in 1932 by the Stevens Ministry in bringing to the Parliament the Constitution Amendment (Legislative Council) Bill 1932 which inserted section 5A into the *Constitution Act 1902*. The precursor to section 5A contained in the Bavin Ministry's Constitution (Further Amendment) Bill 1929 was worded in clearer terms:

> The Legislative Council may at any stage return to the Legislative Assembly any Bill which the Council may not amend, suggesting by message the amendment of any provision therein, whether by the omission of any item or otherwise.

As enacted, the wording of section 5A(1) in relation to amendments by the Council differs significantly from the wording of section 5B. Where section 5A(1) refers to a bill returned with '*a message suggesting* any amendment to which the Legislative Assembly does not agree' (emphasis added), section 5B refers to 'any Bill other than a Bill to which section 5A applies' returned with 'any amendment to which the Legislative Assembly does not agree'.

This subtle but important difference of language clearly contemplates that the Council may directly amend a bill to which section 5B applies, whereas it may only suggest by message an amendment to a bill to which section 5A applies.

This interpretation, that the power of the Council to amend an appropriation bill 'for the ordinary annual services of the Government' is constrained, is consistent with the relationship that existed between the Houses concerning appropriation bills prior to the enactment of section 5A. On those occasions prior to 1933 when the Council felt dissatisfaction with an appropriation bill forwarded to it by the Assembly, it included in the message returning the bill to the Assembly a paragraph expressing the Council's point of discontent.[34]

The matter has arisen only once since section 5A was enacted. In 1996, when the Council adopted an amendment to the Appropriation (Parliament) Bill 1996, to which section 5A was interpreted (likely mistakenly) as applying, the amendment in the message returned to the Assembly was expressed as a 'suggested amendment'.[35]

---

34 See, for example, *Minutes*, NSW Legislative Council, 21 December 1894, p 126; 20 December 1904, p 123; 5 December 1905, pp 174-175.

35 *Minutes*, NSW Legislative Council, 26 June 1996, pp 274-275. It is possible that that form of words was adopted as an expression of comity towards the Legislative Assembly.

The meaning of 'for the ordinary annual services of the Government'

As cited above, section 5A(1) of the *Constitution Act 1902* is expressed as applying only to a bill 'appropriating revenue or moneys for the ordinary annual services of the Government'. This expression has its origins in the so-called Compact of 1857 between the Government and Legislative Council of South Australia.[36] It was then picked up in section 53 of the Commonwealth Constitution at federation, and in turn in section 5A in 1933.[37] As stated by the Attorney General, the Hon Henry Manning, during debate in the Council on the Constitution Amendment (Legislative Council) Bill 1932 which inserted section 5A into the *Constitution Act 1902*:

> … the phrase 'appropriating revenue or moneys for the ordinary annual services of the Government' has been carefully selected and is deemed to have a special meaning.[38]

The meaning of 'for the ordinary annual services of the Government' is not defined in the *Constitution Act 1902*. However, the Solicitor General and Crown Solicitor have both cited with approval the following broad definition offered by Sir Kenneth Bailey KC, Solicitor General of Australia, in relation to the equivalent Commonwealth provision:

> In my opinion, … the ordinary annual services of the government should be taken to be those services provided or maintained within any year which the Government may, in light of its powers and authority, reasonably be expected to provide or maintain as the occasion requires through the Departments of the Public Service and State agencies and instrumentalities.[39]

Twomey elaborates on that definition by observing that the expression covers services that the government is permitted or required to provide by legislation, as well as those provided to fulfil its policies.[40]

Odgers notes that the interpretation of the expression at the Commonwealth level was substantially settled in 1965 as part of an agreement referred to as the Compact of 1965. However, since then, the Senate has on several occasions revisited the matter to affirm the agreed application of the terms of the Compact.[41]

In 2010, Council members of the Joint Select Committee on Parliamentary Procedure adopted the same understanding of the expression. However, they also proposed that the Procedure Committee examine the merits of the Council passing a resolution, similar to the Senate resolution, concerning its understanding of what constitutes an

36 The South Australian Compact of 1857 referred to the 'ordinary annual expense of the Government'.

37 R Laing (ed), *Odgers' Australian Senate Practice*, as revised by H Evans, 14th ed, (Department of the Senate, 2016), p 386. See also Twomey, (n 2), p 565.

38 *Hansard*, NSW Legislative Council, 21 September 1932, p 406.

39 Cited in Solicitor General, 'Parliament Management Bill and the "Ordinary Annual Services of the Government"', Advice 92/50, May 1992, p 2. See also Crown Solicitor, 'Supplementary Advice: Section 5A of the Constitution Act 1902', 30 September 1996, cited in *Auditor General's Report to Parliament 1996*, vol 2, p 441. See also Twomey, (n 2), p 565.

40 Twomey, (n 2), p 565.

41 *Odgers*, 14th ed, (n 37), pp 386-390.

appropriation bill 'for the ordinary annual services of the Government'.[42] To date the House has not acted on this proposal.

Further guidance as to the meaning of 'the ordinary annual services of the Government' is provided below.

Appropriations for capital works

Appropriations for capital works are clearly distinct from appropriations 'for the ordinary annual services of the Government'. As such, there is a strong argument that capital works appropriations do not fall within the meaning of section 5A of the *Constitution Act 1902*, and that a bill containing appropriations for capital works may be directly amended by the Council. However, at a practical level, the Council is in a somewhat uncertain position as capital works appropriations are now included as part of the annual budget appropriation bill.

At the Commonwealth level the position is far clearer. The expression 'the ordinary annual services of the government', as it appears in sections 53 and 54 of the Commonwealth Constitution, was understood by its framers to refer to the annual appropriations which were necessary for the continuing expenses of government, as distinct from major projects not part of the continuing and settled operations of government.[43] *Odgers* traces in detail the Compact of 1965, when the Commonwealth Government agreed as a matter of practice that there would be a separate capital works appropriation bill, not to be regarded as part of the ordinary annual services of the government, and therefore subject to amendment by the Senate. The matter has been considered by the Senate on many occasions since.[44]

There is no such arrangement in New South Wales. Before 1982, the recurrent and capital budgets were managed from two separate funds, the Consolidated Revenue Fund and the General Loan Account. The difference between the two accounts was described in 1982 by the Leader of the Opposition in the Council, the Hon Lloyd Lange, as follows:

> The [General] Loan Account provides for capital works which, by and large, are spread over a period of years and not just for the ordinary annual services such as wages of teachers or hospital staff. Ordinary annual services, of course, are those that occur each year, need to be funded and expended each year, and do not have a life longer than one year.[45]

Under the arrangements in place prior to 1982, it was understood that bills appropriating revenue for capital works from the General Loan Account were not 'for the ordinary annual services of the Government' and therefore did not fall within the meaning of section 5A of the *Constitution Act 1902*.

---

42 Joint Select Committee on Parliamentary Procedure, *Reforms to parliamentary processes and procedures*, October 2010, p 57.

43 *Odgers*, 14th ed, (n 37), p 386.

44 For details, see *Odgers*, 14th ed, (n 37), pp 386-391. See also Twomey, (n 2), pp 566-567.

45 *Hansard*, NSW Legislative Council, 25 August 1982, p 458.

However, in 1982 the two funds were merged on the recommendation of the Wilenski Review of Public Administration in New South Wales to bring capital and recurrent budgets closer together.[46] During debate on the bills proposing the merger of the two funds,[47] Mr Lange argued that the merger would have the effect of curtailing the powers of the Council to deal with capital appropriations by bringing the bill relating to the capital account within the annual budget bill to which section 5A applied:

> The flow-on effect of these bills is to include in what is essentially a section 5A money bill what we and a number of eminent authorities regard as a section 5B bill and to put them together as a single bill.[48]

By contrast, the Leader of the Government in the Council, the Hon Paul (DP) Landa, indicated that recurrent and capital appropriations would continue to be clearly distinguished, and that the Solicitor General had advised that the merger of the funds would not alter the powers of the Council:

> The powers of this House will continue in existence unaltered by the bills now before the House, so that only those provisions dealing with the type of appropriation covered by section 5A of the Act can be brought into force without being passed by this House, and all other provisions require either to be passed by this House or to be put to a referendum.[49]

Despite the advice of the Solicitor General, at a practical level the merger of the funds and the presentation of a single annual appropriation bill to Parliament containing appropriations for both recurrent expenses (to which section 5A clearly applies) and capital expenditure (to which as outlined above section 5A does not apply) places the Council in a difficult position.

The matter arose again in July and August 1996, when the Auditor-General sought advice from the Crown Solicitor whether, *inter alia*, appropriations for non-recurrent capital items, and appropriations for policies and programs which are new for the year in question, could be classed as being outside the scope of 'ordinary annual services'. In his advice, the Crown Solicitor concluded that both categories of appropriations are included within the meaning of 'the ordinary annual services of the Government' and are therefore subject to section 5A, but acknowledged argument based on the Commonwealth arrangements to the contrary.[50]

In 2010, Council members on the Joint Select Committee on Parliamentary Procedure reasserted the view, consistent with the advice of the Solicitor General in 1982, but

---

46 P Wilenski, *Review of New South Wales Government Administration: Direction for Change – Interim Report*, November 1977. See also P Wilenski, *Review of New South Wales Government Administration: Further Report – Unfinished Agenda*, May 1982.

47 The Constitution (Consolidated Fund) Amendment Bill 1982 and the Audit (Consolidated Fund) Amendment Bill 1982.

48 *Hansard*, NSW Legislative Council, 25 August 1982, p 458.

49 Ibid, p 456.

50 Crown Solicitor, 'Supplementary Advice Section 5A Constitution Act 1902', Advice to the Auditor General, 30 September 1996, published in *Auditor-General's Report to Parliament*, vol 2, 1996, pp 430-441.

contrary to the advice of the Crown Solicitor in 1996, that appropriations for capital works do not form part of 'the ordinary annual services of the Government'.[51]

Should the inclusion of capital works appropriations in the annual budget appropriation bill ever be challenged in the courts, the question would arise whether the capital works appropriations had been 'tacked' onto an appropriation bill 'for the ordinary annual services of the Government' within the meaning of section 5A(3) of the *Constitution Act 1902*. 'Tacking' is discussed further below.[52]

Parliamentary appropriations

It is doubtful whether parliamentary appropriations, routinely presented in the annual appropriation (parliament) bill, are appropriations 'for the ordinary annual services of the Government', and as such fall within the meaning of section 5A of the *Constitution Act 1902*.

Of note is section 24B(3) of the *Constitution Act 1902*, inserted into the *Constitution Act 1902* in 1995 by the *Constitution (Fixed Term Parliaments) Amendment Act 1993* as part of the move to fixed four-year parliaments in New South Wales. Amongst other things, it provides for the dissolution of the Assembly by the Governor during a four-year term of Parliament upon rejection of an appropriation bill 'for the ordinary annual services of the Government', but pointedly excludes 'a Bill which appropriates revenue or moneys for the Legislature only' from its application:

> (3) The Legislative Assembly may be dissolved if it:
>
> (a) rejects a Bill which appropriates revenue or moneys for the ordinary annual services of the Government, or
>
> (b) fails to pass such a Bill before the time that the Governor considers that the appropriation is required.
>
> *This subsection does not apply to a Bill which appropriates revenue or moneys for the Legislature only.* (emphasis added)

This explicit exclusion of 'a Bill which appropriates revenue or moneys for the Legislature only' from the application of section 24B(3) of the *Constitution Act 1902* is a clear indication by the Parliament that it does not see parliamentary appropriations as falling within the ambit of appropriations 'for the ordinary annual services of the Government'. Nor does the Parliament regard rejection of such a bill by the Assembly as a ground for the dissolution of the Assembly.

It is particularly significant to note that this exclusion of parliamentary appropriation from the operation of section 24B was adopted as an amendment to the *Constitution (Fixed Term Parliaments) Amendment Act 1993*.[53] The amendment was moved in the

51 Joint Select Committee on Parliamentary Procedure, *Reforms to parliamentary processes and procedures*, October 2010, p 57.

52 For further information, see the discussion later in this chapter under the heading 'Tacking'.

53 The amendment was adopted by the Legislative Assembly on 18 November 1992.

Assembly by the independent Member for the South Coast, Mr John Hatton, and was the only amendment to the bill in either House. In moving the amendment, Mr Hatton observed:

> … the question of a separate appropriation for the Parliament is vital to its independence from the Executive Government. … It is important that Parliament itself be in control of its own budget, otherwise Executive Government could stifle the independent and proper workings of the Parliament itself, of which Executive Government is a creature.[54]

The question as to whether parliamentary appropriations are appropriations 'for the ordinary annual services of the Government' subsequently arose again in June 1996. On 26 June 1996, the Council adopted an amendment to the Appropriation (Parliament) Bill 1996 to insert an additional appropriation to establish a President's Contingency Fund to fund committees appointed by the Legislative Council.[55] Despite the clear intent of the Parliament in enacting section 24B(3) only three years earlier, both the Leader of the Government and the Leader of the Opposition seemingly adopted the position that the bill was subject to the provisions of section 5A of the *Constitution Act 1902*.[56] In addition, when the bill was returned to the Assembly, the amendment was expressed as a 'suggested amendment' consistent with the wording of section 5A.[57]

The message returning the bill was reported in the Assembly the next day, at which time the Assembly disagreed to the suggested amendment and returned the following message to the Council:

> The Legislative Assembly having had under consideration the Legislative Council Message of 26 June, 1996, relating to a suggested amendment to the Appropriation (Parliament) Bill, 1996, informs the Legislative Council that it does not agree to the suggested amendment and further that pursuant to section 5A of the Constitution Act, 1902, proposes to forthwith transmit the Bill together with the Appropriation Bill and other cognate Bills to His Excellency the Governor for Royal Assent.[58]

---

54 *Hansard*, NSW Legislative Assembly, 17 November 1992, p 9039.

55 The full amendment was as follows: 'In addition to the sums appropriated by sections 4 and 5, this Act appropriates such sum as may be necessary to establish a President's Contingency Fund to be used solely to fund any committees appointed by the Legislative Council to deal with matters referred to any committee additional to the normal work of the standing committees appointed by the House.' See *Minutes*, NSW Legislative Council, 26 June 1996, pp 274-275. Arguably, this amendment, containing as it did an open-ended appropriation for an indeterminate sum of money, contravened the common law requirement that the sum appropriated in an appropriation bill must be specific: either a precise figure, or a figure that can be calculated by reference to a specific formula. For further information, see the discussion earlier in this chapter under the heading 'The annual appropriation bills'. This point was made by the Treasurer, the Hon Michael Egan, in debate on the amendment. See *Hansard*, NSW Legislative Council, 26 June 1996, p 3711.

56 *Hansard*, NSW Legislative Council, 26 June 1996, p 3712.

57 *Minutes*, NSW Legislative Council, 26 June 1996, pp 274-275. It is possible that this was done as an expression of comity towards the Legislative Assembly.

58 *Minutes*, NSW Legislative Council, 11 September 1996, p 289.

The bill was subsequently presented by the Assembly to the Governor and received assent the next day, that is 28 June 1996.[59] The actions of the Assembly in this regard were not contested by the Council.

On 5 July 1996, the Auditor-General sought advice from the Crown Solicitor as to whether section 5A was applicable to an appropriation bill for the Legislature, noting that the Legislature may not be part of the government for the purposes of this section. In his opinion dated 19 August 1996, the Crown Solicitor took the view that whilst the Supreme Court would likely be prepared to rule upon the matter, there was no reason in the meantime to depart from a previous opinion expressed by the Solicitor General, Keith Mason QC, in 1992.[60] That opinion acknowledged the view that Parliament is clearly 'not the tool of the Government', and that the government 'does not provide services through the Legislature', but argued that appropriations for the Parliament have been treated as part of the ordinary annual services of the government since that phrase first entered the *Constitution Act* in 1933 when section 5A was enacted.[61]

This position adopted by the Solicitor General in 1992 largely related to the period from 1933 to 1978 when the Council was indirectly elected. It also predated the adoption of section 24B(3) in 1995. Should the matter arise again, it seems likely that additional considerations to those before the Solicitor General in 1992 would arise. Whilst the *Constitution Act 1902* does not include a written separation of powers between the Legislature and the executive, it is abundantly clear that the modern Legislative Council is not run as part of the services of the government and should not be regarded as such.

At the Commonwealth level, it is clear that parliamentary appropriations are not part of the ordinary annual services of the government. In May 1980 a Select Committee of the Senate was appointed to inquire into and report upon the Commonwealth Parliament's control of its appropriations and staffing. The committee re-affirmed the Senate position that Parliament is not an ordinary annual service of the government and that such classification is inconsistent with the concept of the separation of powers and the supremacy of Parliament.[62] Subsequently, the Commonwealth Government agreed to the provision of a separate parliamentary appropriation bill which would not be treated as part of the ordinary annual services of the government, but with the government retaining control over the total amount of funds appropriated to the Parliament.[63]

---

59 This is the only time that section 5A has been employed since its insertion into the *Constitution Act 1902* in 1933. As indicated, it is doubtful it was employed correctly.

60 Crown Solicitor, 'Section 5A Constitution Act 1902', Advice to the Auditor General, 19 August 1996, published in *Auditor-General's Report to Parliament*, 1996, vol 2, p 433.

61 Solicitor General, 'Parliament Management Bill and the "Ordinary Annual Services of the Government"', Advice 92/50, May 1992, pp 3-4.

62 Report of the Select Committee on Parliament's Appropriation and Staffing, Parliamentary Paper no 151 of 1981.

63 Crown Solicitor, 'Section 5A Constitution Act 1902', Advice to the Auditor General, 19 August 1996, published in *Auditor-General's Report to Parliament*, 1996, vol 2, pp 432-433. See also *Odgers*, 14th ed, (n 37), pp 420-422.

The position in Victoria is even clearer. Section 65(1) of the *Constitution Act 1975* (Vic) expressly provides that the annual appropriation bill 'for the ordinary annual services of the Government' 'does not include a Bill to appropriate money for appropriations for or relating to the Parliament'.

Special (or standing) appropriations

Special (or standing) appropriations in a special (or standing) appropriation bill are not appropriations 'for the ordinary annual services of the Government', and as such do not fall within the meaning of section 5A of the *Constitution Act 1902*. In 1990 in *Brown v West*, the High Court made it clear that standing appropriations are not part of the annual appropriations process.[64] However, as a matter of practice, the funds used to satisfy special appropriations are now usually appropriated through the annual appropriation bill.[65]

Taxation bills

Taxation bills are not bills 'appropriating revenue or money for the ordinary annual services of the Government', and as such do not fall within the meaning of section 5A of the *Constitution Act 1902*. Accordingly they may be directly amended by the Council, with any disagreement or deadlock between the Houses to be resolved in accordance with the provisions of section 5B of the *Constitution Act 1902*.

Historically, taxation bills were a major point of contention between the two Houses, particularly during the 1890s, culminating in the Council's rejection of the Reid Ministry's Land and Income Tax Assessment Bill on 20 June 1895,[66] which precipitated a general election and the holding of a free conference. However, a more pragmatic and less confrontational relationship appeared to develop between the Houses in the first decades of the 20th century. According to Clune and Griffith, both Houses appeared to tread an increasingly cautious path, with the Council 'acknowledging that responsibility for financial matters should rest with the elected Lower House, and the Assembly less eager to force a constitutional crisis by insisting on its privileges'.[67]

The adoption of sections 5A and 5B of the *Constitution Act 1902* in 1933 put the status of taxation bills on a clearer basis. During debate on the Constitution Amendment (Legislative Council) Bill 1932, which inserted sections 5A and 5B into the *Constitution Act 1902*, the Attorney General, the Hon Henry Manning, emphasised that section 5A(1) was intended to be limited in its application to appropriation bills 'for the ordinary annual services of the Government' only and not to extend to other types of money

64 *Brown v West* (1990) 169 CLR 196 per Mason CJ, Brennan, Deane, Dawson and Toohey JJ.

65 Twomey, (n 2), pp 540-542, 565.

66 *Minutes*, NSW Legislative Council, 20 June 1895, p 238.

67 For a detailed discussion of conflict between the Houses, particularly over taxation bills, see D Clune and G Griffith, *Decision and Deliberation: The Parliament of New South Wales 1856-2003*, (Federation Press, 2006), pp 78-82.

bills, such as taxation bills, which were clearly intended to fall under the provisions of section 5B:

> I should like to point out … the essential difference between a bill appropriating revenue or moneys for the ordinary annual services of the Government and a taxation measure … An Appropriation Bill appropriates money for the ordinary services of the Crown, whereas a taxation bill does not appropriate money, but merely affirms that there shall be charged, levied, collected and paid a tax upon the incomes or whatever it may be of certain individuals. It may provide that incomes from personal exertion or incomes from property shall be subject to a tax. But it does not appropriate any money derived from such tax. That money is paid into consolidated revenue, and an Act of Parliament is required to appropriate it for the annual services of the Crown. [T]he language used in proposed new s 5A(1) has been employed for the express purpose of differentiating between those two things.[68]

This understanding was reiterated some years later by the Premier, the Hon William McKell, when speaking in the Assembly on the second reading of the Constitution (Legislative Council Reform) Bill 1943:

> In the constitution of most countries, which even claim to be democratic, the powers of the Second Chamber in relation to bills imposing taxation are rigidly limited, but not so in New South Wales. Here there are two classifications only – an 'appropriation bill' and 'any other bill', and the Legislative Council's powers in relation to taxation bills, whether they fix a rate of tax or provide the method of assessment and collection, are the same as in the case of ordinary legislation; they all fall within section 5B.[69]

When the Constitution (Legislative Council Reform) Bill 1943 was forwarded to the Council for concurrence, the Minister of Justice and Vice-President of the Executive Council, the Hon Reg Downing, observed:

> Section 5A sets out that the Legislative Council may delay an appropriation bill for one month, but if the bill is not accepted at the end of that period it goes for the Royal Assent. All other measures are dealt with under section 5B, under which the Legislative Council can defy the Legislative Assembly … The only bill over which the Legislative Assembly was given complete power was an Appropriation Bill, not a Money Bill … In New South Wales today taxation bills fall with ordinary policy legislation into the category of 'other bills', governed by the provisions of section 5B.[70]

Since the adoption of section 5B in 1933, taxation bills have been amended in the Council on a number of occasions. For example, in November 1939 and November 1952, the Council amended the stamp duties amendment bills of those years.[71] Most recently, on 22 June 2017, on the initiative of the government, the Council amended the State

68 *Hansard*, NSW Legislative Council, 28 September 1932, p 588.

69 *Hansard*, NSW Legislative Assembly, 11 November 1943, p 735.

70 *Hansard*, NSW Legislative Council, 30 November 1943, pp 1115-1116.

71 *Minutes*, NSW Legislative Council, 2 November 1939, pp 304-305; 13 November 1952, p 132.

Revenue and Other Legislation (Budget Measures) Bill 2017, part of the package of annual budget bills.[72]

The matter arose in debate on 24 June 2015 on the Small Business Grants (Employment Incentive) Bill 2015, when a point of order was taken that proposed amendments to the bill were out of order as they purported to amend a taxation bill. The Deputy President and Chair of Committees, the Honourable Trevor Khan, in an extensive ruling canvassing past precedents, did not uphold the point of order and allowed the amendments to be moved. In the event, the amendments were negatived.[73]

There have also been previous occasions when amendments to taxation bills have been moved in the Council without success.[74]

Tacking

The restriction on the power of the Council in relation to appropriation bills 'for the ordinary annual services of the Government' under section 5A of the *Constitution Act 1902* brings with it a temptation for the executive government to include in such bills other measures. This is known as 'tacking', meaning the 'tacking' of extraneous provisions onto such a bill.

To prevent 'tacking', section 5A(3) of the *Constitution Act 1902* provides that if a bill which is subject to the provision of section 5A becomes law under the section, then any provision in the act dealing with 'any matter other than such appropriation shall be of no effect'. This provision clearly contemplates that it is for the courts to determine whether or not a provision is of 'no effect'.[75]

The restriction on tacking applies only to appropriation bills 'for the ordinary annual services of the Government'. The fact that it was not thought necessary in 1932 to apply a tacking provision to bills under section 5B not 'for the ordinary annual services of the Government' is a further indication that it was envisaged that the Council should have full powers to amend such bills.

Section 5: Money bills shall originate in the Legislative Assembly

Section 5 of the *Constitution Act 1902* sets out the broad plenary legislative power of the Legislature to make laws for the peace, welfare and good government of New South Wales in all cases whatsoever, subject to the following proviso:

> Provided that all Bills for appropriating any part of the public revenue, or for imposing any new rate, tax or impost, shall originate in the Legislative Assembly.

---

72 *Minutes*, NSW Legislative Council, 22 June 2017, pp 1798-1799.

73 *Hansard*, NSW Legislative Council, 24 June 2015, pp 1727-1728.

74 See, for example, the State Revenue and Other Legislation Amendment (Budget Measures) Bill 2008, *Hansard*, NSW Legislative Council, 4 December 2008, pp 12616-12617.

75 Twomey, (n 2), p 574.

This proviso has remained unchanged since the enactment of the *Constitution Act 1902*, and substantially the same since the commencement of responsible government in 1856.[76]

Under the terms of section 5, all bills appropriating public revenue or imposing a new rate, tax or impost must originate in the Assembly. Unlike section 5A adopted in 1933, section 5 applies to all money bills, including all appropriation bills, not just those bills 'appropriating revenue or moneys for the ordinary annual services of the Government'.

The prohibition in section 5 applies not merely to the introduction of a money bill in the Council but the 'origination' of a money bill in the Council. Accordingly, it seems clear that the prohibition cannot be avoided by introducing a 'non-money' bill into the Council and then inserting a financial provision by way of an amendment in committee.[77]

At its adoption in 1855, section 5 reflected, at least in part, the understanding that the Lower House is pre-eminent with respect to money bills. That understanding was based on the historic struggle of the House of Commons in England to wrest control of financial affairs from the Crown, achieved in full with the 'Glorious Revolution' of 1688-1689.

However, the extent to which the Assembly was pre-eminent with respect to money bills was contested by the Council in the years after responsible government, and subsequently clarified in 1933 with the adoption of sections 5A and 5B of the *Constitution Act 1902* alongside a new indirectly elected Council.[78]

In more recent times, the application of section 5 arose in the Council in 1989 during debate on the Business Franchise Licences (Tobacco) Further Amendment Bill 1989, which concerned the sale of tobacco by licensees and the recovery of licence fees. In arguing against the power of the Council to amend the bill which had properly been introduced in the Assembly, the Leader of the Government, the Hon Ted Pickering, relied on advice from the Solicitor General, which stated in part:

> From the late seventeenth century it has been established parliamentary usage that the sole right to initiate money bills rests in the lower House: *Erskine May* 20th ed pp 842ff. This is a reflector of the 'financial initiative of the Crown' to which reference has already been made. Mr Justice Stephen (as he then was) has remarked on the fact that s 53 of the federal Constitution which modifies this principle in some respects gives the Senate powers which are 'unusual in a modern Upper House' (*Victoria v Commonwealth* supra at 168). Unlike the federal Constitution nothing in the *Constitution Act 1902* (NSW) modifies that parliamentary usage.

---

76 As originally enacted in the *Constitution Act 1855* the proviso stated: 'Provided, that all Bills for appropriating any Part of the Public Revenue, for imposing any new Rate, Tax, or Impost, subject always to the Limitation contained in Clause Sixty-two of this Act, shall originate in the Legislative Assembly of the said Colony.'

77 Twomey, (n 2), pp 555-556.

78 For further information, see the discussion later in this chapter under the heading 'Are the powers of the Council concerning money bills further constrained by convention?'.

> On the contrary, the State Constitution clearly reflects it and gives it effect in presently relevant circumstances.
>
> Section 5 qualifies the very grant of legislative power to the legislature by providing that 'all Bills for appropriating any part of the public revenue or for imposing any new rate, tax or impost, shall originate in the Legislative Assembly'. That injunction and the centuries of parliamentary and political convention which it embodies would be entirely put to nought if the Council could amend a Bill (of any nature) coming from the Assembly by tacking [on] an appropriation or taxing provision.[79]

The opposition relied on different advice, offered by Jeff Shaw QC, who was later to become a member of the Council and the Attorney General in a future administration. In arguing that amendment of the bill by the Council did not offend section 5 of the *Constitution Act 1902*, Mr Shaw observed:

> Section 5 of the *Constitution Act 1902* requires that bills for appropriating any part of the public revenue or for imposing any new rate, tax or impost shall originate in the Legislative Assembly. In my opinion, the present bill meets that test. It has originated in the Legislative Assembly. But can the Legislative Council amend it so as to, in a sense, appropriate the new tax in a particular way as suggested in the Opposition amendment which was moved in the Lower House? In my view section 5 of the Constitution provides no barrier to such amendment. It only provides that the bill appropriating the public revenue or imposing a new tax or rate of tax shall originate in the Lower House. This has happened.
>
> It seems to me open to the Upper House to amend that revenue or money bill – which has originated in the Lower House – by varying or amending the way in which the new revenue should be used. Such an amendment would not constitute a new bill which must originate in the Lower House. On the contrary, it merely specifies the way in which the newly-collected revenue (the increase in fees) should be utilized by the responsible officer. There seems to me to be a fundamental difference between the notion that a money bill must originate in the Legislative Assembly and another and different notion (which does not find support in the Constitution) to the effect that the Upper House may never amend such a money bill. I would draw a distinction between originating the legislation in the Lower House and the amendment of such an appropriation bill by the Upper House. The latter, I think, is acceptable and possible under the Constitution.
>
> If this is correct, and the Upper House (contrary to the wishes of the Lower House) amends an appropriation bill so as to specify a way in which the increased revenue ought to be used, then the provisions of the *Constitution* pertaining to disagreement between the Houses come into play.[80]

In the event, the amendments were ruled out of order by the Chair of Committees for being outside the leave of the bill.[81]

---

79 *Hansard*, NSW Legislative Council, 8 August 1989, pp 9526-9528.

80 Opinion of JW Shaw QC, quoted in *Hansard*, NSW Legislative Council, 8 August 1989, pp 9507-9508.

81 The reasons given by the Chair were that the amendments were outside the leave of the bill, and that the amendments related to appropriations rather than taxation. See *Hansard*, NSW Legislative Council, 8 August 1989, pp 9530, 9531-9532.

Whilst there remain competing interpretations of the meaning of section 5, the position of the Council is that section 5 should be given its plain or literal meaning, that is that all money bills must originate in the Assembly, without reading into it further restrictions on the powers of the Council. This is discussed further below.[82]

Introduction of bills in the Council imposing financial obligations

Section 5 of the *Constitution Act 1902* does not act to prevent the introduction of bills in the Council which in their implementation impose an additional financial obligation or legal liability on the Crown. Where an additional financial obligation or legal liability is imposed, any additional expenditure must be met from an existing appropriation, or from a future appropriation as part of the annual budget process.[83] For it to be otherwise would place large parts of public policy and administration beyond the legislative initiative of the Council, thereby destroying its effectiveness as one of the branches of the Legislature.[84] In a significant ruling given in September 2003 in relation to the introduction of the State Arms, Symbols and Emblems Bill 2004, the Deputy President and Chair of Committees, the Hon Amanda Fazio, observed:

> [Section 5 of the *Constitution Act 1902*] does not mean that the Legislative Council cannot consider and pass bills that originate in this Chamber and that eventually, somewhere along the line, will incur some expenditure by the Government. Given that the bill does not specify the appropriation of any amount of public revenue I do not consider it to be what is commonly referred to as a money bill. Accordingly, I find that the introduction of the bill in this Chamber is in order.[85]

It is routine for bills to be introduced in the Council imposing additional financial obligations on the Crown, to be met out of existing or future appropriations. As an example, in May 2016 the government introduced the Coastal Management Bill 2016 in the Council, which required the establishment of a NSW Coastal Council, with members of the council entitled to be paid such remuneration as determined by the responsible minister from time to time.

On some occasions, bills introduced in the Council which have imposed additional financial obligations on the Crown have included specific indication that funding is to be made available out of money to be provided by the Parliament:

- In 1993, the Letona Co-operative (Financial Assistance) Bill 1993 provided that 'Parliament recommends that the State provide financial assistance to Letona [Co-operative Limited] by means of a grant in the sum of $5,000,000', with such

82 See the discussion under the heading 'Are the powers of the Council concerning money bills further constrained by convention?'.

83 Twomey, (n 2), p 552.

84 Clune and Griffith, (n 67), p 82. Clune and Griffith ague that this principle was established in 1883 by the Hon William Dalley QC, Attorney General in the Stuart Government, in dealing with the Criminal Law Amendment Bill 1883.

85 *Hansard*, NSW Legislative Council, 18 September 2003, p 3566.

assistance 'to be provided out of money to be provided by Parliament or that is otherwise legally available'. The bill received assent on 25 November 1993.

- In 1996, the Innovation and Productivity Council Bill 1996 provided that 'the expenses of the Council in exercising its functions under this Act are to be paid out of money to be provided by Parliament'. The bill received assent on 1 November 1996.

It is not strictly necessary for bills introduced in the Council imposing additional financial obligations on the Crown to contain such provisions. However, the framing of bills with specific financial implications in such terms could be viewed as an appropriate expression of comity towards the Legislative Assembly.

Bills imposing fees and penalties

It is common for bills to include fees, penalties or fines as part of a statutory framework, and such bills have on occasion been initiated in the Council.

In 1849, the House of Commons adopted a standing order (now standing order 79), based on a resolution passed in 1831, waiving the privilege of the Commons in relation to bills or amendments to bills initiated in the Lords dealing with certain fees and penalties. Rigid enforcement of the rule against the initiation of such money bills in the House of Lords prior to that time had proved unnecessarily inconvenient.[86]

Based on practice in the Westminster Parliament, on 27 June 1872 the Legislative Council resolved:

> (i) That in the opinion of this House the originating of an Act in this House imposing fees for benefits taken or services rendered under the Act, and in order to secure the execution of such Act, is not at variance with the provisions of the Constitution Act.
>
> (ii) That in the opinion of this House the originating of an Act in this House providing for pecuniary penalties or forfeitures where the object of such penalties and forfeitures is to secure the execution of the Act or the punishment or prevention of offences, is not at variance with the Constitution Act.

On 28 January 1874, on the introduction of the Companies Bill 1874 in the Council, President Hay gave a ruling that the intent of the 1872 resolution was to adopt the principles recognised in the Imperial Parliament.[87]

In modern times, it seems likely that fees and penalties, if properly categorised as such, do not amount to taxation for the purposes of section 5 of the *Constitution Act 1902*. As such, bills imposing fees and penalties may be initiated in the Council. However, recent High Court decisions as to what amounts to taxation may have significantly narrowed

86 D Natzler KCB and M Hutton (eds), *Erskine May's Treatise on The Law, Privileges, Proceedings and Usage of Parliament*, 25th ed, (LexisNexis, 2019), para 37.12. See also Ruling: Hay, *Minutes*, NSW Legislative Council, 28 January 1874, p 90.

87 Ruling: Hay, *Minutes*, NSW Legislative Council, 28 January 1874, p 90.

the scope of this exception with, for instance, business franchise fees being held to amount to taxation.[88]

Section 46: Money bills to be recommended by the Governor or introduced by a minister

Section 46 of the *Constitution Act 1902* provides:

> **46 Money Bills to be recommended by Governor**
>
> (1) It shall not be lawful for the Legislative Assembly to originate or pass any vote, resolution, or Bill for the appropriation of any part of the Consolidated Fund, or of any other tax or impost to any purpose which has not been first recommended by a message of the Governor to the said Assembly during the Session in which such vote, resolution, or Bill shall be passed.
>
> (2) A Governor's message is not required under this section or under the Standing Rules and Orders of the Legislative Assembly for a Bill introduced by, or a vote or resolution proposed by, a Minister of the Crown.

The origin of section 46(1) dates back to the *Australian Constitutions Act (No 1) 1842*, which provided:

> … that it shall not be lawful for the said council to pass or for the said Governor to assent to any bill appropriating to the public service any sums or sum of money arising from the sources aforesaid unless the Governor on her Majesty's behalf shall first have recommended to the council to make provision for the specific public service towards which such money is to be appropriated.

Section 46(2) was inserted into the *Constitution Act 1902* in 1987[89] to overcome the inconvenience of arranging a message from the Governor for the introduction in the Assembly of every money bill. In modern times, all money bills introduced in the Assembly under section 46 are introduced under section 46(2).

There are two possible interpretations of the meaning of section 46.

The first is that it complements section 5 of the *Constitution Act 1902*. Just as section 5 prevents a money bill originating in the Council, section 46 prevents a bill being returned to the Assembly with an appropriation inserted. As such, it reinforces the understanding from section 5 that the financial initiative is with the Assembly.[90]

The alternate position is that section 46 is designed to prevent private members in the Legislative Assembly seeking to introduce money bills in that House without having first been recommended in a message from the Governor. As such, it has nothing to do

88 See, for example, the decision of the High Court in *Ha v New South Wales* (1997) 189 CLR 465.

89 *Constitution (Amendment) Act 1987*, sch 1(9).

90 Twomey, (n 2), pp 558-559. This view of the meaning of section 46 was adopted by the Solicitor General in 1989 in an opinion cited during debate on the Business Franchise Licences (Tobacco) Further Amendment Bill 1989. The opinion is cited in *New South Wales Legislative Council Practice*, 1st ed, (n 18), p 410.

with the Council. Rather, its intention is again to ensure that the financial prerogative in the Assembly rests with the executive government, but in a very different way to section 5.[91]

These alternate positions are explored further below in relation to amendments to bills in the Council imposing financial obligations on the Crown. From this, it is clear that the Council has not interpreted section 46 as imposing any additional constraint on its powers in relation to money bills beyond those already in place under other sections of the *Constitution Act 1902*.

Amendment of bills in the Council imposing additional financial obligations

The consistent position adopted by the Legislative Council over many years is that section 46 of the *Constitution Act 1902* does not act to prevent the moving or adoption of amendments to bills in the Council which in their implementation impose additional financial obligations or legal liability on the Crown.[92]

It may be argued that all amendments considered by the Council ultimately have financial implications, even if it is only the cost of their preparation and printing. However, there have been various occasions where Council amendments have clearly had quite significant financial implications for the Crown.

For example, in 1934, the Council amended the Special Income and Wages Tax Bill 1934 in relation to the rate of taxation paid by employees, although the purpose of the amendment was simply to correct a drafting error in the bill.[93]

In 1955 the Council amended the Fire Brigades (Amendment) Bill 1955 to provide that the award wages and salaries of firemen or officers of fire brigades would not be reduced.[94]

In 1963, the Council amended the State Planning Authority Bill 1963 to increase the amount of money to be paid by the Treasurer to the General Fund from £100,000 to £250,000. The Attorney General and Leader of the Government in the Council, the Hon Reg Downing, stated that the imposition of a direct obligation on the Crown to pay a certain sum of money was unusual, but did not dispute the constitutional powers of the House to do so:

> I do not deny that, constitutionally, this amendment can be moved in the chamber, but to say the least, it is most unusual. I cannot recall, at the moment, any occasion on which the Legislative Council has imposed a direct liability

91 JR Stevenson, Clerk of the Parliaments, 'Introduction of public bills sponsored by the Government in the Legislative Council', Advice to the Vice-President of the Executive Council, 10 November 1965.

92 Nor in passing does section 5 of the *Constitution Act 1902*, which has nothing to do with amendment of bills in the Council, but goes specifically to the *originating* of *money bills* in the Legislative Assembly. Had Parliament intended section 5 to be interpreted in such a way as to constrain the Legislative Council from amending bills, including money bills, to impose financial obligations on the Crown, it could be expected to have explicitly provided as such.

93 *Hansard*, NSW Legislative Council, 25 October 1934, p 3439; *Minutes*, NSW Legislative Council, 25 October 1934, p 163; 30 October 1934, p 166.

94 For further information, see *New South Wales Legislative Council Practice*, 1st ed, (n 18), p 407.

> upon the Crown. In this instance an additional commitment of 150,000 pounds is being imposed by a House that does not bear the responsibility for originating the taxation from which this money is to be secured. This is a direct charge of 150,000 pounds upon Government revenue … I know that many amendments moved here have indirectly incurred expense but I know of no case where a direct obligation has been imposed by this House upon the Crown to pay a certain amount of money — in this case 150,000 pounds. I am not disputing that this House can do it.[95]

In 1969, the Council amended the Aborigines Bill 1969 to provide for the payment of fees to Aboriginal members of the newly established Aborigines Advisory Council and the Consumer Protection Bill 1969 to increase the number of positions on the Consumer Affairs Council. In an unprecedented move, on both occasions, the Assembly obtained a message from the Governor under section 46 before agreeing to the amendments. In its message to the Council both times, the Assembly indicated that the amendments were only agreed to 'upon the request for and receipt of a Message from the Governor recommending additional expenses in connection with the Bill brought about by the Council's amendment' and desired that its actions not be drawn into a precedent by either House.[96]

On the second of these two occasions, both the Leader of the Government in the Legislative Council, the Hon John Fuller, and the Leader of the Opposition in the Council, the Hon Reg Downing, made statements, as a matter of privilege, indicating that in their view the Council was perfectly within its rights in amending the bill and that there was no validity in or requirement for the Legislative Assembly's addendum to the message. The Hon John Fuller in particular observed:

> Almost every bill that comes before this Council from the Assembly has expenses associated with it in some way. It is almost impossible to say that a bill has no public expense associated with it. Even if a bill authorizes the employment of one extra individual in the public service it could be said to be to that extent a money bill.
>
> To my mind section 46 of the Constitution Act refers only to the Legislative Assembly. If it is felt that the Legislative Assembly needs a message from the Governor before that House is in a position to proceed with a bill that might be considered a drain on the Consolidated Revenue Fund, that is a matter for the Assembly to decide and has nothing to do with the Legislative Council. It is a matter solely relating to the operation of another place. I do not see any necessity for the addendum to the message on this bill.[97]

In more recent times, amendments to bills moved and sometimes agreed to in the Council imposing additional financial obligations on the Crown have included specific indication that funding to implement the amendments be made available out of money to be provided by the Parliament or the State, or words to that effect:

---

95 *Hansard*, NSW Legislative Council, 20 November 1963, pp 6437-6438.

96 *Minutes*, NSW Legislative Council, 12 March 1969, p 385; 2 April 1969, pp 490-491.

97 *Hansard*, NSW Legislative Council, 2 April 1969, p 5528.

- In 2000, the House amended the Dairy Industry Bill 2000 to provide for a Dairy Farmers and Dairy Co-operatives Restructure Scheme with payments under the scheme to be made out of money to be provided by Parliament or that is otherwise legally available.[98]
- In 2012, the House amended the Marine Pollution Bill 2011 to establish an Oiled Wildlife Care Network, with 'any expenditure under this section … to be paid out of money to be provided by Parliament'.[99]
- In 2017, the Shooters, Farmers and Fishers Party moved an amendment to the Greyhound Racing Bill 2017 to provide financial assistance to the Greyhound Welfare and Integrity Commission, with the assistance to be funded out of 'money that is lawfully available to the Government of New South Wales'. On this occasion the amendment was negatived.[100]
- In 2019, the House amended the Ageing and Disability Commissioner Bill 2019 to insert the following provision: 'Parliament recommends the State provide financial assistance to independent specialist disability advocates, information and representative organisations in New South Wales by grants of a minimum of $20 million per annum'.[101] Subsequently, on receipt of a message from the Legislative Assembly disagreeing with the amendment, the House by return message to the Assembly insisted on the amendment.[102] On the Assembly again disagreeing with the amendment and suggesting an alternate amendment, the House accepted the alternate amendment.[103]
- In 2020, the House amended the COVID-19 Legislation Amendment (Emergency Measures – Treasurer) Bill 2020 to insert the following provision: 'Parliament recommends that this Act be amended to allow the Secretary to establish a scheme to provide financial assistance from money held in the Property Services Compensation Fund to landlords who are suffering financial hardship caused directly or indirectly by the COVID-19 pandemic …'.[104] The amendment was agreed to by the Assembly.

It is not strictly necessary for amendments to bills moved in the Council imposing additional financial obligations on the Crown to include specific indication that funding to implement the amendment be made available out of money to be provided by the Parliament or the State, or words to that effect. Indeed, whilst almost every amendment moved in the Council has expenses associated with it in some way, very few amendments moved in the Council ever contain such provisions. However, whilst not strictly necessary, as with the introduction of bills in the Council imposing specific

98 *Minutes*, NSW Legislative Council, 22 June 2000, p 542.
99 *Hansard*, NSW Legislative Council, 22 February 2012, pp 8622-8623.
100 *Minutes*, NSW Legislative Council, 5 April 2017, pp 1522-1523.
101 *Minutes*, NSW Legislative Council, 18 June 2019, p 220.
102 *Minutes*, NSW Legislative Council, 19 June 2019, pp 246-249.
103 *Minutes*, NSW Legislative Council, 20 June 2019, pp 267-269.
104 *Minutes*, NSW Legislative Council, 12 May 2020, pp 909-910.

financial obligations, the framing of amendments to bills in such terms where they have specific financial implications could be viewed as an appropriate expression of comity towards the Legislative Assembly.

ARE THE POWERS OF THE COUNCIL CONCERNING MONEY BILLS FURTHER CONSTRAINED BY CONVENTION?

As indicated above, the *Constitution Act 1902* places certain specific limitations on the powers of the Council in respect of money bills: under section 5 such bills must originate in the Assembly; under section 5A the Council may only suggest by message to the Assembly amendments to a bill 'appropriating revenue or moneys for the ordinary annual services of the Government'; and under section 5A such a bill may be presented by the Assembly to the Governor for assent, notwithstanding that the Council has not consented to the bill.

However, it has been argued that the powers of the Council in relation to money bills are further constrained by parliamentary convention, to the extent that the Council ought not to amend or reject any money bill. This convention, it is argued, was inherited from the English Parliament at the establishment of responsible government in 1856.[105]

In the UK, there is no doubt as to the pre-eminence of the House of Commons with respect to money bills.[106] Under the *Parliament Act 1911* (UK), a money bill not passed by the House of Lords within one month may be presented for Royal Assent and become an act of the Parliament notwithstanding that the House of Lords has not passed the bill. The *Parliament Act 1911* also makes provision for the Speaker of the House of Commons to certify a bill to be a 'money bill', with such certificate to be conclusive for all purposes; it may not for example be questioned in a court of law.[107] Even before the adoption of these measures in 1911, the pre-eminence of the House of Commons with respect to money bills was firmly established.

However, it is also clear that the powers of the House of Commons with respect to money bills were only partly admitted by the Council at the outset of responsible government in New South Wales in 1856. Clune and Griffith summarise the relationship that developed between the two Houses in relation to money bills between 1856 and 1932 as follows:

> A conveniently loose convention developed permitting the Council to amend machinery bills merely 'regulating' taxation, while acquiescing in the substantive power of the Assembly over Money Bills generally. By means of compromise and accommodation between the two Houses, both the spirit and the letter of

105 Twomey, (n 2), pp 531-540.

106 The history of the struggle of the House of Commons for pre-eminence in financial matters is summarised in *Victoria v Commonwealth* (1975) 134 CLR 338 at 385-386 per Stephen J.

107 *Erskine May*, 25th ed, (n 86), para 29.78.

> the constitutional arrangements for responsible government were generally satisfied.[108]

In 1929, President Peden summarised the situation as follows:

> The views taken by this House, and by the Legislative Assembly differ, and have differed, I suppose, almost from the date of responsible government. Broadly speaking, with certain exceptions, like the Appropriation Bill, this House has asserted that it has a right to amend money bills. The Legislative Assembly has asserted that the Council has no right to amend a money bill. How have the controversies been settled? I should be very much inclined to say that the controversies have to a very large extent been settled by the wise and temperate view which this House has taken in regard to the exercise of its strictly legal powers. This House has not considered that it has in fact the full measure of power within the mere words of the Constitution; we really have not claimed to have in fact the full legal powers. Is it now almost unthinkable that we should reject an Appropriation Bill?[109]

The relationship between the Houses in respect of money bills was further altered with the adoption of sections 5A and 5B of the *Constitution Act 1902* in 1933, after approval by the electors at a referendum.

Sections 5A and 5B were inserted into the *Constitution Act 1902* at a very tumultuous point in the history of the Council, following Premier Bavin's entrenchment of the Council in 1930 and Premier Lang's second attempt to abolish it between 1930 and 1932. In this context, the reform to the powers of the Council with respect to money bills (and other bills) implemented by sections 5A and 5B, on the initiative of the Stevens Ministry, was very deliberate. The reform was introduced concurrent with changes to the electoral system of the Council: henceforth the reconstituted Council was to consist of 60 indirectly elected members. With the traditional mechanism of 'swamping' the Council no longer available for the resolution of deadlocks between the Houses, another mechanism was necessary. However, in proposing sections 5A and 5B, the conservative Stevens Ministry deliberately chose not to extend to the Legislative Assembly the powers with respect to money bills held by the House of Commons, based no doubt on the experience of Premier Lang's time in office. As the Crown Solicitor acknowledged in 1948, the political disputes in New South Wales in the early 1930s meant that the powers traditionally claimed by the House of Commons were not conceded as being appropriate to the Assembly, and the intent of the new sections 5A and 5B was to limit the powers extended to the Assembly over money bills and to confirm certain powers claimed by the Council.[110] The words of the Crown Solicitor in 1948 are instructive:

---

108 For detailed discussion of the relationship between the Council and Assembly over money bills prior to 1932, see Clune and Griffith, (n 67), pp 75-82. See also Twomey, (n 2), pp 570-571.

109 *Hansard*, NSW Legislative Council, 26 November 1929, p 1654.

110 Crown Solicitor, 'Constitution Act: The Attorney General's memo of the 22 June 1948', 13 October 1948.

> In England legislative provision was made in the Parliament Act 1911 to regulate relations between the respective Houses. In that Act a provision was made whereby a Money Bill which had been passed by the House of Commons and sent to the House of Lords but not passed by the latter House within one month was, unless the House of Commons otherwise directed, presented to His Majesty for Royal Assent notwithstanding that the House of Lords had not passed the Bill. A 'Money Bill' was carefully defined, and provision was made for the endorsement on every Money Bill of a certificate of the Speaker of the House of Commons that it was a Money Bill. Such certificate was declared to be conclusive for all purposes and to be not liable to be questioned in any Court of law.
>
> When the Constitution Act was amended in 1933 two new Sections – Sections 5A and 5B – were inserted to deal with Bills in respect of which there was a disagreement between the two Houses. It must be assumed, I think, that at the time due consideration was given to the provisions of the Parliament Act. It must also, I think, be accepted that the omission of what are obviously important matters dealt with in the Parliament Act, was deliberate. Because of the political disputes at the time the powers traditionally claimed by the House of Commons were not conceded as being appropriate to the Legislative Assembly, and the trend of these new Sections was to limit the powers of the Assembly, and to confirm certain at least of the powers claimed by the Legislative Council. This, in my opinion, is the explanation of the marked differences between Sections 5A and 5B of the Constitution Act and the corresponding provisions of the Parliament Act, and little help can be derived from a consideration of the latter Act. Accordingly, in my opinion, Sections 5A and 5B must be construed as having no direct relation to the Parliament Act, and must be construed as special provisions applicable in New South Wales which were deliberately framed in a form different from the form in which the Parliament Act regulated the relations between the House of Commons and the House of Lords.[111]

In short, the arrangements adopted for the resolution of disputes over money bills by the Parliament in 1932 were specifically adapted for local circumstances, and were deliberately very different to those in the United Kingdom Parliament.

Those arrangements clearly entailed a distinction between money bills appropriating revenue 'for the ordinary annual services of the Government' under section 5A, and all other money bills under section 5B. On 14 September 1932, when the Attorney General, the Hon Henry Manning, moved the second reading of the Constitution Amendment (Legislative Council) Bill 1932 in the Legislative Council, *Hansard* records that he read onto the record the proposed section 5A, on which he commented: 'This is, of course, a bill for the appropriation of money for the annual services of the Crown.' He continued that in regard to other bills, the proposed section 5B would apply, which he then proceeded also to read onto the record.[112]

On 28 September 1932, during subsequent debate of amendments to the bill in committee, Mr Manning further observed:

---

111 Ibid, p 2.

112 *Hansard*, NSW Legislative Council, 14 September 1932, p 167.

> There was an endeavour to accurately define the difference between the two classes of bill referred to, and to secure to this House, as far as possible, that there shall be no usurpation by the other Chamber of functions to which under the law it is not entitled. Those two principles have been borne in mind, and in the bill an attempt is made to observe and apply them as far as possible. The language used in the clause has been selected with the greatest possible care, with every attempt to preserve to the Lower Chamber what might be considered to be its proper function while preventing it from usurping a function that it does not constitutionally possess. The attempt has been made, first of all, in the language of new section 5A, subclause (3), describing the bill as 'a bill which appropriates revenue or moneys for the ordinary annual services of the Government'.[113]

Accordingly, the Council does not admit that the convention of the Westminster Parliament that the Lower House is pre-eminent in respect of money bills places any further restriction on its powers concerning money bills. The convention finds expression in section 5 of the *Constitution Act 1902*, which was first adopted in 1855 at the outset of responsible government in almost identical terms, and also possibly in section 46 of the *Constitution Act 1902*, which dates back even further, to 1842. However, the convention was never fully accepted by the Council in the years 1856 to 1932, and was modified in important ways in its application to the Houses of the Parliament through the adoption of sections 5A and 5B of the *Constitution Act 1902* in 1932.

In the Australian common law tradition, there are two general approaches to the interpretation of legislation, the literal approach and the purposive approach. The literal approach is based on the literal meaning of the words used in the text of legislation; the purposive approach looks at the broader purpose of the legislation and the 'mischief' it is intended to address.[114] In the case of the provisions of the *Constitution Act 1902* in relation to money bills, particularly sections 5A and 5B, the literal meaning of the words, but also the intent of the Parliament behind them, are clear. To attempt to read down the powers of the Council in respect of all money bills based on the law and parliamentary convention in Westminster contradicts both the very deliberate and precise wording of the *Constitution Act 1902* and the history of relations between the Legislative Council and the Legislative Assembly on money bills since 1856.

113 *Hansard*, NSW Legislative Council, 28 September 1932, p 586.

114 D Pearce and R Geddes, *Statutory Interpretation in Australia*, 8th ed, (LexisNexis Butterworths, 2014), ch 2. In New South Wales, section 33 of the *Interpretation Act 1987* specifically requires that, in interpreting the provisions of a New South Wales act, regard is to be had to the object or purpose of the act.

CHAPTER 18

DELEGATED LEGISLATION

This chapter examines delegated legislation, including requirements concerning the making of such legislation, its publication, commencement and tabling in Parliament. It also examines the disallowance of delegated legislation by the Legislative Council and the scrutiny of delegated legislation by committees of the Council and the Parliament.

THE NATURE OF DELEGATED LEGISLATION

Delegated legislation, or subordinate legislation as it is sometimes called, is legislation made by the executive government under authority of the Parliament of New South Wales according to an act of Parliament. It includes statutory rules, by-laws, ordinances, orders in council and various other 'instruments'. The amount of delegated legislation created by the executive government in New South Wales vastly exceeds the amount of primary legislation passed by the Parliament each year.

The essential premise behind the making of delegated legislation is that Parliament should deal directly with general legislative principles in primary acts, setting the groundworks according to which the executive government attends to matters of administration and detail by way of delegated legislation.[1] From this premise flow two principal advantages of delegated legislation:

- In matters of public administration, the routine making of new instruments facilitates regular adjustments to the law, without undue delay. Adjustments can also be made in cases of emergency.
- By delegating the power to make subordinate legislation, the time of the Parliament can be more usefully used to consider significant matters of policy and principle.

However, Parliament's delegation of its law-making power to the executive government also comes with a risk: that of overreach in the use of the power by the executive government. Such overreach can take two forms:

1 R Laing (ed), *Odgers' Australian Senate Practice*, as revised by H Evans, 14th ed, (Department of the Senate, 2016), p 430.

- The presentation of primary legislation to Parliament which, if passed by the Parliament, would inappropriately delegate excessive powers to the executive government to act on behalf of the Parliament in the future, without further reference to Parliament.[2]
- The inappropriate use of delegated power by the executive government to change the law, for example changes to the law that are not in accordance with the provisions or intent of the primary legislation, that unduly trespass on personal rights and liberties, that remove the right to review of administrative decisions, and that contain matters more appropriate for parliamentary enactment by way of primary legislation.

To address this risk, the Parliament has adopted a range of mechanisms to superintend the exercise of delegated legislative power by the executive government: directions as to the manner and form of the making of delegated legislation, the staged repeal of delegated legislation after a certain time, provision for the disallowance of delegated legislation by resolution of either House of the Parliament, and parliamentary committee review of both primary and delegated legislation. This is examined further below.

MAKING OF DELEGATED LEGISLATION

The Parliament by the passage of legislation may confer on the executive government the power to make delegated legislation. The operative provision in legislation is usually couched in a generic form of words, such as: 'The Governor may make regulations, not inconsistent with this Act, for or with respect to any matter that by this Act is required or permitted to be prescribed or that is necessary or convenient for carrying out or giving effect to this Act'.[3]

The *Subordinate Legislation Act 1989* contains extensive requirements applicable to the making of delegated legislation. This is examined below.

The *Subordinate Legislation Act 1989*

The *Subordinate Legislation Act 1989* regulates the making and duration of 'statutory rules' as defined in the act. Under the act a 'statutory rule' is defined as a regulation, by-law, rule or ordinance that is made by the Governor, or that is made by a person or body other than the Governor and is required by law to be approved or confirmed by the Governor.[4] However, the definition excludes rules of the courts, the standing orders of both Houses and regulations and by-laws made under certain acts.[5]

---

2 Such provisions in primary acts are sometimes referred to as 'Henry VIII clauses', a reference to the Statute of Proclamations of 1539 passed by the English Reformation Parliament during the reign of Henry VIII which authorised the King with the advice of his Council to make 'traditional' proclamations which were to be observed 'as though they were made by Act of Parliament'.

3 See, for example, the *Central Coast Water Corporation Act 2006,* s 60(1).

4 *Subordinate Legislation Act 1989*, s 3.

5 Ibid, sch 4.

The *Subordinate Legislation Act 1989* was enacted with the aim of avoiding duplication and inconsistency in the making of delegated legislation, allowing adequate opportunities for public consultation on pieces of delegated legislation and ensuring effective legislative review.[6] It includes requirements to be observed before the making of statutory rules. These include:

- compliance with specified guidelines (as far as practicable);[7]
- preparation of a regulatory impact statement;[8]
- consultation with stakeholders and the public;[9] and
- provision of an opinion from the Attorney General or Parliamentary Counsel as to whether a proposed statutory rule may legally be made, at the time the rule is submitted for making or approval by the Governor.[10]

Aside from these requirements, the *Subordinate Legislation Act 1989* also provides that a statutory rule which is the same in substance as one which has been disallowed by either House of the Parliament may not be made within four months of the date of disallowance of that rule, unless the relevant House has rescinded the disallowance.[11]

The act also provides for the staged repeal, or 'sunsetting', of statutory rules, generally after five years.[12] This provision ensures that the attention of the executive is regularly turned to the utility of keeping particular regulations in force. Any replacement rules are also subject to the requirements of the *Subordinate Legislation Act 1989* before they can be made.

Significantly, however, the *Subordinate Legislation Act 1989* only applies to statutory rules as defined above; it fails to capture forms of delegated legislation made under certain acts, such as 'guidelines', which lie outside the scope of the definition. For example, the *Motor Accidents Compensation Act 1999* authorises the State Insurance Regulatory Authority to issue 'guidelines' regarding compulsory third party motor accident insurance premiums and procedures to be followed by the Motor Accidents Medical Assessment Service. Whilst such 'guidelines' are akin to rules of court and may be described as delegated legislation, they are not subject to the requirements of the *Subordinate Legislation Act 1989*.

Responsibility for drafting of delegated legislation rests with the Parliamentary Counsel's Office.

---

6 *Hansard*, NSW Legislative Council, 10 October 1989, pp 10552-10555. The legislation was enacted in response to recommendations of the then Regulation Review Committee. See Regulation Review Committee, *Legislation for the Staged Review of New South Wales Statutory Rules*, 27 July 1989.

7 *Subordinate Legislation Act 1989*, s 4 and sch 1.

8 Ibid, s 5(1).

9 Ibid, s 5(2) and (3).

10 Ibid, s 7(c).

11 Ibid, s 8(2).

12 Ibid, s 10(2). Repeal may be postponed in certain circumstances (s 11).

PUBLICATION OF DELEGATED LEGISLATION

The *Interpretation Act 1987* provides for the publication of 'statutory rules' as defined in the act and specifies the time at which such rules come into effect. The definition of a 'statutory rule' provided by the act differs from that contained in the *Subordinate Legislation Act 1989*, in that it includes rules of court and is not subject to a specified list of exceptions.[13] The *Interpretation Act 1987* also includes definitions of 'regulation', 'by-law', 'rule' and 'ordinance'.[14]

Section 39(1)(a) of the *Interpretation Act 1987* provides that a statutory rule must be published on the NSW legislation website: legislation.nsw.gov.au.[15] Certain exceptions are set out in section 39(3) to (5), including the standing orders of either House of the Parliament.

COMMENCEMENT OF DELEGATED LEGISLATION

The *Interpretation Act 1987* provides that a statutory rule takes effect on the day on which it is published or, if a later day is specified in the rule for that purpose, on the later day so specified.[16] Most statutory rules take effect on the day they are published on the NSW legislation website under these provisions.

However, certain other acts directly specify the time of commencement of delegated legislation. For example, under schedule 3 (part 1, clause 2) of the *Aboriginal Housing Act 1998*, 'any such provision may, if the regulations so provide, take effect from the date of assent to this Act or a later date'. Alternatively, notwithstanding section 39 of the *Interpretation Act 1987*, the time of commencement may be specified in the instrument when made.[17] In other cases, the relevant act specifies a date of commencement which is after the last day on which the instrument can be disallowed. For example, the *Sydney Water Act 1994* provides that amendments to the operating licence of Sydney Water do not take effect until 15 sitting days after being laid before each House of the Parliament or the failure or withdrawal of a disallowance motion within that time.[18] As another example, under the *Anti-Discrimination Act 1977* regulations take effect 14 sitting days

13 The *Interpretation Act 1987* defines a 'statutory rule' as a regulation, by-law, rule or ordinance that is made by the Governor, or that is made by a person or body other than the Governor but is required by law to be approved or confirmed by the Governor, or a rule of court. See *Interpretation Act 1987*, s 21.

14 *Interpretation Act 1987*, s 20.

15 Statutory rules were previously published in the *Government Gazette*.

16 *Interpretation Act 1987*, s 39(1)(b) and 39(2). Section 39(2A) further provides that a statutory rule is not invalid merely because (without statutory authority) the statutory rule is published on the NSW legislation website after the day on which one or more of its provisions is or are expressed to commence. In that case, the provisions commence on the day the statutory rule is published on the NSW legislation website, instead of on the earlier day.

17 See, for example, the *Roads Obstructions (Special Provisions) Act 1979*, s 10(3).

18 *Sydney Water Act 1994*, s 16(2).

after they have been tabled in each House, unless disallowed by either House, or on such later date as is specified in the regulation.[19]

TABLING OF DELEGATED LEGISLATION IN PARLIAMENT

The *Interpretation Act 1987* provides that Parliament must be informed of the making by the executive government of 'statutory rules' as defined in the act.

Section 40(1) provides that written notice of the making of a statutory rule must be laid before each House of the Parliament within 14 sitting days of its publication on the NSW legislation website.

Notice of the making of a statutory rule must be laid before the House by a minister or by the Clerk.[20] Perversely, however, failure to do so does not affect the validity of the statutory rule.[21] In practice, the Parliamentary Counsel's Office prepares a list of statutory rules for tabling following publication on the NSW legislation website and forwards the list to the Clerk of each House. The Clerk generally tables statutory rules published on the NSW legislation website on the Tuesday of each sitting week.[22]

Certain other acts also include requirements for the tabling of instruments made under their provisions. In some cases the act provides that section 40 of the *Interpretation Act 1987* applies[23] whilst other acts include their own tabling provisions.[24]

DISALLOWANCE OF DELEGATED LEGISLATION

Many forms of delegated legislation are subject to disallowance by either House of the Parliament under part 6 of the *Interpretation Act 1987* or under the provisions of the primary act.

The disallowance mechanism provided by the *Interpretation Act 1987* applies to 'statutory rules' within the definition provided in the act. Section 41 provides that either House of

19 *Anti-Discrimination Act 1977*, s 127(3).

20 *Interpretation Act 1987*, s 40(3A) and 40(4). Until 1993, all statutory rules were required to be tabled by the responsible minister, but in that year the *Interpretation Act 1987* was amended to provide for tabling by the minister or the Clerk.

21 *Interpretation Act 1987*, s 40(4). During the second reading speech on the Interpretation Bill 1987 the Hon Kevin Rozzoli argued against such a procedure as follows: 'It is important that these matters be brought to the direct attention of the Parliament. Failure to do so is an abrogation of the responsibility of the Government to address a matter to Parliament. Abrogation of that responsibility should attract the sanction or penalty of rendering that statutory rule invalid. I consider it a gross omission from the Bill that the situation has been allowed to stand.' See *Hansard*, NSW Legislative Assembly, 18 February 1987, p 8481.

22 For further information, see the discussion in Chapter 10 (The conduct of proceedings) under the heading 'Tabling of reports and papers by ministers, committee chairs and the Clerk'.

23 See, for example, the *Poisons and Therapeutic Goods Act 1966*, s 46.

24 See, for example, the *National Parks and Wildlife Act 1974*, s 35(2).

the Parliament may pass a resolution disallowing a statutory rule either before notice of the rule is laid before the House, or at any time after the notice is laid before the House, provided that, in the latter case, notice of the disallowance motion is given within 15 sitting days of the notice being laid before the House.[25] On the passing of a disallowance motion the statutory rule in question 'shall cease to have effect'.[26] The disallowance of a statutory rule has the same effect as repeal of the rule.[27] Where a statutory rule which amends or repeals an earlier statutory rule or act is disallowed, the disallowance has the effect of 'restoring or reviving the other act or statutory rule, as it was immediately before it was amended or repealed, as if the rule had not been made', unless the former statutory rule was subject to automatic repeal.[28] A regulation may also be disallowed by either House of the Parliament in part only.[29]

However, unlike in some other jurisdictions, there is no provision for automatic disallowance of a statutory rule where a notice of motion for disallowance of the rule is not dealt with by the House within a certain period. By contrast, section 42(2) of the *Legislation Act 2003* (Cth) provides for the automatic disallowance of a legislative instrument where a notice of disallowance has not been dealt with within 15 sitting days.

In addition to the provisions of the *Interpretation Act 1987*, certain other acts also provide that instruments made under their own provisions must be tabled in Parliament and are subject to disallowance by either House.[30] In some cases these acts provide that disallowance is to be in accordance with the provisions in part 6 of the *Interpretation Act 1987*,[31] whilst in others the disallowance mechanism is set out in the act itself.[32]

To assist members with the statutory time limits applicable to motions for the disallowance of statutory instruments, the Clerk produces a Statutory Rules and Instruments Paper which shows all statutory rules and instruments subject to disallowance, the date of their tabling in the House (where this has occurred), and the time within which notice of their disallowance may be given. The paper is issued on the Tuesday of each week that the Council is sitting, and on the first Tuesday of each month when the Council is not sitting. It was first produced in 1987 following the commencement of the *Interpretation Act 1987*.

25 *Interpretation Act 1987*, s 41(1).

26 Ibid, s 41(2). The disallowance takes effect on the day, and at the time, that the resolution of the House disallowing the regulation is adopted. There is no scope for the Council to adopt a resolution disallowing a statutory rule from a later day or time. See *Aidon v Minister for Aboriginal Affairs of New South Wales* [2006] NSWLEC 169 at [19] per Lloyd J. See also Crown Solicitor, 'Whether disallowance of regulations can take effect at a later date', 23 September 2019.

27 *Interpretation Act 1987*, s 41(3).

28 Ibid, s 41(4).

29 Ibid, s 41(6).

30 A list of disallowable instruments other than 'statutory rules' to which Part 6 of the *Interpretation Act 1987* applies is available on the NSW Parliamentary Counsel's Office website.

31 See, for example, the *Poisons and Therapeutic Goods Act 1966*, s 46.

32 See, for example, the *National Parks and Wildlife Act 1974*, s 35.

Disallowance procedure

The procedures of the House for the bringing on, debating and resolution of a motion to disallow a statutory instrument under section 41 of the *Interpretation Act 1987* or the authority of any other act are as follows.

Any member of the House may give a notice of motion to disallow a statutory instrument under section 41 of the *Interpretation Act 1987* or the authority of any other act. Such a notice is set down on the *Notice Paper* as business of the House (SO 78(1)).

On a motion to disallow a statutory instrument being called on, the House first decides the question, without amendment or debate, whether the matter should proceed as business of the House (SO 78(2)). If the House decides that the matter should not proceed as business of the House, the motion is set down as an item of private members' business (SO 78(5)), in which case it may not proceed for some time, if at all. Such instances are rare.[33]

If the House decides that the disallowance motion should proceed as business of the House, the House then decides a further question as to when the matter will proceed (SO 78(3)). Usually the member with carriage moves that the matter proceed forthwith, however there have been instances where the member with carriage has moved that the matter proceed on a certain day.[34] The current practice of the House is to agree to the question that the matter proceed forthwith, without amendment or debate.[35]

Assuming that the House agrees that the matter should proceed forthwith, the member with carriage moves the disallowance motion and debate commences. An amendment may be moved to the question, for example to limit or expand the scope of the disallowance motion, or to refer the instrument to committee for inquiry and report, which removes the disallowance motion from the *Notice Paper*.[36]

Time limits apply to the debate on a motion to disallow a statutory instrument as listed in Appendix 11 (Time limits on debates and speeches in the Legislative Council) (SO 78(4)). The member moving the motion and the minister first speaking may speak for not more than 15 minutes, whilst any other member may speak for not more than 10 minutes. The total time for debate is one and a half hours, after which the President interrupts debate to allow the mover to speak in reply for not more than 10 minutes. The President then puts the question on any amendments and the substantive motion.

The same question rule does not prevent a motion for disallowance of a statutory instrument substantially the same in effect as one previously disallowed (SO 103(2)). This exception is intended to allow the House to again consider a motion to disallow a statutory instrument where a motion to disallow a similar instrument was previously agreed to

33 See, for example, *Minutes*, NSW Legislative Council, 25 May 2006, p 48; 10 March 2010, p 1690.

34 See, for example, *Minutes*, NSW Legislative Council, 1 September 2010, p 2005.

35 Standing order 78 does not prescribe the consequences if a motion moved under standing order 78(3) that the matter proceed forthwith is negatived.

36 For further information, see S Want and J Moore, edited by D Blunt, *Annotated Standing Orders of the New South Wales Legislative Council*, (Federation Press, 2018), p 272.

by the House, but the executive government subsequently remade the instrument.[37] However, if a motion to disallow a statutory instrument was previously negatived by the House, the same question rule does apply, such that a motion in the same terms could not be proposed again in the same session except in accordance with standing order 103(1).

The House has in the past granted leave for multiple disallowance motions, relating to a common subject, to be moved together.[38]

The use of the disallowance procedure since the advent of responsible government in 1856 is discussed in the first edition of *New South Wales Legislative Council Practice*.[39] The disallowance procedure is also discussed further in the *Annotated Standing Orders of the New South Wales Legislative Council*.[40]

'Regulatory void'

If the House disallows a statutory rule and there is no prior rule to be revived because of the staged repeal of the prior rule under the *Subordinate Legislation Act 1989*, the effect of disallowance is to create a 'regulatory void'. The solution to this might appear to be to create a new statutory rule to fill the void, but the impact of section 8 of the *Subordinate Legislation Act 1989* on such a course needs to be considered. As noted previously, section 8 provides that a statutory rule which is the same in substance as one which has been disallowed by either House of the Parliament may not be made within four months of the date of disallowance of the former rule, unless the House has rescinded the disallowance.[41] The likelihood of a regulatory void occurring is greater where a new rule is tabled less than 15 sitting days before the staged repeal of the rule which is being replaced. There have been at least two occasions on which the Council has rescinded resolutions of disallowance in view of legal advice that, in the absence of such rescission, section 8 would prevent a new rule being published for four months.[42]

Impact of prorogation on disallowance

If a motion for disallowance is on the *Notice Paper* when the House is prorogued, the motion lapses. However, the lapsing of a motion in these circumstances does not defeat

37 Under section 8 of the *Subordinate Legislation Act 1989*, a statutory rule cannot be remade within four months of the date of its disallowance, unless the resolution disallowing the statutory rule has been rescinded.

38 See, for example, *Minutes*, NSW Legislative Council, 16 May 1996, p 144; 10 March 2016, p 718; 3 May 2017, p 1561.

39 L Lovelock and J Evans, *New South Wales Legislative Council Practice,* 1st ed, (Federation Press, 2008), pp 431-435.

40 *Annotated Standing Orders of the New South Wales Legislative Council*, (n 36), pp 270-274.

41 *Subordinate Legislation Act 1989*, s 8(2).

42 See *Minutes*, NSW Legislative Council, 30 October 1996, p 410; *Hansard*, NSW Legislative Council, 30 October 1996, pp 5477-5481 (concerning the *Centre Based and Mobile Child Care Services Regulation 1996*); and *Minutes*, NSW Legislative Council, 12 November 1998, p 864; *Hansard*, NSW Legislative Council, 12 November 1998, pp 9800-9801 (concerning the *Security Industry Regulation 1998*).

the House's power to disallow the rule providing that a new notice of motion for disallowance is given in the next session within 15 sitting days of the relevant instrument being laid before the House as required by the *Interpretation Act 1987*.[43]

SCRUTINY OF DELEGATED LEGISLATION BY PARLIAMENTARY COMMITTEES

There are two parliamentary committees with functions relating to the scrutiny of delegated legislation: the Joint Legislation Review Committee and the Legislative Council's Regulation Committee.

By way of background to these two committees, the Legislative Council first established a dedicated committee to review and scrutinise subordinate legislation in 1960: the Committee on Subordinate Legislation. In 1987, this committee was replaced by a joint committee of both Houses: the Regulation Review Committee. This was despite protests at the time from members of the Council that the function properly rested with the Council. In 2003, the Regulation Review Committee was in turn replaced by the Legislation Review Committee, also a joint committee of both Houses, with responsibility for reviewing subordinate but also primary legislation. This history is discussed in detail in the first edition of *New South Wales Legislative Council Practice*.[44]

In 2017, in response to continued dissatisfaction expressed by members of the Legislative Council with the scrutiny of delegated legislation, and following a recommendation of the Select Committee on the Legislative Council Committee System, the Legislative Council established a new committee, the Regulation Committee, to undertake additional scrutiny functions in relation to delegated legislation.

The Legislation Review Committee

The Legislation Review Committee is a joint committee of both Houses. It is constituted under the *Legislation Review Act 1987* and appointed by resolution of both Houses at the commencement of each Parliament.[45]

The committee has eight members: three nominated by the Council and five by the Assembly.[46] The means of establishment of the committee is declared in the act to be 'in accordance with the practice of Parliament with reference to the appointment of members to serve on joint committees of both Houses of Parliament'.[47]

---

43 Crown Solicitor, 'Disallowance of regulation following prorogation of Parliament', 1 September 1999. See also Crown Solicitor, 'Motions for disallowance of notifications under Fluoridation of Public Water Supplies Act 1957 - Adaminaby, Berridale, Jindabyne and Manning River District Water Supplies', 17 December 1972.

44 *New South Wales Legislative Council Practice*, 1st ed, (n 39), pp 435-441.

45 *Legislation Review Act 1987*, s 4.

46 Ibid, s 5(1).

47 Ibid, s 5(2).

The committee has a dual role: to scrutinise bills introduced into Parliament[48] and to scrutinise regulations[49] subject to disallowance by resolution of either House of the Parliament.[50]

In relation to bills, the committee may consider whether a bill 'inappropriately delegates legislative powers' or 'insufficiently subjects the exercise of legislative power to parliamentary scrutiny'.[51]

In relation to regulations, the committee's key function is to consider whether Parliament's attention should be drawn to a regulation on any ground, including that:

- the regulation trespasses unduly on personal rights and liberties;
- the regulation may have an adverse impact on the business community;
- the regulation may not be within the general objects of the legislation under which it was made;
- the regulation may not accord with the spirit of the legislation under which it was made even though it may have been legally made;
- the objective of the regulation could have been achieved by alternative and more effective means;
- the regulation duplicates, overlaps or conflicts with another regulation or act;
- the form or intention of the regulation calls for elucidation; and
- any of the requirements of sections 4, 5 and 6 of the *Subordinate Legislation Act 1989*, or of the guidelines and requirements in schedules 1 and 2 to that act, appear not to have been complied with, to the extent that they were applicable in relation to the regulation.[52]

After considering a regulation the committee may report to each House and in doing so may recommend disallowance of the regulation.[53] The committee may review and report on a regulation after the period for disallowance has passed, provided the committee resolves to do so during the disallowance period.[54]

48 Ibid, s 8A(1)(a).

49 'Regulation' is defined in section 3 of the *Legislation Review Act 1987* as 'a statutory rule, proclamation or order that is subject to disallowance by either or both Houses of Parliament'.

50 *Legislation Review Act 1987*, s 9(1)(a). Following the making of a statutory rule, a copy of the regulatory impact statement and all written comments and submissions received are forwarded to the Legislation Review Committee within 14 days after it is published. See *Subordinate Legislation Act 1989*, s 5(4).

51 *Legislation Review Act 1987*, s 8A(1)(b)(iv) and (v).

52 Ibid, s 9(1)(b).

53 Ibid, s 9(1)(c).

54 Ibid, s 9(1A).

The committee has two additional functions with respect to all regulations, irrespective of whether they are still subject to disallowance: conducting a regular systematic review of regulations and inquiring into and reporting on any question in connection with regulations referred to the committee by a minister.[55]

As with the former Regulation Review Committee, the Legislation Review Committee is precluded from considering the merits of government policy.[56] This is the role of the House and of other committees. This approach is consistent with the approach of equivalent committees in other jurisdictions.

Since its formation, the Legislation Review Committee has tabled a weekly Legislation Review Digest during sitting weeks, bringing concerns regarding bills to the attention of members in time for debate on them. However, in respect of regulations, the committee has adopted a different procedure:

> The Committee considers all regulations made and normally raises any concerns with the Minister in writing. When it has received the Minister's reply, or if no reply is received after 3 months, the Committee publishes this correspondence in the Digest. The Committee may also inquire further into a regulation. If it continues to have significant concerns regarding a regulation following its consideration, it may include a report in the Digest drawing the regulation to the Parliament's 'special attention'.[57]

During the 56th Parliament (2015–2019), the committee reviewed approximately 1,380 regulations and reported on 81 of those regulations. The primary grounds on which Parliament's attention was drawn to regulations included that:

- the regulation trespassed on personal right and liberties (69 regulations);
- the regulation had an adverse impact on the business community (nine regulations); and
- the form or intention of the regulation calls for elucidation (six regulations).

For some regulations multiple issues were raised covering different grounds. During the same time period the committee reviewed and reported on 367 bills.

The Regulation Committee

In 2017, the Legislative Council formed a new committee to examine delegated legislation: the Regulation Committee. For many years, members of the House had expressed concerns that the regulation scrutiny function of the Legislation Review Committee was inadequate.[58] However, the catalyst for the Regulation Committee's formation was a

55 Ibid, s 9(2).
56 Ibid, s 9(3).
57 Legislation Review Committee, *Legislation Review Digest No 66/55*, 18 November 2014, p v.
58 See, for example, the statement of the Hon Don Harwin in the House of 5 April 2006; *Hansard*, NSW Legislative Council, 5 April 2006, pp 22060-22061.

recommendation of the Select Committee on the Legislative Council Committee System in 2016,[59] which concluded in its report:

> The select committee believes that the Legislative Council should play a greater role in the scrutiny of delegated legislation via the establishment, on a trial basis, of a Regulation Committee.
>
> Rather than replicating the work of the joint Legislation Review Committee which reviews all disallowable regulations, the proposed committee would take an innovative approach to its role, by focusing on the substantive policy issues regarding a small number of regulations of interest as well as trends relating to delegated legislation.[60]

The Regulation Committee was first established on a trial basis during the 56th Parliament on 23 November 2017.[61] The committee was subsequently re-established at the commencement of the 57th Parliament on 8 May 2019 on an ongoing basis.[62] It consists of eight members, comprising four government members, two opposition members, and two crossbench members.

The committee is required to inquire into and report on any regulation that is referred to it by the House, including the policy or substantive content of the regulation, or any other matter in relation to regulations referred to it by the House. Where a regulation referred to the committee is the subject of a notice of motion or order of the day for the disallowance of the regulation:

- the notice or order stands postponed until the tabling of the committee's report;
- unless otherwise ordered, the committee must table its report within six weeks; and
- on tabling of the committee's report, the Clerk is to restore the notice or order to its former positon on the *Notice Paper* at the stage it had reached prior to the regulation being referred.[63]

As an example of these arrangements, on 7 May 2019, notice was given in the House for the disallowance of the *Liquor Amendment (Music Festivals) Regulation 2019* and the *Gaming and Liquor Administration Amendment (Music Festivals) Regulation 2019*. The regulations established a regulatory scheme for 'high-risk' music festivals in New South Wales. On 30 May 2019, in accordance with the resolution establishing the Regulation Committee, the House referred the regulations to the committee for inquiry and report, whereupon the disallowance motion was set down on the *Notice Paper* for future consideration following receipt of the report of the committee.[64] Following the conduct of a detailed

59 Select Committee on the Legislative Council Committee System, *The Legislative Council committee system*, 28 November 2016, Recommendation 3, p vii.
60 Ibid, p 4.
61 *Minutes*, NSW Legislative Council, 23 November 2017, pp 2223-2225.
62 *Minutes,* NSW Legislative Council, 8 May 2019, pp 100-103.
63 Ibid.
64 *Minutes*, NSW Legislative Council, 30 May 2019, p 154.

inquiry, including evidence that the regulations were not supported by the industry, the committee reported out of session on 28 August 2019.[65] On 17 September 2019, the Clerk informed the House of receipt of the report of the committee out of session, whereupon the disallowance motion was restored to the *Notice Paper* as business of the House.[66] On 26 September 2019, in accordance with the recommendation of the committee,[67] the House disallowed the regulations.[68]

65 Regulation Committee, *Liquor Amendment (Music Festivals) Regulation 2019 and Gaming and Liquor Administration Amendment (Music Festivals) Regulation 2019*, Report No 4, August 2019.

66 *Minutes*, NSW Legislative Council, 17 September 2019, p 400.

67 Regulation Committee, *Liquor Amendment (Music Festivals) Regulation 2019 and Gaming and Liquor Administration Amendment (Music Festivals) Regulation 2019*, Report No 4, August 2019, p 59.

68 *Minutes*, NSW Legislative Council, 26 September 2019, pp 478-479.

CHAPTER 19

DOCUMENTS TABLED IN THE LEGISLATIVE COUNCIL

This chapter examines the tabling of documents in the Legislative Council, including returns to orders for the production of State papers. The tabling of documents in the Council is one of the principal means by which the House informs itself in relation to public affairs.

TABLING OF DOCUMENTS IN THE LEGISLATIVE COUNCIL

Types of documents tabled in the Legislative Council

There are various types of documents routinely tabled in the Legislative Council: reports of agencies that report directly to Parliament such as the Audit Office and the Ombudsman, annual reports of government departments and agencies, other government reports, delegated legislation, committee reports, government responses to committee reports, petitions, ministerial responses to petitions and papers provided in returns to orders for the production of State papers.

Whilst the vast majority of documents tabled in the Legislative Council are printed documents, section 21 of the *Interpretation Act 1987* defines a document as any record of information, including:

(a) anything on which there is writing, or

(b) anything on which there are marks, figures, symbols or perforations having a meaning for persons qualified to interpret them, or

(c) anything from which sounds, images or writings can be reproduced with or without the aid of anything else, or

(d) a map, plan, drawing or photograph.

From time to time, non-written documents, such as compact discs, have been tabled in the Council.[1] The Senate and House of Representatives also permit the tabling of non-written documents.[2]

Tabling of documents when there is no other business before the House

Documents may be tabled in the Legislative Council when there is no other business before the House (SO 42(1)) as follows:

- the President may table any documents under the authority of various acts or at his or her discretion (SO 54(1));
- ministers (or parliamentary secretaries) may table documents under the authority of various acts or at their discretion, or according to standing and sessional orders (SO 54(1));
- the Clerk may table documents under the authority of various acts, according to standing and sessional orders or by resolution of the House, including an order of the House for the production of State papers (SO 54(2));
- committee chairs, or another member of a committee in the absence of the chair, may table committee reports and accompanying documents according to standing order (SO 230); and
- any member may present a petition and move that it be received by the House, although petitions are usually only presented by private members (SO 68(1)).

The President and ministers are entitled to table documents at their discretion as part of their duties: the President has a duty to inform the Council of matters concerning public accountability and the powers, rights and responsibilities of the House; and ministers have a duty to inform the Council in relation to public affairs generally.[3]

There is no provision in the standing orders for private members to table documents in the Legislative Council (other than committee reports and petitions). Accordingly, private members may generally only table documents by leave of the House (SOs 42(2) and 54(4)).[4] Very rarely, the House has resolved according to notice that a private member be authorised to table documents.[5]

---

1 See, for example, *Minutes*, NSW Legislative Council, 15 November 2005, p 1716; 26 February 2008, p 438. Attempts have also been made on other occasions to table video cassettes and compact discs, and more recently USB sticks, although the House has denied leave on such occasions. See *Minutes*, NSW Legislative Council, 26 October 2004, p 1073; 21 February 2017, p 1378.

2 R Laing (ed), *Odgers' Australian Senate Practice*, as revised by H Evans, 14th ed, (Department of the Senate, 2016), p 579; DR Elder and PE Fowler (eds), *House of Representatives Practice,* 7th ed, (Department of the House of Representatives, 2018), p 601.

3 *Odgers*, 14th ed, (n 2), p 578.

4 See, for example, the presentation by private members of papers deemed to be too irregular to be received as petitions: *Minutes*, NSW Legislative Council, 22 April 2010, p 1761; 4 June 2015, p 190; 23 June 2016, p 1000.

5 See, for example, *Minutes*, NSW Legislative Council, 21 October 1997, pp 123-126; 3 September 2003, pp 263-264. See also the discussion later in this chapter under the heading 'Publication and printing of tabled documents'.

Tabling of documents by the President

The President is authorised to table any documents in the Legislative Council under the authority of various acts or at his or her discretion at any time when there is no other business before the House (SOs 54(1) and 42(1)). The President often tables documents at the commencement of proceedings each sitting day, but on occasion at other times as well.

The most common documents tabled by the President are reports of agencies which report directly to Parliament through the Presiding Officers pursuant to an act such as the Audit Office, the Ombudsman, the Independent Commission Against Corruption and the Law Enforcement Conduct Commission. However, the acts establishing these agencies adopt different arrangements for the tabling of these agencies' reports:

- Reports of the Audit Office may be presented to the President if the House is sitting, or to the Clerk if it is not sitting.[6] A report which is presented to the Clerk when the House is not sitting is, on presentation and for all purposes, taken to be a report published by order or under the authority of the House.[7]
- Reports of the Ombudsman, the Independent Commission Against Corruption and the Law Enforcement Conduct Commission may be presented to the President only,[8] unless there is a vacancy in the Office of the President, in which case they may be presented to the Clerk.[9] If a report includes a recommendation that it be made public forthwith, the President may make it public, whether or not the House is in session and whether or not the report has been laid before the House.[10] If a report does not include a recommendation that it be made public forthwith, it is not published until it is tabled in the House.[11]

---

6 *Public Finance and Audit Act 1983*, s 38E. The Crown Solicitor has advised that a House is not sitting if it is not meeting to transact business, whether because the House is adjourned and yet to commence a sitting, prorogued or dissolved. However, a House is 'sitting' if a sitting is suspended. See Crown Solicitor, 'Tabling of reports presented by Auditor General', 17 November 2009.

7 *Public Finance and Audit Act 1983*, s 63C(c).

8 *Ombudsman Act 1974*, s 31AA; *Independent Commission Against Corruption Act 1988*, s 78; *Law Enforcement Conduct Commission Act 2016*, s 142.

9 *Ombudsman Act 1974*, s 5A(2); *Independent Commission Against Corruption Act 1988*, s 79(2); *Law Enforcement Conduct Commission Act 2016*, s 6(2).

10 *Ombudsman Act 1974*, s 31AA(2); *Independent Commission Against Corruption Act 1988*, s 78(3); *Law Enforcement Conduct Commission Act 2016*, s 142(2). The Crown Solicitor has advised that section 31AA of the *Ombudsman Act 1974* does not provide the Presiding Officers with discretion as to whether to make public a report of the Ombudsman. On receipt it must be made public forthwith. See Crown Solicitor, 'Operation Prospect "Whether power to give 48 hours" Notice of Tabling Report', May 2017.

11 In such cases, section 31AA(1) of the *Ombudsman Act 1974* provides that a report shall be laid before the House on the next sitting day, whilst section 78(1) of the *Independent Commission Against Corruption Act 1988* and section 142(2) of the *Law Enforcement Conduct Commission Act 2016* provide that a report shall be laid before the House within 15 sitting days. Invariably, however, they are tabled on the next sitting day.

The President is also required to table the 'Register of Disclosures by Members of the Legislative Council'[12] and the annual report of the Parliamentary Ethics Advisor.[13]

As Chair of the Procedure Committee, the President also routinely tables reports of that committee.

The President may also table other documents at his or her discretion. This may occur in conjunction with statements by the President on matters of privilege or procedure.[14] In addition, the President tables documents concerning the administration of the Parliament such as the annual reports of the Department of the Legislative Council and the Department of Parliamentary Services.

Tabling of documents by ministers

Ministers (and parliamentary secretaries) are authorised to table documents in the Legislative Council under the authority of various acts or at their discretion (SOs 54(1) and 42(1)), or according to standing and sessional order, at any time when there is no other business before the House. Ministers may table:

- Annual reports of government departments and agencies under the provisions of section 13(1) of the *Annual Reports (Departments) Act 1985* and section 11(1) of the *Annual Reports (Statutory Bodies) Act 1984*.[15]
- Documents produced by State-owned corporations, such as their constitutions, statements of corporate intent and related corporate material under section 26 of the *State Owned Corporations Act 1989*.
- Statutory reviews of the operation of an act tabled under the provisions of that act.

Ministers also routinely table documents according to standing and sessional orders including government responses to committee reports (SO 233(1)) and ministerial responses to petitions containing more than 500 signatures.[16] In addition, ministers table lists of papers tabled and not ordered to be printed in the previous calendar month (SO 59(1)) and lists of unproclaimed legislation (SO 160(2)), as discussed below.

12 Tabled according to the *Constitution (Disclosures by Members) Regulation 1983*, cl 21.

13 Tabled according to the resolution establishing the Parliamentary Ethics Adviser.

14 For further information, see the discussion in Chapter 10 (The conduct of proceedings) under the heading 'Statements by the President'.

15 At the time of publication, the *Annual Reports (Departments) Act 1985* and the *Annual Reports (Statutory Bodies) Act 1984* were scheduled to be repealed under schedule 1 to the *Government Sector Finance Legislation (Repeal and Amendment) Act 2018*. In future, annual reporting requirements will fall under division 7.3 of the *Government Sector Finance Act 2018*.

16 Tabled according to sessional order first adopted on 12 August 2014 and re-adopted in subsequent sessions. See *Minutes,* NSW Legislative Council, 12 August 2014, p 2648; 6 May 2015, pp 59-60; 8 May 2019, pp 60-61.

Papers tabled and not ordered to be printed

Standing order 59 provides that on the first sitting day of each month, a minister is to table a list of all papers tabled in the previous month (or since the last sitting of the House, if the last sitting occurred more than one month before) and not ordered to be printed. On tabling of the list, a motion may be moved, without notice, that certain papers on the list be printed.[17]

Unproclaimed legislation

Standing order 160(2) provides that on the second sitting day of each month, a minister is to table a list of legislation passed by the Parliament and assented to by the Governor but not proclaimed to commence within 90 days of assent.[18] This standing order was adopted in 2004, but its origins can be traced to earlier resolutions of the House expressing concern at the failure of the government to proclaim the commencement of certain provisions of acts duly passed by the Parliament.[19]

Tabling of committee reports by committee chairs

Committee chairs, or in the absence of the chair, the deputy chair or another member of the committee, may table committee reports in the Legislative Council, with accompanying documents, when there is no other business before the House (SOs 230 and 42(1)). A report of a committee is required to be tabled in the House within 10 calendar days of the report being adopted by the committee (SO 230).[20] Reports of joint committees, such as reports of the Legislative Review Committee, are also tabled by the committee chair, or if the chair is a member of the Legislative Assembly, by another member of the committee in the Council. Committee chairs have also occasionally tabled committee discussion papers in the House.[21]

---

17 The motion for printing was historically a mechanism by which the House authorised a document to be published and disseminated. Before 2004, all documents tabled and not ordered to be printed were referred to the Printing Committee for consideration. The Printing Committee would report to the House if the printing of any of the documents was recommended. The adoption of standing order 59 in 2004 made obsolete the need for a Printing Committee. For further information, see S Want and J Moore, edited by D Blunt, *Annotated Standing Orders of the New South Wales Legislative Council*, (Federation Press, 2018), pp 198-200.

18 In 2010, the Joint Select Committee on Parliamentary Procedure recommended that the government should include in the list of unproclaimed legislation tabled in the Legislative Council reasons why the legislation has not been proclaimed. See Joint Select Committee on Parliamentary Procedure, *Reforms to parliamentary processes and procedures*, October 2010, pp 26, 58. To date, this recommendation has not been implemented.

19 For further information, see the discussion in Chapter 15 (Legislation) under the heading 'Commencement of acts'. See also the *Annotated Standing Orders of the New South Wales Legislative Council*, (n 17), pp 527-528.

20 Alternatively, the report may be tabled out of session with the Clerk under the authority of standing order 231.

21 See, for example, *Minutes,* NSW Legislative Council, 10 November 2015, p 544.

Tabling of documents by the Clerk

The Clerk is authorised to table documents in the Legislative Council under the authority of various acts, according to standing order or by resolution of the House at any time when there is no other business before the House (SOs 54(2) and 42(1)).

The Clerk routinely tables reports received out of session[22] from agencies which report directly to Parliament, as required by statute, such as reports from the Auditor General received out of session.[23] The Clerk also routinely tables other papers required to be tabled under statute which have been presented to Parliament out of session according to statute or under the authority of standing order 55, as amended by sessional order. Such papers include:

- statutory rules published on the NSW legislation website;[24]
- committee reports received out of session (SO 231);[25]
- government responses to committee reports received out of session (SO 233, as amended by sessional order);
- returns to order under standing order 52(2);[26]
- reports of the Independent Legal Arbiter under standing order 52(8);[27] and
- ministerial responses to petitions received out of session.[28]

Presentation of petitions by members

Any member may present a petition to the Legislative Council, although a petition is usually presented by a private member (SO 68(1)). On presentation, the member may move that the petition be received. The tabling of petitions in the House is discussed further in Chapter 10 (The conduct of proceedings).[29] The rules for the content of petitions

22 For further information, see the discussion later in this chapter under the heading 'Tabling of documents when the House is not sitting'.

23 *Public Finance and Audit Act 1983*, ss 38E, 51, 52A, 52B, 52F and 63C. Under section 38E, if the House is sitting at the time a report of the Auditor General is to be presented, the report is presented to the President.

24 For further information, see the discussion in Chapter 18 (Delegated legislation) under the heading 'Tabling of delegated legislation in Parliament'.

25 It is routine for committees of the Legislative Council to present reports out of session, and for those reports to be lodged with the Clerk and presented to the House by the Clerk on the next sitting day. It is also routine for reports of the joint Legislative Review Committee to be received out of session under section 10 of the *Legislation Review Act 1987* and reported in the same manner.

26 For further information, see the discussion later in this chapter under the heading 'Current procedures for the production of State papers under standing order 52'.

27 Ibid.

28 For further information, see the discussion later in this chapter under the heading 'The management of petitions'.

29 See the discussion under the heading 'Presentation of petitions'.

and the management of petitions once they are received by the House are discussed later in this chapter.[30]

Tabling of documents when the House is not sitting

Standing order 55, as amended by sessional order,[31] provides that where, under the authority of an act, a report or other document is required to be tabled in the House by a minister, and the House is not sitting, such report or document may be lodged with the Clerk. On presentation, the report is deemed to have been laid before the House, published under the authority of the House and printed.

Many acts, such as the *Public Finance and Audit Act 1983*,[32] the *Annual Reports (Departments) Act 1985*[33] and the *Annual Reports (Statutory Bodies) Act 1984*[34] explicitly provide for the presentation of reports to the Clerk when the House is not sitting, and for such reports on presentation to be deemed to be published by order or under the authority of the House. However, in instances where an act requires that a minister table a report in Parliament but does not provide authority for the report to be published,[35] standing order 55, as amended by sessional order, provides that authority.

Reports of government departments and agencies tabled with the Clerk out of session and made public, either under the authority of the principal act or standing order 55, as amended by sessional order, are subsequently reported to the House by the Clerk on the next sitting day and are recorded in the *Minutes of Proceedings* for that day.

In 2006, in advice provided to the Clerk of the Legislative Assembly, the Crown Solicitor contested the authority of the Legislative Council to publish reports received by the Clerk out of session under standing order 55(2) where this was not provided for under the relevant act. The Crown Solicitor observed that different acts contain different provisions in relation to tabling of reports out of session, and that:

> [in] my view, where Parliament has provided that a particular report must be tabled in Parliament, without allowing for deemed tabling out of session, the requirement is deliberate and must be complied with. Where Parliament intends an alternative procedure to be available, it has expressly said so.[36]

30 See the discussion under the heading 'Petitions'.

31 *Minutes*, NSW Legislative Council, 3 June 2009, p 1189; 9 May 2011, p 73; 6 May 2015, p 57; 8 May 2019, pp 59-60.

32 *Public Finance and Audit Act 1983*, s 63C.

33 *Annual Reports (Departments) Act 1985*, s 13(2) and (3). At the time of publication, the *Annual Reports (Departments) Act 1985* was scheduled to be repealed under schedule 1 to the *Government Sector Finance Legislation (Repeal and Amendment) Act 2018*. In future, annual reporting requirements will fall under division 7.3 of the *Government Sector Finance Act 2018*.

34 *Annual Reports (Statutory Bodies) Act 1984*, s 11(2) and (3). At the time of publication, the *Annual Reports (Statutory Bodies) Act 1984* was scheduled to be repealed under schedule 1 to the *Government Sector Finance Legislation (Repeal and Amendment) Act 2018*. In future, annual reporting requirements will fall under division 7.3 of the *Government Sector Finance Act 2018*.

35 See, for example, the *Water Management Act 2000*, s 386F; and the *Casino Control Act 1992*, s 89A.

36 Crown Solicitor, 'Meaning of term "Cause to be Tabled" – Reports to Parliament.' Advice provided to the Clerk of the Legislative Assembly, 28 February 2006, pp 7-8.

The Council has not adopted this view. As articulated in the *Annotated Standing Orders of the New South Wales Legislative Council*, 'presentation of documents to the Clerk out of session has become a widespread and commonly followed practice, utilised by many ministers since 2004'.[37]

However, where there is no legislative requirement for a government report to be presented to Parliament out of session, the provisions of standing order 55, as amended by sessional order, do not apply. In such cases, the report cannot be received by the Clerk out of session and is held for tabling by a minister on the next sitting day. This includes during periods when the House has been prorogued. Standing order 55(3), as amended by sessional order,[38] provides:

> Any report or other document which is not required under an Act to be tabled in the House by a Minister may not be lodged with the Clerk when the House has been prorogued.[39]

Although there are few reports that fall into this category, there are instances where the Clerk has not been able to receive out of session reports of some significance. For example, following the Special Commission of Inquiry into the Waterfall Rail Accident, the government agreed that the Independent Transport Safety and Reliability Regulator would report quarterly on the implementation of the recommendations of the Special Commission. However, as there was no legislative requirement that the reports of the Regulator be presented to the House, the Clerk could not receive the reports out of session.

Committee reports, government responses to committee reports and ministerial responses to petitions may also be received by the Clerk and made public when the House is not sitting under the respective authority of standing orders 231(2), 233(3) and a sessional order amending standing order 68. Returns to orders for the production of State papers may also be received by the Clerk, although only documents over which privilege is not claimed are made public. In addition, reports of the Independent Legal Arbiter may be received by the Clerk, but are available only to members of the Legislative Council (SO 52(8)). The House may decide to publish such reports later.

Tabling of documents during debate

The standing orders do not provide for the tabling of documents in the House during debate, unlike the provision made in the standing orders outlined above for the tabling of documents when there is no other business before the House. Accordingly, members must seek the leave of the House if they wish to table a document during debate.

---

37 *Annotated Standing Orders of the New South Wales Legislative Council*, (n 17), p 185.

38 *Minutes*, NSW Legislative Council, 3 June 2009, p 1189; 9 May 2011, p 73; 6 May 2015, p 57; 8 May 2019, p 60.

39 For further information, see Procedure Committee, *Report relating to limiting debate, tabling of papers when the House is prorogued, absence of a quorum and rules in the galleries*, Report No 4, 12 March 2009, pp 3-6.

There are many examples of ministers and parliamentary secretaries seeking and obtaining leave of the House to table documents during debate, including during debate on a bill,[40] following a ministerial statement[41] and during Question Time.[42]

By contrast, the House has traditionally been reluctant to grant private members leave to table documents during debate. Leave has been denied by the House where a document is already in the public domain, where the House is unaware of the contents of a document, or where a document has been deemed not strictly relevant to the debate before the House.[43]

When during debate the House grants a private member leave to table a document, the document is available for inspection by members of the House only unless the House authorises the document to be made public, usually by motion moved immediately by the member: 'That the document be published' (SOs 54(4) and 57). Alternatively, the motion may be moved according to notice on a subsequent day.[44]

As an alternative to seeking leave to table a document during debate in the House, members may seek leave to have the text of a document incorporated in *Hansard*, where it automatically becomes public. Ministers and parliamentary secretaries do this routinely when they seek leave of the House to incorporate their second reading speech on Assembly bills in *Hansard*. However, as with tabling a document, the House may refuse leave to incorporate the text of a document in *Hansard*, for example where the document is already in the public domain.[45]

By longstanding convention, documents are not tabled during proceedings in a Committee of the whole House, by leave or otherwise. Whilst the standing orders clearly allow amendments to be moved to a bill in committee, there is currently no other power or provision for a committee to receive documents or submissions, or take evidence in any other way. Nor is there currently a mechanism for a document tabled in a committee

40 *See, for example, Hansard*, NSW Legislative Council, 8 May 2012, p 11191; 19 November 2013, p 25880.

41 *See, for example, Hansard*, NSW Legislative Council, 4 May 2006, p 22580.

42 *See, for example, Hansard*, NSW Legislative Council, 14 November 2007, p 4022.

43 *Hansard*, NSW Legislative Council, 22 June 2010, p 24404.

44 On 17 June 2008, the House was informed that the Hon John Della Bosca had been stood aside from ministerial duties. See *Minutes*, NSW Legislative Council, 17 June 2008, p 650. Mr Della Bosca subsequently made a personal explanation concerning the matter and was granted leave to table a document entitled 'Statement from John Della Bosca'. See *Minutes*, NSW Legislative Council, 17 June 2008, p 654. The tabling of this document raised the question whether the document should be treated as a public or confidential document, depending on whether Mr Della Bosca tabled it in his capacity as a minister (although stood aside with no portfolio) or as a private member. Ultimately, it was determined that Mr Della Bosca tabled the document in his capacity as a private member rather than as a minister, and that therefore the document should remain confidential and available to members of the Council only.

45 For further information, see the discussion in Chapter 13 (Debate) under the heading 'Incorporation of material in *Hansard*'. See also the *Annotated Standing Orders of the New South Wales Legislative Council*, (n 17), pp 157-158.

to be reported to the House or for the House to consider whether to accept the document or make it public.[46]

Orders in relation to tabled documents

The motion for the tabling of a document quoted by a minister in debate

Standing order 56 provides that a document relating to public affairs quoted by a minister in debate may be ordered to be laid on the table of the House by motion without notice moved immediately at the conclusion of the minister's speech, unless the minister states that the document is of a confidential nature or should more properly be obtained by an order of the House.

This standing order has its origins in longstanding practice of the House of Commons. *Erskine May* comments that a minister may not read or quote from a despatch or other State paper not before the House unless he or she is prepared to lay it upon the table of the House, if it can be done without injury to the public interest. However, in 1893, the Speaker of the House of Commons ruled that confidential documents or documents of a private nature need not necessarily be tabled.[47]

Standing order 56 was only formally adopted by the Legislative Council in 2004, although there were at least two occasions on which the House ordered the tabling of a document quoted in debate prior to 2004.[48] The principle behind the standing order is that members of the House are expected to contribute their own views and words to a debate. The use of someone else's words is subject to the right of the House to see the whole document from which those words are quoted.[49]

The use of standing order 56 since 2004 to seek the tabling of a document quoted by a minister in debate is traced in detail in the *Annotated Standing Orders of the New South Wales Legislative Council*.[50] In summary, whilst the procedure has been used on a number of occasions, the outcome has not always been satisfactory. It is well established that the President is not in a position to validate a claim by a minister that a document is confidential,[51] or to ascertain whether a document is 'relating to public affairs'.[52] Nor is the President required to judge whether a document tabled is indeed the document from which the minister was quoting.[53] In such circumstances, the utility of the process and the principle it seeks to uphold is somewhat undermined.

---

46 Ruling: Mallard (Temporary Chair), *Hansard*, NSW Legislative Council, 19 September 2019, p 56.

47 D Natzler KCB and M Hutton (eds), *Erskine May's Treatise on The Law, Privileges, Proceedings and Usage of Parliament,* 25th ed, (LexisNexis, 2019), para 21.26.

48 For further information, see the *Annotated Standing Orders of the New South Wales Legislative Council*, (n 17), pp 187-188.

49 R Laing (ed), *Annotated Standing Orders of the Australian Senate*, (Department of the Senate, 2009), p 481.

50 *Annotated Standing Orders of the New South Wales Legislative Council*, (n 17), pp 185-188.

51 *Hansard*, NSW Legislative Council, 22 June 2010, p 24374; 19 March 2014, p 27431.

52 Ruling: Harwin, *Hansard,* NSW Legislative Council, 23 February 2012, p 8823.

53 *Hansard*, NSW Legislative Council, 7 September 2006, p 1620.

The motion that the House 'take note' of a report or document

Standing order 57 provides that on a document being laid before the House, other than a petition or a return to an address to the Governor for documents or an order for the production of State papers, a motion may be made that a day be appointed for its consideration. The procedural mechanism used for consideration of the document is a motion moved without notice that the House 'take note' of the document.

The purpose of this standing order is to enable the House to debate reports or documents tabled in the House, such as reports of the Auditor General, that are of particular significance or interest to members. The process is separate from the much more commonly used mechanism for debating committee reports and government responses to committee reports under standing orders 232 and 233, as amended by sessional order, although the process uses the same procedural mechanism: a 'take note' motion.

The standing orders have provided for the House to 'take note' of documents since 1856. However, the procedure was not used at all between 1927 and 2012. When its use was revived on 22 November 2012, the House had little guidance as to the procedures to be followed, prompting the adoption of a sessional order in 2015 setting out new procedures for the 'take note' of a report or document.[54] The House re-adopted the sessional order at the commencement of the 57th Parliament in May 2019.[55]

Under the sessional order, on a member moving that the House 'take note' of a tabled report or document, debate on the motion is to be immediately adjourned, and resumption of the debate is set down as government or general business on the *Notice Paper*, as the case may be. On resumption of the debate, each speaker is limited to 10 minutes, except the mover of the motion who is allowed 15 minutes and a further 10 minutes in reply. If the motion is not disposed of sooner, after one hour, the President or other occupant of the chair is to interrupt debate to allow the mover of the motion to speak in reply and to put all questions necessary to dispose of the motion and any amendments. These time limits are listed in Appendix 11 (Time limits on debates and speeches in the Legislative Council).

Since the adoption of the sessional order in 2015, a motion under standing order 57 to take note of a report has been moved on three occasions: in September 2016, February 2017 and March 2018. On the first two occasions it was used to 'take note' of reports of the Auditor General.[56] On the third occasion a motion to 'take note' of a report by the NSW Ombudsman was moved,[57] although the debate never proceeded. On each occasion resumption of the adjourned debate was listed on the *Notice Paper* as an item of private members' business.

54 *Minutes,* NSW Legislative Council, 6 May 2015, p 60. For further information, see the *Annotated Standing Orders of the New South Wales Legislative Council*, (n 17), pp 189-190, 191-193.

55 *Minutes,* NSW Legislative Council, 8 May 2019, p 60.

56 *Minutes,* NSW Legislative Council, 13 September 2016, p 1113; 15 September 2016, p 1137; 21 February 2017, p 1383; 23 February 2017, p 1416.

57 *Minutes,* NSW Legislative Council, 8 March 2018, p 2330.

Custody and publication of tabled documents

Custody and availability of tabled documents

All documents tabled in the Legislative Council are recorded in the *Minutes of Proceedings* for that sitting day and subsequently in an index of tabled papers published in the *Journals*.[58]

The Clerk has custody of all documents tabled in the Legislative Council.[59] Together, they form the 'Tabled Papers Series', a hard copy series of every document tabled in the House since 1856. Such documents may only be taken from the Office of the Clerk by a resolution of the House or, if the House is not sitting for more than two weeks, by approval of the President (SO 50(1)).[60] In such instances, the House is to be notified when it next sits (SO 50(2)).[61]

From 1856 until 1904, parliamentary papers which were ordered to be printed were included along with the *Minutes of Proceedings* in the *Journals of the Legislative Council*. Subsequently, from 1904 until 2006 they were published in separate volumes called the 'Joint Volumes of Parliamentary Papers'. However, in 2006, by agreement between the Clerks of both Houses, the publication of the 'Joint Volumes of Parliamentary Papers' series was discontinued. Whilst historically the 'Joint Volumes of Parliamentary Papers' series was the means by which most documents published by the House were accessed, by 2006 this had ceased to be the case, with departments and agencies routinely making reports and other documents available through the internet.

With the discontinuation of the 'Joint Volumes of Parliamentary Papers', on 23 November 2006, the Council passed a resolution authorising the Clerk to enter into a Memorandum of Agreement with the State Records Authority for the transfer of records of the House to the care, but not control, of the Authority. The resolution also expressly authorised the Clerk, under standing order 50, to transfer to the Authority from time to time as

58 The only exception to this occurred on 24 August 1960, when the Attorney General, the Hon Robert Downing, tabled minutes of a joint sitting of members of the Legislative Assembly and Legislative Council held on 20 April 1960 under section 5B of the *Constitution Act 1902* to consider the Constitution Amendment (Legislative Council Abolition) Bill 1960. The Hon Colonel Hector Clayton, Leader of the Opposition in the Legislative Council, immediately moved that the document be not entered in the *Minutes of Proceedings* on the basis that the meeting itself was not a proceeding of the House. The motion was carried on division, 30 votes to 20. See *Minutes*, NSW Legislative Council, 24 August 1960, p 17. For further information, see the discussion in Chapter 2 (The history of the Legislative Council) under the heading '1934–1961: Labor's further attempts to abolish the Council'.

59 The standing orders have invested in the Clerk custody of all documents tabled in the House since 1856. For further information, see the *Annotated Standing Orders of the New South Wales Legislative Council*, (n 17), p 156.

60 However, there have been occasions when documents have been temporarily removed from the Tabled Papers Series. These instances are documented in the *Annotated Standing Orders of the New South Wales Legislative Council*, (n 17), pp 151-156.

61 This provision has not been utilised to date.

occasion may require, the records of the House not currently in use. The resolution has continuing effect until rescinded or amended by the House.[62]

Under the resolution, documents transferred to the Authority are subject to access orders in accordance with the spirit of part 6 of the *State Records Act 1998*:[63]

- Documents tabled in the House and authorised to be made public are open to public access.
- Documents tabled in the House and not made public remain closed to public access for 30 years from the date of tabling, after which the Clerk may make an open access direction. This category of documents includes privileged documents tabled in returns to orders under standing order 52 and documents tabled by private members, which are only available to members of the House unless ordered to be made public by the House.
- Documents which have not been published by authority of the House or a committee, such as transcripts of *in camera* evidence and confidential submissions, remain closed to public access unless access is authorised by resolution of the House.

A Memorandum of Agreement between the Clerks of the two Houses and the Director of the State Records Authority was signed on 5 March 2008.

Notwithstanding these changing arrangements for the management of papers tabled in the Legislative Council, it is important to emphasise that all such documents continue to form the 'Tabled Papers Series', and that all documents tabled in the House since 1856, including those tabled but not ordered to be printed, continue to be available, either at Parliament House or through the State Records Authority.

Under the standing orders, any document tabled in the Legislative Council and made public as part of the 'Tabled Papers Series' may be inspected at the Office of the Clerk at any reasonable time (SO 60(1)). The Clerk may charge a reasonable fee for copies of extracts from documents tabled in the House (SO 60(2)). In practice, in modern times, a majority of reports tabled in the House are available electronically online both on government department and agency websites and also on the Parliament's website through the Parliament's tabled papers database. Accordingly, the primary application of this standing order relates to the inspection of papers tabled in returns to orders for the production of State papers.[64]

---

62 *Minutes*, NSW Legislative Council, 23 November 2006, pp 431-432.

63 Although documents held by the House are State records for the purposes of the *State Records Act 1998*, the requirements of the act in relation to the protection, management and control of the records, together with public access requirements, do not apply to the Houses of the Parliament. See *State Records Act 1998*, ss 9, 26 and 49. Nevertheless, the Parliament complies with the spirit and intent of the act.

64 For further information, see the *Annotated Standing Orders of the New South Wales Legislative Council*, (n 17), pp 200-201.

Whilst the Clerk is the official custodian of all documents tabled in the House, in practice the registration, collation and management of such documents is undertaken by the Procedure Office on behalf of the Clerk.

Publication and printing of tabled documents

All documents tabled in the Legislative Council by the President, ministers and the Clerk are considered to be public,[65] unless otherwise ordered by the House (SO 54(3)).[66] By contrast, with the exception of petitions, documents presented by private members are available for inspection by members of the House only unless the House authorises them to be made public (SO 54(4)).[67]

On the tabling of a document, other than a petition or a return to an address or order for papers, a motion may be made that it be printed (SO 57(b)). When the House is not sitting, documents tabled with the Clerk under the authority of an act are published under the authority of the act or by authority of the Clerk under standing order 55, as amended by sessional order.[68]

As articulated in the *Annotated Standing Orders of the New South Wales Legislative Council*, the motion that a document be printed has a long history. At one time, the practice of the House was to restrict publication and distribution of tabled documents, and their inclusion in the 'Joint Volumes of Parliamentary Papers' series, to those documents that had been ordered to be 'printed'. In modern times, with the adoption of standing order 54 for the publication of documents, this is no longer the case, and all documents presented to the House by the President, ministers and the Clerk are considered to be public, unless otherwise ordered by the House (SO 54(3)). Nevertheless, the House has continued the practice of ordering the majority of reports tabled by the President, ministers and the Clerk to be printed.[69] Certain acts also continue to require the printing of documents tabled with the Presiding Officers and Clerks out of session.

---

65 A notable exception to this is documents provided in returns to orders of the House for the production of State papers where a claim of privilege is made under standing order 52(5).

66 For an example where the House ordered that a tabled document be kept confidential to members of the Legislative Council, see *Minutes*, NSW Legislative Council, 25 February 2020, p 778.

67 In some cases, the House has imposed certain conditions on the publication of documents tabled by private members. For example, in 1997 the House passed a resolution granting leave to the Hon Franca Arena to table certain documents regarding allegations of paedophile activities amongst prominent persons, but imposed various conditions regarding access to the documents. Under the resolution, the documents were to be retained in the custody of the Clerk and not considered public, although the Clerk was granted leave to provide a copy of the documents to a Special Commission of Inquiry established to inquire into the allegations and to the Commissioner of Police. On receipt of the report of the Commissioner of Police, the House was to reconsider whether it was necessary or desirable to continue to restrict access to the documents. See *Minutes*, NSW Legislative Council, 21 October 1997, pp 123-126.

68 Committee reports tabled with the Clerk out of session are published under the authority of standing order 231.

69 For further information, see the *Annotated Standing Orders of the New South Wales Legislative Council*, (n 17), pp 190, 193-196.

However, there is one circumstance in which the 'printing' of a document may be of continuing procedural importance. Standing order 54 does not explicitly provide for the publication by the House of committee reports tabled in the House by the chair or other member of a committee under standing order 230. Accordingly, after tabling, a motion is moved immediately that the report be printed under standing order 57(b), thereby effectively publishing the report.

Errata to tabled documents

Where an error is identified in a report or document tabled in the House, it is common practice for an erratum to the report or document to be submitted by the relevant department or agency for additional tabling in the House.[70] Whilst standing order 58 provides for the correction of clerical or typographical errors in reports, by authority of the President, it is not suitable for use as a mechanism to address errors in reports of government departments and agencies.[71]

PETITIONS

Rules relating to the content of petitions

There are various rules relating to the content of petitions that are primarily designed to ensure a petition's authenticity and provide protection to the petitioners and the House. Under standing orders 68, 69 and 70, a petition must:

- relate to a matter over which the House has jurisdiction (SO 68(2));[72]
- be typewritten, printed or written in ink without insertion or erasure (SO 69(1));
- contain a request for action by the House or the Parliament (SO 69(2));
- be in English where practicable, and if not, be accompanied by a translation, in English, certified correct by the member who presents it (SO 69(3));
- contain both the printed names of the persons signing the petition and their signatures (SO 69(5)), which must be written on a page containing the petition prayer and not be pasted or otherwise transferred to it (SO 69(4));
- not have letters, affidavits or other documents attached, except for a petition for a private bill (SO 69(7));

70 The Council does not accept revised copies of the report on the basis that the original report has been received and made public by the House and entered into the Tabled Papers Series.

71 For further information, see the *Annotated Standing Orders of the New South Wales Legislative Council*, (n 17), pp 196-197.

72 However, this requirement has been interpreted broadly to include matters on which the government can make representation on behalf of the people of New South Wales, such as matters of national or even international significance.

- not contain references to any debate in the House of the same session unless it is relevant to the petition (SO 70(1));
- be respectful and temperate in its language and not contain language disrespectful of the Parliament (SO 70(2)); and
- not request, either directly or indirectly, a grant of public money (SO 70(4)).

It is the responsibility of the member presenting a petition to ensure that he or she is familiar with its contents and that it complies with the rules and orders of the House (SO 70(3)). To this end, the member presenting a petition must sign the top of the first page of the petition (SO 68(7)).

To ensure that a petition complies with the standing orders, it is now customary for members to submit it to the Clerk for review prior to presentation to the House. Members can seek to present petitions which do not comply with the rules outlined above as 'irregular petitions'.[73]

In earlier times, petitions were on occasion ruled out of order or rescinded and withdrawn after having been presented to the House.[74] There were also occasions on which the presentation of petitions was contested or negatived.[75]

Petitions need only contain one signature but usually include tens, hundreds or thousands of signatures. The largest petition ever presented to the House contained approximately 500,000 signatures. It was presented on 4 May 2004 and related to the deregulation of pharmacies.[76] The second largest petition ever presented was an irregular petition containing approximately 100,000 signatures. It was presented on 9 May 2013 and related to organ trafficking and harvesting.[77]

Petitions have been presented on a wide range of subjects, requesting that the House introduce legislation, repeal or change existing laws or take particular action for the benefit of particular persons. A petition from an individual citizen may seek the redress of a personal grievance such as the correction of an administrative error.

---

73 For further information, see the discussion in Chapter 10 (The conduct of proceedings) under the heading 'Presentation of petitions'.

74 See, for example, a petition received but later rescinded and withdrawn as there were no signatories to the petition and the petition did not contain a prayer, *Minutes,* NSW Legislative Council, 1 October 1861, p 21; a petition withdrawn as the prayer did not conform to standing orders, *Minutes,* NSW Legislative Council, 30 October 1861, p 53; a petition received but later withdrawn as the petitioners had erroneously designated themselves, *Minutes,* NSW Legislative Council, 15 November 1866, p 99; and four petitions ruled out of order as the prayer was in contravention of the standing orders (although they were subsequently presented again and received), *Minutes,* NSW Legislative Council, 26 August 1915, p 62.

75 For further information, see the *Annotated Standing Orders of the New South Wales Legislative Council*, (n 17), p 228.

76 *Minutes,* NSW Legislative Council, 4 May 2004, p 664.

77 *Minutes,* NSW Legislative Council, 9 May 2013, p 1697.

The standard form of a petition to the President and members of the Legislative Council is at Appendix 14 (The form of a petition to the Legislative Council).

The management of petitions

A copy of each petition received by the House is referred by the Clerk to the appropriate minister for consideration (SO 68(9)).[78] Under a sessional order first adopted by the House on 12 August 2014 and re-adopted in subsequent sessions,[79] the responsible minister must table a response to a petition signed by more than 500 signatories within 35 calendar days of the petition being received. If the House is not sitting at the time the minister provides the response, it may be tabled with the Clerk out of session and presented by the Clerk to the House when it next sits. The Clerk is also required to forward a copy of the response to the member who lodged the petition.

When a response to a petition has not been received within 35 calendar days, the President is to inform the House on the next sitting day. If the Leader of the Government in the Legislative Council has not provided the response by the end of that sitting week, the President is to again inform the House on the first day of each sitting week until the response is provided.[80]

The information contained in a petition presented to the House is considered to be public. As such, any information may be extracted from it, including the names and addresses of signatories. There is nothing to prevent such signatories being contacted, although harassment or other adverse treatment of signatories may constitute a contempt.[81]

E-petitions

The Legislative Council has traditionally not accepted e-petitions. The standing orders have been interpreted as requiring that only hard copies of petitions may be received.[82]

However, on 24 March 2020, the House adopted a resolution authorising the President and the Clerk to investigate infrastructure to support the receipt of e-petitions hosted on

78 This provision was first adopted by sessional order on 20 February 1986. See *Minutes,* NSW Legislative Council, 20 February 1986, p 26.

79 *Minutes,* NSW Legislative Council, 12 August 2014, p 2648; 6 May 2015, pp 59-60; 8 May 2019, pp 60-61.

80 *Minutes,* NSW Legislative Council, 8 May 2019, pp 60-61.

81 *Odgers*, 14th ed, (n 2), pp 591-592. Members and their staff or other citizens or groups coordinating the compilation of a petition should make clear to people signing the petition that their details will be made public.

82 By contrast, the Senate standing orders, which are almost identical to the Council's in relation to petitions, are interpreted in the Senate in a way that allows the receipt of electronic petitions, provided that a Senator certifies that the electronic petition has been duly posted with the text available to the signatories. See *Odgers*, 14th ed, (n 2), p 592. The matter was considered by the Procedure Committee in 2017 and 2018, but without coming to a consensus on whether the House should accept e-petitions in the future. See Procedure Committee, *E-petitions*, Report No 11, June 2018.

the Parliament's website, and authorising the Procedure Committee to initiate a trial of e-petitions during the remainder of 2020, with the committee to report to the House on the operation of the trial by the first sitting day in 2021.[83]

ORDERS FOR THE PRODUCTION OF STATE PAPERS

The power of the House to order the production of State papers[84] was considered in Chapter 3 (Parliamentary privilege in New South Wales).[85] In summary, the House has an inherent common law power to order the production of State papers held by the government, such a power being reasonably necessary to enable the House to carry out its functions. These orders are commonly referred to as orders for the production of State papers or just orders for papers.

Between 1856 and the early part of the 20th century, the practice of the Legislative Council ordering the production of State papers was well established. However, it subsequently fell into disuse, and was not revived again until the 1990s, when the power of the House to order the production of State papers was challenged by the government in the courts, precipitating the *Egan* decisions, discussed below.

The *Egan* decisions

The *Egan* decisions[86] were a series of three court decisions between 1996 and 1999 prompted by the refusal of the Treasurer and Leader of the Government in the Legislative Council, the Hon Michael Egan, to table in the Legislative Council certain State papers ordered to be produced by the House. The decisions largely confirmed the power of the Council to order the production of State papers.

At the time of the *Egan* decisions, the power of the House to order the production of State papers was regulated by standing order 18, first adopted in 1895,[87] which simply provided: 'Any papers may be ordered to be laid before the House and the Clerk shall communicate to the Premier's Department any such order.'[88]

---

83 *Minutes*, NSW Legislative Council, 24 March 2020, p 880.

84 State papers were defined by Gleeson CJ in the decision of the Court of Appeal in *Egan v Willis and Cahill* (1996) 40 NSWLR 650 at 654 as 'papers which are created or acquired by ministers, office-holders, and public servants by virtue of the office they hold under, or their service to, the Crown in right of the State of New South Wales'. This definition was adopted by the majority (Gaudron, Gummow and Hayne JJ) in the decision of the High Court in *Egan v Willis* (1998) 195 CLR 424 at 442.

85 See the discussion under the heading 'The power to order the production of State papers'.

86 See the decision of the New South Wales Court of Appeal in *Egan v Willis and Cahill* (1996) 40 NSWLR 650, the decision of the High Court in *Egan v Willis* (1998) 195 CLR 424 and the decision of the New South Wales Court of Appeal in *Egan v Chadwick* (1999) 46 NSWLR 563.

87 The standing order was subsequently revised in 1922 and 1927.

88 Prior to 1895, the power to order the production of State papers was regulated by standing orders 23 and later 26. For further information, see the *Annotated Standing Orders of the New South Wales Legislative Council*, (n 17), pp 171-172.

Egan v Willis and Cahill (1996) and *Egan v Willis (1998)*: The functions and powers of the Legislative Council

The first two *Egan* decisions – the decision of the New South Wales Court of Appeal in *Egan v Willis and Cahill* in 1996 and the decision of the High Court in *Egan v Willis* in 1998 – related primarily to the functions of the Legislative Council, and whether the power to order the production of State papers was reasonably necessary in order for the Council to perform those functions.

By way of background, on 18, 25 and 26 October 1995, the Legislative Council adopted three orders under then standing order 18 for the production of State papers in relation to three matters: the closure of certain veterinary laboratories and the Biological and Chemical Research Institute at Rydalmere,[89] the government's negotiations with Twentieth Century Fox concerning the conversion of the Sydney Showground into a film complex,[90] and the government's decision to recentralise the Department of Education resulting in the closure of regional offices.[91]

On 26 October 1995, the deadline for the production of papers concerning the closure of certain veterinary laboratories and the Biological and Chemical Research Institute at Rydalmere having passed,[92] the House, on the motion of the Leader of the Opposition, the Hon John Hannaford,[93] adopted a further order that the documents be tabled by 4.00 pm that day. On this occasion, the resolution specifically called on the Leader of the Government in the Legislative Council, the Hon Michael Egan, to table the documents.[94] On the passing of this further deadline of 4.00 pm, Mr Hannaford moved a further motion noting the failure of the government and Mr Egan to comply with the orders for papers, censuring Mr Egan, and calling on him to lodge the required documents with the Clerk before the House met again on 13 November 1995. The motion was ultimately amended to express displeasure with Mr Egan, whilst still calling on him to lodge the required documents by 13 November 1995.[95] During the debate, Mr Egan tabled certain documents in relation to the government's negotiations with Twentieth Century Fox.[96] Further documents in relation to the government's negotiations with Twentieth Century Fox were also tabled on 30 October 1995, 1 November 1995 and 3 November 1995.[97]

---

89 *Minutes*, NSW Legislative Council, 18 October 1995, pp 231-232. The order required that the documents be produced by 12.00 noon on 24 October 1995.

90 *Minutes*, NSW Legislative Council, 25 October 1995, pp 262-264. The order required that the documents be produced by 5.00 pm on 26 October 1995.

91 *Minutes*, NSW Legislative Council, 26 October 1995, pp 278-279. The order required that the documents be produced by 5.00 pm on 1 November 1995.

92 On 24 October 1995, in response to a question without notice, the Leader of the Government in the Legislative Council, the Hon Michael Egan, had indicated that the documents would not be tabled in the House. See *Hansard*, NSW Legislative Council, 24 October 1995, pp 2140-2141.

93 The motion was moved according to notice following the suspension of standing and sessional orders on contingent notice.

94 *Minutes*, NSW Legislative Council, 26 October 1995, pp 273-274, 275-276.

95 *Minutes*, NSW Legislative Council, 26 October 1995, pp 279-283.

96 *Minutes*, NSW Legislative Council, 26 October 1995, p 281.

97 *Minutes*, NSW Legislative Council, 13 November 1995, p 290.

When the House met again on 13 November 1995, no further documents having been received beyond those noted above, and the deadline for all three returns to orders having passed, Mr Hannaford again moved a motion[98] noting the failure of the government to comply with the orders, adjudging Mr Egan guilty of contempt and suspending him from the service of the House for seven calendar days, unless he indicated to the President that he was willing to table the documents at the next sitting of the House.[99] The question that Mr Egan be adjudged in contempt of the House was agreed to, however an amendment to the motion also provided for the matter to be referred to the Standing Committee on Parliamentary Privilege and Ethics for inquiry and report by 15 February 1996 as to what sanctions should be imposed where a minister fails to obey an order for papers.[100] There the matter rested for several months. The House later extended the committee's reporting date to 17 May 1996.[101]

Over five months later, on 23 April 1996, the House adopted a new order for papers requiring the production of all papers in relation to the government's consideration of the Report of the Commission of Inquiry into the Lake Cowal gold mine.[102] For the first time, the resolution made provision for a claim of privilege by the government over the documents, to be available for inspection by members of the Legislative Council only in the Office of the Clerk. Once again, however, no return was received by the return date of 30 April 1996. On 1 May 1996, the House censured Mr Egan for his failure to comply with the order for papers, and again ordered the production of the documents, this time by 9.30 am the next day.[103]

The next day, 2 May 1996, on Mr Egan failing to produce the required papers by 9.30 am, the House on motion of Mr Hannaford found Mr Egan guilty of contempt, suspended him from the service of the House for the remainder of the sitting day, and ordered his attendance at his place at the table of the House on the next day to explain his continued non-compliance with all four orders for papers made by the House since October 1995. The President, the Hon Max Willis, then directed the Usher of the Black Rod, Mr Warren Cahill, to escort Mr Egan from the precincts of the Parliament. When Mr Egan refused to leave the chamber, arguing that the House had no authority to compel the production of documents and therefore no grounds for suspending him, the President was obliged to leave the Chair, before Mr Egan was finally escorted by the Usher of the Black Rod from the chamber and the Parliament building onto Macquarie Street.[104]

---

98 The motion was moved without notice following the suspension of standing and sessional orders on contingent notice.

99 As moved, paragraph 6 of the motion also provided that should Mr Egan continue to fail to table the documents, he be required to attend at the Bar of the House on the sitting day next following the expiry of his suspension to explain his reasons for continued non-compliance, and that if at that time he continued to decline to table the documents, his seat be declared vacant, without further order of the House. See *Minutes*, NSW Legislative Council, 13 November 1995, pp 292-296.

100 *Minutes*, NSW Legislative Council, 13 November 1995, pp 292-296.

101 *Minutes*, NSW Legislative Council, 17 April 1996, p 32.

102 *Minutes*, NSW Legislative Council, 23 April 1996, pp 62-65.

103 *Minutes*, NSW Legislative Council, 1 May 1996, pp 101-106.

104 *Minutes*, NSW Legislative Council, 2 May 1996, p 118. On a more light-hearted note, Mr Egan many years later indicated that he had been 'intimidated and terrified' by 'the big, burly Usher of

This was the first time a minister had been suspended from a House of an Australian Parliament for failing to produce documents.

The next day, 3 May 1996, Mr Egan commenced proceedings in the Supreme Court. The proceedings were later removed, by consent, to the Court of Appeal. Mr Egan claimed unlawful trespass in the manner of his ejection from the House, on which the court was effectively obliged to adjudicate,[105] raising the further question of the validity of the House's actions in suspending him.

On 10 May 1996, court proceedings having already commenced, the Standing Committee on Parliamentary Privilege and Ethics tabled its report concerning sanctions where a minister fails to table documents. The report found that the power of the House to order the production of papers was uncertain, and that in those circumstances it would not be appropriate for the committee to recommend what sanctions would be appropriate where a minister fails to table documents. The committee recommended that legislation be introduced to clarify the privileges of the House, including the power to order the production of papers.[106]

When the House next met on 14 May 1996, the President informed the House of the commencement of the court proceedings. The House subsequently passed a resolution agreeing with the action taken by the President and the Usher of the Black Rod in arranging for legal representation in the proceedings.[107] The House also resolved that in view of the court proceedings, the order of the House of 2 May for Mr Egan to attend at his place at the table of the House to explain his non-compliance with the four orders for papers be deferred until after the court proceedings were decided.[108]

The New South Wales Court of Appeal delivered its decision in the case of *Egan v Willis and Cahill* on 29 November 1996. The court found that the Legislative Council has both a law-making function and a function of overseeing the executive government, and that the power to order the production of State papers is reasonably necessary for the proper exercise by the Legislative Council of those functions.[109] In his decision Gleeson CJ noted:

---

the Black Rod', who had approached him 'in a threatening way with his rod over his shoulder'. For more information on these events, see also D Clune, 'The Legislative Council and Responsible Government: *Egan v Willis* and *Egan v Chadwick*', Part Three of the Legislative Council's Oral History Project, August 2017. Mr Egan's removal to the footpath of Macquarie Street was subsequently found by the Court of Appeal to be beyond the Council's power and to constitute a trespass.

105 See the authorities of *Stockdale v Hansard* (1839) 112 ER 1112, *Kielley v Carson* (1842) 13 ER 225, *Barton v Taylor* (1886) 11 AC 197, and *Willis and Christie v Perry* (1912) 13 CLR 592. These decisions were cited in *Egan v Willis and Cahill* (1996) 40 NSWLR 650 at 676 per Mahoney P. In the subsequent decision of the High Court in *Egan v Willis* (1998) 195 CLR 424 at 466-467, McHugh J in dissent criticised the decision of the Court of Appeal to accept jurisdiction.

106 Standing Committee on Parliamentary Privilege and Ethics, *Report on inquiry into sanctions where a minister fails to table documents*, Report No 1, 10 May 1996, pp 21-22.

107 *Minutes*, NSW Legislative Council, 14 May 1996, pp 125-126.

108 Ibid, p 126.

109 *Egan v Willis and Cahill* (1996) 40 NSWLR 650 at 664-665 per Gleeson CJ, at 677 per Mahoney P, at 692 per Priestley JA.

> The capacity of both Houses of Parliament, including the House less likely to be 'controlled' by the government, to scrutinise the workings of the executive government, by asking questions and demanding the production of State papers, is an important aspect of modern parliamentary democracy. It provides an essential safeguard against abuse of executive power.[110]

The court also held that the resolution of the Council suspending Mr Egan was within the Council's power as a measure of self-protection,[111] but that his removal to the footpath of Macquarie Street, the so-called 'footpath point', was beyond the Council's power and constituted a trespass.[112]

The President tabled a copy of the Court of Appeal's decision in *Egan v Willis and Cahill* in the House when it next met on 3 December 1996.[113] Subsequently, following formalities that day, Mr Egan made a ministerial statement to the House regarding the judgment, indicating that the previous day, 2 December 1996, special leave had been sought to appeal the decision to the High Court.[114]

Following the ministerial statement, according to the resolution of the House of 2 May 1996, the President called on Mr Egan to attend at his place at the table of the House to explain his reasons for non-compliance with the four outstanding orders for papers. However, on a motion moved by Mr Egan, the House resolved that as leave had been sought to appeal to the High Court, the order of the House be postponed until those proceedings had been decided.[115]

The following day, 4 December 1996, the President announced receipt of a copy of the application, lodged by the Crown Solicitor, for special leave to appeal to the High Court.[116] On 6 June 1997, the High Court granted Mr Egan special leave to appeal.[117]

The High Court delivered its decision in the case of *Egan v Willis* on 19 November 1998, almost two years after the original Court of Appeal decision. The High Court decision upheld the previous decision of the Court of Appeal. The joint judgment of Gaudron, Gummow and Hayne JJ, together with the separate judgments of Kirby J and Callinan J, reiterated that the functions of the Legislative Council include both law-making and superintendence of the executive, and that in order to fulfil these functions the Legislative Council has the power to suspend a member of the House who refuses to produce non-privileged documents in response to an order for their production.[118] As the majority judgment noted:

---

110 Ibid, at 665 per Gleeson CJ.
111 Ibid, at 671-672 per Gleeson CJ, at 682-683 per Mahoney P, at 693 per Priestley JA.
112 Ibid, at 672 per Gleeson CJ, at 684-686 per Mahoney P, at 693 per Priestley JA.
113 *Minutes*, NSW Legislative Council, 3 December 1996, p 526.
114 *Hansard*, NSW Legislative Council, 3 December 1996, p 6820.
115 *Minutes*, NSW Legislative Council, 3 December 1996, p 529.
116 *Minutes*, NSW Legislative Council, 4 December 1996, p 536.
117 *Hansard*, NSW Legislative Council, 16 June 1997, pp 10179-10180 per the Hon Michael Egan.
118 *Egan v Willis* (1998) 195 CLR 424 at 453-454 per Gaudron, Gummow and Hayne JJ, at 502-505 per Kirby J, at 513 per Callinan J.

> The primary function of the Legislative Council is indicated by s 5 of the *Constitution Act*. This is the exercise by the Legislative Council, as an element of the legislature, of its power, subject to the provisions of the Commonwealth Constitution, to make laws for the peace, welfare and good government of New South Wales in all cases whatsoever …
>
> … the long practice since 1856 with respect to the production to the Council of State papers, together with the provision in Standing Order 29 for the putting to Ministers of questions relating to public affairs and the convention and parliamentary practice with respect to the representation in the Legislative Council by a Minister in respect of portfolios held by members in the Legislative Assembly, are significant. What is 'reasonably necessary' at any time for the 'proper exercise' of the 'functions' of the Legislative Council is to be understood by reference to what, at the time in question, have come to be conventional practices established and maintained by the Legislative Council.[119]

The President tabled a copy of the decision in *Egan v Willis* in the House later that day.[120]

Egan v Chadwick (1999): The power to compel the production of State papers subject to claims of privilege

Whilst the 1996 and 1998 decisions in *Egan v Willis and Cahill* and *Egan v Willis* clearly affirmed the common law power of the Legislative Council to order the production of non-privileged documents, the power of the Council to compel the production of documents subject to a claim of privilege by the executive government, notably legal professional privilege or public interest immunity, remained at issue. This matter came to a head in the House in 1998, when the government once again refused to table documents in response to an order by the House, this time based on claims of legal professional privilege and public interest immunity, precipitating the further judgment of the New South Wales Court of Appeal in *Egan v Chadwick*.[121]

By way of background, on 24 September 1998, whilst the decision of the High Court in *Egan v Willis* was still pending, the House adopted a new order for papers relating to the contamination of Sydney's water supply system.[122] Once again the documents were not provided by the required date of 29 September 1998.

On 13 October 1998, when the House met again, the President reported receipt of a letter from the Director-General of the Cabinet Office, dated 29 September 1998, indicating that the government would not be complying with the order of the House on the basis that the documents were covered by legal professional privilege or public interest immunity. This position was based on advice from the Crown Solicitor, dated 28 September 1998.[123]

---

119 Ibid, at 454 per Gaudron, Gummow and Hayne JJ.

120 *Minutes*, NSW Legislative Council, 19 November 1998, p 896.

121 (1999) 46 NSWLR 563.

122 *Minutes*, NSW Legislative Council, 24 September 1998, pp 730-731.

123 *Minutes*, NSW Legislative Council, 13 October 1998, p 740.

In response, later on 13 October 1998, on the motion of the Leader of the Opposition, the Hon John Hannaford, the House once again censured Mr Egan for his failure to table the documents and ordered that he table the documents with the Clerk by 5.00 pm the next day, in accordance with the following arrangements:

- documents subject to claims of legal professional privilege or public interest immunity were to be clearly identified and made available to members of the Legislative Council only, and were not to be published or copied without an order of the House;
- in the event that a member of the House disagreed with the validity of a claim of privilege made over any of the documents, that member was authorised to dispute the validity of the claim in writing to the Clerk, who was authorised to release the disputed documents to an Independent Legal Arbiter who was either a Queen's Counsel, a Senior Counsel or a retired Supreme Court Judge, appointed by the President, for evaluation and report within five days as to the validity of the claim;
- any document identified by the government as a Cabinet document was not to be made available to members of the Legislative Council, however the Independent Legal Arbiter could be requested to evaluate any such claim; and
- the President was to advise the House of any report from an Independent Legal Arbiter, at which time a motion could be moved forthwith that the disputed document or documents be made public without restricted access.[124]

This was the first time the House had adopted such procedural provisions to address claims of privilege over documents returned to an order of the House.

The following day, 14 October 1998, the Clerk tabled a return of public documents[125] lodged with him that day in relation to the contamination of Sydney's water supply system.[126] The President subsequently informed the House that Mr Egan had commenced new proceedings in the Supreme Court seeking a declaration that the Council had no power to order the production of documents subject to claims of legal professional privilege or public interest immunity, or to determine for itself a claim for legal professional privilege or public interest immunity; and that an injunction had been sought restraining the defendants[127] from taking any steps to compel compliance by Mr Egan with the order of the House of 13 October 1998 in relation to those documents.[128]

---

124 Although the resolution did not explicitly say so, the resolution clearly assumed that in deciding to publish a document over which privilege had been claimed, the House would be informed by the advice of the Independent Legal Arbiter. See *Minutes*, NSW Legislative Council, 13 October 1998, pp 744-747, 749-752.

125 That is to say, documents not subject to a claim by the government of legal professional privilege or public interest immunity.

126 *Minutes*, NSW Legislative Council, 14 October 1998, p 759. A further return of public documents was provided on 20 October 1998. See *Minutes*, NSW Legislative Council, 20 October 1998, p 772.

127 The President, the Honourable Virginia Anne Chadwick, the Clerk, Mr John Denton Evans, and the Usher of the Black Rod, Mr Warren Cameron Cahill.

128 *Minutes*, NSW Legislative Council, 14 October 1998, pp 759-760.

Also on 14 October 1998, the Clerk received an opinion provided by a barrister, Mr Philip Taylor, which indicated that the House was entitled to conclude that Mr Egan had not complied with the resolution of the House of 13 October 1998.[129]

Notwithstanding the institution of new court proceedings, on 20 October 1998, on the motion of Mr Hannaford, the House once again adjudged Mr Egan guilty of contempt for his failure to provide all documents in relation to the contamination of Sydney's water supply system. He was suspended from the service of the House for five sitting days or until he fully complied with the order of 13 October 1998, whichever occurred first. Mr Egan having left the chamber, the President announced that the suspension of Mr Egan was from the chamber only.[130]

On 22 October 1998, the President informed the House that amended summonses had been issued in the Supreme Court on behalf of Mr Egan. In addition to the original claim, the amended summonses claimed that the actions of the Council on 20 October 1998 were punitive in nature and beyond the powers of the House. An injunction was also sought restraining the defendants from taking any steps to compel compliance by Mr Egan with the order for his suspension.[131]

On 19 November 1998, as cited earlier, the High Court delivered its decision in the case of *Egan v Willis*. This prompted the House, on 24 November 1998, to again order the production of papers relating to the four matters outstanding from 1995 and 1996, together again with the documents relating to the contamination of Sydney's water supply system. Once again, the House adopted procedural provisions to address claims of privilege over documents provided in the returns, similar to those adopted for the first time on 13 October 1998. The documents were required to be produced by 26 November 1998.[132]

On 26 November 1998, in response to this further order, the Attorney General, the Hon Jeff Shaw, tabled certain papers relating to the four orders for papers outstanding from 1995 and 1996, but not papers relating to the contamination of Sydney's water supply system. He then made a statement in which he indicated that the government would not be tabling documents pertaining to the original four orders over which it was claiming privilege, and that it had commissioned Sir Laurence Street QC, former Chief Justice of the Supreme Court, to make an assessment of the validity of the government's claims of privilege. He then tabled the report of Sir Laurence Street entitled *Legislative Council's Order for production of documents – Assessment of privilege*, dated 25 November 1998, together with a list of documents on which privilege was claimed.[133]

---

129 The President subsequently tabled this opinion in the House on 20 October 1998. See *Minutes*, NSW Legislative Council, 20 October 1998, p 773.

130 *Minutes*, NSW Legislative Council, 20 October 1998, pp 773, 774-776.

131 *Minutes*, NSW Legislative Council, 22 October 1998, pp 796-797.

132 *Minutes*, NSW Legislative Council, 24 November 1998, pp 920-927.

133 *Minutes*, NSW Legislative Council, 26 November 1998, pp 946-947; *Hansard*, NSW Legislative Council, 26 November 1998, p 10746.

In response to this continued and ongoing failure to table all documents ordered to be produced by the Legislative Council, Mr Hannaford immediately moved, pursuant to contingent notice, that Mr Egan be again adjudged guilty of contempt and suspended from the service of the House for the remainder of the session or until he fully complied with the order for papers of 24 November 1998. Following prolonged debate, the motion was amended to require Mr Egan to provide by 11.00 am the next day, 27 November 1998, all documents listed in the report of Sir Laurence Street relating to the four outstanding orders for papers from 1995 and 1996 over which privilege had been claimed, together with all documents over which privilege had been claimed relating to Sydney's water supply system. In the event Mr Egan failed to fully comply, he was to be automatically suspended from the service of the House for the remainder of the session or until he fully complied with the orders for papers. Once again, the House adopted procedural provisions to address claims of privilege over any documents.[134]

On 27 November 1998, on the required papers not having been produced by Mr Egan, and Mr Egan being present in the House at the commencement of proceedings, the President directed the Usher of the Black Rod to escort him from the chamber.[135] According to the resolution of the House of the previous day, he was suspended from the service of the House for the remainder of the session or until he fully complied with the order for papers. In the event, there was only one further sitting week in December 1998 before the end of the session and the Parliament.

On 2 December 1998, the second last sitting day of the Parliament, the House agreed to permanently adopt during the session and unless otherwise ordered procedural provisions addressing claims of privilege in returns to orders, similar to those first adopted by the House on 13 October 1998.[136]

The New South Wales Court of Appeal delivered its decision in the case of *Egan v Chadwick* on 10 June 1999. The court found that the Council's power to order the production of State papers included the power to compel the production of documents in respect of which a claim of legal professional privilege or public interest immunity could be made by the executive government. This is discussed in detail below. However, the three members of the court reached different conclusions with respect to Cabinet documents, discussed later in this chapter.[137]

The claim of legal professional privilege

In proceedings before the Court of Appeal in *Egan v Chadwick*, counsel for Mr Egan argued that the Legislative Council did not have the power to compel the executive government to produce and table documents subject to a claim of legal professional privilege. In court

134 *Minutes*, NSW Legislative Council, 26 November 1998, pp 947, 948-951, 952-961.

135 *Minutes*, NSW Legislative Council, 27 November 1998, p 970.

136 *Minutes*, NSW Legislative Council, 2 December 1998, pp 997-1000.

137 See the discussion under the heading 'Orders for the production of State papers and Cabinet documents'.

proceedings, legal professional privilege is a rule protecting communications between legal practitioners and their clients from disclosure under compulsion of the court.

In their judgment, all three members of the Court of Appeal rejected this argument, agreeing that the executive government is compelled to produce such documents to the Legislative Council, on the basis that their production may be reasonably necessary for the exercise by the Council of its legislative function and its role in scrutinising the executive.

In his judgment, Spigelman CJ distinguished the application of legal professional privilege to a private client/lawyer relationship in court proceedings from its application to the relationship between the executive government and the Parliament.[138] Of the relationship between the executive government and the Parliament, Spigelman CJ indicated:

> I have not found it easy to reconcile the strength of the High Court's contemporary reasoning on the role of legal professional privilege (as exemplified most clearly in the result in *Carter*, where access to information required for purposes of a criminal defence was denied) and the emphasis on the accountability function of the Legislative Council in *Egan v Willis*. I have concluded that the latter should prevail.[139]

Priestley JA similarly concluded that a claim by the executive government of legal professional privilege does not make such documents immune from production to the Council:

> I do not think that the justification for legal professional privilege applies in New South Wales when a House of Parliament seeks the production of Executive documents. The Executive and the House perform their different functions in the same public interest, funded by public money. The legislature is entrusted with the carrying out of the fundamentally important task of reviewing, changing and adding to the statute law of the State. To carry out that task it must have the power to call for any information relevant to carrying out its task.[140]

Meagher JA also agreed that the Council's power to call for documents extended to documents subject to a claim of legal professional privilege.[141]

The claim of public interest immunity

In proceedings in *Egan v Chadwick*, counsel for Mr Egan also argued that the Legislative Council does not have the power to compel the executive government to produce and table documents subject to a claim of public interest immunity. The claim of public interest immunity refers to a claim by the executive government that it is not in the public interest for certain information to be made public.

---

138 *Egan v Chadwick* (1999) 46 NSWLR 563 at 578 per Spigelman CJ.

139 Ibid.

140 Ibid, at 593-594 per Priestley JA.

141 Ibid, at 596 per Meagher JA.

Once again, all three members of the Court of Appeal rejected this argument, agreeing that the executive government is compelled to produce such documents to the Legislative Council, subject to the exemption of certain Cabinet documents, on the basis that production may be reasonably necessary for the exercise by the Legislative Council of its legislative function and its role in scrutinising the executive.[142]

In his judgment, Spigelman CJ started by noting that the ability of a House of Parliament to enforce access to a document subject to a claim of public interest immunity had never been resolved as a matter of parliamentary practice, citing *Odgers* and *House of Representatives Practice*, but also the report of the Legislative Council's Standing Committee on Parliamentary Privilege and Ethics of 10 May 1996 entitled *Report on inquiry into sanctions where a minister fails to table documents*.[143] Up until that time, no House of an Australian Parliament had sought to enforce demands for production of such documents.[144]

Subsequently, he noted that in court proceedings, determination of a claim of public interest immunity requires the balancing by the court of conflicting public interests: the significance of the information to the issues in the trial, against the public harm from disclosure.[145] The immunity is not absolute.[146] He continued:

> Where the public interest to be balanced involves the legislative or accountability functions of a House of Parliament, the courts should be very reluctant to undertake any such balancing. This does not involve a constitutional function appropriate to be undertaken by judicial officers. This is not only because judges do not have relevant experience, a proposition which may be equally true of other public interests which they are called upon to weigh. It is because the court should respect the role of a House of Parliament in determining for itself what it requires and the significance or weight to be given to particular information.[147]

On this basis, Spigelman CJ concluded that access to information over which a claim of public interest immunity may be made is reasonably necessary for the performance of the functions of the Council (excepting claims of immunity relating to certain Cabinet documents).[148]

In his judgment, Priestley JA noted that where claims of public interest immunity arise in judicial proceedings, the courts nonetheless have the power to compel the executive to produce such documents, for the purpose of balancing the public interests for and against disclosure. In exercising this power in respect of such documents, the Council has a duty analogous to that of a court to balance the public interest considerations, and

142 Ibid, at 574 per Spigelman CJ, at 595 per Priestley JA and at 597 per Meagher JA.

143 Standing Committee on Parliamentary Privilege and Ethics, *Report on inquiry into sanctions where a minister fails to table documents*, Report No 1, 10 May 1996.

144 *Egan v Chadwick* (1999) 46 NSWLR 563 at 573 per Spigelman CJ.

145 Citing the authority in *Sankey v Whitlam* (1978) 142 CLR 1 and *Commonwealth v Northern Land Council* (1993) 176 CLR 604.

146 *Egan v Chadwick* (1999) 46 NSWLR 563 at 573 per Spigelman CJ.

147 Ibid, at 574 per Spigelman CJ.

148 Ibid.

a duty to prevent publication beyond itself of documents the disclosure of which would be inimical to the public interest.[149] Priestley JA continued:

> The function and status of the Council in the system of government in New South Wales require and justify the same degree of trust being reposed in the Council as in the courts when dealing with documents in respect of which the Executive claims public interest immunity. In exercising its powers in respect of such documents the Council has the same duty to prevent publication beyond itself of documents the disclosure of which will … be inimical to the public interest … When the Executive claims immunity on such grounds, the Council will have the duty, analogous to the duty of the court … of balancing the conflicting public interest considerations.[150]

In his judgment, Meagher JA observed that the position of the Council in respect of claims of public interest immunity is no different from that in respect of claims of legal professional privilege, and that the court 'cannot possibly prohibit the Council from examining such documents'.[151]

Claims of Cabinet confidentiality, which are a subset of the claim of public interest immunity, are discussed later in this chapter.[152]

Summary of orders for the production of State papers since 1999

A copy of the decision of the Court of Appeal in *Egan v Chadwick* was tabled by the President in the House on 22 June 1999.[153] On this occasion the government did not appeal.

The next day, 23 June 1999, the House again ordered the production of papers in relation to the contamination of Sydney's water supply system.[154] On this occasion, the government provided the documents which had previously been withheld based on claims of legal professional privilege or public interest immunity.[155]

Since then, the House has continued to order the production of State papers. In total, 39 orders for papers were made by the House in the 52nd Parliament from 1999 to 2003. In subsequent Parliaments, the number has fluctuated, with a high of 145 in the 53rd Parliament from 2003 to 2006, including 56 in 2006 alone, and a low of 18 in the 56th Parliament from 2015 to 2019, including only two orders for papers in 2017. In the 57th Parliament commencing in May 2019, the number of orders for papers being adopted by the House has rebounded. These fluctuations reflect the changing party numbers in the House.

149 Ibid, at 594 per Priestley JA.
150 Ibid.
151 Ibid, at 597 per Meagher JA.
152 See the discussion under the heading 'Orders for the production of State papers and Cabinet documents'.
153 *Minutes*, NSW Legislative Council, 22 June 1999, p 142.
154 *Minutes*, NSW Legislative Council, 23 June 1999, pp 148-150.
155 *Minutes*, NSW Legislative Council, 29 June 1999, p 166.

The most common orders for papers have related to major infrastructure projects, particularly motorways, land and property developments, the environment and conservation, utilities, hospitals and health services, and justice and corrective services.

Documents provided by the government in response to orders for State papers have ranged from a single document to more than 100 boxes of documents in relation to Sydney's millennium trains and Hunter rail cars.

In general terms, governments have fully complied with all orders for papers made by the House since the *Egan* decisions, as required by law. However, from time to time, as discussed later in this chapter, issues have arisen in relation to Cabinet documents,[156] documents held by statutory bodies and related entities,[157] and documents not produced due to administrative[158] or procedural issues.[159]

It is also notable that in exercising its power to order the production of State papers since 1999, the House and members have been scrupulous in paying due regard to claims of privilege over returned documents. Where claims of privilege have been made over documents, the confidentiality of those documents has never been breached. In turn, where members have disputed the validity of such claims of privilege, the House has always proceeded informed by the advice of an Independent Legal Arbiter. In those instances where the House has departed from the advice of the Arbiter, it has if anything erred in favour of preserving the confidentiality of documents which the Arbiter has recommended be made public.[160]

Non-government members now routinely give contingent notices of motion, usually at the start of a session, that on any minister failing to table documents in accordance with an order of the House, standing and sessional orders be suspended to allow a motion to be moved forthwith adjudging any minister guilty of contempt of the House for failure to comply with the order.

Current procedures for the production of State papers under standing order 52

As indicated above, prior to 2004, standing order 18 simply provided that orders for papers by the House were to be communicated by the Clerk to the Premier's Department.

156 See the discussion later in this chapter under the heading 'Orders for the production of State papers and Cabinet documents'.

157 See the discussion later in this chapter under the heading 'Orders for the production of State papers not in the custody or control of a minister'.

158 See the discussion later in this chapter under the heading 'Current procedures for the production of State papers under standing order 52'.

159 See the discussion later in this chapter under the heading 'The effect of prorogation on orders for the production of State papers'.

160 For further information, see the discussion later in this chapter under the heading 'Summary of claims of privilege since 1999'.

However, by the resolutions of 23 April 1996,[161] 13 October 1998,[162] 24 November 1998[163] and 26 November 1998,[164] the House adopted procedures for documents to be tabled and not made public where a claim of privilege is made by the executive, and processes to assess such claims of privilege through an Independent Legal Arbiter. On 2 December 1998, these procedures were consolidated into a sessional order, which subsequently formed the basis of standing order 52, adopted in 2004.[165]

Standing order 52 remains in force today. It regulates the power of the House to order the production of State papers and sets out the procedures to be followed for the production of State papers to the Legislative Council. These procedures are described in detail in the *Annotated Standing Orders of the New South Wales Legislative Council*.[166] In summary, they are as follows:

- Any member of the House may give a notice of motion for the production of State papers. The notice usually states the ministerial offices, departments and agencies that are the subject of the order and the documents sought. The notice also specifies the date[167] by which the documents are required to be returned, by default 21 days.[168]
- If the House agrees to the motion, with or without amendment, the Clerk communicates the order to the Department of Premier and Cabinet (SO 52(1)), in practice the Secretary of the Department, with a copy sent to the General Counsel and Head of Legal Branch.[169] The Department of Premier and Cabinet coordinates the return to order on behalf of the government.
- The return to order must be received by the Clerk by the date specified in the order. On occasion, the House has passed a resolution to extend the return date or to alter the terms of an order where the minister or a department has indicated difficulties in meeting the deadline.[170] On other occasions, a supplementary return has been provided at a later time.[171]

---

161 *Minutes*, NSW Legislative Council, 23 April 1996, pp 62-65.

162 *Minutes*, NSW Legislative Council, 13 October 1998, pp 744-747, 749-752.

163 *Minutes*, NSW Legislative Council, 24 November 1998, pp 920-927.

164 *Minutes*, NSW Legislative Council, 26 November 1998, pp 947, 948-951, 952-961.

165 For further information, see the *Annotated Standing Orders of the New South Wales Legislative Council*, (n 17), p 175.

166 *Annotated Standing Orders of the New South Wales Legislative Council*, (n 17), pp 161-166.

167 The notice may specify the return of different documents on different dates, although this is unusual. For examples, see *Minutes*, NSW Legislative Council, 25 February 2010, p 1673; 26 September 2019, pp 483-484.

168 For further information, see the discussion later in this chapter under the heading 'The timeframe for the tabling of returns to orders'.

169 By practice, the Clerk also communicates the order to the Leader of the Government in the Legislative Council, whom the House ultimately holds responsible for the provision of the return. However, there has been one instance where the House sent an order for papers directly to the relevant agency. For further information, see the discussion later in this chapter under the heading 'Orders for the production of State papers not in the custody or control of a minister'.

170 For further information, see the discussion later in this chapter under the heading 'Amendment of an order or extension of a return date'.

171 For further information, see the *Annotated Standing Orders of the New South Wales Legislative Council*, (n 17), p 162.

- If the return to order is received by the Clerk when the House is sitting, the Clerk tables it in the House at the next opportunity (SO 52(2)). Alternatively, if the House is not sitting, the return is received by the Clerk and is deemed to have been presented to the House and published by authority of the House (SO 52(4)). The Clerk subsequently tables the return in the House when it next meets. In either case, the publication of the documents in the return is subject to a claim of privilege by the government over the documents, as discussed further below.
- A return to order is to include an indexed list of all documents tabled, providing the date of creation of the documents, the author of the documents, and a description of the documents (SO 52(3)).[172]
- Privilege may be claimed over a document or documents provided in a return to order. This is not a claim for non-production of the document or documents.[173] Rather it is a claim that the document or documents not be made public by the House. Where a claim of privilege is made, a separate return is provided, together with a separate accompanying index showing the date of creation of the document or documents, a description of the document or documents, the authors and the reason for the claim of privilege (SO 52(5)(a)). A document or documents over which privilege is claimed can only be viewed by members of the Legislative Council in the Office of the Clerk, and may not be published or copied without an order of the House (SO 52(5)(b)).[174] However, the index itself is made public, as is any submission in support of the claim of privilege.[175]
- Any member of the Council may dispute the validity of a claim of privilege by the government over a document or documents in a return to order. This may be done by communication in writing to the Clerk.[176] On receipt of such communication, the Clerk is authorised to release the document or documents

172 For further information, see the discussion later in this chapter under the heading 'The provision of an index to a return'.

173 The exception to this is documents claimed to be immune from production by virtue of being 'Cabinet documents'. For further information, see the discussion later in this chapter under the heading 'Orders for the production of State papers and Cabinet documents'.

174 Whilst the House may decide to authorise the publication of privileged documents at any time, ordinarily the House does not do so until after receipt of an assessment of the documents by the Independent Legal Arbiter. Nevertheless, it is important to emphasise that the House is not bound to follow this process, and may decide to publish a document at any time. For further information, see the *Annotated Standing Orders of the New South Wales Legislative Council*, (n 17), p 164.

175 The government has in the past routinely claimed privilege over the index to the privileged papers as well as any submission in support of the claim of privilege, in addition to the papers themselves. The House and the Clerk have not acceded to this claim, primarily on the basis that there is no provision in standing order 52 for a claim of privilege over an index of documents.

176 In doing so, members are encouraged to be as detailed as possible in their correspondence, identifying the particular document or documents in dispute as listed in the index to the privileged documents and the reason or reasons they believe that the document or documents do not warrant the claim of privilege being upheld.

to an Independent Legal Arbiter for evaluation and report within seven days as to the validity of the claim (SO 52(6)).[177] The Independent Legal Arbiter is appointed by the President and must be a Queen's Counsel, a Senior Counsel or a retired Supreme Court Judge (SO 52(7)). In some instances, the Arbiter has sought additional information and assistance from the Clerk and from the office or department which claimed privilege.

- On completion of his or her report, the Independent Legal Arbiter lodges the report with the Clerk, who makes it available to members and notifies the House of its receipt when the House next meets. The report is initially available to members of the Legislative Council only, and may not be published or copied without an order of the House (SO 52(8)). However, following the Clerk's notification of the House of the receipt of the report, in most cases, the member who lodged the disputed claim of privilege gives notice and moves that the report be tabled in the House and made public. Whilst it is usual for the House to agree to this motion, and for the report subsequently to be tabled by the Clerk and made public, this is not always the case.[178]
- Where the report of the Arbiter is tabled by the Clerk and made public, as a further step, the member who lodged the disputed claim of privilege usually gives notice and moves that the House make public any document or documents which the Arbiter has recommended be made public.[179] This is entirely a decision of the House, although in a small number of instances the House has authorised a committee to undertake this role.[180] In most instances, where the Arbiter's report is tabled and made public and the Arbiter has recommended that a document or documents be published, the House agrees with that recommendation and authorises the publication of the document or documents.

177 In practice the House has not sought to enforce this deadline of seven days, given on some occasions the complexity of the papers needing to be assessed by the Arbiter.

178 For further information, see the *Annotated Standing Orders of the New South Wales Legislative Council*, (n 17), p 166.

179 Technically, the recommendation of the Arbiter is usually in the form that the claim of privilege by the government be denied or not be upheld by the House. This recommendation is based on an assessment by the Arbiter of whether the claim of privilege is validly made, and if so, whether it is outweighed by the public interest in disclosure. For further information, see the discussion later in this chapter under the heading 'The approach of the Independent Legal Arbiters to claims of privilege'.

180 In the lead-up to the final week of the 55th Parliament, in view of the fact that the House was awaiting receipt of a number of returns to orders, and that a number of disputed claims of privilege were before the Arbiter, the House resolved that the Privileges Committee be authorised to undertake the role usually performed by the House in dealing with the disputed claims of privilege whilst the House was not sitting. The House adopted the same approach at the end of 2019 ahead of the summer long adjournment and on 24 March 2020 when the House adjourned for an extended period in view of the impact of the COVID-19 pandemic. See *Minutes*, NSW Legislative Council, 20 November 2014, pp 365-367; 24 October 2019, p 596; 24 March 2020, pp 878-879. For other instances, see the *Annotated Standing Orders of the New South Wales Legislative Council*, (n 17), pp 167-168.

The Clerk subsequently tables the document or documents in the House. Only occasionally has the House not acted on the Arbiter's recommendation that a document or documents be published, or gone beyond the Arbiter's recommendations in relation to the redaction of material.[181] On one occasion, the House referred a document over which privilege had been claimed and the Arbiter's subsequent report to the Privileges Committee for review of the validity of the claim and the Arbiter's recommendation.[182]

- The Clerk is required to maintain a register showing the name of any person examining documents tabled in a return to order (SO 52(9)).

It is notable that these procedures were comprehensively reviewed on two occasions in 2013 and 2014. In 2013, as part of an inquiry into the 2009 Mt Penny return to order, the Privileges Committee examined in detail the operation of the order for papers process and in particular standing order 52, following receipt of comprehensive submissions from both the Department of Premier and Cabinet and the Clerk.[183] Subsequently, in 2014, following his appointment as Independent Legal Arbiter, the Hon Keith Mason QC sought detailed submissions from members, the Crown Solicitor's Office and the Clerk on the role of the Independent Legal Arbiter as part of a disputed claim of privilege on the WestConnex Business Case.[184] Neither review prompted any changes to the provisions of standing order 52, although they did result in some changes to the practices of the House, for example in relation to the timeframe for the return of ordered documents, discussed below.

The timeframe for the tabling of returns to orders

From time to time, issues have arisen in relation to the timeframe for the compilation and tabling of returns to orders.

Between the late 1990s and 2013, orders for papers made by the House routinely adopted a deadline of 14 days for the tabling of a return, although variations of between 1 and 28 days were not unusual. However, in 2013, the Privileges Committee recommended that the deadline should be 21 days. This followed a finding by the Privileges Committee that in 2009, the former Department of Primary Industry had failed to comply fully with an order for the production of papers in relation to the Mt Penny mining exploration

181 As examples, in March 2010, the House chose not to publicly release certain documents in relation to a return to order concerning the 2009-2010 Budget, contrary to the recommendation of the Arbiter. See *Minutes*, NSW Legislative Council, 10 March 2010, p 1688. Similarly, in June 2010, the House chose not to publicly release certain documents in relation to the CBD Metro Rail return to order (and to seek further redactions of other documents), again contrary to the recommendation of the Arbiter. See *Minutes*, NSW Legislative Council, 23 June 2010, p 1952. For further information, see the *Annotated Standing Orders of the New South Wales Legislative Council*, (n 17), p 166.

182 For further information, see the *Annotated Standing Orders of the New South Wales Legislative Council*, (n 17), p 167.

183 Privileges Committee, *The 2009 Mt Penny return to order*, Report No 69, October 2013, ch 5.

184 *Minutes*, NSW Legislative Council, 13 August 2014, p 2660.

licence and tender process due to administrative failing within the department, partly as a result of the tight timeframe in which the papers were sought.[185]

The House has generally adopted the 21-day deadline since that time, although it has varied according to the nature of the order.

Amendment of an order or extension of a return date

From time to time, on representations from the relevant minister or department, the House has passed resolutions extending the return date for an order previously agreed to,[186] or altering the terms of an order previously agreed to.[187]

Of particular note, on 19 and 26 March 2014, the House adopted two orders for papers relating to documents from the office of the former Minister for Finance and Services and Minister for the Illawarra[188] and documents concerning reform of planning laws in New South Wales.[189]

On 16 April 2014, the Clerk received correspondence from the Acting Secretary of the Department of Premier and Cabinet indicating that it was not practicable to produce the documents sought within the timeframes specified, given the nature of the orders.[190] In support, the Acting Secretary forwarded an opinion from the Solicitor General and Ms Mitchelmore of Counsel dated 9 April 2014 in relation to the order for papers process. In that opinion, the Solicitor General and Ms Mitchelmore stated that as orders for papers under standing order 52 are based on an accepted power of the Council to compel the production of documents, there is relatively limited scope for disputing the terms of an order. However, the Solicitor General and Ms Mitchelmore submitted:

> It would be reasonable in our view, to query or dispute an order that contained an impractical deadline or referred to no specific subject matter in relation to the documents sought – but, for example, by location only – or referred to a subject matter that was so broad and unwieldy as to place great practical difficulties upon compliance.[191]

When the House sat again on 6 May 2014, the Clerk tabled the correspondence from the Acting Secretary and also certain documents, but not a full return, received earlier that day from the Department of Premier and Cabinet in relation to the two orders for papers.[192] Following their tabling, the Leader of the Government in the Legislative

185 Privileges Committee, *The 2009 Mt Penny return to order*, Report No 69, October 2013, p 96.
186 See, for example, *Minutes*, NSW Legislative Council, 26 October 2006, p 316; 13 November 2013, p 2191.
187 See, for example, *Minutes*, NSW Legislative Council, 19 November 2014, pp 323-324.
188 *Minutes*, NSW Legislative Council, 19 March 2014, pp 2379-2381.
189 *Minutes*, NSW Legislative Council, 26 March 2014, pp 2417-2419.
190 Correspondence from the Acting Secretary of the Department of Premier and Cabinet to the Clerk, 16 April 2014.
191 Solicitor General and A Mitchelmore, 'Question of powers of Legislative Council to compel production of documents from executive', 9 April 2014, p 7.
192 *Minutes*, NSW Legislative Council, 6 May 2014, pp 2458-2459.

Council, the Hon Duncan Gay, made a ministerial statement in relation to the incomplete returns. At the outset, he clearly stated that the government did not dispute the power of the House to compel ministers and agencies to produce documents, but that in the circumstances, the government had been unable to comply in full with the terms of the orders.[193]

On 8 May 2014, the House passed a resolution accepting the partial return to order of 6 May 2014 in relation to the reform of planning laws in New South Wales as though the initial resolution had been passed with a variation.[194]

In relation to the order for papers concerning documents from the office of the former Minister for Finance and Services and Minister for the Illawarra, on 15 May 2014 the House passed a new order for papers concerning the documents with a longer timeframe of 56 days for their provision. However in doing so, the House specifically asserted that it was not bound by the advice of the Solicitor General, although the Solicitor General's advice, in the main, confirmed the power of the House to order the production of State papers, and indicated that the appropriate time for issue to be taken with the terms of any order for papers was before an order for papers is made by the House[195] and not afterwards.[196] Ultimately the return to order was tabled in the House on 12 August 2014.[197]

The provision of an index to a return

Standing order 52(3) specifies that a return to order is to include an indexed list of all documents tabled, showing the date of creation of the documents, the author of the documents and a description of the documents. An indexed list of documents is also required to be provided to accompany a return of documents over which privilege is claimed, which is to include the reasons for the claim of privilege (SO 52(5)(a)).

The provision by the executive government of an index arose as an issue in 2004 in relation to a return of privileged documents relating to tunnel ventilation systems in various Sydney road tunnels. Following his appointment as Independent Legal Arbiter to evaluate and report on the validity of the claims of privilege made in relation to the return, Sir Laurence Street wrote to the Clerk to advise that 'he had experienced difficulty in being able to responsibly determine whether or not privilege should be allowed because of the manner in which the Roads and Traffic Authority (RTA) had provided their documents'. The documents were subsequently re-examined by officers of the RTA in the Office of the Clerk and a revised index provided. The matter was reported to the House when the House next sat.[198]

193 *Hansard*, NSW Legislative Council, 6 May 2014, pp 28120-28123.
194 *Minutes*, NSW Legislative Council, 8 May 2014, pp 2486-2488.
195 That is, on the House debating the question on the motion for the order.
196 *Minutes*, NSW Legislative Council, 15 May 2014, pp 2520-2521.
197 *Minutes*, NSW Legislative Council, 12 August 2014, p 2645.
198 *Minutes*, NSW Legislative Council, 31 August 2004, pp 948-949.

In 2013, during an inquiry by the Privileges Committee into the 2009 Mt Penny return to order, the Department of Premier and Cabinet contested the power of the Legislative Council to require the provision of an index to a return:

> … DPC does not accept that the Council has any power to direct the executive as to the particular manner in which it complies with such an order. For example, and notwithstanding the current text of Standing Order 52, it appears that the Legislative Council has no power to require the executive to produce an index of the documents produced.[199]

In support, the Department of Premier and Cabinet cited an article published by Professor Anne Twomey in 2007 entitled 'Executive Accountability to the Australian Senate and the New South Wales Legislative Council', in which she stated that '[t]here seem to be no legal grounds for further requiring the use of government resources other than those necessary to produce the papers'.[200]

In his submission to the Privileges Committee in response, the Clerk acknowledged that standing order 52 of itself does not provide a legal basis for requiring the production of an index to a return to order, but argued that the power to order the production of an index is a matter of necessity. The biggest return to order ever received – a return to order in relation to Hunter Rail Cars in 2006 – constituted 142 boxes of papers. Without the production of an index, it would have been very difficult, if not impossible, for members of the Council to have made an intelligent assessment of the documents provided and the material they contained. Whilst it may be possible for officers of the Council to prepare such a list, it is plainly apparent that the government agencies that collated the documents are in the best position to prepare it. The Clerk also cited:

- Numerous past instances where the executive government has been required to create documents in response to an order for papers.[201] The Clerk also observed that the executive routinely creates documents in response to the requirements of other standing orders, such as the requirement under standing order 233 for a government response to be prepared to committee reports.
- The need for an index where the government wishes to claim privilege over specific documents.[202]

In its subsequent report, the Privileges Committee also concluded that the power to require the provision of an index likely exists as a matter of necessity, but that it is also a matter of practice. The Committee stated that it is self-evidently in the interest of the

199 Privileges Committee, Inquiry into the 2009 Mt Penny return to order, Submission 8a, Department of Premier and Cabinet, p 14.

200 A Twomey, 'Executive Accountability to the Australian Senate and the New South Wales Legislative Council', *Legal Studies Research Paper,* (Vol 70, No 7, 2007), p 3. A version of this article was later published in the *Australasian Parliamentary Review*, (Vol 23, No 1, Autumn 2008).

201 For further information, see the discussion below under the heading 'The creation of documents by the executive government for a return to order'.

202 Privileges Committee, Inquiry into the 2009 Mt Penny return to order, Submission 11, NSW Legislative Council, pp 5-6, 15.

government to provide an index where the government wishes to claim that a document is privileged.[203]

The matter was addressed further in 2014 in legal advice provided by the Solicitor General and Ms Mitchelmore of Counsel to the government in relation to the order for papers process.[204] The advice stated:

> It may be noted that SO 52(3) provides that a return under the order made is to include an index list of all documents tabled, showing the date of creation of the document, a description of the document and the author of the document. If the return comprises more than a small number of documents, it could be argued with some justification, in our view, that an index of the kind described in SO 52(3) is incidental to the power to compel production and so reasonably necessary for the effective functioning of the House. It may, of course, also be convenient for the Executive to provide such an index where a claim for privilege in relation to some documents is to be made under SO 52(5).[205]

Odgers also observes that orders for the production of documents may require the creation and production of documents by the person or body having the information to compile the documents.[206]

The creation of documents by the executive government for a return to order

In addition to asserting the power to require the provision of an index to a return, the House has also asserted the power to order the executive government to create other documents in response to an order for the production of State papers.

As examples, on 6 December 1932, the House ordered a statement showing the details of amounts of money derived from the State Lottery and paid to hospitals.[207] The return was provided on 13 December 1932.[208] On 14 November 2001, the House ordered a return showing various statistics from the New South Wales Companion Animals Register.[209] The return was provided on 29 November 2001.[210] On 14 November 2019, the House ordered the production of lists showing the mean temperatures in schools which applied for funding under the cooler classrooms program.[211] The lists were provided on 21 November 2019.[212] On 27 February 2020, the House ordered the production of

203 Privileges Committee, *The 2009 Mt Penny return to order*, Report No 69, October 2013, p 95.
204 The advice was forwarded to the Clerk by the Acting Secretary of the Department of Premier and Cabinet and tabled in the House on 6 May 2014. See *Minutes*, NSW Legislative Council, 6 May 2014, pp 2458-2459.
205 Solicitor General and A Mitchelmore, 'Question of powers of Legislative Council to compel production of documents from executive', 9 April 2014, p 7.
206 *Odgers*, 14th ed, (n 2), pp 581-582.
207 *Minutes*, NSW Legislative Council, 6 December 1932, p 165.
208 *Minutes*, NSW Legislative Council, 13 December 1932, p 174.
209 *Minutes*, NSW Legislative Council, 14 November 2001, p 1266.
210 *Minutes*, NSW Legislative Council, 29 November 2001, p 1312.
211 *Minutes*, NSW Legislative Council, 14 November 2019, pp 693-694.
212 *Minutes*, NSW Legislative Council, 21 November 2019, p 773.

lists showing courses delivered at TAFEs.[213] The lists were provided on 5 March 2020, although on this occasion the Secretary of the Department of Premier and Cabinet asserted that 'agencies are not obliged to create documents in response to Orders for Papers'.[214]

The publication of State papers provided in returns to orders

As indicated, *Egan v Chadwick*[215] confirmed that the executive is compelled to produce State papers to the Legislative Council notwithstanding a claim of privilege, specifically legal professional privilege or public interest immunity, although the status of Cabinet documents was variously decided.

On receipt of returns to orders, the House automatically publishes all documents over which a claim of privilege is *not* made.[216] The House may also decide immediately or at a later time to publish documents over which a claim of privilege has been made although, as discussed above, it invariably does so informed by a report of the Independent Legal Arbiter.

However, in 2014 the Crown Solicitor contested this approach, arguing that it is not, of itself, a function of the House to require production of documents in order to make them public. As stated by the Crown Solicitor in a submission to the Hon Keith Mason on the role of the Independent Legal Arbiter:

> The nature and scope of the power to order the production of documents affects the nature and scope of the related power of the House to make public documents which have been produced to the House. That latter power also presumably exists because it is reasonably necessary for the performance of the House's functions of making laws and of scrutinising the Executive. One would therefore expect (leaving aside for the moment documents over which the Executive claims 'privilege') that the House would make public only those specific documents returned under a call for papers the publication of which has a sufficient connection with the particular exercise of the House's law-making or scrutiny functions which supported the making of the order for documents. Even with a carefully crafted order, it could be expected that many documents returned would ultimately, on inspection by the members, turn out to be entirely or substantially unrelated to the particular exercise of the function of the House which supported the making of the order.[217]

213 *Minutes*, NSW Legislative Council, 27 February 2020, p 840.

214 Correspondence from the Secretary of the Department of Premier and Cabinet to the Clerk, 5 March 2020. The correspondence was tabled in the House on 24 March 2020. See *Minutes*, NSW Legislative Council, 24 March 2020, p 860.

215 (1999) 46 NSWLR 563.

216 On one occasion in 2009, the House delayed the publication of documents in a return to order not covered by a claim of privilege. For further information, see the *Annotated Standing Orders of the New South Wales Legislative Council*, (n 17), p 163.

217 Crown Solicitor, 'Submission on role of Legal Arbiter under Standing Order 52', 21 July 2014, pp 2, 7. The advice was tabled in the House on 13 August 2014. See *Minutes*, NSW Legislative Council, 13 August 2014, p 2658.

This position is clearly inconsistent with the approach adopted by the Legislative Council. In deciding to publish documents in a return to order, including where it deems appropriate documents over which privilege is claimed by the executive government, the Legislative Council adopts the default position that the public have a right to know the information that underlies public debate and informs government decision making, unless the public interest would be harmed thereby. Members of Parliament are accountable to the public for securing full exposition and justification of all government actions and legislation, a position expressed in 1992 by Mason CJ in *Australian Capital Television Pty Ltd v Commonwealth*:

> … the representatives who are members of Parliament and Ministers of State are not only chosen by the people but exercise their legislative and executive powers as representatives of the people. And in the exercising of those powers the representatives of necessity are accountable to the people for what they do and have a responsibility to take account of the views of the people on whose behalf they act.[218]

The model of a parliament that acts on behalf of the people and is accountable to the people for scrutinising the actions of the government and the passage of new laws is not consistent with the withholding of information from the public for the exclusive knowledge of members of the Legislative Council where there are no good public interest reasons for doing so. Whilst the publication by the House of State papers must always be balanced by an obligation to act in the public interest and to withhold certain information where it is in the public interest to do so, in the absence of good reasons for withholding information from the public, the presumption in favour of publication is overwhelming.

The approach of the Independent Legal Arbiters to claims of privilege

When a claim of privilege is made over a document or documents in a return to order, which as discussed above is essentially a claim that the document or documents should not be published, that claim may be disputed by any member of the House in writing to the Clerk. In such instances, the Clerk is authorised to release the document or documents to an Independent Legal Arbiter for evaluation and report as to whether, in the Arbiter's opinion, the claim of privilege should be upheld (SO 52(6)). It is then up to the House to decide the matter.

Since the decision in *Egan v Chadwick* in 1999, the President has appointed five Independent Legal Arbiters: the late Sir Laurence Street AC KCMG QC, former Chief Justice of the Supreme Court; the Hon M John Clarke QC, former Justice of the Court of Appeal; the Hon Terrence Cole AO RFD QC, former Justice of the Court of Appeal; the Hon Keith Mason AC QC, former Solicitor General and President of the Court of Appeal; and the Hon Joseph Campbell QC, former Justice of the Supreme Court. The approach of these different Arbiters in assessing claims of privilege over documents provided in returns to orders is summarised below.

218 *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106 at 138 per Mason CJ.

The first disputed claim of privilege following the decision in *Egan v Chadwick* in 1999 related to documents concerning Delta Electricity. The Arbiter appointed on that occasion, Sir Laurence Street, articulated in his report the role before him as follows:

> It should be emphasised that the question upon which I am required to make an evaluation and report is wholly distinct from the entitlement of the House to require the production of documents and from the entitlement of Members of the Legislative Council to inspect them. The question is whether documents produced to the House are protected from general publication on the grounds of public interest immunity.
>
> …
>
> The respective interests to be balanced against each other for present purposes are the legitimate interests of Delta Electricity in protecting its commercially sensitive information on the one hand, and, on the other hand, the public interest in making documents available to the public for the purposes of contributing to the common stock of public knowledge and awareness in relation to the information; in a sense, this could be seen as an aspect of transparency and public accountability in relation to the activities of Delta Electricity to which the documents relate.[219]

In 2003, Sir Laurence Street for the first time explicitly described his approach as Arbiter to questions of privilege as involving two steps:

> … whilst the House will ordinarily give great weight to claims of [legal professional privilege] or [public interest immunity] that would be recognised by the Courts and upheld if validly based, the House itself is not restricted by the approach a Court might take. The Court's approach is a safe and prudent guide for the House, but it is not uncommon for the House to deny a claim that a Court might uphold if the House considers it to be in the public interest that privilege be denied and the documents made available for publication.
>
> The essential question to be addressed by the House, and by me as its delegate, will always be whether the public interest in disclosure justifies over-riding [a claim of privilege] notwithstanding that it is validly based. The process involves in effect two stages: is the claim validly based? And if so is it outweighed by the public interest in disclosure?[220]

In 2005, Sir Laurence Street further elaborated on the balancing act between the disclosure of potentially sensitive government information on the one hand, and the public's right to know and the need for transparency and accountability on the part of the executive government on the other:

> While Courts apply developed principles in ruling on claims for privilege, Parliament will evaluate the claim (usually by its Arbiter) to consider whether it is in the public interest to uphold it. This process involves balancing against each

219 Sir Laurence Street QC, 'Disputed claim of privilege – Papers on Delta Electricity', Report of the Independent Legal Arbiter, 14 October 1999, pp 2-3.

220 Sir Laurence Street QC, 'Disputed claim of privilege – Papers on Cross City Tunnel Motorway Consortium', Report of the Independent Legal Arbiter, 4 September 2003, p 2.

> other two heads of public interest that are in tension. On the one hand, there is a public interest in not invading lawyer/client relationships and a public interest in protecting what might be called commercially sensitive material. And, on the other hand, there is a contrary public interest in recognizing the public's right to know and the need for transparency and accountability on the part of the Executive.[221]

In his first report as the Independent Legal Arbiter in 2005, the Hon Terrence Cole adopted a similar approach to Sir Laurence Street, citing the balancing of competing public interests:

> In its submission the RTA drew attention to the fact that it is a recognised factor to be weighed in considering public interest immunity privilege that release of information might cause damage to property, especially major infrastructure.
>
> …
>
> A competing interest is found in the right of the public 'to discuss, review and criticise government action'[222] which right is constrained if information relating to the activities of government is not made public.[223]

In 2007, the third Independent Legal Arbiter appointed by the President, the Hon M John Clarke, also spoke of the balancing of competing public interests:

> The challenge to the claims of privilege, as they have been expressed, bring[s] into play a balancing between the protection of private rights to have the confidentiality of commercial-in-confidence material respected and the public interest in the disclosure of the contents of that material.[224]

The approach of Sir Laurence Street, the Hon Terrence Cole and the Hon M John Clarke to the role of Arbiter up until 2007 was the subject of an article published by Professor Anne Twomey in 2007 entitled 'Executive Accountability to the Australian Senate and the New South Wales Legislative Council',[225] in which she argued that the role of the Arbiter should be confined to assessing the technical validity of a claim of privilege, whilst leaving the role of balancing competing public interests to the House:

> It is arguable that the evaluative role of the independent legal arbiter should be confined to deciding whether the documents fall within a privileged category. There are good grounds for arguing that the independent legal arbiter should not undertake the balancing task as, like a judge, the arbiter does not have the relevant experience to make such an assessment. This is consistent with the fact that the independent legal arbiter is a 'legal' arbiter with legal qualifications

---

221 Sir Laurence Street QC, 'Disputed claim of privilege – Papers on Cross City Motorway Consortium', Second report of the Independent Legal Arbiter, 20 October 2005, p 2.

222 Citing *Commonwealth v John Fairfax and Sons Limited* (1980) 147 CLR 39 at 52.

223 The Hon Terrence Cole QC, 'Disputed claim for privilege – Circular Quay Pylons', Report of the Independent Legal Arbiter, 17 August 2005, pp 4-5.

224 The Hon M John Clarke QC, 'Disputed claim of privilege – State finances', Report of the Independent Legal Arbiter, 16 January 2007, p 2.

225 Twomey, 'Executive Accountability to the Australian Senate and the New South Wales Legislative Council', (n 200).

> who is engaged to undertake a 'legal' evaluation of the validity of the claim to privilege.[226]

Whilst acknowledging this view, it is important to emphasise that the House is in a very different position to the courts in dealing with claims of privilege, and that whilst the House is undoubtedly informed by the views of the Arbiter, it is ultimately a decision of the House whether or not documents subject to a claim of privilege should be made public.[227]

Since his first appointment as the Independent Legal Arbiter in 2014, the Hon Keith Mason has adopted a slightly different approach from his predecessors. As indicated previously, on the occasion of his second appointment as Arbiter in 2014 on a disputed claim of privilege concerning the WestConnex Business Case, Mr Mason sought detailed submissions from members, the Crown Solicitor and the Clerk as to the role of the Independent Legal Arbiter.[228] In his subsequent report, Mr Mason addressed the various positions contained in the submissions in detail. His report on that occasion departed from the 'two-stage' approach articulated previously by Sir Laurence Street,[229] simply adopting the position that whilst claims of privilege in the parliamentary environment are the same as in court proceedings, the balancing exercise needs to involve an assessment of the significance and relevance of the documents to parliamentary proceedings, as opposed to legal proceedings.[230] In relation to the subsequent publication by the House of documents deemed not to be privileged, he observed:

> I do not see why the arbiter should in principle be troubled by the possibility that non-privileged documents duly called for may, under the House's control, be accessed by the media or by members of the public … . So long as overriding harm is not done to the 'proper functioning of the executive arm of government and of the public service' (*Sankey v Whitlam* (1978) 142 CLR 1 at 56 per Stephen J), public debate stemming potentially from such sources is of the essence of representative democracy.[231]

Mr Mason also indicated that he did not see it as the role of the Arbiter to inquire into what function the House is exercising when it decides to order the production of State papers.[232]

It is notable that on a number of subsequent occasions when he has been appointed Arbiter, Mr Mason has sought to provide competing parties to a claim of privilege the maximum opportunity to read and consider the opposing arguments and to provide a

226 Ibid, p 8.

227 For further information, see L Lovelock, 'The Power of the New South Wales Legislative Council to order the production of State papers: Revisiting the *Egan* decisions ten years on', *Australasian Parliamentary Review,* (Vol 24, No 2, Spring 2009).

228 *Minutes*, NSW Legislative Council, 13 August 2014, p 2660.

229 The Hon Keith Mason QC, 'Report under standing order 52 on disputed claim of privilege – WestConnex Business Case', Report of Independent Legal Arbiter, 8 August 2014, p 7.

230 Ibid, pp 6-7.

231 Ibid, p 8.

232 Ibid, p 9.

response. In part this has provided a remedy to previous criticisms by the Department of Premier and Cabinet and others of the order for papers process that parties making a claim of privilege under the standing order 52 process have only one opportunity to make their argument. Although his approach has been different from that of his predecessors, the conclusions and recommendations of Mr Mason have been broadly the same as those of previous Arbiters, thereby continuing to build a body of precedents, as summarised below.

Finally, the Hon Joseph Campbell was first appointed as the Independent Legal Arbiter on 24 October 2019 to evaluate and report on the disputed claim of privilege on documents lodged with the Clerk on 26 September 2019 relating to the disclosures of Minister Sidoti.[233] He was appointed to the position after the Hon Keith Mason recused himself from the role due to a perceived conflict of interest.[234] Mr Campbell adopted a similar approach in his report to the approach of Mr Mason, in particular pointedly rejecting a submission by the Department of Premier and Cabinet that production of documents concerning ministerial propriety was not reasonably necessary to the performance by the Council of its functions.[235]

Summary of claims of privilege since 1999

As indicated, the claim of privilege by the executive government over a document or documents in a return to order is essentially a claim that the document or documents should not be published, and that instead the document or documents should be available for inspection by members of the Legislative Council only.

In their assessment of such claims, the starting point of the Independent Legal Arbiters has generally been that the public interest in disclosure should prevail over claims of privilege, unless there are good reasons in the public interest to keep a document or documents confidential. As stated by the Hon Terrence Cole in 2012:

> Where these two interests conflict, it will be a rare circumstance where the public interest in performing the constitutional role of government does not prevail. That is because of the pre-eminence of the constitutional parliamentary function of the Legislative Council, and its members, of reviewing the arrangements made or proposed by the executive government.[236]

In 2003, Sir Laurence Street also made it clear that, in his opinion, it was the responsibility of those claiming privilege to demonstrate not only that the claim was validly based but that the public interest in confidentiality outweighed the public interest in disclosure:

---

233 *Minutes*, NSW Legislative Council, 24 October 2019, p 601.

234 *Minutes*, NSW Legislative Council, 16 October 2019, p 525.

235 The Hon Joseph Campbell QC, 'Report under Standing Order 52 on Disputed Claim of Privilege – Allegations concerning Hon John Sidoti MP', Report of the Independent Legal Arbiter, 4 November 2019, pp 16-17.

236 The Hon Terrence Cole QC, 'Disputed Claim for Privilege – Nimmie-Caira system enhanced environmental water delivery project', Report of the Independent Legal Arbiter, 20 November 2012, p 5.

> As a generality it can be accepted that there is a clear public interest in respecting validly based claims for Legal Professional Privilege, Public Interest Immunity and Commercial in Confidence Privilege. The ordinary functions of government and the legitimate interests of third parties could be encumbered and harmed if such claims are disregarded or over-ruled. As against this, there can be matters in respect of which the public interest in open government, in transparency and accountability will call for disclosure of every document that cannot be positively and validly identified as one for which the public interest in disclosure is outweighed by the public interest in immunity. It lies with the party claiming privilege to establish it.[237]

In 2008, Sir Laurence Street was also critical of what he perceived as a practice of some government agencies of making claims of privilege simply because they could do so, without regard to the need for the claim:

> When dealing with matters of this nature I am frequently troubled by the impression that, in segregating documents with reference to a possible claim of privilege, the question addressed by the responsible public officer is 'Can privilege be claimed for this document?' If the answer is 'Yes', then the claim is made.
>
> I believe it would promote public confidence in the discharge by public authorities of their responsibilities if, where this question is answered 'Yes', a further question were posed 'Do we **need** to make the claim of privilege?' In a great many matters ranging across a variety of topics that have been referred to me as the Arbiter, substantial numbers of documents justify the answer 'Yes' to the first of the two questions I have posed and are made the subject of a claim of privilege without the second question being addressed.[238]

Nevertheless, claims of privilege have often been accepted by the Independent Legal Arbiters and in turn the House. Whilst claims of public interest immunity have generally not been upheld either by the Arbiters or the House, claims of commercial-in-confidence immunity, sometimes viewed as a subset of public interest immunity, have been accepted, at least where they refer to specific commercial transactions and negotiations of the government on hand at the time. Claims of legal professional privilege immunity have also been accepted where the disclosure of legal advice has the potential to cause harm to important State interests or to the operations of the senior public service and government. Claims in relation to the privacy of individuals have also regularly been accepted. These matters are discussed further below.

Claims for non-publication based on public interest immunity

The most common claim of privilege over documents provided to the Council in returns to orders is that of public interest immunity, although the earlier expression 'Crown privilege' is sometimes still used.

---

237 Sir Laurence Street QC, 'Disputed claim of privilege – Papers on Millennium Trains', Report of the Independent Legal Arbiter, 22 August 2003, pp 6-7.

238 Sir Laurence Street QC, 'Disputed claim of privilege – Iron Cove Bridge', Report of the Independent Legal Arbiter, 18 March 2008, p 2.

Claims of public interest immunity have generally not been upheld by the Independent Legal Arbiters or in turn the House. This is because in many instances, there is an overwhelming case for publication and ventilation of important matters of public policy in the public interest. As observed in 1980 by Mason J in *Commonwealth v John Fairfax & Sons Ltd*:

> … it can scarcely be a relevant detriment to the government that publication of material concerning its actions will merely expose it to public discussion and criticism. It is unacceptable in our democratic society that there should be a restraint on the publication of information relating to government when the only vice of that information is that it enables the public to discuss, review and criticize government action.
>
> Accordingly, the court will determine the government's claim to confidentiality by reference to the public interest. Unless disclosure is likely to injure the public interest, it will not be protected.[239]

Examples of claims of public interest immunity that have not been upheld by the Independent Legal Arbiters or in turn the House are:

- a claim in relation to the conditional lease of a former quarantine station on the foreshores of Sydney Harbour, where it was held that the public interest in the foreshores of the Harbour and the stewardship of the site outweighed the confidentiality of government policy in relation to the site;[240]
- a claim in relation to the appointment of an administrator of the Wellington Local Aboriginal Land Council, where it was held that the public interest in transparency and accountability in relation to the discharge by ministers and departments of their public responsibilities concerning the Land Council outweighed the confidentiality of sensitive material;[241]
- a claim in relation to Sydney Water Corporation contracts and other commercial documents concerning the Sydney desalination plant, where it was held that the public interest in oversight of the actions of the executive in this matter overrode the claim of privilege;[242]

---

239 *Commonwealth v John Fairfax & Sons Ltd* (1980) 147 CLR 39 at 52 per Mason J.

240 Sir Laurence Street QC, 'Disputed Claim of Privilege – Conditional Agreement to Lease the Quarantine Station', Report of the Independent Legal Arbiter, 31 July 2001, pp 2-3. The report was tabled in the House on 11 September 2001. See *Minutes*, NSW Legislative Council, 11 September 2001, p 1132. The House adopted the recommendations of the Arbiter on 20 September 2001. See *Minutes*, NSW Legislative Council, 20 September 2001, pp 1166-1167.

241 Sir Laurence Street QC, 'Disputed Claim of Privilege – Appointment of Mr Peter Scolari as Administrator of the Wellington Local Aboriginal Land Council', Report of the Independent Legal Arbiter, 17 October 2001, pp 2-3. The report was tabled in the House on 18 October 2001. See *Minutes*, NSW Legislative Council, 18 October 2001, p 1220. The House adopted the recommendations of the Arbiter on 13 November 2001. See *Minutes*, NSW Legislative Council, 13 November 2001, p 1251.

242 The Hon Terrence Cole QC, 'Disputed claim for privilege – Desalination plant', Report of the Independent Legal Arbiter, 22 December 2005, pp 11-12. The report was tabled in the House on 28 February 2006. According to resolution of the House of 30 November 2005, the documents considered by the Arbiter not to be privileged were authorised to be made public on 22 December 2005. See *Minutes*, NSW Legislative Council, 28 February 2006, p 1840.

- a claim in relation to the lease agreement of Luna Park, where it was held that the public interest in the management of Luna Park as a distinctive Sydney landmark and part of the cultural heritage of the city overrode various claims of public interest immunity (and one of commercial-in-confidence immunity);[243] and
- a claim in relation to water management arrangements in the Murray-Darling basin, including arrangements between the State and Commonwealth Governments and those entitled to water rights, where it was held that matters such as the future of river communities, the cost to taxpayers of the management arrangements and the impact on the environment were important matters of public interest.[244]

Only in limited and unusual circumstances have claims of public interest immunity been upheld by the Independent Legal Arbiters and in turn the House. Examples of such claims are:

- a claim in relation to the government's policy of attracting investment to the State;[245]
- a claim to protect the identity of an informant where it concerned the enforcement or administration of the law;[246]
- a claim in relation to a study then being undertaken concerning the health effects of unflued gas heaters, on the basis that publication would place at risk the peer review process;[247]

---

243 Sir Laurence Street QC, 'Disputed Claim of Privilege – Luna Park Leases and Agreements', Report of the Independent Legal Arbiter, 19 June 2006, p 5. According to resolution of the House of 7 June 2006, the documents considered by the Arbiter not to be privileged were authorised by the House to be made public on 19 June 2006. See *Minutes*, NSW Legislative Council, 7 June 2006, p 92. The report was subsequently tabled in the House on 29 August 2006. See *Minutes*, NSW Legislative Council, 29 August 2006, pp 143-144.

244 The Hon Terrence Cole QC, 'Disputed claim for privilege – Nimmie-Caira system enhanced environmental water delivery project', Report of the Independent Legal Arbiter, 20 November 2012, p 4. The report was tabled in the House on 21 November 2012. See *Minutes*, NSW Legislative Council, 21 November 2012, p 1413. The House adopted the recommendations of the Arbiter on 22 November 2012. See *Minutes*, NSW Legislative Council, 22 November 2012, p 1431.

245 Sir Laurence Street QC, 'Disputed Claim of Privilege – Mogo Charcoal Plant', Report of the Independent Legal Arbiter, 28 May 2002, p 3. The report was tabled in the House on 5 June 2002. See *Minutes*, NSW Legislative Council, 5 June 2002, p 191. The House adopted the recommendations of the Arbiter on 6 June 2002. See *Minutes*, NSW Legislative Council, 6 June 2002, p 197.

246 Sir Laurence Street QC, 'Disputed Claim of Privilege – Papers on M5 East Motorway', Report of the Independent Legal Arbiter, 25 October 2002, p 6. The report was tabled in the House on 30 October 2002. See *Minutes*, NSW Legislative Council, 30 October 2002, p 445. The House adopted the recommendations of the Arbiter on 31 October 2002. See *Minutes*, NSW Legislative Council, 31 October 2002, p 452.

247 Sir Laurence Street QC, 'Disputed Claim of Privilege – Unflued Gas Heaters', Report of the Independent Legal Arbiter, 4 June 2010, pp 5-6. The report was tabled in the House on 10 June 2010. See *Minutes*, NSW Legislative Council, 10 June 2010, p 1928. The House took no further action to publish the papers.

- a claim in relation to the New South Wales register of buildings containing potentially combustible cladding, on the basis that its disclosure could endanger public safety.[248]

Claims for non-publication based on commercial-in-confidence immunity

A claim that a document is 'commercial-in-confidence' is essentially a subset of a claim of public interest immunity. It is not in itself a recognised head of privilege, even in the courts. However, such claims have been more likely to be upheld by the Independent Legal Arbiters and in turn the House than claims based on public interest immunity alone, at least where they refer to specific commercial transactions and negotiations of the government on hand at the time. Examples of claims of commercial-in-confidence immunity that have been upheld by the Arbiters and in turn the House are:

- a claim in relation to the specific costs of power generation by an individual power generator;[249]
- a claim in relation to the tender process for the M5 East Motorway, where it was held that release of the information could prejudice negotiations in relation to its construction;[250] and
- a claim in relation to ongoing commercial negotiations with contractors for the WestConnex Project.[251]

However, claims of commercial-in-confidence immunity have not been upheld by the Arbiters and subsequently the House where they have been more generally based, or

248 The Hon Keith Mason QC, 'Report under standing order 52 on disputed claim of privilege – Register of Buildings Containing Potentially Combustible Cladding', Report of the Independent Legal Arbiter, 13 December 2019, pp 4-5. According to the resolution of the House of 24 October 2019 authorising the Privileges Committee, whilst the House was not sitting, to undertake the role usually performed by the House in dealing with reports of the Independent Legal Arbiter on disputed claims of privilege, the Clerk referred the report to the Privileges Committee on 13 December 2019. On 16 December 2019, the Privileges Committee resolved that the report of Mr Mason be made public. See *Minutes*, NSW Legislative Council, 25 February 2020, p 789.

249 Sir Laurence Street QC, 'Disputed Claim of Privilege – Papers on Delta Electricity', Report of the Independent Legal Arbiter, 14 October 1999, pp 5-6. The report was tabled in the House on 20 October 1999. See *Minutes*, NSW Legislative Council, 20 October 1999, p 126. The House chose to publish certain documents deemed by the Arbiter not to be privileged on 21 October 1999. See *Minutes*, NSW Legislative Council, 21 October 1999, pp 136-137.

250 Sir Laurence Street QC, 'Disputed Claim of Privilege – Papers on M5 East Motorway', Report of the Independent Legal Arbiter, 25 October 2002, pp 4-5. The report was tabled in the House on 30 October 2002. See *Minutes*, NSW Legislative Council, 30 October 2002, p 445. The House adopted the recommendations of the Arbiter on 31 October 2002. See *Minutes*, NSW Legislative Council, 31 October 2002, p 452.

251 The Hon Keith Mason QC, 'Report under standing order 52 on disputed claim of privilege – WestConnex Business Case', Report of the Independent Legal Arbiter, 8 August 2014, p 12. The report was tabled in the House on 13 August 2014. See *Minutes*, NSW Legislative Council, 13 August 2014, p 2658. The House adopted the recommendation of the Arbiter on 14 August 2014. See *Minutes*, NSW Legislative Council, 14 August 2014, pp 2670-2671.

where information was already in the public sphere or concerned private interests. Examples include:

- a claim in relation to the supply of charcoal and woodchips to the Mogo Charcoal Plant near Batemans Bay, where it was held that the magnitude of the development and associated contracts was such as to expose it to a clearly recognisable obligation of disclosure;[252]
- a claim in relation to Tillegra Dam in the Hunter Valley, where it was held that the document in question was over two years old, and that the significant public debate concerning the State's water reserves and the needs of the Hunter River region in particular justified making the document public;[253]
- a further claim in relation to Tillegra Dam in response to a further order for papers, where it was held that subject to redaction of contract details, the project was of such public interest as to outweigh any commercial sensitivity;[254]
- a claim in relation to budget papers outlining regional electorate capital works summaries, together with funds from asset sales and other sources, where it was held that there is an overriding public interest in disclosure of Treasury's allocation and expenditure of public funds;[255]
- a claim in relation to the VIP Gaming Management Agreement with Crown Casino at Barangaroo, where it was held that any claim of commercial confidentiality on behalf of Crown Casino in a private venture does not outweigh

252 Sir Laurence Street QC, 'Disputed Claim of Privilege – Mogo Charcoal Plant', Report of the Independent Legal Arbiter, 28 May 2002, p 10. The report was tabled in the House on 5 June 2002. See *Minutes*, NSW Legislative Council, 5 June 2002, p 191. The House adopted the recommendations of the Arbiter on 6 June 2002. See *Minutes*, NSW Legislative Council, 6 June 2002, p 197.

253 Sir Laurence Street QC, 'Disputed claim of privilege – Document regarding proposed Tillegra Dam', Report of the Independent Legal Arbiter, 20 January 2009, pp 3-4. The report was tabled in the House on 24 June 2009. See *Minutes*, NSW Legislative Council, 24 June 2009, p 1279. On 1 July 2009, the Clerk received correspondence from the Director General of the Department of Premier and Cabinet advising that Hunter Water Corporation had withdrawn its claim of privilege over the document, which accordingly was made public. The House was informed when it next sat on 1 September 2009. See *Minutes*, NSW Legislative Council, 1 September 2009, p 1293.

254 Sir Laurence Street QC, 'Disputed claim of privilege – Documents regarding proposed Tillegra Dam – Further Order', Report of the Independent Legal Arbiter, 18 May 2010, pp 1-2. The report was tabled in the House on 2 June 2010. See *Minutes*, NSW Legislative Council, 2 June 2010, p 1876. On 3 June 2010, the Clerk tabled correspondence from the Director General of the Department of Premier and Cabinet that Hunter Water Corporation had withdrawn its claim of privilege on the documents. See *Minutes*, NSW Legislative Council, 3 June 2010, p 1884.

255 Sir Laurence Street QC, 'Disputed Claim of Privilege – 2009-2010 Budget', Report of the Independent Legal Arbiter, 11 December 2009, pp 6-7. The report was tabled in the House on 25 February 2010. See *Minutes*, NSW Legislative Council, 25 February 2010, p 1668. The House adopted the recommendation of the Arbiter, with certain documents kept confidential, on 10 March 2010. See *Minutes*, NSW Legislative Council, 10 March 2010, p 1688.

the public interest in the publication of an agreement designed to protect the public;[256]

- a claim of both commercial-in-confidence immunity but also public interest immunity in relation to a Memorandum of Understanding between the government and the National Rugby League in relation to the redevelopment of Sydney stadiums, where it was held that oversight of the effectiveness of such procurement and tender processes is at the heart of fiscal oversight of government;[257]
- a claim in relation to budget papers revealing the gaming machine profits of clubs and hotels, where it was held that commercial harm to private interests does not of itself generate a public interest immunity;[258] and
- a claim in relation to Landcom's business plans for 2019, where the Arbiter determined that the plans did not entail anything that could be described as 'ongoing commercial negotiations'.[259]

The proper basis of a claim of commercial-in-confidence immunity is not that commercial information of a general nature may be revealed, including potentially the commercial information of private interests, but that the revealing of such information may cause damage to specific commercial transactions and negotiations of the government on hand at the time.

---

256 The Hon Keith Mason QC, 'Report under standing order 52 on disputed claim of privilege – Crown Casino VIP Gaming Management Agreement', Report of the Independent Legal Arbiter, 21 October 2014, p 3. The report was tabled in the House on 22 October 2014. See *Minutes*, NSW Legislative Council, 22 October 2014, p 189. The House subsequently referred the VIP Gaming Management Agreement and the report of the Arbiter to the Privileges Committee for further consideration. The committee reported that, having reviewed the matter, it supported the recommendation made by the Arbiter in his report. The House adopted the recommendation of the Arbiter, with certain portions of the agreement redacted, on 12 November 2014. See *Minutes*, NSW Legislative Council, 12 November 2014, pp 261-262.

257 The Hon Keith Mason QC, 'Report under standing order 52 on disputed claim of privilege – Sydney Stadiums', Report of the Independent Legal Arbiter, 22 May 2018, pp 4-7. The report was tabled in the House on 24 May 2018. See *Minutes*, NSW Legislative Council, 24 May 2018, pp 2630. The House made further orders in relation to the publication of these documents on 5 June 2018. See *Minutes*, NSW Legislative Council, 5 June 2018, pp 2641-2642.

258 The Hon Keith Mason QC, 'Report under standing order 52 on disputed claim of privilege – Budget Finances 2018-2019: Gaming machine profits', Report of the Independent Legal Arbiter, 19 July 2018, pp 1-4. The report was tabled in the House on 15 August 2018. See *Minutes*, NSW Legislative Council, 15 August 2018, p 2852. The House adopted the recommendations of the Arbiter on 16 August 2018. See *Minutes*, NSW Legislative Council, 16 August 2018, p 2867.

259 The Hon Keith Mason QC, 'Report under standing order 52 on disputed claim of privilege: Landcom Bullying Allegations 2019', 13 September 2019, p 10. The report was tabled in the House on 18 September 2019. See *Minutes*, NSW Legislative Council, 18 September 2019, p 421. The House adopted the recommendations of the Arbiter on 19 September 2019. See *Minutes*, NSW Legislative Council, 19 September 2019, pp 435-436.

Claims for non-publication based on legal professional privilege

Claims for the non-publication of documents in returns to orders on the basis of legal professional privilege have been accepted on a number of occasions by the Arbiters and in turn the House, mostly where the release of the information would cause harm to important State interests or the operations of the senior public service and government. Claims of legal professional privilege that have been upheld by the Arbiters and the House have included:

- a claim in relation to legal advice, including advice from the Crown Solicitor, sought by State Forests, and ongoing exchanges for the purpose of seeking and receiving legal advice by Planning NSW, in relation to the Mogo Charcoal Plant near Batemans Bay;[260]
- two separate claims in relation to documents prepared by the RTA for Senior Counsel seeking formal legal opinions in relation to the M5 East Motorway,[261] and in relation to the Lane Cove Tunnel;[262] and
- a claim in relation to communications between the RTA and government authorities and solicitors in relation to the Inner West busways project.[263]

However, claims of legal professional privilege have not been upheld where the material did not meet the relevant test of legal professional privilege outlined above. For example, a claim of legal professional privilege in relation to the appointment of an Administrator of the Wellington Local Aboriginal Land Council was not upheld by the Arbiter or the House on the basis that the documents had not been prepared for the purposes of seeking legal advice or of being furnished by legal advisers to the

260 Sir Laurence Street QC, 'Disputed Claim of Privilege – Mogo Charcoal Plant', Report of the Independent Legal Arbiter, 28 May 2002, pp 4, 6-7, 10. The report was tabled in the House on 5 June 2002. See *Minutes*, NSW Legislative Council, 5 June 2002, p 191. The House adopted the recommendations of the Arbiter on 6 June 2002. See *Minutes*, NSW Legislative Council, 6 June 2002, p 197.

261 Sir Laurence Street QC, 'Disputed Claim of Privilege – Papers on M5 East Motorway', Report of the Independent Legal Arbiter, 25 October 2002, pp 2-3. The report was tabled in the House on 30 October 2002. See *Minutes*, NSW Legislative Council, 30 October 2002, p 445. The House adopted the recommendations of the Arbiter on 31 October 2002. See *Minutes*, NSW Legislative Council, 31 October 2002, p 452.

262 Sir Laurence Street QC, 'Disputed Claim of Privilege – Lane Cove Tunnel – Further Order', Report of the Independent Legal Arbiter, 22 May 2006, p 5. The report was tabled in the House on 25 May 2006. See *Minutes*, NSW Legislative Council, 25 May 2006, p 47. The House adopted the recommendations of the Arbiter on 7 June 2006. See *Minutes*, NSW Legislative Council, 7 June 2006, p 92.

263 Sir Laurence Street QC, 'Disputed Claim of Privilege – Inner West Busways Project', Report of the Independent Legal Arbiter, 23 July 2009, p 5. The report was tabled in the House on 3 September 2009. See *Minutes*, NSW Legislative Council, 3 September 2009, p 1326. The House made a further order in relation to the publication of certain documents in view of the report of the Arbiter on 9 September 2009. See *Minutes*, NSW Legislative Council, 9 September 2009, pp 1356-1357.

department or minister.[264] Similarly, a claim of legal professional privilege in relation to the CBD Metro Rail project, by then discontinued, was not upheld.[265]

In 2005, in relation to a return to order concerning the Cross City Tunnel, Sir Laurence Street advised the House that the public interest in the construction and commissioning of the tunnel was of such a level as to outweigh legal arguments that would ordinarily have justified a claim of legal professional privilege. As Sir Laurence Street stated:

> … regardless of varying degrees of sensitivity, I am of the view that there is a legitimate public interest in all of the RTA's actions being laid bare. Indeed, although it may find this unwelcome and irksome, I am of the view that it is in the RTA's own interests as one of the State's great institutions of government, to table all of its material and to 'stand up and be counted'… The public has an over-riding right in the present climate of concern over the tunnel project – financial, environmental and even safety – to have ordinary barriers of confidentiality or privilege placed aside.[266]

This was a highly unusual recommendation from the Arbiter, reflecting the extremely high level of public interest and concern in the cross-city tunnel project at the time. The House subsequently ordered the publication of the papers considered by Sir Laurence Street not to be privileged.[267]

In response, in 2006, in a claim of privilege accompanying a further return to order in relation to the Lane Cove Tunnel, the Cabinet Office asserted that:

> At law, legal professional privilege is absolute and is not subject to any public interest override. Although standing order 52 provides that any member may dispute the *validity* of a claim for privilege, in which case the matter may be referred to an independent legal arbiter, it is not open for the arbiter to disregard any claim of privilege which has been validly made.[268]

This position is misconceived. It is correct that in proceedings before the courts, legal professional privilege is absolute and is not subject to any overriding test of public interest. However, as Spigelman CJ observed in *Egan v Chadwick*, the test of legal professional privilege applied by the courts is not the test that applies to the relationship

---

264 Sir Laurence Street QC, 'Disputed claim of privilege – Appointment of Mr Peter Scolari as Administrator of the Wellington Local Aboriginal Land Council', Report of the Independent Legal Arbiter, 17 October 2001, pp 3-4. The report was tabled in the House on 18 October 2001. See *Minutes*, NSW Legislative Council, 18 October 2001, p 1220. The House adopted the recommendations of the Arbiter on 13 November 2001. See *Minutes*, NSW Legislative Council, 13 November 2001, p 1251.

265 Sir Laurence Street QC, 'Disputed Claim of Privilege – CBD Metro Rail', Report of the Independent Legal Arbiter, 7 May 2010, pp 5-6. The report was tabled in the House on 12 May 2010. See *Minutes*, NSW Legislative Council, 12 May 2010, p 1792. The House made a further order in relation to the publication of certain documents in view of the report of the Arbiter on 23 June 2010. See *Minutes*, NSW Legislative Council, 23 June 2010, p 1952.

266 Sir Laurence Street QC, 'Disputed Claim of Privilege – Papers on Cross City Consortium, Third report', Report of the Independent Legal Arbiter, 15 November 2005, p 4.

267 *Minutes*, NSW Legislative Council, 16 November 2005, p 1747.

268 The Cabinet Office, 'Lane Cove Tunnel – Further Order', Submission in support of claims for privilege by the Cabinet Office, 8 March 2006.

between the Parliament and the executive. The House is not bound, as is a court, to uphold a claim of legal professional privilege simply because it is a valid claim, but rather to evaluate whether it is in the public interest for the document to be made public. As stated by Sir Laurence Street in his report on the Lane Cove Tunnel – Further Order, referring to the statement of the Cabinet Office cited above:

> If this means no more than that the arbiter must evaluate whether a technically valid claim of privilege is out-weighed by a higher public interest in disclosure, then it is plainly correct. But if, as it appears that it may, it means that the arbiter is bound, as for example is a Court, to uphold a claim of privilege that is technically valid, then it is plainly wrong. The arbiter's duty, as the delegate of Parliament, is to evaluate the competing public interests in, on the one hand, recognizing and enforcing the principles upon which legal professional privilege is recognized and upheld in the Courts, and, on the other hand, recognizing and upholding an overriding public interest in disclosure of the otherwise privileged documents.[269]

In the event, Sir Laurence Street held that whilst certain documents in the return to order fell within the normal category of legal professional privilege, being documents brought into existence for the purpose of seeking and giving legal advice, nevertheless the public interest in relation to the Lane Cove Tunnel outweighed the interest in upholding the claim of legal professional privilege. However, Sir Laurence Street supported the claim of legal professional privilege over other documents from the Cabinet Office.[270] The House subsequently ordered the publication of the papers considered by Sir Laurence Street not to be privileged.[271]

Claims for non-publication based on secrecy provisions

As noted in Chapter 3 (Parliamentary privilege in New South Wales), so-called statutory secrecy provisions, that is, provisions in statutes which prohibit in general terms the disclosure of certain categories of information, have no effect on the law of privilege such as the common law power of the House to order the production of State papers, unless such provisions do so by express word or by very clear and necessary implication.[272]

However, in 2014, in the return to order on the VIP Gaming Management Agreement with Crown Casino at Barangaroo, the Department of Premier and Cabinet and the Independent Liquor and Gaming Authority sought to rely in part on the secrecy provision in section 17 of the *Gaming and Liquor Administration Act 2007* in arguing against the publication of the agreement. The Independent Legal Arbiter appointed on this occasion, the Hon Keith Mason, rejected this submission, re-stating the position that

269 Sir Laurence Street QC, 'Privileged Documents – Lane Cove Tunnel Further Order', Report of the Independent Legal Arbiter, 22 May 2006, p 4.

270 Ibid, pp 1-2, 5. The report was tabled in the House on 25 May 2006. See *Minutes*, NSW Legislative Council, 25 May 2006, p 47.

271 *Minutes*, NSW Legislative Council, 7 June 2006, p 92.

272 For further information, see the discussion under the heading 'Statutory secrecy provisions'.

statutory non-disclosure provisions will only affect the powers of the Council if they do so by express reference or necessary implication.[273]

Claims for non-publication based on parliamentary privilege

From time to time, departments and agencies have also made claims of parliamentary privilege over documents provided in returns to orders.[274] Such claims are entirely misconceived. Parliamentary privilege protects proceedings in Parliament from questioning or impeachment in the courts or any other 'place out of parliament'. It is in no way a shield to be used against production of documents to the Parliament itself. As stated by the Hon Keith Mason in 2014, 'Parliament's privileges could not, by definition, be infringed by something done under the authority [of] the House'.[275]

Claims for non-publication based on privacy

It is common for the House, on the recommendation of the Independent Legal Arbiters, to order the redaction of the names of individuals from documents provided in returns to orders, on the grounds of privacy.[276]

Orders for the production of State papers and Cabinet documents

Since the decision in *Egan v Chadwick*[277] in 1999, the most fraught issue in relation to the power of the Legislative Council to order the production of State papers has been the

273 The Hon Keith Mason QC, 'Report under standing order 52 on disputed claim of privilege – Crown Casino VIP Gaming Management Agreement', Report of the Independent Legal Arbiter, 21 October 2014, pp 4-5. The report was tabled in the House on 22 October 2014. See *Minutes*, NSW Legislative Council, 22 October 2014, p 189. The House subsequently referred the VIP Gaming Management Agreement and the report of the Arbiter to the Privileges Committee for further consideration. The committee reported that, having reviewed the matter, it supported the recommendation made by the Arbiter in his report. The House adopted the recommendation of the Arbiter, with certain portions of the agreement redacted, on 12 November 2014. See *Minutes*, NSW Legislative Council, 12 November 2014, pp 261-262.

274 Return to Order – The Choices of Life Incorporated, 21 September 2010; Return to Order – Coal seam gas exploration, 10 November 2010; Return to order – WestConnex Business Case, 25 March 2014; Return to order – GONSW Equity Fund, 27 June 2019; Return to order – Representations made by Fairross Pty Ltd, Jam Land Pty Ltd, and Bobingah Pty Ltd in relation to land clearing, 27 June 2019.

275 The Hon Keith Mason QC, 'Report under standing order 52 on disputed claim of privilege – WestConnex Business Case', Report of Independent Legal Arbiter, 8 August 2014, p 13. This position also finds expression in the following statement by Professor Snape in *Harry Potter and the Half Blood Prince*: 'You dare use my own spells against me, Potter?' See JK Rowling, *Harry Potter and the Half-Blood Prince*, 1st ed, (Bloomsbury Publishing, 2005), p 563.

276 See, for example, Sir Laurence Street QC, 'Disputed Claim of Privilege – Papers on Maldon-Dumbarton Railway Line', Report of the Independent Legal Arbiter, 12 December 2006, pp 1-3; the Hon Keith Mason QC, 'Report under standing order 52 on disputed claim of privilege – Sydney Stadiums', Report of the Independent Legal Arbiter, 22 May 2018, p 11; the Hon Keith Mason QC, 'Report under standing order 52 on disputed claim of privilege – Floodplain Harvesting Exemptions', Report of the Independent Legal Arbiter, 11 June 2020.

277 (1999) 46 NSWLR 563.

status of Cabinet documents. Currently, the executive government does not provide a broad range of documents assessed as 'cabinet information' in returns to orders of the Legislative Council.[278]

The current state of the law as articulated in *Egan v Chadwick*

Egan v Chadwick is authority for the power of the Legislative Council to order the production of State papers, including those subject to a claim of privilege. However, the three members of the Court of Appeal did not agree on one aspect of the power of the Legislative Council to order the production of State papers: whether the Legislative Council has the power to compel the production of Cabinet documents.

The headnote to the decision in *Egan v Chadwick* records the majority holding (Priestley JA dissenting) that 'in respect of Cabinet documents their immunity from production is complete'.[279] This statement significantly oversimplifies the three judgments of Spigelman CJ, Meagher JA and Priestley JA in *Egan v Chadwick*.

In his judgment, Spigelman CJ indicated that it was not reasonably necessary for the proper exercise of the functions of the Legislative Council to call for Cabinet documents where their production would conflict with the doctrine of ministerial responsibility, either in its individual or collective dimension.[280]

However, Spigelman CJ specifically drew a distinction between documents which either directly or indirectly disclose the 'actual deliberations within Cabinet',[281] and those which are described as 'Cabinet documents', 'but which are in the nature of reports or submissions prepared for the assistance of Cabinet'.[282]

With respect to the former category of documents, that is documents which reveal the 'actual deliberations within Cabinet', Spigelman CJ cited with approval the following passage from the 1993 decision of the High Court in *Commonwealth v Northern Land Council*:

> … It has never been doubted that it is in the public interest that the deliberations of Cabinet should remain confidential in order that the members of Cabinet may exchange differing views and at the same time maintain the principle of collective responsibility for any decision which may be made … Despite the pressures which modern society places upon the principle of collective responsibility, it remains an important element in our system of government.[283]

278 The matter has been raised on a number of occasions in academic writing, including B Walker SC, 'Justified Immunity or Unfinished Business? The Appropriateness of Parliamentary and Executive Immunities in the 21st Century', Paper presented to the annual Harry Evans lecture at Parliament House, Canberra, 1 December 2017 and S Ohnesorge and B Duffy, 'Evading Scrutiny: Orders for Papers and Access to Cabinet Information by the New South Wales Legislative Council', *Public Law Review,* (Vol 29, 2018), p 118.

279 *Egan v Chadwick* (1999) 46 NSWLR 563.

280 Ibid, at 574 per Spigelman CJ.

281 Ibid, at 576 per Spigelman CJ.

282 Ibid, at 574 per Spigelman CJ.

283 *Commonwealth v Northern Land Council* (1993) 176 CLR 604 at 615 per the whole court. But see also the further discussion later in this chapter under the heading 'Was *Egan v Chadwick* correctly

He continued that the documents in question in the case of *Egan v Chadwick* were in fact documents which recorded the actual deliberation of Cabinet, and that their revelation would be inconsistent with the doctrine of collective ministerial responsibility.

With respect to the latter category of documents, that is to say, documents prepared outside Cabinet 'for submission to Cabinet', Spigelman CJ observed:

> Documents prepared outside Cabinet for submission to Cabinet may, or may not, depending on their content, manifest a similar inconsistency.[284]

In determining whether access to either category of documents would contradict the collective responsibility of ministers, Spigelman CJ concluded:

> The test is whether disclosure is inconsistent with the principles of responsible government – not a balancing exercise between conflicting public interests.[285]

His Honour further indicated that it was 'neither necessary nor desirable' to articulate the meaning of this test further.[286]

Meagher JA took a broader view that the immunity of Cabinet documents from production was 'complete'.[287] In his judgment, he observed:

> The Cabinet is the cornerstone of responsible government in New South Wales, and its documents are essential for its operation. That means their immunity from production is complete. The Legislative Council could not compel their production without subverting the doctrine of responsible government, the doctrine on which the Legislative Council also relies to justify its rights to call for documents.[288]

Priestley JA adopted the same approach to Cabinet documents as he did to any other document over which the executive government may claim public interest immunity. Also citing *Commonwealth v Northern Land Council*,[289] but different passages to those cited by Spigelman CJ, Priestley JA observed that a court of law 'undoubtedly has the power to compel production to itself even of Cabinet documents, even though the power will in regard to certain Cabinet documents be used with the highest degree of circumspection'.[290] From this, his Honour went on to say that 'The function and status of the Council in the system of government in New South Wales require and justify the same degree of trust being reposed in the Council as in the courts when dealing with documents in respect of which the Executive claims public interest immunity'.[291] He concluded:

---

decided in relation to Cabinet documents?' As noted there, *Commonwealth v Northern Land Council* supports the view there is not an absolute bar against the compulsory disclosure or tender into evidence before the courts of even the most core Cabinet documents.

284 *Egan v Chadwick* (1999) 46 NSWLR 563 at 575 per Spigelman CJ.

285 Ibid, at 576 per Spigelman CJ.

286 Ibid.

287 Ibid, at 597 per Meagher JA.

288 Ibid.

289 (1993) 176 CLR 604 at 617-619 per the whole court.

290 *Egan v Chadwick* (1999) 46 NSWLR 563 at 594 per Priestley JA.

291 Ibid.

> One result of this view is that, notwithstanding the great respect that must be paid to such incidents of responsible government as cabinet confidentiality and collective responsibility, no *legal right* to *absolute* secrecy is given to any group of men and women in government, the possibility of accountability can never be kept out of mind, and this can only be to the benefit of the people of a truly representative democracy.[292]

Based on these three judgments, the law as it currently stands concerning the power of the Legislative Council to order the production of Cabinet documents is effectively the position articulated by Spigelman CJ, sitting as it does between the contrasting decisions of Meagher and Priestley JJ. Documents disclosing, either directly or indirectly, the *actual* deliberations of Cabinet are not required to be produced to the Legislative Council in response to an order for papers. Documents prepared outside Cabinet may, or may not, depending on their content, also be immune from production, according to the test articulated by Spigelman CJ of whether their production 'is inconsistent with the principles of responsible government'.

What are documents that disclose the 'actual deliberations within Cabinet'?

The test of a Cabinet document adopted by Spigelman CJ in *Egan v Chadwick*, namely a document that discloses the 'actual deliberations within Cabinet', or possibly a document prepared outside of Cabinet 'for submission to Cabinet',[293] can be defined more fully.

Documents which disclose the *actual* deliberations of Cabinet and documents prepared 'for submission to Cabinet' include:

- Cabinet minutes, which are the formal signed submissions and recommendations made to Cabinet by individual ministers, as submitted to the Cabinet secretariat in advance of a Cabinet meeting. Such minutes reveal the position put to the Cabinet by the minister primarily responsible for the subject of the minute.
- The responses of other government departments and agencies to Cabinet minutes, setting out support for or criticism of the minutes, and advice to the Premier setting out the different views of ministers and agencies and an argument as to the preferable resolution of such conflicts. Whilst prepared prior to Cabinet, these documents show the arguments that ministers intend to put to Cabinet and when compared to the outcome, indirectly reveal the deliberations of the Cabinet.
- The formal records of decisions at Cabinet made by the Director-General of the Cabinet Office.[294]

A statutory definition of a broader category of 'cabinet information' is provided in clause 2 of schedule 1 to the *Government Information (Public Access) Act 2009*:

---

292 Ibid, at 595 per Priestley JA.

293 *Egan v Chadwick* (1999) 46 NSWLR 563 at 575 per Spigelman CJ.

294 Twomey, 'Executive Accountability to the Australian Senate and the New South Wales Legislative Council', (n 200), p 12.

(1) It is to be conclusively presumed that there is an overriding public interest against disclosure of information (referred to in this Act as Cabinet information) contained in any of the following documents:

(a) a document that contains an official record of Cabinet,

(b) a document prepared for the dominant purpose of its being submitted to Cabinet for Cabinet's consideration (whether or not the document is actually submitted to Cabinet),

(c) a document prepared for the purpose of its being submitted to Cabinet for Cabinet's approval for the document to be used for the dominant purpose for which it was prepared (whether or not the document is actually submitted to Cabinet and whether or not the approval is actually given),

(d) a document prepared after Cabinet's deliberation or decision on a matter that would reveal or tend to reveal information concerning any of those deliberations or decisions,

(e) a document prepared before or after Cabinet's deliberation or decision on a matter that reveals or tends to reveal the position that a particular Minister has taken, is taking, will take, is considering taking, or has been recommended to take, on the matter in Cabinet,

(f) a document that is a preliminary draft of, or a copy of or part of, or contains an extract from, a document referred to in paragraphs (a)–(e).

…

(3) Information is not Cabinet information merely because it is contained in a document attached to a document referred to in subclause (1).

(4) Information is not Cabinet information to the extent that it consists solely of factual material unless the information is contained in a document that, either entirely or in part, would:

(a) reveal or tend to reveal information concerning any Cabinet decision or determination, or

(b) reveal or tend to reveal the position that a particular Minister has taken, is taking or will take on a matter in Cabinet.[295]

The non-provision of Cabinet documents by the executive government

As indicated, as the common law currently stands in New South Wales, the power of the Legislative Council to order the production of Cabinet documents is effectively defined by the position articulated by Spigelman CJ in *Egan v Chadwick*: the Council does not have the power to compel the production of documents disclosing the *actual* deliberations of Cabinet, or possibly documents prepared outside Cabinet 'for submission to Cabinet' where their production 'is inconsistent with the principles of responsible government'.[296]

295 *Government Information (Public Access) Act 2009*, sch 1, cl 2.

296 *Egan v Chadwick* (1999) 46 NSWLR 563 at 574-575 per Spigelman CJ.

Whilst it must be acknowledged that the test as articulated above is somewhat obscure and difficult to apply, the evidence before the Legislative Council is that the executive government, in responding to orders for papers since 1999, has not adopted this test.

In 2013, as part of an inquiry by the Privileges Committee into the 2009 Mt Penny return to order, the committee was given evidence that in responding to orders for papers, the Department of Premier and Cabinet adopts the definition of Cabinet information provided in the *Government Information (Public Access) Act 2009*, as cited above, and that it is likely that other departments do the same.[297] Indeed, the Department of Premier and Cabinet recommended that the definition of Cabinet information in clause 2 of schedule 1 to the *Government Information (Public Access) Act 2009* be incorporated into standing order 52.[298] This position was not supported by the Clerk, on the basis that the definition of Cabinet information in the *Government Information (Public Access) Act 2009* is potentially a broader definition than that articulated by Spigelman CJ in *Egan v Chadwick*. The recommendation of the Department of Premier and Cabinet was subsequently rejected by the Privileges Committee.[299] The House in turn cited the committee's position with approval.[300]

Beyond this evidence received in 2013, however, the Council is largely unaware of the number of 'cabinet documents' being excluded from returns to orders, and how they are being defined. In part this is because agencies are specifically directed not to refer to 'cabinet documents' in indexes to returns.[301] It is also because in most cases, orders for papers made by the Legislative Council are couched in terms of a range of documents, and the Council is only aware that 'cabinet documents' have been excluded from the return if there is a specific indication as such.[302] The Council only normally

297 Privileges Committee, *The 2009 Mt Penny return to order*, Report No 69, October 2013, pp 78-79.

298 Privileges Committee, Inquiry into the 2009 Mt Penny return to order, Submission 8a, Department of Premier and Cabinet, Recommendation 8, p 11.

299 Privileges Committee, *The 2009 Mt Penny return to order*, Report No 69, October 2013, pp 94-95. The committee cited the judgment of Priestley J in *Egan v Chadwick* as 'instructive'.

300 *Minutes*, NSW Legislative Council, 19 November 2014, pp 340-341, 344-346.

301 Correspondence from Ms Sanderson to Dr Sheldrake dated 13 November 2009 in relation to the Mt Penny order for papers, cited in Privileges Committee, *The 2009 Mt Penny return to order*, Report No 69, October 2013, p 107. See also Premier's Memorandum M2006-08: 'Maintaining Confidentiality of Cabinet Documents and Other Cabinet Conventions'.

302 For example, on 8 May 2014, the House ordered the production of documents relating to the CBD and South East Light Rail Project. On 5 June 2014, the House received a return to order which did not include specific documents sought. However, the index to the return to order included correspondence from the Secretary of Transport for NSW stating that: 'Transport for NSW has reviewed its relevant files for the purposes of determining whether it holds any documents, other than Cabinet documents, that fall within the terms of the resolution. I note that all agencies are obliged to protect the confidentiality of Cabinet documents and not produce or refer to any such documents in complying with the resolution.' See *Minutes*, NSW Legislative Council, 19 November 2014, pp 344-345. In another example, on 10 June 2010, the House ordered the production of documents in relation to the 2010-2011 Budget Finances. The return to order, received on I July 2010, and tabled in the House on 31 August 2010, stated that 'the Budget process is undertaken by Treasury on behalf of the Budget Committee of Cabinet and as such most documentation is

becomes aware that a specific document has been classified as a 'cabinet document' where it specifically orders the production of that document, and the return identifies the document as a 'cabinet document'.[303]

Over the years, the House has attempted to address this issue by seeking from the government explanation of what 'Cabinet documents' have been excluded from returns to orders, and how they meet the test of Cabinet documents as variously articulated in *Egan v Chadwick*. For example, in 2005 and 2014, the House adopted this approach in relation to the non-provision of certain documents, presumed to be deemed 'Cabinet documents', concerning the grey nurse shark population and the CBD and South East Light Rail Project respectively.[304]

However, since 2018, the non-provision of 'Cabinet documents' has arisen far more often and the House has become far more assertive in its approach to the matter. Four instances are discussed below.

On 15 March, 12 April and 17 May 2018, the House adopted three orders for the production of State papers in relation to Sydney stadiums, the relocation of the Powerhouse Museum from Ultimo to Parramatta and the out-of-home care system in New South Wales.[305] On the receipt of the return to order concerning Sydney stadiums, concerns were raised by members that the return did not include the expected document, presumably on the basis that the document had been classified as a 'cabinet document'.[306] No return was provided to the orders concerning the relocation of the Powerhouse Museum from Ultimo to Parramatta and an anticipated report on the out-of-home care system in New South Wales was not provided, the government stating that no documents covered by

covered by Cabinet confidentiality provisions. See *Minutes*, NSW Legislative Council, 31 August 2010, p 1994.

303 For example, on 24 February 2005, the House ordered the production of specific studies and related papers in relation to the grey nurse shark population. See *Minutes*, NSW Legislative Council, 24 February 2005, p 1248. On 22 March 2005, the Clerk tabled correspondence received from the Director General of the Premier's Department on 17 March 2005 citing advice from the Department of Primary Industries indicating that two documents identified in the resolution had not been provided because they 'formed part of a Cabinet Minute dealing with Grey Nurse Sharks' and asserting that 'Cabinet minutes and documents are exempt from standing order 52 requests'. See *Minutes*, NSW Legislative Council, 22 March 2005, p 1283. For other examples, see L Lovelock and J Evans, *New South Wales Legislative Council Practice*, 1st ed, (Federation Press, 2008), pp 482-485.

304 See *Minutes*, NSW Legislative Council, 1 December 2005, p 1813; 19 November 2014, pp 344-346.

305 *Minutes*, NSW Legislative Council, 15 March 2018, p 2388; 12 April 2018, pp 2442-2443, 2444-2445; 17 May 2018, p 2561.

306 The return to order did not include the business case for the redevelopment of the stadiums, even though Infrastructure NSW had published summaries of the business case on its website. On the Clerk subsequently querying the absence of the document, the Deputy Secretary of the Department of Premier and Cabinet confirmed that 'no agency or minister's office named in the resolution has identified any additional documents for production'. See correspondence from the Deputy Secretary, Department of Premier and Cabinet to the Clerk, 16 May 2018. The correspondence was tabled in the House on 16 May 2018. See *Minutes*, NSW Legislative Council, 16 May 2018, p 2540.

the terms of the resolution had been identified, again presumably on the basis that the documents sought had been classified as 'Cabinet documents'.[307]

In a subsequent answer to a question without notice on these matters on 1 May 2018, the Leader of the Government in the Legislative Council, the Hon Don Harwin, stated:

> … the New South Wales Court of Appeal in *Egan v Chadwick* concluded that the power of the House to compel the production of documents does not extend to Cabinet information. Accordingly, even if otherwise covered by the terms of an order, Cabinet documents are neither identified nor produced in response to an order.[308]

Mr Harwin also cited advice from the Crown Solicitor that the Legislative Council does not have the power to require the provision of an index identifying 'Cabinet documents' not provided in a return, and the reasons they meet the test of 'Cabinet documents' as articulated in *Egan v Chadwick*:

> … the government will not be creating new documents brought into existence after the date of the order to identify how the provision of certain documents to the House would breach the immunity attaching to Cabinet documents.[309]

Subsequently, on 5 June 2018, on a motion moved by the Leader of the Opposition in the Legislative Council, the Hon Adam Searle, the House censured Mr Harwin, as representative of the Government in the House, for the government's failure to comply fully with the orders of the House of 15 March, 12 April and 17 May 2018, and further ordered that certain documents known to exist in relation to all three outstanding orders for papers be provided by 9.30 am the following day. The resolution also provided that should the Leader of the Government fail to provide the documents in compliance with the resolution, he be ordered to attend at his place at the table of the House following prayers to explain his reasons for continued non-compliance.[310] During debate on the motion, the House considered at length the decision in *Egan v Chadwick* as it related to Cabinet documents.[311] In his contribution, Mr Harwin expressed the view that the law in relation to Cabinet documents is settled and well-established following the decision in *Egan v Chadwick*, and that the government had fully complied with the three orders for papers.[312]

The following day, 6 June 2018, the Clerk tabled correspondence from the Deputy Secretary of the Department of Premier and Cabinet advising that 'after considering advice from the Crown Solicitor … I advise that there are no further documents for production'.[313] The advice of the Crown Solicitor stated:

---

307 *Minutes*, NSW Legislative Council, 1 May 2018, p 2456; 22 May 2018, p 2576.

308 *Hansard*, NSW Legislative Council, 1 May 2018, p 14.

309 Ibid.

310 *Minutes*, NSW Legislative Council, 5 June 2018, pp 2646-2647, 2648-2649.

311 *Hansard*, NSW Legislative Council, 5 June 2018, pp 11-12, 23-41.

312 Ibid, p 38.

313 Correspondence from the Deputy Secretary, Department of Premier and Cabinet to the Clerk, 6 June 2018. The correspondence was tabled in the House on 6 June 2018. See *Minutes*, NSW Legislative Council, 6 June 2018, p 2661.

> A minister will not be in breach of a resolution of the Council under Standing Order 52 by refusing to produce a Cabinet document which, in accordance with the judgment of the majority in *Egan v Chadwick*, the Council has no power to request.[314]

The President, in accordance with the resolution of the House of the previous day, then called on Mr Harwin to explain his reasons for continued non-compliance. Mr Harwin, standing at his place at the table of the House, addressed the House and advised that further to the advice of the Deputy Secretary, the documents ordered to be produced would in fact be provided by 5.00 pm on Friday 8 June 2018.[315]

Following this advice, on 8 June 2018, the Clerk received further correspondence from the Secretary of the Department of Premier and Cabinet which stated in part:

> I note that all of the documents referred to in the resolution[316] are Cabinet documents, and that the Legislative Council has no power to require such documents to be produced.
>
> On this occasion, however, the government has decided to provide the documents sought to the Legislative Council on a voluntary basis, even though the Council has no power to require such production.
>
> …
>
> The unredacted versions of these documents are provided on a confidential basis for inspection by members of the Legislative Council only.[317]

The Clerk tabled the correspondence in the House when it next met on 19 June 2018, together with redacted copies of the documents.[318]

On 21 June 2018, on the motion of Mr Searle, the House adopted a further resolution asserting that the only established mechanism for the lodging of such documents with the Clerk was under standing order 52, rejecting the assertion that the documents were provided voluntarily, citing the respective positions of Spigelman CJ and Meagher J and Priestley J in *Egan v Chadwick*, and stating that:

> … the true principle from *Egan v Chadwick* concerning the power of the House to order the production of Cabinet documents is, at a minimum, that articulated by Spigelman CJ, and that the government has failed to undertake the discrimination between classes of documents required by the reasoning of Spigelman CJ.[319]

---

314 Crown Solicitor, 'Whether a Minister can be suspended for not producing Cabinet documents under Standing Order 52', p 2. The advice was also tabled in the House on 6 June 2018. See *Minutes*, NSW Legislative Council, 6 June 2018, p 2661.

315 *Minutes*, NSW Legislative Council, 6 June 2018, p 2661; *Hansard*, NSW Legislative Council, 6 June 2018, p 41.

316 Referring to the resolution of the House of 5 June 2018.

317 Correspondence from the Secretary, Department of Premier and Cabinet to the Clerk, 8 June 2018, p 1.

318 *Minutes*, NSW Legislative Council, 19 June 2018, pp 2731-2732.

319 *Minutes*, NSW Legislative Council, 21 June 2018, pp 2796-2799.

The matter arose again in mid-2019. On 30 May 2019, the House on the motion of Mr Justin Field ordered the production of documents in relation to the Murray River to Broken Hill Pipeline.[320] The return to order received on 12 July 2019 did not include the preliminary and final business cases of the Broken Hill Long-term Water Supply Solution, over which Cabinet confidentiality was claimed. However, following notice being given by Mr Field of a further motion concerning the matter asserting the power of the House to order the production of such documents,[321] the government provided the final business case directly to Mr Field, who published it separately.[322]

The matter arose for a third time in late 2019. On 26 September 2019, again on the motion of Mr Field, the House ordered the production of a review of the Native Vegetation Code.[323] Once again the return to order received on 10 October 2019 did not include the requisite document.[324] Evidence in budget estimates confirmed that the review had been deemed 'Cabinet in confidence'.[325] On 17 October 2019, again on the motion of Mr Field, the House once again ordered the production of the review, reiterating its position that 'the test to be applied in determining whether a document is a Cabinet document … is, at a minimum, that articulated by Spigelman CJ in *Egan v Chadwick* and that the government had failed to undertake the discrimination between classes of documents required by the reasoning of Spigelman CJ'.[326] Once again the document was not provided.[327] However, following notice being given by Mr Field of a further motion censuring the Leader of the Government in the Legislative Council for failing to comply with the two orders,[328] on 24 March 2020 the government again provided a copy of the report directly to Mr Field, who again published it separately.[329]

The matter arose for a fourth time in late 2019 and in 2020. On numerous occasions in late 2019 and 2020, the House ordered the production of the final business case and strategic business case for the proposed Western Harbour Tunnel and Beaches Link.[330] On four occasions, the documents were not tabled, the government indicating that it did not hold any documents covered by the terms of the resolution which were lawfully required to

320 *Minutes*, NSW Legislative Council, 30 May 2019, pp 154-155.
321 *Notice Paper*, NSW Legislative Council, 7 August 2019, pp 454-456.
322 'Disdain: Anger as Broken Hill pipe business case finally released', *Sydney Morning Herald*, 15 August 2019.
323 *Minutes*, NSW Legislative Council, 26 September 2019, pp 489-490.
324 *Minutes*, NSW Legislative Council, 15 October 2019, p 502.
325 Portfolio Committee No 7 – Planning and Environment, Inquiry into the Budget Estimates 2019-2020, Evidence, 13 September 2019, pp 63-65.
326 *Minutes*, NSW Legislative Council, 17 October 2019, pp 553-556.
327 *Minutes*, NSW Legislative Council, 24 October 2019, p 615.
328 *Notice Paper*, NSW Legislative Council, 26 February 2020, pp 1848-1849.
329 'Devastating biodiversity loss made worse by rise in land clearing', *Sydney Morning Herald*, 27 March 2020.
330 *Minutes*, NSW Legislative Council, 14 November 2019, pp 686-687; 27 February 2020, pp 829-830; 13 May 2020, pp 943-944; 17 June 2020, pp 1049-1050 (proof); 18 June 2020, pp 1079-1080, 1081-1083 (proof).

be produced.[331] However, following the fifth order, on 4 August 2020, the Leader of the Government in the Legislative Council, the Hon Don Harwin, indicated that the documents would be provided voluntarily by 5.00 pm on 5 August 2020.[332] At the time, Mr Harwin was under very real threat of suspension from the service of the House. The documents were provided with redactions on 5 August 2020. They were subject to a claim of confidentiality, to be made available to members of the Council only.[333] On 6 August 2020, the House censured the Leader of the Government for producing the documents with extensive and unnecessary redactions of critical information, and again ordered the provision of the documents in a form consistent with the previous orders of the House.[334] As with the earlier precedent in 2018, the House also subsequently adopted a resolution rejecting the assertion by the Government that the documents were provided voluntarily.[335]

These events in 2018, 2019 and 2020 highlight the ongoing dispute between the Legislative Council and the government as to the correct interpretation of the law as established in *Egan v Chadwick* in relation to Cabinet documents. As the law currently stands, documents that disclose the *actual* deliberations of Cabinet are not required to be produced to the Legislative Council in response to an order for papers. Other documents prepared outside of Cabinet may, or may not, depending on their content, be required to be produced to the Legislative Council, depending on whether their production 'is inconsistent with the principles of responsible government'.[336] However, there is no blanket immunity from production to the Legislative Council of any document that may be classified as a 'Cabinet document', and certainly not according to the definition of Cabinet information in the *Government Information (Public Access) Act 2009*. Nor, on the basis of events in 2018, is the House likely to continue to be willing to accept the government's ongoing failure to provide an index to 'cabinet documents', together with reasons why they meet the test of being 'cabinet documents' in accordance with the judgment of Spigelman CJ in *Egan v Chadwick*.[337]

---

331 *Minutes*, NSW Legislative Council, 25 February 2020, p 787; 24 March 2020, pp 854; 2 June 2020, p 955; 18 June 2020, p 1078 (proof).

332 *Hansard*, NSW Legislative Council, 4 August 2020, p 1 (proof).

333 *Minutes*, NSW Legislative Council, 5 August 2020, p 1179 (proof).

334 *Minutes*, NSW Legislative Council, 6 August 2020, pp 1200-1201 (proof).

335 *Minutes*, NSW Legislative Council, 6 August 2020, pp 1204-1205 (proof).

336 *Egan v Chadwick* (1999) 46 NSWLR 563 at 576 per Spigelman CJ.

337 In this regard, it is notable that on 13 October 1998, prior to the decision in *Egan v Chadwick*, the House adopted a resolution providing for the Independent Legal Arbiter to assess whether documents were Cabinet documents. See *Minutes*, NSW Legislative Council, 13 October 1998, pp 744-747, 749-752. This provision was extended in the subsequent resolution of the House of 2 December 1998 permanently adopting during the session and unless otherwise ordered procedural provisions addressing claims of privilege in returns to orders. See *Minutes*, NSW Legislative Council, 2 December 1998, pp 997-1000. However, for reasons that are not clear, this provision was not extended to the new standing order 52, as first adopted as a sessional order for trial in 2003. For further information, see the discussion in Ohnesorge and Duffy, 'Evading Scrutiny: Orders for Papers and Access to Cabinet Information by the New South Wales Legislative Council', (n 278), pp 130-131.

Was *Egan v Chadwick* correctly decided in relation to Cabinet documents?

Whilst as discussed above the correct interpretation of the law as established in *Egan v Chadwick* in relation to Cabinet documents remains in dispute, a further issue in relation to Cabinet documents is whether *Egan v Chadwick* was correctly decided in the first place.

It is well established that the courts have the power to compel production of documents relating to Cabinet deliberations, based on the authority of *Sankey v Whitlam*[338] and *Commonwealth v Northern Land Council*.[339] Where once a certificate from a minister certifying that a document was a Cabinet document and should not be disclosed in the public interest was conclusive and non-examinable by a court,[340] the courts now assert the right to examine Cabinet documents, 'even if, as in the case of records of Cabinet deliberations, the highest degree of protection against disclosure is warranted'.[341]

If the courts have the power to compel production of Cabinet documents, the question arises why the Houses of the Parliament should not have the same power, particularly when regard is had to the constitutional role of the Council in reviewing the actions of the executive and holding it to account. This point was made by Priestley JA in *Egan v Chadwick*, when he observed:

> The function and status of the Council in the system of government in New South Wales require and justify the same degree of trust being reposed in the Council as in the courts when dealing with documents in respect of which the Executive claims public interest immunity. … The carrying out of the duty will, in regard to certain cabinet documents, require the same very high degree of circumspection mandated for the courts by the High Court in the *Commonwealth v Northern Land Council* case (at 617-619) already referred to.[342]

A similar observation was made by the Hon Sir Anthony Mason, former Chief Justice of Australia, in an article published in 2014.[343] As Priestley JA did in *Egan v Chadwick*, Sir Anthony Mason referred to passages taken from the majority judgment of the High Court (of which Sir Anthony Mason was Chief Justice) in *Northern Land Council*, which clearly acknowledge the existence of the power of the courts to order the production of

338 (1978) 142 CLR 1.

339 (1993) 176 CLR 604.

340 *Duncan v Cammell, Laird and Co Ltd* [1942] AC 624 at 636 per the Lord Chancellor.

341 *Commonwealth v Northern Land Council* (1993) 176 CLR 604 at 617-618 per Mason CJ, Brennan, Deane, Dawson, Gaudron and McHugh JJ. For further information tracking the evolution of the treatment of Cabinet information by the courts through the decisions in *Duncan v Cammell, Laird and Co Ltd* [1942] AC 624, *Conway v Rimmer* [1968] AC 910, *Sankey v Whitlam* (1978) 142 CLR 1 and *Northern Land Council* (1993) 176 CLR 604, see Ohnesorge and Duffy, 'Evading Scrutiny: Orders for Papers and Access to Cabinet Information by the New South Wales Legislative Council', (n 278), pp 121-123.

342 *Egan v Chadwick* (1999) 46 NSWLR 563 at 594 per Priestley JA.

343 A Mason, 'The Parliament, the Executive and the Solicitor-General', in G Appleby, P Keyzer and J Williams (eds), *Public Sentinels: A Comparative Study of Australian Solicitors-General*, (Ashgate, 2014).

Cabinet documents, even if that power is used only in exceptional circumstances.[344] Sir Anthony Mason continued:

> The majority in *Egan v Chadwick* did not refer to the passages quoted above. The majority judgments proceeded as if these passages did not exist. On the other hand, Priestley JA relied on these passages in concluding that the courts have power to order production of Cabinet documents, even if the power will be exercised only in exceptional circumstances, if at all. He was right to do so. If claims for privilege for such documents are not treated as conclusive in the courts, why should they be treated differently in Parliament?[345]

The same opinion was expressed by Mr Bret Walker SC in a paper presented to the annual Harry Evans Lecture at Parliament House, Canberra, on 1 December 2017.[346] He argued that the positions adopted by Spigelman CJ and Meagher JA in *Egan v Chadwick* failed to accord to the Legislative Council control over its proceedings, for its own functions, that the courts have pronounced that they have over their own. Also citing the authority of *Northern Land Council*, Mr Walker observed that in the law courts, there is no absolute bar against the compulsory disclosure or tender into evidence of even the most core Cabinet documents, and that the courts are able to balance the competing interests of the administration of justice and Cabinet secrecy. He suggested that Parliament should be able to do the same,[347] and disagreed with the position expressed by Meagher JA in *Egan v Chadwick* that: 'No process can arise for the courts – or anyone else – balancing interests against each other.'[348]

Sharon Ohnesorge and Beverly Duffy have summarised recent court cases in New South Wales concerning the production of Cabinet papers,[349] citing *State of New South Wales v Public Transport Ticketing Corporation*,[350] *R v Obeid (No 9)*,[351] and *Ku-ring-gai Council v Garry West as delegate of the Acting Director-General, Office of Local Government*.[352] In those cases, the courts in New South Wales have taken into account a range of factors in

344 One of the passages cited by Sir Anthony Mason was the following passage: 'In the case of documents recording the actual deliberations of Cabinet, only considerations which are indeed exceptional would be sufficient to overcome the public interest in their immunity from disclosure, they being documents with a pre-eminent claim to confidentiality.'

345 Mason, 'The Parliament, the Executive and the Solicitor-General', (n 342), p 63.

346 Walker SC, 'Justified Immunity or Unfinished Business? The Appropriateness of Parliamentary and Executive Immunities in the 21st Century', (n 278).

347 Ibid, pp 9-10.

348 *Egan v Chadwick* (1999) 46 NSWLR 563 at 597 per Meagher JA. See Walker SC, 'Justified Immunity or Unfinished Business? The Appropriateness of Parliamentary and Executive Immunities in the 21st Century', (n 278), p 10. See also Mr Walker SC's keynote address to the Proceedings of the C25 Seminar marking 25 years of the committee system in the Legislative Council, 20 September 2013. See also submissions before the Royal Commission into the Home Insulation Program, Brisbane, 14 May 2014.

349 Ohnesorge and Duffy, 'Evading Scrutiny: Orders for Papers and Access to Cabinet Information by the New South Wales Legislative Council', (n 278), pp 121-123.

350 [2011] NSWCA 60.

351 [2016] NSWSC 520.

352 (2017) 95 NSWLR 1.

assessing the public interest immunity attaching to Cabinet documents, including: the nature of the Cabinet document, for example whether it discloses the actual deliberations of Cabinet or was merely submitted to Cabinet; the subject matter of the document, including whether that subject matter concerns policy development or a commercial dispute; the importance of the document to the proceedings; whether the proceedings are civil or criminal in nature; the circumstances in which the document was prepared, including any applicable statutory scheme; and whether the document was prepared by a consultant external to government. The weight accorded to any one of these factors will vary according to the circumstance of the case. If necessary, the court will inspect the documents in question in determining the claim.[353]

To justify their finding that (certain) Cabinet documents are immune from production to the Legislative Council, Spigelman CJ and Meagher JA referred extensively to the doctrine of collective ministerial responsibility to Cabinet, which they suggested was an obstacle to the power of the House to compel production of Cabinet documents. The logic of such an approach, overriding as it does one of the core constitutional functions of the Legislative Council, was further doubted by Sir Anthony Mason in 2014:

> The statement that Cabinet confidentiality reflects the principle of collective responsibility means no more than that confidentiality is an important incident of, and conducive to, collective responsibility in promoting and maintaining full and frank deliberations in Cabinet. To say, as the majority in *Egan v Chadwick* did, that this element of ministerial responsibility is to prevail over the role of a House in securing accountability of government, inverts the true order of constitutional priorities and the right of the public to be fully informed about the activities of its government, and have those activities scrutinised by their elected representatives. Curiously enough, Spigelman CJ referred to the statement of Lord Chancellor Haldane on responsible government in which he said that the executive 'is almost the creature' of the legislature (*Egan v Chadwick*: 569). Today there are those who would say that the Executive dominates the Legislature, at least the Lower House if not the Senate in the Australian Parliament, though that domination is at odds with Parliament's historic purpose. To weaken the Parliament's oversight of the Executive by denying a House power to compel the production of documents recording Cabinet deliberations would be to subtract further from Parliament's historic role of oversight and holding the Executive to account.
>
> The passage from the judgments of Gaudron, Gummow and Hayne JJ in *Egan v Willis* (at 451), quoted above,[354] a passage not mentioned by the majority in

353 Citing *State of New South Wales v Public Transport Ticketing Corporation* [2011] NSWCA 60 and *R v Obeid (No 9)* [2016] NSWSC 520. See Ohnesorge and Duffy, 'Evading Scrutiny: Orders for Papers and Access to Cabinet Information by the New South Wales Legislative Council', (n 278), p 123.

354 The passage cited by Sir Anthony Mason was the following passage: 'A system of responsible government traditionally has been considered to encompass "the means by which Parliament brings the Executive to account" so that "the Executive's primary responsibility in its prosecution of government is owed to Parliament". The point was made by John Stuart Mill, writing in 1861, who spoke of the task of the legislature "to watch and control the government: to throw the light of publicity on its acts". It has been said of the contemporary position in Australia that, whilst "the primary role of Parliament is to pass laws, it also has important functions to question and criticise

> *Egan v Chadwick*, makes it clear that securing the accountability of government activity is the 'very essence' of responsible government. If there is to be a collision between the attainment of this object and the preservation of Cabinet confidentiality, then the former must prevail over the latter.[355]

Mr Bret Walker SC in his article also questioned the position adopted by Spigelman CJ in *Egan v Chadwick* that the Council has the power to compel the production of documents subject to a claim of public interest immunity, based on the 'high constitutional functions' of legislating and enforcing accountability of the executive, but that this power does not extend to Cabinet documents, which Mr Walker suggested might be thought 'a peculiarly useful resort by the chamber in the course of such scrutiny'.[356] Mr Walker argued that the answer given by Spigelman CJ to this apparent contradiction, namely the 'existence of an inconsistency or conflict' between the power of the Council to order the production of State papers and the doctrine of ministerial responsibility, ultimately places secrecy in relation to the heart of executive decision making above the role of an Upper House in holding the executive to account for its decision making.[357]

The status of Cabinet documents appears likely to be an ongoing issue for both the Legislative Council and the executive government. In the first instance, such matters are for the Legislative Council to address. However, the possibility cannot be ruled out that they may again be the subject of further legal challenge.

Orders for the production of State papers not in the custody or control of a minister

The power of the Legislative Council to order the production of State papers is not confined to documents in the custody or control of ministers, and the departments and agencies that report to them. Rather, the power extends to any State papers, including papers held by statutory authorities and public utilities.

In 1996 in *Egan v Willis and Cahill*, Priestley JA gave the following guidance on what documents fall within the boundaries of reasonable necessity:

> In my opinion it is well within the boundaries of reasonable necessity that the Legislative Council have power to inform itself of any matter relevant to a subject on which the legislature has power to make laws. The common law as it operates in New South Wales today necessarily implies such a power, in my opinion, in the two parts ordinarily called parliament and the three part legislature. This seems to me to be a necessary implication in light of the very broad reach of the legislative power of the legislature and what seems to me to be the imperative need for both the Legislative Assembly and Legislative Council to have access

---

government on behalf of the people" and that "to secure accountability of government activity is the very essence of responsible government"'.

355 Mason, 'The Parliament, the Executive and the Solicitor-General', (n 342), p 64.

356 Walker SC, 'Justified Immunity or Unfinished Business? The Appropriateness of Parliamentary and Executive Immunities in the 21st Century', (n 278), p 12.

357 Ibid, pp 12-13.

> (and ready access) to all facts and information which may be of help to them in considering three subjects: the way in which existing laws are operating; possible changes to existing laws; and the possible making of new laws.[358]

This position was cited with approval by the majority in *Egan v Willis* in 1998.[359] The majority also cited with approval both the broad definition of State papers adopted by Gleeson CJ in *Egan v Willis and Cahill* as 'papers which are created or acquired by ministers, office-holders, and public servants by virtue of the office they hold under, or their service to, the Crown in right of the State of New South Wales',[360] together with the judgment in *Lange v Australian Broadcasting Corporation* the previous year which found that:

> … the conduct of the executive branch is not confined to Ministers and the public service. It includes the affairs of statutory authorities and public utilities which are obliged to report to the legislature or to a Minister who is responsible to the legislature.[361]

However, questions arise as to the mechanism by which the Legislative Council may secure the production of State papers from statutory authorities, public utilities and the like that are not under the direct control of a minister.

In legal advice provided by the Solicitor General and Ms Mitchelmore of Counsel to the government in 2014 in relation to the order for papers process, they observed:

> In relation to statutory bodies, there is always a responsible minister in the sense of one designated under the Administrative Arrangements Order. However, whether or not a Minister can call for documents from such a body will depend on the terms of its relevant constituting statute, …
>
> In the case of the Independent Commission Against Corruption, s 111 of the Independent Commission Against Corruption Act 1988 appears to prevent the Commissioner or an officer of the Commission from divulging any information in connection with the exercise of their functions under the legislation, being information acquired by reason of or in the course of the exercise of those functions, except in circumstances that would not be relevant to the response by a Minister to an order of the Council.
>
> In the case of statutory State-owned corporations (SOC), s 20P of the State Owned Corporations Act 1989 allows the portfolio Minister, with the approval of the Treasurer, to give the board a written direction in relation to the SOC and its subsidiaries if the portfolio Minister is satisfied that, because of exceptional circumstances, it is necessary to give the direction in the public interest. Arguably this would allow the portfolio Minister to call for documents sought by the

358 *Egan v Willis and Cahill* (1996) 40 NSWLR 650 at 692-693 per Priestley JA.

359 *Egan v Willis* (1998) 195 CLR 424 at 454 per Gaudron, Gummow and Hayne JJ.

360 Ibid, at 442 per Gaudron, Gummow and Hayne JJ.

361 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 561, cited in *Egan v Willis* (1998) 195 CLR 424 at 452 per Gaudron, Gummow and Hayne JJ.

> Council. It might be noted, however, that there is no similar ministerial power in relation to company State-owned corporations.[362]

The power of the Legislative Council to order the production of papers by statutory bodies and State-owned corporations has arisen on a number of occasions.

On 6 May 2011, the House sought the production of documents in the possession, custody or control of SAS Trustee Corporation, amongst other agencies, in relation to the eligibility of John Flowers MP[363] to be elected to and hold a seat in the Legislative Assembly.[364] In advice to the SAS Trustee Corporation dated 18 May 2011, the Crown Solicitor took the view that the Legislative Council could not require the minister administering the *Superannuation Administration Act 1996* to produce documents relating to Mr Flowers as the minister's power of direction and control did not extend to requiring production of documents relating to an individual member of Parliament. The Crown Solicitor also took the view that the SAS Trustee Corporation was prohibited from providing the documents under the *Privacy and Personal Information Protection Act 1998*.[365]

As discussed in Chapter 3 (Parliamentary privilege in New South Wales), such statutory secrecy provisions have no application to Parliament, unless they alter the law of privilege by express words or by 'necessary implication'. In the event, however, the material was not provided, and the House did not pursue the matter further.

The matter arose again in 2013, when the Council ordered the production of certain documents in the possession, custody or control of the Office of Liquor, Gaming and Racing and Greyhound Racing NSW.[366] On receipt, the return to order included documents from the Office of Liquor, Gaming and Racing but not from Greyhound Racing NSW. Correspondence accompanying the return to order asserted that 'Greyhound Racing NSW … does not represent the Crown and is not subject to direction or control by or on behalf of the government'.[367]

The matter was brought to a more satisfactory conclusion in 2015. On 9 September 2015, the House again ordered the production of documents in the possession, custody or control of Greyhound Racing NSW concerning alleged instances of 'live baiting' in the

---

362 Solicitor General and A Mitchelmore, 'Question of powers of Legislative Council to compel production of documents from executive', 9 April 2014, pp 4-5. The advice was tabled in the House on 6 May 2014. See *Minutes*, NSW Legislative Council, 6 May 2014, pp 2458-2459.

363 Mr Flowers was in receipt of a pension which reportedly could have disqualified him from being a member of Parliament under the *Constitution Act 1902*.

364 *Minutes*, NSW Legislative Council, 6 May 2011, p 64.

365 Crown Solicitor, 'Flowers J F – SO 52 Call for Papers', Advice to SAS Trustee Corporation, 18 May 2011; attached to correspondence from General Counsel to the Clerk, 20 May 2011. The correspondence was tabled in the House on 24 May 2011. See *Minutes*, NSW Legislative Council, 24 May 2011, p 115.

366 *Minutes*, NSW Legislative Council, 27 November 2013, pp 2268-2269.

367 Correspondence from the Acting Director General of the Department of Premier and Cabinet to the Clerk, 4 December 2013. The correspondence was tabled in the House on 30 January 2014. See *Minutes*, NSW Legislative Council, 30 January 2014, p 2304.

greyhound industry. In response, on 14 September 2015, the General Counsel of the Department of Premier and Cabinet again advised:

> Section 5 ('GRNSW independent of Government') of the Greyhound Racing Act 2009 provides that Greyhound Racing NSW does not represent the Crown and is not subject to direction or control by or on behalf of the government.[368]

The Clerk, with the concurrence of the President, subsequently sought advice from Mr Bret Walker SC, which the President tabled in the House on 18 November 2015.[369] In his advice, Mr Walker argued that the practice of committing public administration to entities not subject to ministerial control was not capable of shrinking the range of documents of which the Council may compel production. He observed:

> It would be perverse to suppose that Parliament has enacted the existence and nature of such authorities in order to remove the public affairs for which they are responsible from Parliament's own scrutiny. At least, plain language or necessary intendment would be called for before reaching such a startling conclusion.[370]

He further advised that so-called 'independent' entities, groups or persons with public functions, such as Greyhound Racing NSW, are amenable to orders for papers addressed directly to them by the Council, and that Greyhound Racing NSW was compelled to comply with the House's order.[371]

Mr Walker also posited that the power to order the production of State papers may also be supported by the *Parliamentary Evidence Act 1901*.[372] Noting that section 4(1) of the act provides that a person (not being a Member) 'may be summoned to attend and give evidence before the Council …', Mr Walker reasoned:

> the word 'evidence' itself plainly includes written as well as spoken information, as shown on innumerable occasions in reports to the Council by its committees over many years. In the courts of law, of course, the term 'evidence' has always included documents which become exhibits upon tender, as well as spoken testimony (or affidavits and witness statements, being the written equivalent of testimony).[373]

---

368 Correspondence from Paul Miller, General Counsel, to the Clerk, 14 September 2015. The correspondence was tabled in the House on 15 September 2015. See *Minutes*, NSW Legislative Council, 15 September 2015, p 396.

369 *Minutes*, NSW Legislative Council, 18 November 2015, p 608.

370 B Walker SC, 'Parliament of New South Wales, Legislative Council: Orders for Papers from bodies not subject to direction or control by the Government', p 11.

371 Ibid, pp 15-16.

372 *New South Wales Legislative Assembly Practice, Procedure and Privilege* refers to an advice by the Crown Solicitor which appears to have reached the opposite conclusion. See RD Grove, M Swinson and S Hesford (eds), *New South Wales Legislative Assembly Practice, Procedure and Privilege*, 1st ed, (Department of the Legislative Assembly, 2007), p 300.

373 B Walker SC, 'Parliament of New South Wales, Legislative Council: Orders for Papers from bodies not subject to direction or control by the Government', p 14.

Consistent with this advice, on 14 September 2016, the Council passed a new order for papers held by Greyhound Racing NSW, to be forwarded directly to Greyhound Racing NSW, citing in part the advice of Mr Walker.[374] Whilst the order for papers continued to rely on the common law power of the House to order the production of State papers, in the event of further non-compliance, the House clearly contemplated summoning the Chair of Greyhound Racing NSW under the *Parliamentary Evidence Act 1901* to appear at the Bar of the House to give reasons for any continued non-compliance with the order. In the event, Greyhound Racing NSW fully complied with the order for papers on 12 October 2016.[375]

Issues have also arisen in relation to orders for the production of papers by so-called 'watchdog' agencies such as the Independent Commission Against Corruption and the Audit Office which report directly to Parliament.

On 24 February 2005, the House ordered the production of papers relating to road tunnel filtration from a number of departments and agencies, but also from the Audit Office.[376] In correspondence attached to the return, the Director General of the Department of Premier and Cabinet advised that no response had been received from the Auditor General.[377] The House did not pursue the matter further.

In 2008, the question arose as to the capacity of the House to order the production of a report prepared for the Audit Office by Lexicon Partners. The report was commissioned by the Audit Office to review the assumptions and attestations of the government and its advisers in relation to the proposed electricity industry restructuring, and was referred to extensively in an Audit Office report tabled with the Clerk on 21 August 2008 entitled 'Oversight of Electricity Industry Restructuring'. Relevant to the question was advice provided by the Crown Solicitor to the Auditor General in 2001 concerning the power of the Public Accounts Committee of the Legislative Assembly to require the production by the Auditor General of working papers of the Audit Office. In his advice, the Crown Solicitor suggested that:

> The voluntary disclosure by the Auditor General of a document to a Minister for the purpose only of the Minister responding to an order for production under Standing Order 310 would be a breach of the statutory obligation in s 38(1) [of the *Public Finance and Audit Act 1983*].[378]

374 *Minutes*, NSW Legislative Council, 14 September 2016, p 1123-1124.

375 *Minutes*, NSW Legislative Council, 12 October 2016, p 1137.

376 *Minutes*, NSW Legislative Council, 24 February 2005, p 1251.

377 Correspondence from the Director General of the Department of Premier and Cabinet to the Clerk, 19 March 2005. The correspondence was tabled in the House on 22 March 2005. See *Minutes*, NSW Legislative Council, 22 March 2005, p 1283.

378 Crown Solicitor, 'Production of documents to the Public Accounts Committee by the Auditor General', Advice to the Auditor General, 1 February 2001, para 4.3, published in *Auditor-General's Report to Parliament 2001*, Volume One, pp 211-216. See also Crown Solicitor, 'Notice of motion by Mr Richard Jones MLC for the production of documents relating to Walsh Bay tender', Advice to the Auditor General, published in *Auditor-General's Report to Parliament 1999*, vol 2, pp 387-388.

In the event, the House did not order the production of the Lexicon report.

The matter has not been revisited since, with the result that the status of documents held by agencies such as the Audit Office and the Independent Commission Against Corruption remains unresolved. However, it seems inconceivable that in establishing such agencies by legislation, with the express purpose of monitoring the activities of the executive government and reporting on those activities to Parliament, that the Parliament should have intended to place those agencies beyond the reach of parliamentary oversight of their activities. It may well be that in future, orders for the production of papers from such 'watchdog' agencies are made directly to the relevant commissioner or director-general, as with orders for papers directed to statutory bodies and State-owned corporations, rather than through the executive government.[379]

The effect of prorogation on orders for the production of State papers

There is disagreement between the Legislative Council and the executive government as to the enforceability of orders for papers when a return has not been received prior to prorogation of the House.

The Council takes the view that prorogation has no effect on outstanding orders for papers. The act of prorogation brings to an end a session of the Parliament and in practice all business pending before the House. However, as a continuing House, there is no apparent reason why resolutions of the House in place at the time of prorogation should lapse. There are numerous examples since 1856 where the government routinely complied with orders for the production of State papers in a subsequent session of Parliament without the necessity of a further order.[380]

However, in May 2006, at the commencement of the second session of the 53rd Parliament, the government refused to provide a return to order in relation to four orders for papers from the previous session. Correspondence from the Director General of the Department of Premier and Cabinet to the Clerk indicated that the government had received advice from the Crown Solicitor that orders for papers outstanding at the time of prorogation

379 However, an arguable position has been put by Ms Mitchelmore SC that the precise statutory provisions concerning the preparation of draft and final reports by independent 'watchdog' agencies may necessarily imply a restriction on the capacity of Council committees to order the production of a draft report. By extension, this may by necessary implication also possibly apply to the House. See A Mitchelmore SC, 'Powers of Legislative Council Portfolio Committee No 4 in the context of its Inquiry into Budget Estimates 2018-2019', Legal Advice, 19 November 2018. The advice was published in Portfolio Committee 4, *Budget Estimates 2018-2019*, Report No 39, February 2019, Appendix 3, Item 7.

380 The first occasion was in 1858 and 1859 between the first and second sessions of the 2nd Parliament. On 29 July 1858, in the first session of the 2nd Parliament, the House ordered the production of certain papers in relation to land reserves in Sydney and the suburbs for recreation purposes. See *Minutes*, NSW Legislative Council, 29 July 1858, p 58. The return to order was subsequently tabled in the second session of the 2nd Parliament on 27 January 1859. See *Minutes*, NSW Legislative Council, 27 January 1859, p 11.

had lapsed and that there was no power to restore the orders in the new parliamentary session.[381] Consequently, no documents were produced in respect of the four orders.

In response, the House passed four new orders for the papers in terms similar to the original orders. Each of the new orders noted that the government would not be producing papers in respect of the earlier resolutions, despite the fact that 'there are many established conventions recorded in the *Journals* of the Legislative Council where the government has complied with an order of the House for State papers in the subsequent session'.[382] The documents were eventually tabled.[383]

ADDRESSES TO THE GOVERNOR FOR DOCUMENTS

Standing order 53 provides that the production to the House of papers concerning (a) the royal prerogative, (b) dispatches or correspondence to or from the Governor, or (c) the administration of justice, should be by way of an address to the Governor requesting that the documents be laid before the House.

The distinction between the application of standing order 53 and standing order 52 is that standing order 53 applies to matters that fall within the purview of the Crown and the courts, notably the administration of justice, whereas standing order 52 applies to matters that fall within the purview of the executive government.

Between 1856 and 1899, addresses to the Governor for documents were many and varied. Most addresses appear to have related to the administration of justice,[384] with some concerning correspondence to and from the Governor,[385] and few if any touched on the royal prerogative.[386] On the whole, the Governor acceded to the requests.[387] However, during the 20th century such addresses fell into disuse, with only three such addresses in 1900,[388] 1903[389] and 1948,[390] and an unsuccessful motion for an address in 1987.[391]

---

381 *Minutes*, NSW Legislative Council, 25 May 2006, p 47.

382 *Minutes*, NSW Legislative Council, 25 May 2006, pp 53-57; 6 June 2006, pp 70-72; 8 June 2006, pp 119-120.

383 *Minutes*, NSW Legislative Council, 6 June 2006, p 75; 8 June 2006, p 125; 29 August 2006, pp 142-143.

384 Examples included addresses in relation to court convictions, custody of prisoners at watch houses constituted as gaols, Supreme Court fees and expenses, criminal statistics and convictions for capital punishment.

385 For example, an address in relation to correspondence concerning Sir William Westbrooke Burton's resignation as President of the Legislative Council.

386 A possible example is an address in relation to the use of the Great Seal.

387 *Consolidated Index to the Minutes of Proceedings and Printed Papers*, NSW Legislative Council, 1856-1874, vol 1, pp 25-27; 1874-1893, vol 2, pp 20-22; 1894-1913, vol 3, p 11.

388 *Minutes*, NSW Legislative Council, 8 August 1900, p 68. The address concerned the courts and offices in Chancery Square.

389 *Minutes*, NSW Legislative Council, 25 November 1903, p 152. The address concerned the Hon Sir John Lackey's resignation as President of the Legislative Council.

390 *Minutes*, NSW Legislative Council, 17 August 1948, p 208. The address concerned the release of a prisoner after serving only part of a commuted sentence.

391 *Minutes*, NSW Legislative Council, 24 March 1987, p 705. The address concerned a case of child sexual assault.

The production of documents concerning the administration of justice arose as an issue again on 19 March 2002, when a notice of a motion was given under former standing order 18 (now standing order 52) calling for the production of documents relating to the conviction and custody of a prison inmate, Mr Phuong Ngo. In 2001, Mr Ngo had been convicted of ordering the killing of John Newman MP, a member of the Legislative Assembly. On the notice being given, the Leader of the Government in the Legislative Council, the Hon Michael Egan, took a point of order that production of papers concerning the administration of justice must be sought by address to the Governor under then standing order 19. The President reserved her ruling.[392] On 9 April 2002, she tabled in the House a detailed advice from the Crown Solicitor.[393]

In that advice, the Crown Solicitor considered the origins and rationale for the procedure of obtaining papers by address to the Crown, citing a passage from the 4th edition of *Erskine May*, published in 1859, which specifically referred to the administration of justice as one matter requiring an address to the Crown rather than an order for papers. The Crown Solicitor also noted that case law makes clear that the constitution and operation of the courts is a primary function of the Crown, protected from interference.[394]

The Crown Solicitor then turned to consider the meaning of the expression 'the administration of justice' used in standing order 19, now standing order 53.

The Crown Solicitor argued that it is reasonably clear that papers concerning actual court proceedings constitute papers concerning 'the administration of justice', as do papers concerning the custody of a person following a conviction for a criminal offence, so long as they have a relationship to the actual court proceedings, for example the conditions of custody as specified in the sentence of the court. However, questions arise as to whether the meaning of the phrase extends to include papers concerning police investigations which may or may not lead to court proceedings.[395]

In this regard, the Crown Solicitor referred to the 1920 decision of the Supreme Court of Canada in *Kalick v The King*,[396] in which Brodeur J observed that the expression 'the administration of justice' 'includes the taking of necessary steps to have a person who has committed an offence brought before the proper tribunal, and punished for his offence'.[397] However, in 1992 in *The Queen v Rogerson*,[398] the High Court of Australia rejected the proposition that police investigations could themselves be treated as part of the course of justice,[399] although members of the court acknowledged that attempts

392 *Minutes*, NSW Legislative Council, 19 March 2002, p 69.
393 Crown Solicitor, 'Standing order 19: Administration of Justice', 26 March 2002. See *Minutes*, NSW Legislative Council, 9 April 2002, p 99.
394 Crown Solicitor, 'Standing order 19: Administration of Justice', 26 March 2002, p 5.
395 Ibid, pp 8-9.
396 (1920) 59 SCR 175.
397 *Kalick v The King* (1920) 59 SCR 175 at 186 per Brodeur J.
398 (1992) 174 CLR 268.
399 *The Queen v Rogerson* (1992) 174 CLR 268 at 283 per Brennan and Toohey JJ, at 298-299 per McHugh J.

could be made during a police investigation to pervert the course of justice, such as an act calculated to mislead the police.[400] As stated by Brennan and Toohey JJ:

> Neither the police nor other investigative agencies administer justice in any relevant sense … it is their function to bring or to assist in bringing prosecutions as part of their duty to enforce the law and, sometimes, to institute proceedings of a disciplinary nature before an appropriate tribunal under an applicable disciplinary code.
>
> …
>
> Although police investigations into possible offences against the criminal law or a disciplinary code do not form part of the course of justice, an act calculated to mislead the police during investigations may amount to an attempt to pervert the course of justice.[401]

McHugh J in turn observed:

> The course of justice, like the judicial function, 'is inseparably bound up with the idea of a suit between parties, whether between the Crown and subject or between subject and subject'.
>
> …
>
> Nevertheless, in some circumstances, a false statement made to a police officer in the course of the investigation of an actual, alleged or suspected crime can constitute the offence of attempting to pervert the course of justice even though no judicial proceedings have been commenced.[402]

Based on these authorities, the Crown Solicitor noted that there may be a 'narrow' view that only papers which refer to identifiable curial proceedings fall within the meaning of 'the administration of justice'. That view is that papers recording police investigations of an offence will not 'refer to' the administration of justice because they do not refer to or deal with the curial proceedings which follow, an argument the Crown Solicitor acknowledged is arguable.[403] However, the Crown Solicitor preferred a somewhat broader view:

> The broader view is that a Paper will be one having reference to the administration of justice if it contains material which relates to the administration of justice. Thus, if conduct in the course of a police investigation may constitute conduct which interferes with the administration of justice in the sense described in *Rogerson*, it is difficult to see how a Paper dealing with such conduct would not be one 'having reference to the Administration of Justice'. A literal reading of the Standing Order might support the 'narrow' view. However, it seems to me that the object and purpose of the Standing Order are more consistent with the broader view.[404]

---

400 Ibid, at 294 per Deane J, at 284 per Brennan and Toohey JJ, at 304-305 per McHugh J.

401 Ibid, at 283-284 per Brennan and Toohey JJ.

402 Ibid, at 304-305 per McHugh J.

403 Crown Solicitor, 'Standing order 19: Administration of Justice', 26 March 2002, p 10.

404 Ibid, p 9.

Despite the Crown Solicitor adopting this 'broader' view, the decision in *Rogerson* is clear authority that police investigations are not part of the 'course of justice', which Mason CJ noted is synonymous with 'the administration of justice'.[405] As stated by Mason CJ:

> But police investigations do not themselves form part of the course of justice. The course of justice begins with the filing or issue of proceedings invoking the jurisdiction of a court or judicial tribunal or the taking of a step that marks the commencement of criminal proceedings.[406]

On 10 April 2002 the House debated further the notice of motion given in relation to Mr Ngo before the President ruled out of order certain paragraphs of the notice on the basis that they concerned the administration of justice, and that the documents should be sought under standing order 19 rather than standing order 18. Those paragraphs included the full police brief of evidence for the trial of Mr Ngo, records of certain police interviews in relation to the investigation of Mr Newman's murder, and police reports concerning Mr Ngo's alleged gang involvement, to the extent that they contained material sufficiently related to prospective court proceedings. Other paragraphs of the motion calling for documents relating to functions at, and visitors to, the correctional facility at which Mr Ngo was detained were allowed to stand as they were not deemed sufficiently connected to the execution of the court's sentence to refer to the administration of justice.[407] In the event, however, the motion was never moved.

The production of documents concerning the administration of justice arose again in October 2004 when a motion was moved under standing order 52 calling for the production of 'any advice provided to any minister or government agency by the Solicitor General, Crown Solicitor or the Crown Advocate relating to Operation Auxin', a police operation.[408] Various points of order were taken, citing the 2002 advice of the Crown Solicitor noted above and also previous advices of the Crown Solicitor relating to standing order 52. In the event, the President ruled the motion out of order on the basis that it called for papers which related to 'police investigations and prospective court proceedings', and thus fell within the administration of justice under standing order 53.[409] On the basis of the decision in *Rogerson*, there is doubt whether this ruling was correctly made.

By contrast, in October and November 2006, the House ordered the production of papers under standing order 52 concerning the Sorrenson-Jefferies Report, produced in the aftermath of the Cronulla riots, and a report on a police operation, 'Operation Retz', without any objection being taken that they concerned the administration of justice.[410]

---

405 *The Queen v Rogerson* (1992) 174 CLR 268 at 276 per Mason CJ.

406 Ibid.

407 Ruling: Burgmann, *Hansard*, NSW Legislative Council, 10 April 2002, pp 1194-1195.

408 *Minutes*, NSW Legislative Council, 21 October 2004, p 1058.

409 Ruling: Burgmann, *Hansard*, NSW Legislative Council, 21 October 2004, pp 11765-11766.

410 *Minutes*, NSW Legislative Council, 19 October 2006, pp 282-283; 25 October 2006, p 302; 23 November 2006, p 425.

The matter arose again in February and March 2020, when a motion was moved under standing order 52 for the production of documents related to a police investigation into a car collision involving the Minister for Police and Emergency Services. On a point of order being taken that the order should be made under standing order 53, President Ajaka ruled that the motion was in order, citing the judgments of Mason CJ and Brennan and Toohey JJ in *Rogerson*.[411] The order was agreed to by the House on 13 May 2020.[412]

In June 2020, a separate issue arose in relation to the meaning of the administration of justice following the moving of a motion under standing order 52 ordering the production of documents in relation to economic modelling of public sector wages. The Leader of the Government in the Legislative Council took a point of order that the government had announced its intention to commence proceedings concerning public sector wages in the Industrial Relations Commission of New South Wales, and that therefore the papers in question concerned the administration of justice and should be sought under standing order 53. The President did not uphold the point of order, on the basis that the papers sought were created before the government's announcement of its intention to take the matter to the Industrial Relations Commission. The question of whether industrial matters before the Industrial Relations Commission constitute the administration of justice was not required to be determined.[413]

Since 2005, there have been five occasions on which the House has adopted an address to the Governor for documents under standing order 53. However, on each occasion, the Governor refused to provide the requested documents on the advice of the Executive Council:

- On 15 September 2005, the House adopted an address to the Governor under standing order 53 seeking the production of documents concerning a paroled offender who had been transferred to New South Wales from interstate.[414] On 11 October 2005, the Clerk tabled correspondence from the Official Secretary to the Governor stating that on the advice of the Executive Council the Governor had declined the request, based on the possible impact of disclosure on the future provision of information from other jurisdictions, the possible impact on the victims of the offender in the case, and the possible impact on the likelihood of victims of assault coming forward in the future.[415]
- On 2 September 2009, the House adopted two motions for the production of documents relating to the removal by the Governor of the Hon Anthony Stewart from the ministry. The first motion was made under standing order 52. However, the second motion sought documents relating to the legal

411 Ruling: Ajaka, *Hansard*, NSW Legislative Council, 24 March 2020, pp 67-68.
412 *Minutes*, NSW Legislative Council, 13 May 2020, pp 937-938.
413 Ruling: Ajaka, Hansard, NSW Legislative Council, 3 June 2020 pp 67-68 (proof).
414 *Minutes*, NSW Legislative Council, 15 September 2005, p 1568.
415 Correspondence from Brian Davies, Official Secretary to the Governor, to the Clerk, 4 October 2005. The correspondence was tabled in the House on 11 October 2005. See *Minutes*, NSW Legislative Council, 11 October 2005, p 1611.

proceedings concerning Mr Stewart's removal, and was therefore made under standing order 53.[416] On 20 October 2009, the Clerk tabled correspondence from the Acting Official Secretary to the Governor stating that on the advice of the Executive Council the Governor had declined the request on the basis that the documents were subject to legal privilege and that legal proceedings were still current.[417]

- On 18 March 2010, the House adopted an address to the Governor under standing order 53 seeking the production of documents from 1870 in relation to the pursuit, capture, and autopsy of the person presumed to be 'Captain Thunderbolt', purported to be the longest roaming bushranger in Australian history.[418] On 22 April 2010, the Clerk tabled correspondence from the Acting Official Secretary to the Governor stating that on the advice of the Executive Council the Lieutenant Governor had declined the request on the grounds that the documents were over a century old and that historical research of archived colonial records could be undertaken through the State Records Authority.[419]

- On 25 November 2010, the House adopted an address to the Governor under standing order 53 seeking the production of documents from the Minister for Climate Change and the Environment and the Department of Environment, Climate Change and Water in relation to any court process by or on behalf of the Environment Protection Authority, the Department or the Minister against Birdon Marine Pty Ltd or any related corporation in relation to land at Port Macquarie.[420] On 4 May 2011, the Clerk tabled correspondence from the Official Secretary to the Governor indicating that all documents that fell within the scope of the resolution would be produced in accordance with a separate order under standing order 52, but that it would be preferable for the Governor not to produce documents that were preparatory to a court process.[421]

- On 20 November 2014, the House adopted an address to the Governor under standing order 53 seeking the production of documents in relation to warrants and judgments issued by Bell and Dowd JJ in the Supreme Court in 2000. As part of the address, for the first time the House made provision for privilege to be claimed over the documents.[422] On 6 May 2015, the Clerk tabled

416 *Minutes*, NSW Legislative Council, 2 September 2009, pp 1312-1313.

417 Correspondence from Stephen Patfield, Acting Official Secretary to the Governor, to the Clerk, 25 September 2009. The correspondence was tabled in the House on 20 October 2009. See *Minutes*, NSW Legislative Council, 20 October 2009, p 1417.

418 *Minutes*, NSW Legislative Council, 18 March 2010, p 1724.

419 Correspondence from Stephen Patfield, Acting Official Secretary to the Governor, to the Clerk, 22 April 2010. The correspondence was tabled in the House on 22 April 2010. See *Minutes*, NSW Legislative Council, 22 April 2010, p 1760.

420 *Minutes*, NSW Legislative Council, 25 November 2010, p 2269.

421 Correspondence from Noel Campbell, Official Secretary to the Governor, to the Clerk, 15 December 2010. The correspondence was tabled in the House on 4 May 2011. See *Minutes*, NSW Legislative Council, 4 May 2011, p 46.

422 *Minutes*, NSW Legislative Council, 20 November 2014, pp 352-353.

> correspondence from the General Counsel of the Department of Premier and Cabinet, forwarding correspondence from the Governor declining to produce the documents on advice of the Executive Council with no reason given.[423]

In each of these cases, the House did not pursue the matter further.

Under the separation of powers in New South Wales, the operation of the judiciary is not the responsibility of the executive government, and it is not accountable to the Legislative Council for such matters. As such, the process under standing order 53, based as it is on long parliamentary practice, is entirely appropriate. However, it is important that the definition of documents falling within the meaning of 'the administration of justice' not be expanded unnecessarily to capture also documents relating to matters that clearly do fall within the responsibility of the executive government, such as police investigations. Should this occur, the *Annotated Standing Orders of the New South Wales Legislative Council* contemplates various options open to the House.[424]

423 Correspondence from Paul Miller, General Counsel, to the Clerk, forwarding a Message from the Governor to the President dated 3 December 2014. The correspondence was tabled in the House on 6 May 2015. See *Minutes*, NSW Legislative Council, 6 May 2015, p 53.

424 *Annotated Standing Orders of the New South Wales Legislative Council*, (n 17), p 179.

CHAPTER 20

COMMITTEES

This chapter examines the Legislative Council committee system, including the various types of committees, membership of committees, the rules regulating the operation of committees, the inquiry process, orders for State papers by committees and the effect of prorogation on committees. The following chapter examines the calling and examination of committee witnesses.

THE ROLE OF COMMITTEES

Legislative Council committees usually comprise between six and eight members of the Council drawn from the various political parties in the House. They are appointed by the Council to conduct inquiries on its behalf into policy issues, proposed legislation or executive activity. In doing so, they operate under the authority of the House with all the immunities, rights and powers of the House.

Inquiries conducted by committees typically have several stages, including receipt or adoption of terms of reference, a call for submissions, public hearings and other forms of evidence gathering, and the preparation of a final report. Where a report makes recommendations necessitating government action, the government must provide a response to those recommendations within six months.

In undertaking inquiries, committees increase public awareness of the issues under consideration by the Legislative Council and provide a forum for members of the public and key parties to contribute to policy debates. They may review proposed laws, facilitate more informed policy making and ensure greater government accountability. In addition, committee work enables members to build knowledge and expertise in particular areas of government administration and public policy, which they subsequently bring to their role in the House.

DEVELOPMENT OF THE LEGISLATIVE COUNCIL COMMITTEE SYSTEM

Committees have a long history in the Legislative Council dating back to 1825. However, it is only in comparatively recent times, the last 25 or 30 years, that they have evolved

and grown into one of the most important and recognisable features of the work of the Legislative Council.

The first committee of the colonial Legislative Council was appointed on 31 May 1825, less than a year after the first meeting of the Council in August 1824. It comprised three of the five members of the Council at that time, and was established to investigate the Female Factory at Parramatta. The committee reported three weeks after its establishment on 21 June 1825.[1]

In the following years, the colonial Council appointed a significant number of committees. The majority were appointed to consider bills. In particular, private members' bills originating in the Council were routinely referred to a select committee for inquiry and report, their reports being recorded in the *Votes and Proceedings* of the colonial Council.[2] However, the colonial Council also appointed domestic committees to consider matters such as the rules and orders of the Council,[3] the Parliamentary Library[4] and matters of privilege.[5] Perhaps most significantly, in the lead up to responsible government in 1856, the colonial Council appointed two committees to inquire into the preparation of a constitution for the Colony.[6]

In the years immediately following the achievement of responsible government in 1856, the newly reconstituted Legislative Council established at least 11 select committees on policy issues including the separation of the northern districts,[7] shipwrecks and shipping disasters,[8] Australian federation,[9] the railways[10] and the business of the Supreme Court.[11] However, in the latter half of the 19th century the work of Council committees settled back primarily into the consideration of bills.

This changed again following federation in 1901, after which select committee inquiries became increasingly rare, such that for much of the 20th century, the only committees to be routinely appointed by the House were standing domestic committees such as the Library Committee and the Printing Committee.[12]

It was not until the reconstitution of the Legislative Council in 1978 that committees began to develop into one of the Council's key mechanisms for review of executive

---

1 *Votes and Proceedings,* NSW Legislative Council, 31 May 1825, p 14; 21 June 1825, p 16.
2 See, for example, *Votes and Proceedings,* NSW Legislative Council, 15 March 1830, p 75.
3 *Votes and Proceedings,* NSW Legislative Council, 24 December 1827, p 39.
4 *Votes and Proceedings,* NSW Legislative Council, 18 August 1843, p 1.
5 *Votes and Proceedings,* NSW Legislative Council, 3 July 1844, p 1.
6 For further information, see the discussion in Chapter 2 (The history of the Legislative Council) under the heading '1840s–1855: Towards responsible government'.
7 *Minutes,* NSW Legislative Council, 19 November 1856, p 23.
8 *Minutes,* NSW Legislative Council, 7 January 1857, p 42.
9 *Minutes,* NSW Legislative Council, 20 October 1857, p 13.
10 *Minutes,* NSW Legislative Council, 20 November 1857, p 25.
11 *Minutes,* NSW Legislative Council, 2 December 1857, p 31.
12 D Clune and G Griffith, *Decision and Deliberation: The Parliament of New South Wales 1856-2003*, (Federation Press, 2006), p 203. For details of committees established by the Council since 1856, see the NSW Legislative Council *Consolidated Index to the Minutes of Proceedings and Printed Papers.*

activity. As noted in a monograph published by Dr David Clune in 2013 to commemorate the 25th anniversary of the establishment of the Council's modern committee system:

> The transformation of the Council into a fully elected, full time House led to another major change, the advent of an effective committee system. … It was the beginning of a renaissance for the Legislative Council which has seen it become a powerful instrument for scrutinising the executive and holding it accountable to the electorate.[13]

The seeds of this renaissance were sown in 1979 and 1980 when a member of the opposition in the Council, the Hon Lloyd Lange, twice moved that the House appoint a select committee to inquire into whether the Council should establish a permanent system of standing committees. In the event, both motions were opposed by the government and defeated.[14]

However, in 1982, on the government's own initiative, the House inserted a number of provisions into the standing orders and amended others to permit the appointment of standing committees, including joint committees.[15] The first committee to be established was the Joint Standing Committee upon Road Safety (Staysafe).[16] Further joint committees followed.

Subsequently, in October 1984, after the Legislative Council had finally become a fully elected House at the election held in March 1984, the government of the day also signalled its support for the establishment of the Legislative Council's own system of standing committees.[17] In accordance with this undertaking, in February 1985, the government moved for the appointment of a Select Committee on Standing Committees to inquire into the constitution, operation, funding, staffing and accommodation of such a committee system.[18] In moving the motion, the Leader of the Government in the Legislative Council, the Hon Barrie Unsworth, observed:

> There can be no doubt that as a result of the constitutional reforms initiated by the Wran Government, and overwhelmingly approved by the electorate, the Legislative Council – which is now fully and democratically elected and

13 D Clune, *Keeping the Executive Honest: The Modern Legislative Council Committee System*, Part One of the Legislative Council's Oral History Project, August 2013, p 5. For further information on the reconstitution of the Council, see the discussion in Chapter 2 (The history of the Legislative Council) under the heading '1978: Direct election and reconstitution from 60 to 45 members'.

14 *Hansard,* NSW Legislative Council, 22 March 1979, pp 3034-3076; 27 February 1980, pp 4775-4788; 28 February 1980, pp 4886-4905; 6 March 1980, pp 5227-5247. See also *Minutes*, NSW Legislative Council, 22 March 1979, pp 258-259; 27 February 1980, p 370; 28 February 1980, p 385; 6 March 1980, p 415.

15 *Minutes*, NSW Legislative Council, 17 March 1982, pp 262-263; *Hansard,* NSW Legislative Council, 17 March 1982, pp 2680-2691.

16 *Votes and Proceedings*, NSW Legislative Assembly, 17 March 1982, pp 155-156, 170; *Minutes*, NSW Legislative Council, 30 March 1982, pp 307-308.

17 *Hansard*, NSW Legislative Council, 11 October 1984, pp 1719-1720. This move may have been pre-empting a further move by Mr Lange to the same end.

18 *Minutes,* NSW Legislative Council, 28 February 1985, pp 333-334; *Hansard,* NSW Legislative Council, 28 February 1985, pp 3958-3971.

> whose members now almost all act in a full-time capacity – has taken on a much more vigorous role. The establishment of a standing committee system in the Legislative Council would constitute another major reform … [19]

The report of the Select Committee on Standing Committees was tabled in the House in November 1986.[20] It recommended the establishment of four standing committees on the following subjects: subordinate legislation and deregulation, state progress, social issues and country affairs.[21] The select committee envisaged that the establishment of a comprehensive system of standing committees would expand the Council's role and promote members' engagement with the community and government:

> The Committee sees the creation of such a system as an important option in enhancing the role of the Council. Parliament in general, and the Upper House in particular, needs to be better understood, and an efficient and effective standing committee system increases public contact, awareness and respect. Such a system allows the development of a review process which establishes links and allows discussion across disciplines and professions, between regions and between the private and public sectors. A committee system has the potential to involve Members in the processes of government … and encourages discussion and communication between diverse interests across the State.
>
> Even more significantly, a committee system, properly established and given appropriate resources and goodwill, is able to offer unique advice to Parliament and government.[22]

In June 1988, following the election of the Greiner Government in March 1988, and in accordance with the recommendation of the Select Committee on Standing Committees, the Council appointed the Standing Committee on State Development and the Standing Committee on Social Issues.[23] They were followed in October 1988 by the Standing Committee upon Parliamentary Privilege.[24] The Standing Committee on Law and Justice was appointed in May 1995,[25] following the election of the Carr Government in April 1995.[26]

In May 1997, the Council appointed a further five standing committees, then known as the general purpose standing committees (GPSCs). Modelled on the Australian Senate's legislation committees, each committee was allocated responsibility for

---

19 *Hansard,* NSW Legislative Council, 28 February 1985, p 3959.

20 *Minutes,* NSW Legislative Council, 19 November 1986, p 498; *Hansard,* NSW Legislative Council, 19 November 1986, pp 6617-6622.

21 Select Committee on Standing Committees of the Legislative Council, *Standing Committees,* November 1986, pp viii-ix and 12-20.

22 Ibid, pp 6-7.

23 *Minutes,* NSW Legislative Council, 9 June 1988, pp 182-186.

24 *Minutes,* NSW Legislative Council, 20 October 1988, p 190.

25 *Minutes,* NSW Legislative Council, 24 May 1995, pp 36-43.

26 The recommendation for a standing committee on subordinate legislation and deregulation was implemented in 1987 under the *Legislation Review Act 1987.* However, rather than being a Council committee, the Legislation Review Committee was established as a joint committee administered by the Assembly.

certain government portfolios. Significantly, their membership was comprised of a non-government majority, reflecting the make-up of the House. In 1997 and again in 1999 they were appointed on a motion moved by the opposition with the support of cross-bench members, the government of the day opposing their appointment.[27] However, in subsequent years the government itself has moved the motion for the appointment of these committees, with cross party support.[28]

The creation of the GPSCs effectively established a second, parallel, standing committee system alongside the three subject standing committees.

In May 2015, at the commencement of the 56th Parliament, the number of GPSCs was increased to six.[29]

On 24 June 2015, the House established the Select Committee on the Legislative Council Committee System to examine the operation of Legislative Council committees.[30] It reported in November 2016. The committee made a number of recommendations in relation to the structure of the Legislative Council committee system, including the trial of a Selection of Bills Committee and a Regulation Committee, and the renaming of the GPSCs as 'portfolio committees'.[31]

In March 2017, in accordance with the recommendation of the Select Committee, the GPSCs were renamed 'portfolio committees' with their key portfolio responsibilities henceforth identified in the title of the committee. For example, General Purpose Standing Committee No 1 became 'Portfolio Committee No 1 – Premier and Finance'.[32] In May 2019, at the commencement of the 57th Parliament, the number of portfolio committees was increased again to seven.[33]

In 2018, again partly in accordance with the recommendations of the Select Committee on the Legislative Council Committee System, the Council trialled four further specialist standing committees: the Selection of Bills Committee, the Regulation Committee, the Public Works Committee and the Public Accountability Committee. All four committees were subsequently re-established on an ongoing basis at the commencement of the 57th Parliament in May 2019. This is discussed further below.[34]

The development of the modern Legislative Council committee system is also documented in the *Annotated Standing Orders of the New South Wales Legislative Council*.[35]

---

27 *Minutes,* NSW Legislative Council, 7 May 1997, pp 674-680; 13 May 1999, pp 62-65.

28 *Minutes,* NSW Legislative Council, 3 July 2003, pp 220-233; 10 May 2007, pp 55-57; 12 May 2011, pp 98-102; 6 May 2015, pp 65-68; 8 May 2019, pp 112-117.

29 *Minutes,* NSW Legislative Council, 6 May 2015, pp 65-68.

30 *Minutes,* NSW Legislative Council, 24 June 2015, pp 218-219.

31 *Minutes,* NSW Legislative Council, 23 November 2017, p 2221.

32 *Minutes*, NSW Legislative Council, 7 March 2017, pp 1425-1426.

33 *Minutes*, NSW Legislative Council, 8 May 2019, pp 112-117.

34 See the discussion later in this chapter under the heading 'Other standing committees'.

35 S Want and J Moore, edited by D Blunt, *Annotated Standing Orders of the New South Wales Legislative Council*, (Federation Press, 2018), pp 677, 679-680, 801, 803-808.

THE CURRENT LEGISLATIVE COUNCIL COMMITTEE SYSTEM

The current Legislative Council committee system comprises two main types of committees: standing committees,[36] including the three subject standing committees and the seven portfolio committees (formerly the GPSCs), together with a number of other specialist standing committees; and select committees.[37] The Legislative Council may also form joint committees, both standing and select, with the Legislative Assembly.

The subject standing committees

At the commencement of each Parliament since 1995, the House has appointed three subject standing committees:

- The Standing Committee on State Development, which may examine issues concerned with State, local and regional development in New South Wales, and matters concerned with planning, infrastructure, finance, industry, the environment, primary industry, natural resources, science, local government, emergency services and public administration.
- The Standing Committee on Social Issues, which may examine issues concerned with the social development and wellbeing of the people of New South Wales, including health, education, housing, ageing, disability, children's services and community services, and matters concerned with citizenship, sport and recreation, and gaming and racing.
- The Standing Committee on Law and Justice, which may examine legal and constitutional issues in New South Wales, including law reform, parliamentary matters, criminal law, administrative law and the justice system, and matters concerned with industrial relations and fair trading. The committee also has oversight under the *State Insurance and Care Governance Act 2015* of the operation of the insurance and compensation schemes established under the New South Wales workers compensation and motor accidents legislation.[38] In 2017 the committee also conducted a statutory review of the *State Insurance and Care Governance Act 2015* under clause 12 of schedule 4 to the act.[39]

The role of each committee is to inquire into and report on any matter relevant to the functions of the committee referred to it by the House or, at the committee's discretion, by a minister. Each committee has a government majority, and is chaired by a government member, with an opposition member appointed deputy chair.[40]

---

36 For further information, see the *Annotated Standing Orders of the New South Wales Legislative Council*, (n 35), pp 676-680.

37 For further information, see the *Annotated Standing Orders of the New South Wales Legislative Council*, (n 35), pp 680-683.

38 *Minutes,* NSW Legislative Council, 8 May 2019, pp 92-97.

39 Standing Committee on Law and Justice, *Statutory review of the State Insurance and Care Governance Act 2015*, Report No 63, December 2017.

40 *Minutes,* NSW Legislative Council, 8 May 2019, pp 92-97.

Over the years, the three subject standing committees have conducted many detailed inquiries into complex matters of public policy. Their inquiries have often had relatively long timeframes allowing the committees to conduct indepth investigations. Generally, they have produced consensus reports and developed bipartisan recommendations, and they have a strong reputation for achieving positive outcomes from their inquiries.

The portfolio committees

At the commencement of each Parliament between 1997 and 2011, the House appointed five GPSCs to oversee specific government portfolios. At the commencement of the 56th Parliament in May 2015, the House appointed six GPSCs. Subsequently, in March 2017, they were renamed the portfolio committees.[41] Seven portfolio committees were appointed at the commencement of the 57th Parliament in May 2019.[42]

The portfolio committees have certain distinguishing characteristics. As with other committees, they must inquire into and report on any matters referred to them by the House. Of note, they currently undertake the annual budget estimates inquiry, examined later in this chapter.[43] However, they also have the capacity to self-refer inquiries on any matter relevant to the public administration of portfolios within their responsibility.[44]

The other principal distinguishing characterising of these committees is that they are established with a non-government majority. This in turn has usually resulted in a non-government member being elected chair of each committee.[45] In the 57th Parliament, the House specifically stipulated in the resolution establishing the portfolio committees that the chair of each committee was to be a non-government member.[46]

Other standing committees

In addition to the subject standing committees and portfolio committees, the Legislative Council has for many years appointed a Privileges Committee and a Procedure Committee. Since 2018, it has also appointed four new standing committees: the Selection of Bills Committee, the Regulation Committee, the Public Works Committee and the Public Accountability Committee. These committees are discussed further below.

41 *Minutes*, NSW Legislative Council, 7 March 2017, pp 1425-1426.

42 *Minutes*, NSW Legislative Council, 8 May 2019, pp 112-117.

43 See the discussion under the heading 'Budget estimates'.

44 *Minutes,* NSW Legislative Council, 8 May 2019, pp 112-117. For further information, see the discussion later in this chapter under the heading 'Terms of reference'.

45 However, during the 55th Parliament, three of the five GPSCs were chaired by government members. In the 56th Parliament, one of the six portfolio committees was chaired by a government member.

46 *Minutes*, NSW Legislative Council, 8 May 2019, pp 112-117.

The Privileges Committee

The Privileges Committee has been appointed by resolution of the House at the commencement of each Parliament since 1988.[47]

The Privileges Committee considers and reports on any matters of privilege referred to it by the House or the President, together with submissions referred by the President concerning rights of reply.[48] It also undertakes the functions set out under part 7A of the *Independent Commission Against Corruption Act 1988* relating to members' ethics and the *Code of Conduct for Members*.

In the 57th Parliament, the House specifically stipulated in the resolution establishing the Privileges Committee that the chair of the committee was to be a non-government member.[49]

The operation of the Privileges Committee, including significant inquiries undertaken by the committee, is discussed in detail in Chapter 3 (Parliamentary privilege in New South Wales).[50]

The Procedure Committee

Standing order 205(1) requires that a Procedure Committee be appointed at the commencement of each Parliament.[51]

The Procedure Committee considers amendments to the standing orders, proposals to change the practices and procedures of the House, or any other matter referred to it by the House or the President (SO 205(2)).

The President, Deputy President, Leader of the Government in the Legislative Council and Leader of the Opposition in the Legislative Council must be amongst the members of the committee (SO 205(3)). By convention, the President takes the chair of the Procedure Committee at its first meeting each Parliament.

The Selection of Bills Committee

The Selection of Bills Committee was first established on the last sitting day of 2017, for trial in 2018.[52] The trial was recommended by the Select Committee on the Legislative

47 From 1988-1995 the committee was known as the Standing Committee upon Parliamentary Privilege. From 1995-2004 it was known as the Standing Committee on Parliamentary Privilege and Ethics.

48 For further information, see the discussion in Chapter 3 (Parliamentary privilege in New South Wales) under the heading 'Right of reply to statements made by members in the House'.

49 *Minutes*, NSW Legislative Council, 8 May 2019, pp 89-91.

50 See the discussion under the headings 'The conduct of proceedings before the Privileges Committee', 'The approach of the Privileges Committee to matters of privilege' and 'Findings of the Privileges Committee and actions of the House'. See also the *Annotated Standing Orders of the New South Wales Legislative Council*, (n 35), pp 261-269, 680.

51 The committee was known as the Standing Orders Committee prior to the adoption of the current standing orders in 2004. For further information, see the *Annotated Standing Orders of the New South Wales Legislative Council*, (n 35), pp 673-676.

52 *Minutes,* NSW Legislative Council, 23 November 2017, pp 2221-2223.

Council Committee System, which advocated a greater role for Legislative Council committees in the substantive scrutiny of bills.[53]

The committee was re-established on an ongoing basis on 8 May 2019 at the commencement of the 57th Parliament.[54] This followed a recommendation by the committee that it be permanently established.[55]

The role of the Selection of Bills Committee is to consider all bills introduced in either House, other than an appropriation bill 'for the ordinary annual services of the Government' within the meaning of section 5A of the *Constitution Act 1902*, and to report on whether any bill should be referred to any of the Council's standing committees for inquiry and report. The committee comprises members of all parties in the Council and any independent member, with the Government Whip appointed chair and the Opposition Whip appointed deputy chair. The committee meets at the start of every sitting week to consider which, if any, bill should be recommended for referral for inquiry and report. The committee is permitted to sit whilst the House is sitting.

The procedure for the referral of bills to committees of the House under the Selection of Bills Committee mechanism is discussed in more detail in Chapter 15 (Legislation).[56]

The Regulation Committee

The Regulation Committee was first established on the last sitting day of 2017, for trial in 2018.[57] The trial was recommended by the Select Committee on the Legislative Council Committee System, which advocated that the Legislative Council play a greater role in the scrutiny of delegated legislation.[58]

The committee was re-established on an ongoing basis on 8 May 2019 at the commencement of the 57th Parliament.[59] This followed a recommendation by the committee that it be permanently established.[60]

The role of the Regulation Committee is to inquire into and report on any regulation, including the policy or substantive content of a regulation, and trends or issues that

53 Select Committee on the Legislative Council Committee System, *The Legislative Council committee system,* November 2016, pp 1-3.

54 *Minutes,* NSW Legislative Council, 8 May 2019, pp 97-100.

55 Following the 12-month trial, the committee published an evaluation report in which it recommended the permanent establishment of the committee. See Selection of Bills Committee, *Evaluation of the Selection of Bills Committee trial*, Report No 17, November 2018.

56 See the discussion under the heading 'Referral of bills on the recommendation of the Selection of Bills Committee'.

57 *Minutes*, NSW Legislative Council, 23 November 2017, pp 2223-2225.

58 Select Committee on the Legislative Council Committee System, *The Legislative Council committee system,* November 2016, pp 3-5.

59 *Minutes*, NSW Legislative Council, 8 May 2019, pp 100-103.

60 Following the 12-month trial, the committee published an evaluation report in which it recommended the permanent establishment of the committee. See Regulation Committee, *Evaluation of the Regulation Committee trial*, Report No 3, November 2018.

relate to regulations. It receives all references from the House and its chair must be a non-government member.

Further details of the operation of the Regulation Committee are provided in Chapter 18 (Delegated legislation).[61]

The Public Works Committee

The Public Works Committee was first established on 15 March 2018,[62] in part in response to significant public works being undertaken at that time in Sydney and New South Wales.

The committee was re-established on an ongoing basis on 8 May 2019 at the commencement of the 57th Parliament.[63] This followed a recommendation by the committee that it be permanently established.[64]

The role of the Public Works Committee is to inquire into and report on public works to be executed, including works that are continuations, completions, repairs, reconstructions, extensions, or new works, where the estimated cost of completing such works exceeds $10 million. The committee may receive its inquiries from the House or it may self-refer inquiries. Its chair must be a non-government member.

The Public Works Committee is not to be confused with the Legislative Assembly's Standing Committee on Public Works. Section 7 of the *Public Works and Procurement Act 1912* also provides for the establishment of the Parliamentary Standing Committee on Public Works, but this committee has not been active since the first session of the 29th Parliament commencing on 25 November 1930.

The Public Accountability Committee

The Public Accountability Committee was first established on 15 March 2018,[65] partly in response to concern amongst Council members about the lack of Council representation on the Legislative Assembly Public Accounts Committee. The Public Accounts Committee is a statutory committee formed under the *Public Finance and Audit Act 1983*.[66]

---

61 See the discussion under the heading 'The Regulation Committee'.

62 *Minutes*, NSW Legislative Council, 15 March 2018, pp 2388-2391.

63 *Minutes*, NSW Legislative Council, 8 May 2019, pp 108-112.

64 The committee published an evaluation report at the end of the 56th Parliament in which it recommended the permanent establishment of the committee. See Public Works Committee, *Scrutiny of public works in New South Wales*, Report No 3, February 2019.

65 *Minutes*, NSW Legislative Council, 15 March 2018, pp 2384-2387.

66 The functions of the Public Accounts Committee include examining the consolidated financial statements and general government sector financial statements transmitted to the Legislative Assembly by the Treasurer, the financial reports of statutory bodies and any aspects of the Auditor General's reports to Parliament. It can also instigate its own inquiries. See *Public Finance and Audit Act 1983*, s 57.

The Public Accountability Committee was re-established on an ongoing basis on 8 May 2019 at the commencement of the 57th Parliament.[67] This followed a recommendation by the committee that it be permanently established.[68]

The role of the Public Accountability Committee is to inquire into the public accountability, financial management, regulatory impact and service delivery of New South Wales government departments, statutory bodies and corporations. The committee may receive its references from the House or it may self-refer inquiries. Its chair must be a non-government member.

The concern of Council members about the lack of Council representation on what is currently the Legislative Assembly Public Accounts Committee is long standing. In May 1981, the Joint Committee on the Public Accounts and Financial Accounts of Statutory Authorities recommended that the Public Accounts Committee should be a joint committee comprising five members of the Assembly and three members of the Council.[69] However, this recommendation was not acted on by the government when introducing the Public Finance and Audit Bill 1983. In the second reading debate on the bill, the Leader of the Government in the Legislative Council, the Hon Paul (DP) Landa, asserted that it was not appropriate for members of the Council to sit on the committee due to the limited role of the Council in the consideration of money bills and financial matters.[70]

Twenty years later, on 26 September 2001, the Hon Doug Moppett moved a motion in the Council seeking the concurrence of the Assembly to appoint three Council members to the committee, arguing:

> if we are to scrutinise public administration more effectively – particularly from a financial point of view – it is vital to expand the composition of the Public Accounts Committee to include members of the Legislative Council.[71]

Mr Moppett's motion was agreed to by the House on division on 29 November 2001 and sent to the Legislative Assembly by message.[72] However, the order of the day for consideration of the Legislative Council's message remained on the Legislative Assembly *Business Paper* until the end of the session, and then lapsed on prorogation.

Despite the Council's establishment of its own Public Accountability Committee in March 2018, a further attempt to reconstitute the Legislative Assembly Public Accounts

67 *Minutes*, NSW Legislative Council, 8 May 2019, pp 103-108.

68 The committee published an evaluation report at the end of the 56th Parliament in which it recommended the permanent establishment of the committee. See Public Accountability Committee, *Scrutiny of public accountability in New South Wales*, Report No 3, January 2019.

69 Joint Committee of the Legislative Council and Legislative Assembly upon Public Accounts and Financial Accounts of Statutory Authorities, *Report from the Joint Committee of the Legislative Council and Legislative Assembly upon Public Accounts and Financial Accounts of Statutory Authorities together with the Minutes of proceedings*, May 1981, p 7.

70 *Hansard,* NSW Legislative Council, 28 November 1983, p 3541.

71 *Hansard,* NSW Legislative Council, 26 September 2001, p 17172.

72 *Minutes*, NSW Legislative Council, 29 November 2001, pp 1307-1308.

Committee as a joint committee of both Houses occurred in June 2018, when the Council agreed to amendments moved by Mr Justin Field to the Government Sector Finance Legislation (Repeal and Amendment) Bill 2018 to reconstitute the Public Accounts Committee as a joint committee with four members from each House.[73] During the debate, the Hon Matthew Mason-Cox, in dissent from the position adopted by other members of the Liberal/National party government, spoke in support of the amendments, stating that to introduce a joint Public Accounts Committee with membership of both Houses 'would crystallise a very important reform'. He continued:

> I believe it is overdue; it has been recommended by the Auditor-General previously, it has been recommended by the Public Accounts Committee previously and I believe its time has come. … this reform will, for the first time, bring together the two Houses in the role that has been foreshadowed and envisaged and confirmed in other Parliaments around this country to provide the sort of oversight that should be provided by Houses of Parliament in relation to the expenditure of public funds.[74]

The bill together with the Council amendments was returned to the Legislative Assembly for concurrence on 6 June 2018.[75] Several months later on 14 November 2018, the Assembly disagreed with the amendments and again sent the bill to the Council, giving reasons.[76] During subsequent debate on the matter in a Committee of the whole House, the Hon Matthew Mason-Cox referred to advice provided by the Clerk of the Parliaments that 'there is no legal or constitutional impediment to the reconstitution of the [Public Accounts Committee] as a joint committee. The only relevant considerations are really of merit or policy.'[77] Ultimately, however, the Council resolved not to insist on its original amendments, and the bill passed the Parliament.[78]

The issue of joint membership of the Public Accounts Committee therefore remains unresolved, the Council as an alternative having established its own Public Accountability Committee.

Select committees

Select committees are committees appointed by the Legislative Council to consider specific matters or bills. They may be appointed for a variety of reasons, including that there is no existing standing committee suitable for a particular reference, the desire to appoint a specific committee chair, the need for a specifically constituted committee, or the benefits of constituting a committee with the sole responsibility of examining a particular issue. Once select committees report, they cease to exist, unless given leave

73 *Minutes*, NSW Legislative Council, 6 June 2018, pp 2693-2699.
74 *Hansard*, NSW Legislative Council, 6 June 2018, p 43. Mr Mason-Cox voted in favour of the amendments on 6 June 2018.
75 *Minutes*, NSW Legislative Council, 6 June 2018, pp 2699-2704.
76 *Votes and Proceedings*, NSW Legislative Assembly, 14 November 2018, pp 2065-2066.
77 *Hansard*, NSW Legislative Council, 14 November 2018, p 103.
78 *Minutes*, NSW Legislative Council, 14 November 2018, pp 3204-3210.

to report from time to time. As such they differ from standing committees which are appointed for the life of a Parliament.[79]

Over the years there have been a number of significant select committees appointed by the Legislative Council including the Select Committee on the Conduct and Progress of the Ombudsman's Inquiry 'Operation Prospect' in November 2014,[80] the Select Committee on the Leasing of Electricity Infrastructure in May 2015,[81] the Select Committee on the Legislative Council Committee System in June 2015,[82] and the Select Committee on Off-Protocol Prescribing of Chemotherapy in August 2016.[83]

The high-point in the number of select committees appointed by the Council was in the 55th Parliament between 2011 and 2015.

Joint committees

Joint committees are committees comprised of members of both the Legislative Council and the Legislative Assembly appointed by resolution agreed to by both Houses.[84] Either House can initiate a motion appointing a joint committee. Any proposal by the Council to establish a joint committee must be forwarded to the Assembly by message for its concurrence. Although standing order 220 provides that at least three members of the Council must be present at any meeting of a joint committee, many resolutions appointing joint committees specify that a quorum is formed by the presence of three members from either House, provided that at least one member from each House is present.

A member from either House may chair a joint committee. The standing orders of the House in which the motion for the appointment of the joint committee originated apply to the functioning of the committee, unless otherwise agreed. By convention, joint committees are staffed by officers from the House in which the motion to establish the committee originated.

There are two types of joint committees: statutory and non-statutory.

Joint statutory committees

Joint statutory committees are committees established by legislation, although a resolution of both Houses is still required at the commencement of each Parliament to appoint a statutory committee and its membership, and to provide for any administrative or procedural details not specified in the relevant act.

79 For further information, see the *Annotated Standing Orders of the New South Wales Legislative Council*, (n 35), pp 680-683.

80 *Minutes,* NSW Legislative Council, 12 November 2014, pp 277-279.

81 *Minutes,* NSW Legislative Council, 6 May 2015, pp 75-81.

82 *Minutes,* NSW Legislative Council, 24 June 2015, pp 218-219.

83 *Minutes*, NSW Legislative Council, 11 August 2016, pp 1050-1054.

84 For further information on the operation, background and development of joint committees, see the *Annotated Standing Orders of the New South Wales Legislative Council*, (n 35), pp 719-724.

Examples of joint statutory committees include the Committee on Children and Young People, the Committee on the Health Care Complaints Commission, the Committee on the Independent Commission Against Corruption, and the Committee on the Ombudsman, the Law Enforcement Conduct Commission and the Crime Commission.[85]

The Legislation Review Committee, discussed previously in Chapter 18 (Delegated legislation),[86] is another joint statutory committee of both Houses. The role of the Legislation Review Committee is to scrutinise all bills introduced to Parliament and all regulations subject to disallowance.[87]

Joint (non-statutory) committees

The Houses may also, by resolution, appoint joint committees not established under statute. These can be either standing or select committees.

Examples of joint standing committees include the Joint Standing Committee on Road Safety (Staysafe), first appointed in March 1982;[88] the Joint Standing Committee on Electoral Matters, first appointed in June 2004;[89] and the Joint Standing Committee on the Office of the Valuer General, first appointed in December 2003.[90] These committees have been reappointed in each Parliament since.

Examples of recent joint select committees include the Joint Select Committee on Parliamentary Procedure appointed in September 2010,[91] the Joint Select Committee on the NSW Workers Compensation Scheme appointed in May 2012,[92] the Joint Select Committee on Child Sexual Assault Offenders appointed in August 2013,[93] the Joint Select Committee on Loose Fill Asbestos Insulation appointed in September 2014,[94] the Joint Select Committee on Companion Animal Breeding Practices in New South

85 See the *Advocate for Children and Young People Act 2014*, pt 7; the *Health Care Complaints Act 1993*, pt 4; the *Independent Commission Against Corruption Act 1988*, pt 7; the *Legislation Review Act 1987*; the *Ombudsman Act 1974*, pt 4A; the *Law Enforcement Conduct Commission Act 2016*, pt 7; and the *Modern Slavery Act 2018*, div 4. Part 2 of the *Public Works and Procurement Act 1912* also provides for a joint statutory committee to be called the Parliamentary Standing Committee on Public Works. This committee has not been active since the first session of the 29th Parliament commencing on 25 November 1930. The joint committee is not to be confused with the modern Assembly Standing Committee on Public Works, established under a resolution of the Assembly, or the Council's Public Works Committee.

86 See the discussion under the heading 'The Legislation Review Committee'.

87 *Legislation Review Act 1987*, pt 3.

88 *Minutes,* NSW Legislative Council, 30 March 1982, pp 307-308.

89 *Minutes,* NSW Legislative Council, 29 June 2004.

90 *Minutes,* NSW Legislative Council, 2 December 2003, pp 457-458.

91 *Minutes,* NSW Legislative Council, 23 September 2010, pp 2080-2083.

92 *Minutes,* NSW Legislative Council, 2 May 2012, pp 924-928.

93 *Minutes,* NSW Legislative Council, 21 August 2013, pp 1910-1911.

94 *Minutes,* NSW Legislative Council, 18 September 2014, pp 105-108.

Wales appointed in May 2015,[95] and the Joint Select Committee on Sydney's Night Time Economy appointed in May 2019.[96]

BUDGET ESTIMATES

Since 1997, the Legislative Council's General Purpose Standing Committees/Portfolio Committees have conducted an annual inquiry into the budget known as budget estimates.[97] The budget estimates process examines the details of the proposed annual expenditure of government agencies as contained in the annual appropriation bills. Each portfolio committee is required to consider the budget allocations for their allocated portfolios and report back to the House.

Significantly, the estimates process occurs several months after the annual appropriation bills are passed by the Parliament. Accordingly, the focus of the inquiry is on wide-ranging scrutiny of the government's operations rather than the detail of the proposed expenditure *per se*.

Under the terms of the resolution adopted by the House in recent years for the budget estimates inquiry, the committees must take evidence in public.

It is standard practice for ministers from both the Legislative Council and the Legislative Assembly to appear during budget estimates by invitation. At the start of the 57th Parliament, the House also passed a sessional order amending standing order 25 providing that a parliamentary secretary may be 'required' to give evidence at a budget estimates hearing, but may not substitute for a minister at budget estimates.[98]

In 2019, the House for the first time scheduled estimates over three rounds of hearings during 2019-2020: an initial round, a supplementary round at the discretion of committees, and an additional round.[99] In previous years, the House has only scheduled one round of hearings, with committees to undertake supplementary hearings at their discretion.

The estimates inquiry is one of the key elements of the Council's role of scrutinising the actions of the executive and holding it to account. Estimates hearings provide an opportunity for members of the House to directly question ministers and senior public servants in relation to public spending, government policy and the activities of government agencies.

Whilst the budget estimates process provides an excellent opportunity for members of the House to gather information, it also has the effect of placing ministers and public

95 *Minutes,* NSW Legislative Council, 13 May 2015, pp 99-102.

96 *Minutes*, NSW Legislative Council, 29 May 2019, pp 142-143, 144-145.

97 The budget estimates inquiry was first referred to the GPSCs on 29 May 1997. See *Minutes,* NSW Legislative Council, 29 May 1997, pp 779-781. For further information, see the discussion below under the heading 'Background to the budget estimates inquiry'.

98 *Minutes*, NSW Legislative Council, 8 May 2019, p 77.

99 Ibid, pp 117-119.

servants on notice that their decisions and actions may be questioned publicly. To that extent, it promotes high standards of accountability and probity among senior public servants by encouraging them to fully document and be able to justify their advice and recommendations to government. Similarly, decisions of ministers may be positively influenced by the knowledge that the reasons behind those decisions may be subject to public scrutiny.

Background to the budget estimates inquiry

The conduct of the budget estimates inquiry has evolved significantly over the years. From 1991 to 1994 the budget estimates inquiry was conducted by joint estimates committees.[100] The establishment of these committees arose out of a memorandum of understanding, commonly known as the Charter of Reform, which was signed on 31 October 1991 by Premier Greiner and three non-aligned independents in the Legislative Assembly.[101]

The general election in March 1995 resulted in the election of the Carr Labor Government with a very small majority in the Legislative Assembly. Subsequently, in October 1995, following the failure of the two Houses to agree on the mode of operation of joint estimates committees, the Council established three estimates committees of its own. This was done in recognition of the position of the Council as the 'House of Review', emulating the arrangements in the Federal Parliament where the annual estimates inquiry is conducted by the Senate.[102] The Hon John Hannaford, then Leader of the Opposition in the Legislative Council, saw the establishment of the Council's own estimates committees as reinforcing the relevance of the House. He stated:

> Only through a sensible system of estimates committees, under which all arms of Government are accountable to the public through the questioning of departmental representatives, will this House remain relevant to the people of New South Wales.[103]

These original Council estimates committees had a government majority and reflected the portfolio responsibilities of ministers in the Council. The committees were limited

---

100 *Minutes,* NSW Legislative Council, 25 September 1991, pp 136-141; 14 October 1992, pp 300-316; 13 October 1993, pp 279-300. For further information, see the *Annotated Standing Orders of the New South Wales Legislative Council*, (n 35), pp 806-807, 810-813.

101 'Memorandum of Understanding between the Hon Nick Greiner MP, Premier, For and on behalf of the Liberal/National Party Government and Mr John Hatton MP, Ms Clover Moore MP, and Dr Peter Macdonald MP', 1991. A copy of the memorandum is at *Hansard,* NSW Legislative Assembly, 31 October 1991, pp 4004-4033. Under the memorandum, in return for implementation of the Charter of Reform, the independents would support the government on motions regarding supply and confidence. See also G Griffith, 'The New South Wales Legislative Council: An analysis of its contemporary performance as a house of review', *Australasian Parliamentary Review*, (Vol 17, No 1, 2002), p 53.

102 *Minutes,* NSW Legislative Council, 17 October 1995, pp 217-222; *Hansard,* NSW Legislative Council, 17 October 1995, pp 1760-1765.

103 *Hansard,* NSW Legislative Council, 17 October 1995, pp 1762.

in their scope, operating for a short time to inquire into the budget estimates and report to the House.[104]

Similar arrangements were adopted in 1996.[105] At the time, the Council disagreed with a message from the Assembly requesting the re-establishment of joint estimates committees.[106] In support of the Assembly's message, the Leader of the Government in the Legislative Council, the Hon Michael Egan, observed that government and cross-bench members in the Lower House wished to be involved in the estimates process.[107] In response, the Hon John Hannaford reiterated:

> if this Chamber is to work appropriately as a House of review it must efficiently and effectively review the budget and the financial affairs of the Government. That system should be modelled upon the Senate model …[108]

The establishment of joint estimates committees was again proposed in 1997,[109] but when the Houses were unable to reach agreement on the mode of operation of the committees[110] the Council referred the budget estimates to its newly established GPSCs,[111] now portfolio committees, where the estimates process has remained ever since. It is now accepted that the Council alone performs the role of scrutinising the budget estimates.

MEMBERSHIP OF COMMITTEES

Substantive members

All members of the Legislative Council are eligible to serve on committees, subject to the following restrictions:

- standing order 210(8) provides that the President may not be elected to serve on a committee other than one of which the President is an *ex officio* member, currently only the Procedure Committee;
- standing order 210(9) provides that if the Deputy President and Chair of Committees is elected to serve on a committee and declines to do so, another member is to be elected; and
- certain statutes establishing statutory committees provide that ministers and parliamentary secretaries are not eligible to serve on those committees.[112]

104 *Minutes,* NSW Legislative Council, 17 October 1995, pp 217-220.
105 *Minutes,* NSW Legislative Council, 30 April 1996, pp 81-95.
106 *Minutes,* NSW Legislative Council, 16 May 1996, pp 147-148.
107 *Hansard,* NSW Legislative Council, 16 May 1996, p 1095.
108 Ibid.
109 *Minutes,* NSW Legislative Council, 6 May 1997, pp 643-648; 7 May 1997, pp 657-676.
110 *Minutes,* NSW Legislative Council, 22 May 1997, pp 741-745; 27 May 1997, pp 752-766.
111 *Minutes,* NSW Legislative Council, 29 May 1997, pp 779-781.
112 See, for example, the *Health Care Complaints Act 1993*, s 67(3); the *Independent Commission Against Corruption Act 1988*, s 65(3); the *Law Enforcement Conduct Commission Act 2016*, s 131(3); the

In addition to these formal restrictions, in practice, ministers generally do not serve on committees other than the Procedure Committee.

There is no provision for persons who are not members of Parliament to serve on a Legislative Council committee. In 1994, the Independent Commission Against Corruption (Amendment) Bill 1994 proposed the appointment of five community members to a joint parliamentary ethics committee, but the proposal was rejected in the Council.[113]

Under standing order 210(1), the composition of a committee is determined by the House through the resolution appointing the committee. At the commencement of the 57th Parliament in 2019, the Council adopted the following arrangements for the membership of committees:

Committee	**Members**
The Procedure Committee	The President, Deputy President and Chair of Committees, the Leader of the Government, the Deputy Leader of the Government, the Leader of the Opposition, the Deputy Leader of the Opposition, the Government Whip, the Opposition Whip, one other government member and four cross-bench members.
The three subject standing committees The Privileges Committee The Regulation Committee	Eight members: four government members, two opposition members and two cross-bench members.
The seven portfolio committees The Public Works Committee The Public Accountability Committee	Seven members: three government members, two opposition members and two cross-bench members.
The Selection of Bills Committee	Three government members, one of whom is the Government Whip, two opposition members and one member from each cross-bench party, and any independent member.

Advocate for Children and Young People Act 2014, s 38(3); the *Public Finance and Audit Act 1983*, s 54(4); the *Legislation Review Act 1987*, s 5(3); and the *Modern Slavery Act 2018*, s 23(3). For further information on the membership of committees, see the *Annotated Standing Orders of the New South Wales Legislative Council*, (n 35), pp 693-697.

113 *Hansard*, NSW Legislative Council, 27 October 1994, pp 4780-4783. However, the *Independent Commission Against Corruption (Amendment) Act 1994* required the appointment of three community members to the Legislative Assembly Privileges and Ethics Committee. This requirement remained until it was repealed in 2003 by the *Independent Commission Against Corruption Amendment (Ethics Committee) Act 2003*, although it was replaced with a provision that the Legislative Assembly Privileges and Ethics Committee 'may appoint any member of the public for the purpose of assisting the committee to carry out any of its functions … in relation to the code of conduct'. Community members also served on the Local Government Reference Group appointed to the Legislative Assembly administered Joint Select Committee on Waste Management during the 50th Parliament. See *Votes and Proceedings*, NSW Legislative Assembly, 14 October 1992, pp 575-577.

A notable feature of these arrangements is that government members are in a minority on the seven portfolio committees, the Public Works Committee and the Public Accountability Committee.

The resolutions appointing select committees usually provide for such committees to have between seven and nine members.[114]

When the House does not specify in the resolution appointing a committee specific members to serve on the committee, nominations for membership of that committee are made in writing to the Clerk within seven days of the date of passing of the resolution (SO 210(6)). Nominations may be made as follows:

- government members are nominated by the Leader of the Government in the Legislative Council (SO 210(2));
- opposition members are nominated by the Leader of the Opposition in the Legislative Council (SO 210(3)); and
- cross-bench members are nominated by agreement between the cross-bench members (SO 210(4)).

The House is subsequently advised of the nominations.

Where there are more cross-bench nominations for membership of a committee than places available, the House is required to choose the cross-bench membership of the committee by ballot under standing order 135. Ballots have been held on several occasions.[115]

There are instances where members have declined to serve on a proposed select committee and their names have been withdrawn and replaced.[116] On one occasion, a member declined to act following his appointment to a select committee. He was later discharged from the committee.[117]

At the commencement of each Parliament, the Legislative Assembly routinely sends a message concerning the establishment of joint statutory and non-statutory committees

114 However, there are exceptions to this. For example, in 2013 the resolution appointing the Select Committee on Ministerial Propriety in New South Wales provided for six members. See *Minutes*, NSW Legislative Council, 22 August 2013, pp 1914-1915.

115 At the start of the 57th Parliament, ballots were held for the cross-bench membership of six committees. See *Minutes*, NSW Legislative Council, 28 May 2019, pp 133-135. For examples of ballots in the 56th Parliament, see *Minutes*, NSW Legislative Council, 14 May 2015, pp 108-109; 26 May 2015, pp 118-119.

116 *Minutes,* NSW Legislative Council, 19 March 1931, p 106. Two members requested the withdrawal of their names from the proposed Select Committee on the Industrial Conciliation and Arbitration Bill.

117 *Minutes,* NSW Legislative Council, 6 December 1923, p 111. The committee was the Select Committee on the Advisability of Amending the Constitution Act in so far as it relates to the Legislative Council.

administered by that House, requesting that the Council nominate its members and appoint the time and place of the first meeting of each committee. In such instances, the practice has been for the Leader of the Government in the Legislative Council, having consulted with all members of the House, to move a motion with the concurrence of the House for the simultaneous appointment of Council members to all the joint committees.[118]

Substitute members

Members of committees have the ability to substitute for other members, either for a particular meeting or for a whole inquiry. A substitute member has the same rights as the substantive member who is replaced such as the right to question witnesses, vote and be counted for the purposes of a quorum. This practice was previously authorised under the resolutions appointing the committees until it was adopted as a sessional order at the commencement of the 57th Parliament.[119]

Substitutions may be made by written notice provided to either the committee clerk or chair. In the case of government and opposition members, substitutions may be made by the Leader of the Government, Leader of the Opposition, government or opposition whips or deputy whips, as the case may be. Nominations for substitute cross-bench members may be made by the substantive member or another cross-bench member.[120]

Participating members

Under standing order 218(1), as amended by sessional order,[121] a member of the House who is not a member of a committee may nonetheless take part in the public or private proceedings of a committee and question witnesses as a participating member, but cannot move a motion or be counted for the purposes of a division or quorum.[122]

However, a committee may decide to exclude a participating member from committee proceedings. For example, in February 2006, during its inquiry into correctional services, General Purpose Standing Committee No 3 resolved that a member who was not a member of the committee should not participate in a site visit to a maximum security prison.[123]

---

118 See, for example, *Minutes,* NSW Legislative Council, 22 June 2011, pp 259-263; 28 May 2015, pp 147-152; 19 June 2019, pp 232-237.

119 *Minutes,* NSW Legislative Council, 8 May 2019, pp 88-117. Specific provision was made in 2019 for substitute membership of the Procedure Committee. See *Minutes,* NSW Legislative Council, 8 May 2019, p 88.

120 *Minutes*, NSW Legislative Council, 8 May 2019, p 67.

121 *Minutes*, NSW Legislative Council, 6 May 2015, p 60; 8 May 2019, p 67.

122 For further information, see the *Annotated Standing Orders of the New South Wales Legislative Council*, (n 35), pp 714-716.

123 General Purpose Standing Committee No 3, *Issues relating to the operations and management of the Department of Corrective Services*, Report No 17, June 2006, p 155.

Changing membership

The membership of committees may be changed. In circumstances where the House has appointed members to a committee, only the House may discharge a member from the committee and appoint another member in his or her place (SO 210(7)), or appoint another member in place of a member who has resigned. On one occasion a member was reappointed to a committee following his resignation of his seat in the House and subsequent re-election to that seat after an unsuccessful attempt to be elected to the Australian Senate.[124]

Alternatively, in circumstances where the House has specified that members of a committee are to be nominated by the Leader of the Government, Leader of the Opposition and by agreement between cross-bench members, membership of the committee may be changed simply by the provision of new nominations to the Clerk (SO 210(6)). The President in turn notifies such changes to the House.[125]

The House can also appoint additional members to a committee. For example, in November 1997 two additional members were appointed to the Standing Committee on Parliamentary Privilege and Ethics, which was conducting an inquiry into the conduct of the Hon Franca Arena.[126] On several occasions during the 55th Parliament an additional cross-bench member was also appointed to the Privileges Committee for specific references.[127]

Pecuniary interests and conflicts of interest

Standing order 210(10) provides that no member may take part in a committee inquiry where the member has a pecuniary interest in the inquiry. This standing order is amended by a sessional order first adopted at the commencement of the 54th Parliament in June 2007 and readopted every session since. It provides:

> No member may take part in a committee inquiry where the member has a direct pecuniary interest in the inquiry of the committee, unless it is in common with the general public, or a class of persons within the general public, or it is on a matter of state policy.[128]

124 *Minutes,* NSW Legislative Council, 10 November 2004, p 1107.

125 For further information, see the *Annotated Standing Orders of the New South Wales Legislative Council*, (n 35), pp 693-697.

126 *Minutes,* NSW Legislative Council, 25 November 1997, pp 224-225.

127 *Minutes,* NSW Legislative Council, 14 March 2013, pp 1537-1538; 7 May 2013, pp 1675-1676; 20 November 2014, pp 365-367.

128 *Minutes*, NSW Legislative Council, 8 May 2019, pp 58-67. The sessional order was originally adopted in 2007 after terms of reference were referred to the Standing Committee on State Development for an inquiry into aspects of agriculture in New South Wales. The committee chair had interests in the citrus industry, raising concerns that he could not participate in the inquiry under the provisions of standing order 210(10). See Crown Solicitor, 'Pecuniary interest of a member in a committee inquiry', 26 June 2007, pp 1-8. In the event, the chair continued to chair the

The question of whether a member should seek to be replaced by the House on a particular inquiry due to a conflict of interest depends very much on the circumstances; no general rule or convention applies to all cases.

The following are examples where members have been removed or have stood aside from inquiries or have taken other action over conflict of interest concerns:

- In 1999, during the inquiry by the Privileges and Ethics Committee into statements made by the Hon Michael Gallacher and the Hon John Hannaford concerning the Lord Mayor of Sydney, the Hon Helen Sham-Ho informed the House that, due to her husband standing as a candidate in the forthcoming City of Sydney Council elections, she wished to step aside as chair and requested the Leader of the House to replace her on the committee for the term of the inquiry. The House resolved that the Hon Peter Breen be appointed as a member of the committee in place of Mrs Sham-Ho for the purpose of the inquiry.[129]
- In 2001 Mrs Sham-Ho was again replaced by Mr Breen as a member of the Privileges Committee as part of its inquiry into the possible intimidation of witnesses before General Purpose Standing Committee No 3 and unauthorised disclosure of committee evidence. This step was taken because Mrs Sham-Ho had chaired the General Purpose Standing Committee No 3 inquiry and was therefore personally involved in the events that had led to the inquiry.[130]
- In 2011, during the inquiry by the Select Committee on the Kooragang Island Orica Chemical Leak, the chair of the committee, the Hon Robert Borsak, sought advice as to whether his interest in a company which had a relationship to a subsidiary of Orica Ltd constituted a 'direct pecuniary interest' for the purposes of SO 210(10), as amended by the sessional order. The Clerk subsequently sought advice from the Crown Solicitor who advised that the chair's interests as shareholder and director of the company did conflict with his role as chair, and that his direct pecuniary interest was not in common with the general public or a class of persons within the general public.[131] Based on this advice, the chair on his own initiative stood down from the committee and was replaced as a member and as chair by a member of the same political party.[132]
- In 2020, on the Standing Committee on Social Issues accepting an inquiry into the *State Records Act 1998* referred to it by the Leader of the Government in the Legislative Council, the chair of the committee, the Hon Shayne Mallard, resigned as a board member of the State Archives and Records Authority,

committee after the standing order was amended by the sessional order. See Standing Committee on State Development, *Aspects of agriculture*, Report No 32, November 2007, pp 1-2.

129 *Minutes,* NSW Legislative Council, 15 September 1999, p 564.

130 *Minutes,* NSW Legislative Council, 28 June 2001, p 1070.

131 Crown Solicitor, 'Participation by Hon R Borsak in Select committee on Orica chemical leak', 18 November 2011, p 5.

132 *Minutes,* NSW Legislative Council, 22 November 2011, p 596.

in order to remove any real or perceived conflict of interest in the conduct of the inquiry.

Equally, the following are examples where members have continued to serve on committees after concerns have been raised, either by themselves or others, about a possible conflict of interest:

- In 1989, during the inquiry by the Standing Committee upon Parliamentary Privilege into a Special Report from the Select Committee on the Police Regulation (Allegations of Misconduct) Amendment Bill, three members of the committee indicated that, as they were members of both committees, they ought not to vote on recommendations of the Privileges Committee. The Clerk advised that it was a matter for individual members whether they remained on both committees, and that there was no provision for noting abstentions in either the committee or the House. The Standing Committee upon Parliamentary Privilege subsequently presented an interim report and sought direction from the House. On 6 April 1989 a motion was moved in the House to discharge the three members concerned and appoint other members in their places. After debate the motion was withdrawn by leave and the three members continued to serve on the committee.[133]

- In 2004, at the start of the General Purpose Standing Committee No 5 inquiry into the Hunter Economic Zone and the Tomalpin Woodlands, the committee received correspondence from the Chair of the Hunter Economic Zone seeking the removal of the committee chair due to his stated opposition to the development which was the subject of the inquiry. The committee, by resolution, expressed its confidence in the chair, who remained in the position for the duration of the inquiry.[134]

- In 2012, the Hon Scot MacDonald sought advice whether he should stand aside from the Select Committee on the Closure or Downsizing of Corrective Services NSW Facilities in view of the fact that his wife was about to commence a temporary position at the Armidale District Office of Corrective Services NSW. The Crown Solicitor advised that the interest did not constitute a 'direct pecuniary interest' for the purposes of standing order 210(10).[135] Mr Macdonald continued to participate in the inquiry.

Members who feel that they may have a potential conflict of interest, but where the interest falls short of a direct pecuniary interest, will commonly seek to have that interest recorded in the committee minutes. For example, in 2008 during a General

133 *Minutes*, NSW Legislative Council, 6 April 1989, pp 518-519. See also Standing Committee upon Parliamentary Privilege, *Report from the Standing Committee upon Parliamentary Privilege together with the proceedings of the Committee: Documents issued by the Rev the Hon FJ Nile*, December 1989, pp 48-50.

134 General Purpose Standing Committee No 5, *Hunter Economic Zone and the Tomalpin Woodlands*, Report No 22, December 2004, p 146.

135 Crown Solicitor, 'Pecuniary Interest of member in a committee inquiry', 11 October 2012.

Purpose Standing Committee No 2 inquiry into the NSW Ambulance Service, one of the committee members, the Hon Christine Robertson, had it recorded in the minutes that she was a member of the Health Services Union, one of the key inquiry participants.[136]

OPERATION OF COMMITTEES

The rules regulating the operation of committees

The operation of committees is regulated by a number of standing and sessional orders, together with resolutions of the House and of the committees.

The primary rules that regulate committees are the Legislative Council standing orders, in particular standing orders 204 to 234 contained in Chapter 35 of the Standing Orders which deals specifically with the operation of committees.

In certain instances, these standing orders have been modified by sessional orders. For example, standing order 208 has been modified by sessional order in relation to committee visits of inspection.[137]

The House has also adopted sessional orders concerning matters that are not addressed in the standing orders. Of note is the House's adoption at the commencement of the 57th Parliament of a sessional order concerning orders for the production of State papers by committees.[138]

In addition to the standing and sessional orders, the operation of committees is also determined by resolutions of the House, both resolutions of the House of continuing effect, notably the broadcasting resolution, and resolutions of the House appointing each committee. The resolutions for the appointment of committees are generally passed at the beginning of each Parliament or, in the case of select committees, when the committee is established, and override the standing orders to the extent of any inconsistency.

It is also common practice for committees to adopt a number of procedural resolutions at their first meeting following their establishment, such as resolutions in relation to media and broadcasting procedures, which in the case of standing committees apply for the duration of the Parliament, or the case of select committees for the duration of their inquiry. Where a committee wishes to depart from any initial resolution, a further resolution may be adopted.

When the standing orders, sessional orders, resolutions of continuing effect or resolution appointing a committee are silent on a matter concerning the operations of a committee,

---

136 General Purpose Standing Committee No 2, *The management and operations of the Ambulance Service of NSW*, Report No 27, October 2008, p 193.

137 For further information, see the discussion later in this chapter under the heading 'Other forms of evidence gathering'.

138 *Minutes*, NSW Legislative Council, 8 May 2019, pp 79-83. For further information, see the discussion later in this chapter under the heading 'Orders for the production of State papers by committees'.

the procedures of the House may be used for guidance. For example, the rules of debate under standing order 91 in relation to offensive words, reflecting on a resolution of the House or making personal reflections on members or officers should be used to guide committee proceedings. However, a committee is not strictly bound by the rules of the House. For example, during budget estimates wide latitude in questioning of ministers and other witnesses is allowed. In those circumstances, strict application of the rules for questions in Question Time in the House under standing order 65, as amended by sessional order, would be overly restrictive of members.

Committee meetings

Under standing order 209(2), a committee is not permitted to meet when the House is sitting, unless the House expressly authorises it by resolution. For example, the House has authorised the Selection of Bills Committee to meet whilst the House is sitting.[139] Some select committees have also been authorised by the resolution appointing the committee to meet during a sitting of the House.[140]

Committees may hold both public meetings, such as public hearings and forums, and private meetings, such as *in camera* hearings and deliberative meetings.

The committee clerk records the names of members present at any committee meeting (SO 214(3)).

First meeting

The time and place for the first meeting of a committee following its establishment, usually at the commencement of a Parliament in the case of standing committees, is fixed by the clerk of the committee (SO 213(1)).[141] This meeting is always a private deliberative meeting of the committee. Subsequent meetings of a committee are at the discretion of the committee or the committee chair, acting on behalf of the committee.

Public hearings

Legislative Council committee hearings are held in public, unless the committee decides otherwise (SO 222(1)). This reflects the principle that committee proceedings should be transparent and accessible to the public, unless there are good reasons for them to be kept confidential. However, there are a number of instances where committees have taken significant amounts of evidence *in camera*.[142]

---

139 *Minutes,* NSW Legislative Council, 23 November 2017, pp 2222-2223; 8 May 2019, pp 97-100.

140 See, for example, *Minutes*, NSW Legislative Council, 7 May 1992, pp 188-191; 3 July 2001, p 1097. For further information, see the *Annotated Standing Orders of the New South Wales Legislative Council*, (n 35), pp 691-693.

141 For further information, see the *Annotated Standing Orders of the New South Wales Legislative Council*, (n 35), pp 701-704.

142 For further information, see the *Annotated Standing Orders of the New South Wales Legislative Council*, (n 35), pp 726-727.

In camera hearings

With the exception of the annual budget estimates inquiry,[143] a committee may resolve to take evidence *in camera*, that is, in private (SO 222(1)).

Committees generally take evidence *in camera* in order to protect a witness's privacy or to deal with other sensitive or confidential matters. For example, in 2014, during the General Purpose Standing Committee No 1 inquiry into bullying in WorkCover NSW, the committee held an *in camera* hearing with two key witnesses in relation to documents obtained through an order of the House concerning allegations of bullying. The decision of the committee to hold the hearing *in camera* allowed members to question the witnesses more freely than would have been possible otherwise, whilst dealing appropriately with the sensitive documents and protecting the privacy of the individuals concerned.[144]

In camera hearings may also be used where the holding of a public hearing may be contrary to the public interest, for example where a public hearing may be prejudicial to court proceedings or commercial dealings.

If a committee resolves to take evidence *in camera*, only committee members, the witness or witnesses, committee staff and *Hansard* staff may attend. Media and members of the public are excluded from the proceedings (SO 218(2)). The proceedings are not broadcast.

Deliberative meetings

Committees may also hold confidential deliberative meetings, generally with only members of the committee and secretariat in attendance. Whilst deliberative meetings are confidential, the decisions of the committee are recorded by the clerk and later published in the minutes of the committee proceedings, which are included in the committee's report to the House (SO 234(5)(a)). Unauthorised disclosure of the confidential deliberations of a committee may constitute a contempt.[145]

Appointment or election of the chair and deputy chair of a committee

A resolution of the House appointing a committee, in addition to specifying the membership of the committee, may also specify arrangements in relation to the appointment or election of the chair and deputy chair of the committee. For example, the House may directly appoint the committee chair and deputy chair. Alternatively, the House may specify that the Leader of the Government and Leader of the Opposition are

143 The annual resolution referring the budget estimates and related papers to the portfolio committees for inquiry and report requires that all hearings be conducted in public.

144 General Purpose Standing Committee No 1, *Allegations of bullying in WorkCover NSW*, Report No 40, June 2014, pp 7-9.

145 For further information, see the discussion in Chapter 3 (Parliamentary privilege in New South Wales) under the heading 'Cases of contempt and matters of privilege in the Council'.

to nominate the chair and deputy chair of a committee,[146] or may leave arrangements for the election of the chair and deputy chair to the committee. At the commencement of the 57th Parliament in May 2019, the House in many instances specified that the committees were to elect their own chair and deputy chair in accordance with the standing orders, whilst stipulating that the chair be a non-government member. The House also adopted a sessional order that a parliamentary secretary may not be a chair or deputy chair of a standing committee or portfolio committee.[147]

In those instances where the House leaves to a committee the election of a chair and deputy chair, at the first meeting of the committee, before proceeding to any other business, a chair and deputy chair must be elected (SO 213(2)). The clerk conducts the election for the chair, and the newly elected chair then conducts the election for the deputy chair.

The procedure for electing a chair conforms to procedure in the House for electing the President.[148] In summary, the clerk calls for nominations. If only one nomination is received, the nominated member is declared elected. If more than one nomination is received, the chair is elected by ballot, following the same process as that for electing the President in the House. Before the ballot, nominated members may speak to their nomination if they wish. Subsequently, ballot papers are distributed to the committee members on which they write the name of the member they vote for to be chair. The clerk then counts the ballots.

If two members are nominated, the member with the greater number of votes is declared elected. If there is an equality of votes, the ballot must be taken again. If there is again an equality of votes, the clerk by lot withdraws the name of one candidate, and that candidate is withdrawn from the election. The remaining candidate is declared elected.

If more than two members are nominated, the member with the greater number of votes is declared elected, provided that that member also has an absolute majority of the votes of the members present. If no member has such an absolute majority, then the name of the candidate with the fewest votes is withdrawn and a fresh ballot amongst the remaining nominees takes place. This is repeated until one candidate is declared elected with an absolute majority of the votes of the members present.[149]

Once elected the chair assumes that role and conducts the election for a deputy chair, following the same process for the election of the chair, except that the chair has a casting vote in the event of an equality of votes.

146 See, for example, the resolution appointing the three subject standing committees at the commencement of the 57th Parliament: *Minutes*, NSW Legislative Council, 8 May 2019, pp 92-97.

147 *Minutes*, NSW Legislative Council, 8 May 2019, pp 77-78.

148 For further information, see the discussion in Chapter 6 (Office holders and administration of the Legislative Council) under the heading 'Election and vacation of office'.

149 For further information, see the *Annotated Standing Orders of the New South Wales Legislative Council*, (n 35), pp 698, 701-704.

A committee may vote to remove a chair or deputy chair, in which case a new chair or deputy chair must be elected. However, a committee cannot vote to remove a chair or deputy chair appointed by the House or nominated by the Leader of the Government or Leader of the Opposition in accordance with the resolution establishing the committee.[150]

The role of the chair and deputy chair

The role of the chair of a committee is analogous to the role of the President in the House.

The chair of a committee is responsible for guiding the inquiry process and presiding over meetings of the committee, including conducting votes. During public hearings, this responsibility extends to swearing in witnesses, maintaining order and ruling on the admissibility of questions and points of order. For example, where a remark is considered to be offensive, the chair may request that the offensive remark be withdrawn.

The chair is also responsible for administrative matters concerning a committee such as scheduling meetings. It is also the responsibility of the chair, working with the committee secretariat, to prepare the chair's draft report at the conclusion of an inquiry and to table the committee's report in the House.

The chair may report to the President on any matters relating to the administration, functions and operations of a committee (SO 234(3)).[151]

The deputy chair acts as chair when the chair is absent from a meeting, in which case the deputy chair assumes all the authority of the chair (SO 211(2)). This provision in the standing orders is intended to cover situations where the chair is unexpectedly absent and not where the position has been vacated, such as on the resignation of the chair as a member of the House.

In the temporary absence from a meeting of both the chair and deputy chair, a member of the committee must be elected to act as chair for that meeting only (SO 211(3)).[152] In addition, a sessional order adopted at the commencement of the 57th Parliament provides that in the absence of the deputy chair from a committee meeting, a member of the committee may be elected by the members present to act as deputy chair for that meeting.[153]

---

150 R Laing (ed), *Odgers' Australian Senate Practice*, as revised by H Evans, 14th ed, (Department of the Senate, 2016), p 493. See also the *Annotated Standing Orders of the New South Wales Legislative Council*, (n 35), p 698.

151 For further information, see the *Annotated Standing Orders of the New South Wales Legislative Council*, (n 35), p 761.

152 See, for example, the election of a temporary chair of General Purpose Standing Committee No 2 on 23 September 2005 in the absence of both the chair and deputy chair. See General Purpose Standing Committee No 2, *Budget Estimates 2005-2006*, Report No 21, May 2006, p 1415. For further information, see the *Annotated Standing Orders of the New South Wales Legislative Council*, (n 35), pp 698-699.

153 *Minutes,* NSW Legislative Council, 8 May 2019, pp 58-67.

Quorum

Standing order 214(1) provides that, unless otherwise ordered by the House,[154] the quorum of a committee is three members.[155] Parliamentary privilege may not apply to committee proceedings conducted in the absence of a quorum, as there is some doubt as to whether such proceedings are properly constituted proceedings of the committee.

If a quorum of members is not present at the time appointed for a meeting of a committee, the committee members and secretariat may take steps to form a quorum, such as attempting to contact absent members. However, if a quorum is not formed after 15 minutes, standing order 214(2) provides that the meeting is to stand adjourned and the chair is to fix the next meeting of the committee.

If during the conduct of a meeting of a committee the loss of a quorum is brought to the attention of the chair by another committee member, after 10 minutes, if a quorum is not formed, the chair must suspend the meeting to a later time. If, at that later time, a quorum is still not present, the committee must be adjourned to another date, to be fixed by the chair (SO 215). As with the practice in the House, it is not the responsibility of the chair, or the committee clerk, to call attention to the absence of a quorum during the conduct of a committee meeting. Maintaining a quorum is the responsibility of all committee members.

Electronic participation in committee meetings

On 24 March 2020, the House adopted a sessional order authorising committees to conduct meetings by electronic communication without members of the committee or witnesses being present in the one place.[156] The House adopted this sessional order in order to facilitate ongoing committee work during the COVID-19 pandemic.[157]

This sessional order replaced a previous sessional order adopted at the commencement of the 57th Parliament in May 2019 which authorised members of all committees to participate in committee deliberative meetings by electronic means, but required the chair to be present in the meeting room and prevented members from meeting electronically to consider a draft report (with the exception of a portfolio committee

154 The House has ordered the quorum for some select committees be four or even five members.

155 In recent times, the resolution establishing the three subject standing committees has always provided that the quorum must consist of two government members and one non-government member. Relying on standing order 214(1), the quorum of a portfolio committee is any three members. For further information on the quorum requirements for different types of committees and other procedures in respect of quorums, see the *Annotated Standing Orders of the New South Wales Legislative Council*, (n 35), pp 704-706.

156 *Minutes*, NSW Legislative Council, 24 March 2020, pp 877-878.

157 On 27 March 2020, the Public Accountability Committee self-referred terms of reference to inquire into the NSW Government's management of the COVID-19 pandemic, with the committee anticipating that all its hearings would be conducted via electronic means. This reflected a similar inquiry and approach adopted by the New Zealand Parliament's Epidemic Response Committee. The committee subsequently conducted a number of fully online hearings.

meeting to consider a draft report on the budget estimates, if the portfolio committee so resolved). This previous sessional order also did not authorise committee members to participate electronically in a public hearing of a committee.[158]

Motions and decisions of committees

As in the House, committees take decisions on items of business put to the committee as motions. Any member of a committee, except the chair, may move a motion during committee proceedings. There is no requirement for another member to second the motion. After a motion is moved it may be debated and amendments moved, before the motion and any amendments are put to the committee by the chair. The question on the motion and any amendments may be either carried or negatived on the voices or on division.

Technically a division is only called in a committee if a member disagrees with the chair's determination of a vote on the voices. In practice divisions are called when members desire their votes to be formally recorded in the committee minutes (SO 234(5)(b) and (c)).

If a division is called, the chair, or other member acting as the chair, has a deliberative vote and, in the event of an equality of votes, a casting vote (SO 211(5), as amended by sessional order).

Committee members who are present at a meeting cannot abstain from voting. This reflects the practice in the House.

A resolution of a committee may be annulled or quashed, with effect from the time the resolution was adopted, by the committee resolving to rescind the resolution. However, it is rare that the rescission of a resolution is required, as in most cases the operation of a resolution can simply be superseded by the adoption of a new resolution. It is only where the consequences of a resolution or order have already occurred that rescission may be necessary. These arrangements are the same as those applying to resolutions of the House.[159]

In circumstances where a member wishes to move the rescission of a resolution of a committee, standing order 104 relating to the rescission of resolutions of the House provides guidance as to the procedure to be followed, although it is not binding on a committee. Whilst standing order 104 requires seven days' notice to be given for rescission of a resolution or order of the House, a committee might consider a shorter period of notice, such as 24 hours, as reasonable. Alternatively, if all committee members support rescission, a motion may be moved by leave without the requirement of notice.

158 *Minutes,* NSW Legislative Council, 8 May 2019, pp 73-74. During the 55th and 56th Parliaments, the House adopted similar provisions in the resolutions establishing the subject standing committees, the GPSCs/portfolio committees and the Privileges Committee.

159 For further information, see the discussion in Chapter 12 (Motions and decisions of the House) under the heading 'Rescission of resolutions'.

Chair's rulings and objections to rulings

A committee chair may be called upon to give a ruling on a point of order raised by a committee member in a committee meeting.

In ruling on a point of order, a chair should be guided in the first instance by the standing orders, sessional orders and resolution appointing a committee.[160]

Where there is no provision guiding a chair's ruling, it is established practice that the chair should lean towards a ruling which preserves or strengthens the powers of the Council and its committees and the rights of members rather than one which may weaken or lessen those powers and rights.

Where the chair gives a ruling on a point of order, a committee member may move that the committee dissent from the ruling. To do so the member must put his or her reasons in writing. The dissent motion is then considered at a private deliberative meeting of the committee.[161] If the committee resolves the question on the dissent motion in the negative, the ruling stands. If the question is upheld, the ruling is overturned.

Although objections to chairs' rulings are relatively rare, during the General Purpose Standing Committee No 4 inquiry into the Designer Outlets Centre at Liverpool in 2004, members took objection to a number of rulings of the chair in regard to the relevance of questions being put to witnesses and other matters.[162]

Only the House can take action in relation to disorderly conduct by a member in a committee. Where a member's conduct is grossly disorderly, the committee may refer the matter to the House by way of a special report.

Sub-committees

Standing order 217(1) provides that, where the resolution appointing a committee makes provision for the appointment of a sub-committee, a committee may appoint a sub-committee of two or more members to assist the committee in its work. A sub-committee has the same powers as the committee appointing it (SO 217(2)). Unless otherwise ordered, the quorum of a sub-committee is two, one of whom must be a government member and one a non-government member (SO 217(4)).[163]

---

160 For further information, see the discussion earlier in this chapter under the heading 'The rules regulating the operation of committees'.

161 If the committee is holding a public hearing the hearing must be suspended.

162 General Purpose Standing Committee No 4, *The Designer Outlets Centre, Liverpool*, Report No 11, December 2004, pp 173, 177, 190, 191. For another example, see General Purpose Standing Committee No 1, *Budget Estimates 2007-2008*, Report No 31, December 2007, p 10.

163 For further information, see the *Annotated Standing Orders of the New South Wales Legislative Council*, (n 35), pp 711-713. On 20 August 2019, the Hon Mark Latham gave a notice of motion in the House that Portfolio Committee No 3 – Education, have power to appoint a sub-committee consisting of any two members of the committee, without regard to whether they were a government or non-government member, for the purpose of its inquiry into measurement and outcome-based

In appointing a sub-committee, a committee should identify the members of the sub-committee and appoint a member to act as chair. Where the chair of the committee is serving on the sub-committee, it is usual practice that he or she be appointed to chair the sub-committee. The sub-committee chair has a deliberative and casting vote (SO 217(3)).

A sub-committee is required to report to the committee on any matter referred to it by the committee. The committee may adopt the report, reject the report or adopt the report with variations (SO 217(5)).

The appointment of a sub-committee increases a committee's flexibility and enables it to pursue several tasks simultaneously. Examples of when a sub-committee can be formed include: to work on a specific item of business or discrete aspect of an inquiry, to conduct hearings where the cost associated with the whole committee travelling would not be justified, and to conduct a specific hearing or series of hearings in respect of an inquiry.[164] However, sub-committees should be used judiciously and should not routinely be used in place of meetings of a whole committee.

In the 57th Parliament, the resolutions appointing the three subject standing committees and the Regulation Committee conferred on those committees a power to appoint sub-committees. By contrast, the resolutions appointing the portfolio committees and other committees did not. However, these committees may nevertheless appoint sub-committees if the House so resolves. For example, in May 2005, the House resolved that General Purpose Standing Committee No 2 have power to appoint a sub-committee for the purpose of its inquiry into post school disability programs. This step was taken in order to allow the committee to appoint a sub-committee to conduct site visits and consultations simultaneously.[165]

Conferring with other committees

A Legislative Council committee or sub-committee has authority to confer with any other committee of the Legislative Council or Legislative Assembly to take evidence, deliberate and make joint reports on matters of mutual concern (SO 219(a)). Examples of Council committees conferring with Assembly committees are discussed in Chapter 22 (Relations with the Legislative Assembly).[166]

A Council committee may also meet with any other State or Commonwealth parliamentary committee to inquire into matters of mutual concern (SO 219(b)). There are no examples of a Council committee meeting with a committee of another parliament to jointly inquire into matters. However, there are several precedents of Council committees meeting with

---

funding in New South Wales schools. See *Notice Paper*, NSW Legislative Council, 21 August 2019, p 598. In the event the notice was never moved.

164 See, for example, Standing Committee on State Development, *Port infrastructure in New South Wales*, Report No 30, June 2005, p 106; and Standing Committee on State Development, *Regional aviation services*, Report No 38, October 2014, pp 142-143.

165 *Minutes,* NSW Legislative Council, 25 May 2005, p 1396.

166 See the discussion under the heading 'Committees conferring together'.

a committee of another parliament to discuss matters of mutual concern. For example, in 2015 General Purpose Standing Committee No 4 met with the ACT Legislative Assembly Standing Committee on Health, Ageing, Community and Social Services to discuss the findings of the Council committee's inquiry into the use of cannabis for medical purposes, as part of a similar inquiry being conducted by the ACT committee.[167]

THE INQUIRY PROCESS

Terms of reference

Committee inquiries are conducted according to terms of reference, which define the scope of the inquiry. A committee is not authorised as part of an inquiry to investigate matters outside the scope of its terms of reference, although it is common for terms of reference to refer to 'any other matter' relevant to the terms of reference, thus providing broad scope for the conduct of an inquiry. If a committee clearly goes beyond its terms of reference, the chair may rule the matter out of order.

The terms of reference for a committee inquiry also usually specify the reporting date for the inquiry, although this is not obligatory.

Terms of reference for a committee inquiry may be referred to a committee by the House. This includes the referral of bills to committees for inquiry and report. However certain committees may also receive terms of reference for an inquiry from a minister, which the committee may choose to adopt, whilst certain other committees may adopt self-references. The House may also instruct a committee to expand or restrict existing terms of reference. These matters are considered further below.

Reference of a bill

The House may refer a bill to a standing or select committee for inquiry and report. There are various means by which this may occur, as discussed in Chapter 15 (Legislation).[168]

Ministerial references

The three subject standing committees – the Standing Committee on State Development, the Standing Committee on Social Issues and the Standing Committee on Law and Justice – are unusual in that the resolution establishing them provides that they 'may inquire into and report on any matter relevant to the functions of the committee referred to them by a minister'.[169] No other committees of the Legislative Council have the capacity to adopt terms of reference from a minister in this manner.

---

167 For further information, see the *Annotated Standing Orders of the New South Wales Legislative Council*, (n 35), pp 716-718.

168 See the discussion under the headings 'Amendments to refer a bill to a standing or select committee' and 'Procedures for regular referral of bills to committees'.

169 *Minutes*, NSW Legislative Council, 8 May 2019, pp 91-97.

Whilst the resolution establishing the three subject standing committees provides that they may inquire into ministerial references, a minister is not able to direct them to undertake an inquiry. Rather, on receipt of a proposed ministerial reference, a committee may decide whether to accept the reference by resolution of the committee.[170] A committee may also seek the agreement of the minister to amend the proposed terms of reference before adopting them.[171]

When a committee resolves to adopt terms of reference for an inquiry from a minister, the terms of reference are reported to the House on the next sitting day. On receipt of such notification, the House may amend the reference, instruct the committee on how it will proceed, or direct the committee not to proceed with the reference. It is even possible for the House to refer the reference to another committee. For example, in 2005 the Minister for Police referred to the Standing Committee on Social Issues for inquiry and report matters relating to public disturbances in Macquarie Fields. Considerable debate ensued in the House as to whether the terms of reference were in order, particularly in relation to the appropriateness of the committee inquiring into statements made by a member of the Assembly. Ultimately, the House resolved to amend the terms of reference to remove from them the requirement that the committee inquire into and report on the extent to which the actions of any member of Parliament compromised police operations in the Macquarie Fields area.[172]

Self-references

The resolutions establishing the Public Accountability Committee, the Public Works Committee and the portfolio committees all provide that the committees may self-refer an inquiry into any matter relevant to the functions of the committee, or in the case of the portfolio committees, any matter relevant to the public administration of portfolios allocated to the committees.

In order for one of these committees to self-refer an inquiry, a meeting of the committee must be convened at the request of any three members of the committee made in writing to the committee clerk. The request must include the proposed terms of reference. A meeting of the committee must then be convened within seven days of the receipt of the request, provided that members have been given at least 24 hours' notice. At the meeting, the committee may adopt or reject the terms of reference, or adopt the terms of reference with amendments. Where a committee resolves to adopt self-referred terms of reference, the terms of reference are reported to the House on the next sitting day.

---

170 For further information, see M Thompson, 'Through the lens of accountability: referral of inquiries by ministers to upper house committees', *Australasian Parliamentary Review,* (Vol 28, No 1, Autumn 2013), pp 97-108.

171 Advice of the Clerk of the Parliaments, 'Terms of reference by the Minister for Police to the Standing Committee on Social Issues relating to the public disturbances at Macquarie Fields', 22 March 2005, p 5.

172 Standing Committee on Social Issues, *Public Disturbances at Macquarie Fields*, Report No 38, June 2006, p 1.

Priority of references

In circumstances where committees have multiple references before them, standing order 212 provides that the priority to be accorded to a reference is determined by the committee chair, unless the committee decides otherwise. Committees may prioritise references based on various factors, including the inquiry reporting date, the importance of the issue and the availability of members.[173]

Instructions to committees by the House

The House may give an instruction to a standing or select committee to extend or restrict its terms of reference (SO 182). An example of this occurred on 10 August 2017 when the House gave an instruction to Portfolio Committee No 6 – Planning and Environment to extend its terms of reference for an inquiry into energy from waste technology to examine the transport of waste and recyclable materials out of New South Wales and the prevalence and scale of illegal dumping.[174] Two previous examples occurred in 2005, when the House gave instructions to the Standing Committee on Social Issues that it not commence an inquiry into public disturbances at Macquarie Fields until after the police and Ombudsman investigations into the matter had been completed,[175] and to General Purpose Standing Committee No 4 that it not commence an inquiry into the Cross City Tunnel.[176]

Publicising terms of reference and calling for submissions

A committee generally begins an inquiry by publicising its terms of reference and calling for submissions. Terms of reference may be publicised via media releases and Twitter, although forums such as newspapers, specialist journals or Facebook are also used from time to time. Committees also often write directly to parties with an interest in the subject matter of an inquiry, inviting them to make a submission. In most instances, committees set a deadline for receipt of submissions, although this deadline can be extended.

Discussion or briefing papers

Under SO 226(4) a committee may publish a discussion or briefing paper as part of an inquiry. A discussion paper may expand on and clarify matters raised in the terms of reference and raise issues or questions for parties to address. For example, in 2012, the Select Committee on the Partial Defence of Provocation published a briefing paper to assist submission makers. Following the receipt of submissions and after hearing from witnesses the committee also published an options paper canvassing a range of

173 For further information, see the *Annotated Standing Orders of the New South Wales Legislative Council*, (n 35), pp 699-700.

174 *Minutes,* NSW Legislative Council, 10 August 2017, pp 1852-1853. For further information, see the *Annotated Standing Orders of the New South Wales Legislative Council*, (n 35), pp 593-595.

175 *Minutes,* NSW Legislative Council, 23 March 2005, pp 1294, 1297-1298.

176 *Minutes,* NSW Legislative Council, 15 November 2005, pp 1722-1729.

reform options on which interested parties were invited to make further submissions.[177] In another example, in 2015 the Select Committee on the Legislative Council Committee System published a discussion paper and tabled it in the House to draw members' attention to what was a matter of particular significance to the Legislative Council.[178] In 2019, in an unusual step without precedent, the House required that the Parliamentary Library prepare an Issues Paper on the Uranium Mining and Nuclear Facilities (Prohibitions) Repeal Bill 2019 as part of an inquiry into the bill being conducted by the State Development Committee.[179]

Submissions

Submissions are one of the principal means by which committee members are informed about the subject matter of an inquiry and how individuals, groups or organisations view a particular issue. Submissions also help inform committee members as to which individuals or organisations should be invited as witnesses to any hearings.

Generally speaking, any person or organisation may make a submission to a committee on a current inquiry so long as the submission is relevant to the terms of reference (SO 221).[180] However, from time to time, issues have arisen where members of a committee themselves wish to make a submission to an inquiry. Whilst there is no formal prohibition on members doing so, it is not a desirable practice as the purpose of submissions is to give the community access to the parliamentary process without the appearance that members have pre-judged an issue.[181]

Submissions can take almost any form such as a letter, a research paper, a hand-written note, an image or a video or audio recording.

If a submission is received and accepted by a committee it is confidential unless and until the committee resolves that it be made public. Section 4(2) of the *Parliamentary Papers (Supplementary Provisions) Act 1975* states that '[a] committee may authorise the publication of a document received by it or evidence given before it'. This provision is

177 Select Committee on the Partial Defence of Provocation, *The partial defence of provocation*, April 2013, p 3.

178 Select Committee on the Legislative Council Committee System, *Legislative Council committee system: Discussion paper*, November 2015. For further information on this standing order, see the *Annotated Standing Orders of the New South Wales Legislative Council*, (n 35), pp 738-741.

179 *Minutes*, NSW Legislative Council, 6 June 2019, pp 201-202. The House subsequently referred to the Procedure Committee for inquiry and report mechanisms for consultation on highly contentious bills, including the preparation of issues papers by the Parliamentary Library. See *Minutes*, NSW Legislative Council, 20 June 2019, pp 274-276.

180 For further information, see the *Annotated Standing Orders of the New South Wales Legislative Council,* (n 35), pp 724-726.

181 Advice of the Clerk of the Parliaments to the Hon Arthur Chesterfield Evans, '1. Powers of committees in relation of witnesses; 2. Submissions to committee inquiries by Members', 11 February 2004, p 2.

replicated in standing order 223.[182] In practice, the resolutions appointing committees now universally provide for submissions to committees to be published by the secretariat on receipt, subject to the committee clerk checking for any issues of confidentiality or adverse mention. If such issues arise, the clerk refers to the committee the question of whether a submission should be published.

Submission authors may request that all or part of their submission be kept confidential or that their name be withheld from the public. If a committee accedes to this request and determines that a submission should not be published, either in whole or in part, the author is informed accordingly.

On rare occasions, a committee may reject and return a submission to the author if it is not relevant to the terms of reference or contains defamatory material. Rejecting and returning a submission ensures that the author is aware that it has not been accepted by the committee and therefore does not attract parliamentary privilege.

Individuals and organisations making a submission to a committee inquiry are encouraged not to publish their submission separately until the committee has resolved whether to accept and publish the submission. As indicated above, a committee may decide not to accept and publish a submission, or to publish only part of a submission. Individuals or organisations that publish a submission separately without the endorsement of the relevant committee are not covered by parliamentary privilege.[183]

A committee will generally place on its website submissions that have been accepted and published to ensure that they are accessible to as wide a range of interested parties as possible. Publishing submissions during an inquiry can in turn generate further comment and discussion and encourage others to provide relevant information to the committee.

From time to time, special commissions of inquiry have examined issues also being examined by a committee.[184] Investigative bodies such as the Independent Commission Against Corruption have also conducted inquiries in parallel with committee inquiries.[185] In such instances issues may arise in relation to the availability of submissions made

182 For further information, see the *Annotated Standing Orders of the New South Wales Legislative Council*, (n 35), pp 727-732.

183 For further information, see the *Annotated Standing Orders of the New South Wales Legislative Council*, (n 35), pp 732-736.

184 See, for example, the 2003-2004 Special Commission of Inquiry into Campbelltown and Camden Hospitals which was set up concurrent with the General Purpose Standing Committee No 2 inquiry into complaints handling within NSW Health, and the 2008 Special Commission of Inquiry into Acute Care which was set up concurrent with the General Purpose Standing Committee No 2 inquiry into the NSW Ambulance Service.

185 See, for example, the 2004-2005 Independent Commission Against Corruption inquiry into the Orange Grove Designer Outlet, Liverpool, conducted concurrent with the General Purpose Standing Committee No 4 inquiry into The Designer Outlets Centre, Liverpool. See also the 2009-2010 Independent Commission Against Corruption investigation into allegations of corruption made by or attributed to Michael McGurk, conducted concurrent with the General Purpose Standing Committee No 4 inquiry into Badgerys Creek land dealings and planning decisions.

confidentially to a committee. For example, during the 2008 General Purpose Standing Committee No 2 inquiry into the management and operations of the NSW Ambulance Service, the Special Commission of Inquiry into Acute Care requested access to confidential submissions to the inquiry. This was denied on the grounds that making the submissions available would be contrary to the intention of the submission authors, and would give the commission access to submissions which at that time were not available to members of the Council not on the committee.[186]

Committees may also receive form letters to an inquiry, sometimes many thousands, which may be considered as either submissions or correspondence. General practice is for form letters which include additional comment by the signatory to be treated as a submission, but otherwise for them to be treated as correspondence, although they may still be referred to in the committee's final report.

Hearings

Following the calling for and receipt of submissions, committees normally invite witnesses to appear and give evidence at a hearing.[187] Hearings generally commence after the closing date for the receipt of submissions, although they may commence earlier if there are time constraints.

Hearings are generally held in public, although they may be held *in camera*.[188] They may be held either at Parliament House or other locations in Sydney and in rural and regional New South Wales.

Hearings are an opportunity for committee members to directly question witnesses about matters relevant to an inquiry and to clarify or test issues raised in submissions. Public hearings also allow the ventilation in public of matters of public policy and issues concerning the administration of government.

The calling and examination of witnesses at hearings, including the grounds on which a witness may object to questions, is discussed in Chapter 21 (Witnesses).

Selecting witnesses

Witnesses to committee hearings are selected with a view to obtaining a range of different perspectives on an issue. Primarily, witnesses are identified through submissions received by the committee, which may include requests to appear as a witness. Witnesses

186 General Purpose Standing Committee No 2, *The management and operations of the Ambulance Service of NSW*, Report No 27, October 2008, p 201.

187 However, it is not obligatory that a committee conduct hearings as part of an inquiry. For example, the Standing Committee on State Development received no submissions and took no oral evidence during its 2002 inquiry into local government boundaries in Inner Sydney and the Eastern Suburbs. More recently, the Select Committee on the State Senate Bill 2015 did not conduct hearings during its 2018 inquiry into the State Senate Bill 2015.

188 For further information, see the discussion earlier in this chapter under the heading 'Committee meetings'.

can be invited to appear and give evidence separately or together as a panel. A panel may be desirable where witnesses hold similar or related views, or where there are time constraints.

According to the resolution establishing most committees,[189] the selection of witnesses is a matter for members of a committee as a whole. Unless a committee decides otherwise, the chair usually prepares a proposed witness list. The chair may consult with members and the secretariat in preparing this list. The list is then circulated by email to members of the committee for comment. Members may request the chair to convene a meeting to resolve any disagreement as to witnesses.

Swearing in of witnesses

Section 10(2) of the *Parliamentary Evidence Act 1901* states that every witness giving evidence before a committee of the Council (other than a Committee of the whole House) shall be sworn by the committee chair. The 'Procedural fairness resolution for inquiry participants' adopted by the House on 25 October 2018 also provides:

> **Witnesses to be sworn**
>
> At the start of their hearing a witness will, unless the committee decides otherwise, take an oath or affirmation to tell the truth, and the provisions of the *Parliamentary Evidence Act 1901* will then apply.[190]

A witness may take an oath on the Bible or other religious text, or may make an affirmation.

The swearing in of witnesses lends formality to proceedings and serves to reinforce the obligation of witnesses to provide truthful answers.

However, notwithstanding the requirement in the *Parliamentary Evidence Act 1901*, in the case of public forums, participants are generally not sworn, as this inhibits the flow of proceedings. In certain cases, witnesses may also not be sworn where it may be intimidating for the witness.

The taking of an oath or making of an affirmation does not affect the privileged status of committee proceedings. However, only after a witness has been sworn or affirmed can the witness be required to answer a 'lawful question'. This is discussed further in Chapter 21 (Witnesses).[191]

If a witness refuses to be sworn, or requests not to be sworn, a committee should ask the witness to provide reasons and then deliberate in private to consider the matter. If the

189 See, for example, the resolution establishing the three subject standing committees in the 57th Parliament: *Minutes*, NSW Legislative Council, 8 May 2019, pp 92-97.

190 *Minutes*, NSW Legislative Council, 25 October 2018, pp 3138-3140.

191 See the discussion under the heading 'The power to compel an answer to any 'lawful question''.

committee feels that it is necessary for the witness to be sworn, the committee should advise the witness accordingly and explain the rationale for its decision.[192]

Serving members of the Legislative Council or Legislative Assembly are not sworn when appearing before a committee, as they have previously taken the pledge of loyalty or oath of allegiance on their election to Parliament.

Witnesses reappearing in the course of the same inquiry also appear under their former oath.

Opening statements

After the swearing in of witnesses, the next stage of a committee hearing is often for the chair to invite witnesses to make a short opening statement to the committee, after which committee members will ask questions. An exception to this is the annual budget estimates inquiry, for which the House routinely resolved that witnesses, including ministers, may not make an opening statement before the committee commences questions.[193]

Questions and answers

The hearing process is primarily one of questions from members and answers from witnesses, through which committee members seek information and opinions from witnesses. This is consistent with the inquisitorial nature of parliamentary inquiries. In the vast majority of cases this proceeds in straightforward fashion, with witnesses willingly providing answers.

The order in which questions are asked by members varies between committees. The subject standing committees and the Privileges Committee tend to leave this to the discretion of the committee chair and members, although the committee may resolve otherwise. By contrast the resolution establishing the portfolio committees in the 57th Parliament provides that, unless a committees decides otherwise, the sequence of questions to be asked at hearings alternates between opposition, cross-bench and government members, in that order, with equal time allocated to each.[194]

Questions on notice

It is routine during a hearing for a witness to take questions that he or she is not able to answer in full 'on notice', in order to provide a written answer at a later time.

---

192 In 1887, during an inquiry by the Select Committee on the Law respecting the practice of Medicine and Surgery, a witness refused to take an oath or make an affirmation, but was allowed to proceed and give evidence anyway. See 'Minutes of evidence taken before the Select Committee on the Law respecting the practice of Medicine and Surgery', *Journals*, NSW Legislative Council, 1881-1888, vol 43, pt 4, p 587.

193 See, for example, *Minutes*, NSW Legislative Council, 8 May 2019, pp 117-120.

194 *Minutes*, NSW Legislative Council, 8 May 2019, pp 89-117.

At the end of a hearing where a witness has taken a question or questions 'on notice', the committee chair advises the witness of the return date for written answers. According to the resolutions establishing the committees in the 57th Parliament, that date is 21 calendar days from the date on which questions are forwarded to the witness, unless the committee resolves otherwise.[195] As soon as possible after the hearing, the committee secretariat highlights any questions on notice in the hearing transcript, which is then provided to the witness.

According to the resolutions establishing the committees in the 57th Parliament, all answers to questions on notice are published, subject to the committee clerk checking for confidentiality and adverse mention, and, where those issues arise, bringing them to the attention of the committee for consideration.[196]

Tendered documents

Witnesses at committee hearings routinely seek to tender documents for tabling with the committee. It is the committee's decision whether to accept and make public such documents. To ensure that committee members and staff have an opportunity to review a tendered document, a committee may defer consideration of the matter until the conclusion of the hearing, or later if the document requires careful review.

There have been circumstances where a committee has refused to accept a document tendered by a witness during a hearing. For example, in 2004, during the General Purpose Standing Committee No 4 inquiry into approval of the Designer Outlets Centre – Liverpool, the committee declined to accept a statutory declaration tendered by a witness on the basis that the person who made the statutory declaration was not present and could not attest to the veracity of the document.[197]

Supplementary questions

Following a hearing, committee members may provide supplementary questions to witnesses for answer. Before being sent to witnesses, supplementary questions are initially circulated among committee members, to give members the opportunity to object to the questions. The exception to this is the annual budget estimates inquiry, where the volume of questions and timeframes preclude such an approach.

Unless the committee decides otherwise, members must lodge supplementary questions with the committee clerk within two working days following receipt of the hearing transcript, with witnesses usually requested to return answers within 21 calendar days of the date on which questions are forwarded to them. All answers to supplementary questions are published by the same process as for answers to questions on notice.[198]

---

195 Ibid.

196 Ibid.

197 General Purpose Standing Committee No 4, *The Designer Outlets Centre, Liverpool*, Report No 11, December 2004, p 177.

198 *Minutes*, NSW Legislative Council, 8 May 2019, pp 89-117.

Broadcasting of hearings

Legislative Council committees routinely resolve at their first meeting in a Parliament to authorise the filming, broadcasting, webcasting and still photography of their public proceedings in accordance with the broadcasting resolution of the Legislative Council of 18 October 2007.[199] Such a resolution stands for the life of the committee unless it decides otherwise.

In accordance with this resolution, public hearings of Legislative Council committees at Parliament House are routinely broadcast live via the Parliament's website, although a committee may resolve otherwise.

The House's broadcasting resolution also provides for a committee to authorise the filming, broadcasting and still photography of its public proceedings by a person or organisation that is not an accredited member of the Parliamentary Press Gallery. The person or organisation must give a written undertaking to comply with the terms and conditions set out in the broadcasting resolution and any other terms and conditions determined by the committee.[200]

Witnesses can object to the broadcasting of their appearance. In considering such an objection, a committee should have particular regard to the protection of the witness and the public interest in the proceedings.

Publication of transcripts of hearings, including *in camera* hearings

Parliamentary Reporting (*Hansard*) provides a transcript of all questions asked and answers given during committee proceedings.

The transcript of evidence of a committee public hearing is published as soon as possible after the hearing under the authority of section 4 of the *Parliamentary Papers (Supplementary Provisions) Act 1975*, standing order 223(1) and the resolution of the House establishing the committee,[201] unless the committee decides otherwise.

By contrast, the transcript of evidence of a committee taken *in camera* is kept confidential, unless the committee decides otherwise. Under standing order 223(2), evidence taken *in camera* may be published by a committee if it considers it in the public interest to do so. However, a committee would not usually take this step without first consulting the witness or witnesses concerned. Whilst it is not uncommon for *in camera* evidence to be published with the agreement of a witness, it is less common for this to occur against the wishes of a witness.[202] The 'Procedural fairness resolution for inquiry participants' adopted by the House on 25 October 2018 provides:

---

199 *Minutes*, NSW Legislative Council, 18 October 2007, pp 279-281.

200 Ibid.

201 *Minutes*, NSW Legislative Council, 8 May 2019, pp 89-117.

202 For an example of part of an *in camera* transcript being published against the wishes of a witness, see Select Committee on the Conduct and Progress of the Ombudsman's inquiry 'Operation

Publication of evidence taken in private (*in camera*)

> Prior to their private (*in camera*) hearing, a witness will be informed that the committee and the Legislative Council have the power to publish some or all of the evidence given. If the committee intends to publish, it will normally consult the witness, advise them of the outcome, and give reasonable notice of when the evidence will be published.[203]

The House also has the power to order that evidence taken by a committee *in camera* be laid before it, or to order the release of such evidence to another body. Although the Council rarely exercises this power, it was used in December 1994 when both Houses ordered that *in camera* evidence given before the Joint Select Committee upon Police Administration be provided to the Royal Commission into the New South Wales Police Service.[204] Owing to its sensitivity, the evidence was only made available to the Royal Commission for investigative purposes and not to the general public. [205]

The unauthorised disclosure of evidence taken by a committee *in camera* is a contempt of Parliament. This is discussed further in Chapter 3 (Parliamentary privilege in New South Wales).[206]

Correction of transcripts

Standing order 222(2) provides that witnesses before committees are to be given the opportunity to correct their transcript of evidence. It is practice for the secretariat to make minor corrections to a transcript of verbal inaccuracies identified by a witness, but corrections of substance or explanations of answers must be considered by the committee.[207]

Expunging and redacting transcripts

Although highly unusual, a committee may choose to expunge or redact a portion of evidence from the transcript of a hearing.

Expunging evidence from a transcript removes all traces of the evidence as if it were never said. It should only be used in extremely serious and rare circumstances, for example where evidence places a person at risk of serious harm. It should also occur as soon as possible after the offending statement is made in a hearing. The 'Procedural

---

Prospect', *The conduct and progress of the Ombudsman's inquiry 'Operation Prospect'*, February 2015, pp 226-227.

203 *Minutes*, NSW Legislative Council, 25 October 2018, pp 3138-3140.

204 *Minutes*, NSW Legislative Council, 2 December 1994, pp 464-465.

205 For further information, see the *Annotated Standing Orders of the New South Wales Legislative Council*, (n 35), pp 727-732.

206 See the discussion under the heading 'Cases of contempt and matters of privilege in the Council'.

207 For further information, see the *Annotated Standing Orders of the New South Wales Legislative Council*, (n 35), pp 726-727.

fairness resolution for inquiry participants' adopted by the House on 25 October 2018 provides:

> **Evidence that places a person at risk of serious harm**
>
> Where a witness gives evidence that places a person at risk of serious harm, the committee will immediately consider expunging the information from the transcript of evidence.[208]

The expunging of evidence from the transcript of a hearing must be ordered by resolution of a committee. If the committee needs to deliberate in private to consider the possible expunging of evidence, the media should be asked to refrain from repeating the evidence whilst the committee deliberates. If the committee orders the expunging of evidence, the media should be warned that any act in contravention of the committee's order may constitute an unauthorised disclosure and therefore a potential contempt of Parliament.

There is a small number of examples of evidence being expunged from the transcript of a committee hearing:

- In 2002, evidence was expunged from the transcript of a hearing held by General Purpose Standing Committee No 3 as part of its inquiry into Cabramatta policing when the name of an underage witness who claimed to be a gang member involved in drug dealing was accidentally disclosed.[209]
- In 2015, evidence was expunged from the transcript of a hearing held by the Select Committee on the Conduct and Progress of the Ombudsman's inquiry 'Operation Prospect', after the name of a police informant was accidentally disclosed.[210]
- In 2018, evidence was expunged from the transcript of a budget estimates hearing held by Portfolio Committee No 2 – Health and Community Services after the name of a child under the parental responsibility of the Minister for Family and Community Services was accidentally disclosed.[211]

Redaction of evidence from a transcript involves suppressing certain words when the transcript is published. This is a much more common practice than expunging words. Redaction occurs after a hearing and may be an appropriate means of dealing with the adverse mention of a witness. For example, in 2014, during the General Purpose Standing Committee No 1 inquiry into bullying in WorkCover NSW, the committee

208 *Minutes*, NSW Legislative Council, 25 October 2018, pp 3138-3140.

209 General Purpose Standing Committee No 3, *Review of the Inquiry into Cabramatta policing,* Report No 12, September 2002, p 145.

210 Select Committee on the Conduct and Progress of the Ombudsman's inquiry 'Operation Prospect', *The conduct and progress of the Ombudsman's inquiry 'Operation Prospect',* February 2015, p 168.

211 This was in keeping with the privacy requirements under section 105 of the *Children and Young Persons (Care and Protection) Act 1998*. See Portfolio Committee No 2 – Health and Community Services, *Budget Estimates 2018-2019*, Report No 50, December 2018, p 16.

resolved that the names of WorkCover employees identified in an adverse context be redacted from a transcript.[212]

The decision of a committee to expunge or redact a portion of evidence from the transcript of a hearing should be informed by the principle that a transcript should be as complete and accurate a record of a committee hearing as practicable, and that it is undesirable to alter the record to the extent that it does not reflect what actually occurred. The committee's decision must balance the need to maintain an accurate record with the imperative to protect persons from serious harm and, where appropriate, to safeguard third parties from serious damage to their reputations.

Ths *sub judice* convention

The *sub judice* convention is a practice whereby members of the House refrain from making reference in proceedings to matters before the courts where this could prejudice proceedings or harm specific individuals. The application of the *sub judice* convention to debate in the House is discussed in detail in Chapter 13 (Debate).[213]

In relation to committee proceedings, the *sub judice* convention in no way obligates a committee to forgo its right to inquire into a matter. However, committees are generally sensitive to matters that are *sub judice*. Where a matter arises that may be *sub judice*, a committee should consider the risk of prejudice to court proceedings against the public interest in, and the need for, the committee to inquire into the matter. Only when a committee considers that the risk outweighs the benefit should a committee consider forgoing its right to inquire.

The *sub judice* convention has arisen on a number of occasions in a committee context:

- In 2004, during a General Purpose Standing Committee No 1 inquiry into serious injury and death in the workplace, the committee received evidence of a number of workplace injuries and fatalities in New South Wales, including some cases which were still before the courts or still being considered for prosecution by WorkCover NSW. In those instances, the committee was careful not to trespass on issues that might possibly undermine or hinder a successful prosecution.[214]
- Also in 2004, during a General Purpose Standing Committee No 2 inquiry into health care complaints and complaint handling, the committee chose not to pursue a line of questioning which traversed an Independent Commission Against Corruption investigation.[215]

212 General Purpose Standing Committee No 1, *Allegations of bullying in WorkCover NSW*, Report No 40, 19 June 2014, p 155.

213 See the discussion under the heading 'The *sub judice* convention'.

214 General Purpose Standing Committee No 1, Inquiry into serious injury and death in the workplace, Evidence, 15 March 2004, p 21.

215 General Purpose Standing Committee No 2, Inquiry into complaints handling within NSW Health, Evidence, 30 April 2004, p 1.

- In 2009, during a General Purpose Standing Committee No 4 inquiry into Badgery's Creek land dealings and planning decisions, the committee chair ruled out of order a question put to a witness by another committee member regarding the involvement of the witness in a murder that was then being investigated by police.[216]
- In 2019, during a Public Works Committee inquiry into the impact of Port of Newcastle sale arrangements on public works expenditure in New South Wales, certain lines of questioning were affected by a Federal Court case involving NSW Ports.[217]

The option of hearing evidence *in camera* avoids any immediate impact that a committee hearing may have on court or other legal proceedings and allows a committee to consider what is actually said in evidence. Any subsequent decision by the committee to publish the transcript either in whole or in part can then be based on the actual evidence received.

Other forms of evidence gathering

Committees may also canvass the opinions of interested parties to an inquiry through other forms of evidence gathering such as visits of inspection, briefings, surveys, public forums and roundtable discussions.

Committees may make visits of inspection within New South Wales, elsewhere in Australia with the approval of the President, and outside of Australia if authorised by the House and with the approval of the President (SO 208(d), as amended by sessional order).[218]

A committee may also receive briefings from experts in a particular field. Whilst such briefings are not always transcribed, a transcript is useful if there is likely to be a need to refer to the discussions in the committee's report.[219] Under a sessional order adopted at the commencement of the 57th Parliament, it is necessary for a committee to resolve to allow persons other than members and secretariat staff to attend a private meeting, including briefings.[220]

---

216 General Purpose Standing Committee No 4, Inquiry into Badgerys Creek land dealings and planning decisions, Evidence, 29 September 2009, p 54.

217 Public Works Committee, *Impact of Port of Newcastle sale arrangements on public works expenditure in New South Wales*, Report No 2, February 2019, p 41.

218 *Minutes*, NSW Legislative Council, 8 May 2019, p 86. Different arrangements were adopted in the resolution establishing the three subject standing committees at the commencement of the 57th Parliament. See *Minutes*, NSW Legislative Council, 8 May 2019, pp 92-97. For further information, see the *Annotated Standing Orders of the New South Wales Legislative Council*, (n 35), pp 688-689.

219 See, for example, General Purpose Standing Committee No 5, *Coal seam gas,* Report No 35, May 2012, p 3; General Purpose Standing Committee No 5, *Management of public land in New South Wales*, Report No 37, May 2013, p 3.

220 *Minutes*, NSW Legislative Council, 8 May 2019, pp 58-67.

In recent times, committees have also made increasing use of online surveys to inform committee members of public views on a particular issue. For example, in 2019 the Public Accountability Committee conducted an online questionnaire as part of its inquiry into regulation of building standards, building quality and building disputes.[221]

Committees may also use roundtable discussions and public forums for gathering evidence. These methods provide an opportunity for committee members to hear directly from more people than is possible in public hearings. Roundtable discussions can also enable a committee to bring together parties to an inquiry in order to develop a consensus position on issues and to contribute to the development of recommendations.[222]

Behind each of these consultation methods is a desire to make committee processes more participatory. Less formal methods of evidence gathering can make people feel more comfortable than they might during formal hearings, although they may not be appropriate in all instances.

Participants in briefings, surveys, public forums and roundtable discussions are protected by parliamentary privilege as long as the proceedings are properly constituted proceedings of the committee. The protection of inquiry witnesses is discussed in detail in Chapter 21 (Witnesses).[223]

Extension of reporting date

As noted earlier, terms of reference for a committee inquiry usually specify the committee reporting date. However, it is relatively common for a committee to seek an extension of a reporting date where additional time would assist the committee in the conduct of the inquiry.

The means by which a committee's reporting date may be extended varies according to the circumstances in which the reporting date was set. Where the reporting date was set by the House, a committee may seek an extension of the reporting date by motion moved on notice in the House, usually by the committee chair. Where the reporting date was set in consultation with the minister as part of a ministerial reference, the practice is for a committee to consult with the minister concerning an extension, and subsequently to inform the House of the outcome of that discussion. Where the reporting date was adopted by a committee as part of a self-reference, the committee can simply extend that reporting date by resolution, although again the practice is to inform the House that the reporting deadline has been extended.

221 *Public Accountability Committee, Regulation of building standards, building quality and building dispute* – Final Report, Report No 6, April 2020, p xiv.

222 See, for example, Standing Committee on Social Issues, *Domestic violence trends and issues in NSW*, Report No 46, August 2012, p 2; and Standing Committee on Law and Justice, *The family response to the murders in Bowraville*, Report No 55, November 2014, p 2.

223 See the discussion under the heading 'Protection of witnesses'.

Reports

At the conclusion of a committee inquiry, the committee presents a report to the House which addresses the inquiry's terms of reference, outlines the information gathered by the committee throughout the inquiry and presents the committee's conclusions, findings and recommendations (SO 226(1)).[224] An exception to this are reports prepared by the portfolio committees at the conclusion of the budget estimates inquiry which only provide a summary of the conduct of the inquiry, matters raised during the hearings and any procedural matters of interest, without presenting conclusions and recommendations.[225]

Whilst a committee's conclusions, findings and recommendations are usually based primarily on the submissions and evidence to the committee during the inquiry, they may also refer to additional secondary material, such as legislation, expert reports, court decisions, legal opinions and the like. By convention, *in camera* evidence or confidential submissions may be used in a general sense to inform a committee's report, but are not quoted or sourced directly, except in exceptional circumstances.

In order for a committee to present a report to the House, the chair of the committee, at the committee's request, initially prepares a chair's draft report and submits it to the other members of the committee for consideration. In most cases the committee secretariat prepares the chair's draft report under instruction from the chair.[226] In theory there is nothing to prevent another committee member submitting an alternative report to the committee for its consideration, however this has not happened in living memory.[227]

The chair's draft report is subsequently considered at a deliberative meeting of the committee convened for that purpose (SO 227(2)). To allow members of the committee

---

224 For further information, see the *Annotated Standing Orders of the New South Wales Legislative Council*, (n 35), pp 738-741.

225 Unusually, in 2019, Portfolio Committee No 4 – Legal Affairs included detailed comment and conclusions on procedural matters with respect to the Corrections portfolio in its 2018-2019 budget estimates report. See Portfolio Committee No 4 – Legal Affairs, *Budget Estimates 2018-2019,* Report No 39, February 2019, pp 11-15. See also Portfolio Committee No 7 – Planning and Environment, Budget Estimates 2019-2020, Report No 2, May 2020, pp 3-7.

226 In an exception to this, during an inquiry by Portfolio Committee No 3 into measurement and outcome-based funding in New South Wales schools in 2019 and 2020, the chair of the committee, the Hon Mark Latham, directly prepared the chair's draft report. See Portfolio Committee No 3, *Measurement and outcome-based funding in New South Wales schools*, Report No 40, February 2020, p 126.

227 In 1865 a select committee was appointed to inquire into the question of a vacancy in the Council following the absence of three members for two successive sessions. The motion for the adoption of the draft report proposed by the chair, which considered that the seats of the members had become vacant, was negatived on division. Another draft report from a member of the committee, which considered that the members had not failed to attend for two successive sessions within the intent and meaning of the *Constitution Act 1855*, was adopted on division. See 'Report from the Select Committee on Question of Vacancy', 5 April 1865, *Journals*, NSW Legislative Council, 1865, vol 12, pp 169-170, 173-174.

time to have read and fully understood the draft report, the chair is required to have submitted the draft report to the members of the committee at least seven calendar days prior to the deliberative meeting, unless the committee decides otherwise (SO 227(1), as amended by sessional order).[228]

In considering a chair's draft report, the practice of committees is to consider the report page by page. Any committee member may propose amendments to the draft report (SO 227(2)). However, the chair cannot move an amendment to his or her own report. This follows the practice in the House where the President or Deputy President and Chair of Committees, when presiding, cannot move a motion, including an amendment. Any member of a committee may, following a vote on the voices, require a division on any motion, such as a motion to amend the report or the motion for adoption of the report.

A committee may also include a draft bill in its report to give effect to its recommendations (SO 226(2)). For the purposes of preparing a draft bill the committee may, with the consent of the relevant minister, make use of the services of the Parliamentary Counsel's Office (SO 226(3)). The only time a Council committee has attempted to use this standing order was in 2013 during an inquiry by the Select Committee on the Partial Defence of Provocation. The committee sought the Premier's approval to request the assistance of the Parliamentary Counsel's Office to draft a bill but the request was declined.[229]

A report of a committee includes a foreword by the chair. There are no standing orders or other procedural rules that stipulate the scope or content of a chair's foreword. However, the convention is for a chair to use the foreword to make general comments about the report, thank inquiry participants and emphasise issues of particular significance to the chair or the committee. The foreword should not be used to criticise the report or the inquiry process, or to raise matters rejected by the committee during consideration of the chair's draft report.[230]

Whilst the standing orders are silent as to the content of a chair's foreword, standing order 229 requires a chair's foreword to be approved by a committee before the report is tabled in the House, if the committee so resolves. This standing order was adopted in response to an instance where the chair used a foreword to criticise the report agreed to by the majority of the committee.[231]

---

228 *Minutes*, NSW Legislative Council, 20 November 2019, p 729.

229 Select Committee on the Partial Defence of Provocation, *The partial defence of provocation*, April 2013, pp 237-238. However, the Premier did commit to consulting with committee members on the form of amendments to legislation subsequent to the release of the committee's report. Following the Premier's decision, shortly before the end of the 55th Parliament, committee chairs requested that the President refer the efficacy of standing order 226(3) to the Procedure Committee for consideration. The President did so. See *Minutes*, NSW Legislative Council, 12 August 2014, pp 2650-2651. In the event, the committee did not report before the expiration of the Parliament.

230 Advice of the Clerk of the Parliaments, 'Re: Chair's Forewords', 5 May 2006, p 1.

231 Advice of the Clerk of the Parliaments, 'Report on Inquiry into the Pecuniary Interest Register: Advice in relation to the tabling of Report No 20 of the Standing Committee on Parliamentary

A number of procedural motions are agreed to at the conclusion of a committee's consideration of a chair's draft report. Most importantly, committee members agree to a motion that the chair's draft report, as read or as amended, be adopted as the report of the committee. The committee also agrees to a motion that the transcripts of evidence, submissions, tabled documents, answers to questions on notice, minutes of proceedings and correspondence relating to the inquiry (as the case may be) be tabled with the report, and that all of the documents be published with the exception of documents kept confidential by resolution of the committee. The committee may also agree to motions concerning the circulation of the chair's foreword and the timeframe for the provision of any statements of dissent. Statements of dissent are discussed below.

Unanimity of opinion and statements of dissent

The report of a committee is, as far as practicable, to reflect the unanimous opinion of the committee (SO 228(1)).[232] As *Erskine May* notes: 'It is the opinion of the committee as a committee, not that of individual members, which is required by the House.'[233]

It is the responsibility of the chair and all members of a committee to seek to achieve unanimity (SO 228(2)). In order to do so, the chair may canvass the views of committee members or submit a report outline for discussion before the chair's draft report is prepared. This can smooth the process of achieving a unanimous report.

Where unanimity is not practicable, a committee's report should be prepared that reflects the views of all members of a committee (SO 228(3)). For example, the report may note the views of both the majority and the minority of members on a particular issue, or even the views of an individual member,[234] although this should be considered a last resort. Alternatively, a member may append a brief statement of dissent to a report, provided that the member previously sought to have his or her opinions included in the report, as reflected in the committee minutes (SO 228(4)).[235] A statement of dissent must:

- be relevant to the committee's report and the terms of reference of the inquiry;
- not contain any matter which would unreasonably adversely affect or injure a person, or unreasonably invade a person's privacy;
- be signed by the member or members making it; and

Privilege and Ethics on Thursday 31 October 2002', 1 November 2002, p 3. For further information, see the *Annotated Standing Orders of the New South Wales Legislative Council*, (n 35), pp 746-747.

232 For further information, see the *Annotated Standing Orders of the New South Wales Legislative Council*, (n 35), pp 743-746.

233 D Natzler KCB and M Hutton (eds), *Erskine May's Treatise on The Law, Privileges, Proceedings and Usage of Parliament*, 25th ed, (LexisNexis, 2019), para 34.48.

234 See, for example, General Purpose Standing Committee No 5, *A sustainable water supply for Sydney*, Report No 25, June 2006, pp 47-49, 94, 147-156.

235 The first dissenting statement adopted in a report of a Council committee was in the second report of the Social Issues Committee in 1991. See Standing Committee on Social Issues, *Medically acquired HIV*, Report No 2, October 1991, pp 1-8.

- be no more than 1,000 words in length (SO 228(4)).

Statements of dissent are appended to a committee's report in the order in which they are received by the committee clerk.

Committee staff do not provide assistance in the drafting of statements of dissent. However, the committee clerk may be required to provide procedural advice on the content of such statements. In cases where a statement does not conform with the standing orders, the clerk will advise the member that the statement must be redrafted.

Other members of a committee, including the chair, do not have a right to view a statement of dissent by a member before the report of the committee is tabled. However, members sometimes request that their statements of dissent be circulated to other members of the committee in advance of the report being tabled.

Tabling of reports

A report of a committee, along with accompanying documents such as submissions, transcripts of evidence and correspondence,[236] must be tabled in the House within 10 calendar days of the report being adopted by the committee (SO 230).

The tabling of committee reports is discussed in Chapter 10 (The conduct of proceedings)[237] and in Chapter 19 (Documents tabled in the Legislative Council).[238] In summary, the report is signed and presented to the House by the committee chair, or in the absence of the chair, the deputy chair or another member of the committee (SO 230). Upon tabling, the chair usually moves that the House 'take note' of the report, which allows the House to debate the report, although the debate is usually adjourned immediately. When the House is not sitting, the report is tabled by the secretariat with the Clerk (SO 231), who reports receipt of the report when the House next sits, following which the chair then usually moves the 'take note' debate. A report tabled with the Clerk is for all purposes deemed to have been laid before the House and to be a document published by order or under the authority of the House.[239]

On rare occasions, on the tabling of a report in the House, the House has recommitted the report or a recommendation in the report to the committee concerned for further consideration. For example, in 1998 the House recommitted for further consideration the report of the Standing Committee on Parliamentary Privilege and Ethics entitled *Report on Person Referred to in the Legislative Council (Professor Robert Walker)*.[240] The report

236 When confidential documents are tabled in the House at the end of an inquiry, they remain confidential to members of the Legislative Council.

237 See the discussion under the heading 'Tabling of reports and papers by ministers, committee chairs and the Clerk'.

238 See the discussion under the heading 'Tabling of committee reports by committee chairs'.

239 For further information, see the *Annotated Standing Orders of the New South Wales Legislative Council*, (n 35), pp 748-750.

240 Standing Committee on Parliamentary Privilege and Ethics, *Report on person referred to in the Legislative Council (Professor Robert Walker)*, Report No 8, October 1998.

concerned a request for a right of reply.[241] The committee was asked to reconsider in particular whether the proposed right of reply met with the guidelines agreed to by the House in relation to rights of reply, and the appropriateness of those guidelines.[242] In another example, in 2006 the House recommitted recommendation 33 of the Joint Standing Committee on Electoral Matters report entitled *Inquiry into the administration of the 2003 election and related matters*. The recommendation proposed to remove the entrenchment provision in the *Constitution Act 1902* which prevents the government of the day altering the system of counting votes in the Council without approval by the people at a referendum.[243]

Debate on committee reports tabled in the House is discussed further in Chapter 10 (The conduct of proceedings).[244]

Evidence referred to another committee by the House

The House may refer evidence collected by one committee to another committee for further inquiry and report. This occurred in 2006 following the tabling of the report of the Select Committee on the Proposed Sale of Snowy Hydro Limited, when the House referred the evidence collected by that committee to the newly formed Select Committee on the Continued Public Ownership of Snowy Hydro Limited.[245] Similarly, in 2007 the House referred to General Purpose Standing Committee No 2 the evidence collected by General Purpose Standing Committee No 4 during its inquiry into the operations of the Home Building Service of the Office of Fair Trading. This followed the adoption of the inquiry by General Purpose Standing Committee No 2 after a change in the portfolio responsibilities of the GPSC.[246]

Government responses to committee reports

Standing order 233 requires all committee reports tabled in the Legislative Council which make recommendations for action by the government to be referred by the Clerk to the Leader of the Government in the Legislative Council. The Leader of the Government must, within six months of a report being tabled, provide a written response indicating what action, if any, the government proposes to take in relation to each recommendation (SO 233(1)). If the House is not sitting when a minister seeks to table a response, it may be presented to the Clerk and is deemed to have been tabled (SO 233(2)).

---

241 For further information, see the discussion in Chapter 3 (Parliamentary privilege in New South Wales) under the heading 'Right of reply to statements made by members in the House'.

242 *Minutes,* NSW Legislative Council, 12 November 1998, pp 861-862.

243 *Minutes,* NSW Legislative Council, 27 September 2006, pp 231-232.

244 See the discussion under the heading 'Debate on committee reports and government responses'. See also the *Annotated Standing Orders of the New South Wales Legislative Council*, (n 35), pp 750-753.

245 *Minutes,* NSW Legislative Council, 7 June 2006, p 103.

246 *Minutes,* NSW Legislative Council, 25 September 2007, p 234.

The President is required to report to the House if a government response has not been received within the six month deadline (SO 233(4)). The record of governments to date in providing responses within the required timeframe is generally very good.[247]

However, from time to time, issues have arisen concerning the provision of government responses to reports tabled at the conclusion of the previous Parliament. On 7 September 2011, following the change of government at the commencement of the 55th Parliament, the Clerk received correspondence from the Leader of the House advising that the government would not respond to various committee reports tabled in the last six months of the 54th Parliament, on the basis that the newly elected government, which enjoyed the confidence of the 55th Parliament, was not obliged to respond to reports which were tabled during the 54th Parliament.[248] On 9 September 2011, the Clerk indicated in reply that the application of standing order 233 is not limited to individual Parliaments and that, as such, the government was bound by its provisions. The Clerk also observed that the Council received a number of government responses in the 54th Parliament to reports which were tabled in the 53rd Parliament.[249] Subsequently, on 11 October 2011, in accordance with standing order 233(4), the President informed the House that government responses had not been received to nine committee reports tabled during the 54th Parliament.[250] The House subsequently passed a resolution requiring the government to respond to all nine reports.[251] The government responses were received on the first sitting day in 2012.[252]

At the commencement of the 56th Parliament, issues again arose in relation to the provision of government responses to the reports of the Select Committee on the Conduct and Progress of the Ombudsman's inquiry 'Operation Prospect'.[253]

At the commencement of the 57th Parliament in May 2019, there was again a delay in the provision of government responses to four committee reports. In correspondence tabled

247 On several occasions soon after the adoption of the current standing orders in 2004, ministers wrote to the Clerk advising that a response would not be provided until after the deadline for their receipt. See, for example, *Minutes,* NSW Legislative Council, 17 March 2004, p 619; 7 June 2005, p 1420; 7 March 2006, p 1875. However, this has not happened now for many years. For further information, see the *Annotated Standing Orders of the New South Wales Legislative Council*, (n 35), pp 754-759.

248 Correspondence from the Leader of the House, the Hon Duncan Gay, to the Clerk of the Parliaments, 7 September 2011. The correspondence was tabled in the House on 11 October 2011. See *Minutes,* NSW Legislative Council, 11 October 2011, pp 458-459. This correspondence retracted previous correspondence dated 20 June 2011. See *Minutes,* NSW Legislative Council, 20 June 2011, p 225.

249 Correspondence from the Clerk of the Parliaments to the Leader of the House, the Hon Duncan Gay, 9 September 2011. The correspondence was also tabled in the House on 11 October 2011. See *Minutes,* NSW Legislative Council, 11 October 2011, pp 458-459.

250 *Minutes,* NSW Legislative Council, 11 October 2011, pp 458-459.

251 *Minutes,* NSW Legislative Council, 13 October 2011, pp 492-494.

252 *Minutes,* NSW Legislative Council, 14 February 2012, pp 668-669. For further information, see the *Annotated Standing Orders of the New South Wales Legislative Council*, (n 35), pp 754-759.

253 For further information, see the *Annotated Standing Orders of the New South Wales Legislative Council*, (n 35), pp 757-758.

in the House, the Leader of the Government in the Legislative Council attributed the delay to the 2019 election and the formation of the new cabinet. However, the requirement for responses to be provided was not contested.[254] Ultimately the responses were received.

At the commencement of the 57th Parliament in May 2019, the House adopted a sessional order amending standing order 233 to provide that if a government response does not address each individual recommendation of a committee in its report, the President is to inform the House on the next sitting day, and the relevant minister must immediately explain to the House the reason for non-compliance. This process is to continue each month until a full government response to each recommendation is provided.[255] This sessional order was adopted by the House to address concerns that government responses had in the past not always addressed each recommendation of a committee.

The operation of this sessional order arose in the House on 13 May 2020, on the tabling of the government response to Report No 4 of the Public Accountability Committee entitled Regulation of building standards, building quality and building disputes – First Report.[256] On the tabling of the response, the President made a statement to the House in which he noted that the response did not specifically address the 19 recommendations in the first report of the committee, but that the response included a statement noting that the committee had released a final report on 30 April 2020, and that the government would provide a complete response to both reports in responding to the final report. In the circumstances, the President proposed to accept the government response, subject to the will of the House, on the understanding that the government response to the final report specifically addressed all recommendations in both the first and final reports.[257] The House took no further action.

Debate on government responses to committee reports tabled in the House is discussed further in Chapter 10 (The conduct of proceedings).[258]

ORDERS FOR THE PRODUCTION OF STATE PAPERS BY COMMITTEES

It is well established that the House has the inherent power under the common law principle of necessity to order the production of State papers.[259] The existence of this power was affirmed by the courts in the *Egan* decisions of the late 1990s.[260]

254 *Minutes*, NSW Legislative Council, 28 May 2019, pp 125-126.

255 *Minutes,* NSW Legislative Council, 8 May 2019, pp 86-87.

256 Minutes, NSW Legislative Council, 23 May 2020, p 948.

257 Hansard, NSW Legislative Council, 23 May 2020, pp 64-65.

258 See the discussion under the heading 'Debate on committee reports and government responses'.

259 For further information, see the discussion in Chapter 3 (Parliamentary privilege in New South Wales) under the heading 'The power to order the production of State papers' and in Chapter 19 (Documents tabled in the Legislative Council) under the heading 'Orders for the production of State papers'.

260 See the decision of the New South Wales Court of Appeal in *Egan v Willis and Cahill* (1996) 40 NSWLR 650, the decision of the High Court in *Egan v Willis* (1998) 195 CLR 424 and the decision of the New South Wales Court of Appeal in *Egan v Chadwick* (1999) 46 NSWLR 563.

Several joint statutory committees also have an express statutory power to 'send for persons, papers and records'.[261]

However, there is debate regarding the power of standing and select committees of the Legislative Council to order the production of State papers. The Council and its committees have consistently asserted the power, based on the common law principle of necessity and the delegation by the House of the power under standing order 208.[262] However, this position has been contested by the executive government since 2003.

By way of background, following the *Egan* decisions of the late 1990s, between 1999 and 2001 there was a growing body of precedents of documents being provided to Legislative Council standing committees following a formal order by a committee.[263]

Consistent with this body of precedents, in 2003, as part of the trial of new standing orders by way of sessional orders, the Legislative Council for the first time adopted a sessional order providing that a committee has power to send for persons, papers, records and things.[264] This sessional order was subsequently adopted as standing order 208(c) in 2004.[265] As adopted, standing order 208(c) provides:

> **208 Powers**
>
> A committee has power:
>
> …
>
> (c) to send for and examine persons, papers, records and things,[266]

Also in 2003, in *Attorney-General (Canada) v MacPhee*,[267] heard in the Prince Edward Island Supreme Court Trial Division in Canada, Cheverie J observed:

---

261 See, for example, the Committee on the Independent Commission Against Corruption, *Independent Commission Against Corruption Act 1988*, s 69(1); the Committee on the Ombudsman, the Law Enforcement Conduct Commission and the Crime Commission, *Ombudsman Act 1974*, s 31G(1); and the Committee on Children and Young People, *Advocate for Children and Young People Act 2014*, sch 2, s 6(1).

262 It is also possible that the power may exist under the *Parliamentary Evidence Act 1901*.

263 See, for example, General Purpose Standing Committee No 1, *Inquiry into Multiculturalism – Interim report*, Report No 9, May 2000, pp 142-144, 146; General Purpose Standing Committee No 5, *Report on Inquiry into Northside Storage Tunnel – Scotts Creek Vent*, Report No 9, November 2000, pp 142-143, 147; and General Purpose Standing Committee No 3, *Cabramatta Policing*, Report No 8, July 2001, pp 268, 271.

264 The new sessional orders were trialled from 14 October 2003. See *Minutes*, NSW Legislative Council, 14 October 2003, p 324. From 1988 until the adoption of this sessional order in 2003, the equivalent provision was included in the resolution establishing the standing committees in each Parliament.

265 *Minutes*, NSW Legislative Council, 5 May 2004, p 676. For further information, see the *Annotated Standing Orders of the New South Wales Legislative Council*, (n 35), pp 684-688.

266 In 2019, the standing order was amended by sessional order, but its provision in respect of the power to send for and examine persons, papers, records and things remained unchanged. See *Minutes*, NSW Legislative Council, 8 May 2019, p 86.

267 (2003) PESCTD 6.

> It is my conclusion the Legislative Assembly of Prince Edward Island has the power to summon witnesses and order them to produce documents. This power is constitutional by virtue of the fact it is an exercise of inherent parliamentary privilege. The Committee of the House is an extension of the House and possesses the same constitutional power to summon witnesses and order them to produce documents.[268]

However, in 2003, the executive government contested the power of standing and select committees of the Legislative Council to order the production of State papers. The Premier's 2003 'Guidelines for public officials appearing before parliamentary committee', issued in November 2003, stated:

> Officers should be aware that the Houses of Parliament have the power to require the production of documents (other than Cabinet documents) regardless of claims for privilege. If a Committee requires an officer to hand over documents in the officer's possession at the hearing, the officer should request that the Committee refer the matter to the relevant House for a formal order to be made pursuant to the Standing Orders.[269]

The adoption of this position by the executive government was likely based on advice provided by the Crown Solicitor in September 2001 following an order for papers made by General Purpose Standing Committee No 1 during its inquiry into the workers compensation scheme. In his advice, the Crown Solicitor observed:

> … I doubt that it would be reasonably necessary for the functions of the Committee for it to have such a power, nor would it be reasonably necessary for the functioning of the House as an organ of responsible government for the House to have the power to delegate that power to the Committee.[270]

Over the following decade, the power of Council standing committees to order the production of State papers was routinely contested by the executive government:

- In 2004, during a General Purpose Standing Committee No 4 budget estimates inquiry, issues arose concerning the provision of an internal audit bureau report by the Chair of Sydney Water, which she had referred to the Independent Commission Against Corruption for investigation. The issue was resolved when the Leader of the Government in the Legislative Council successfully moved for the production of the document to the House.[271]
- In 2004, during a General Purpose Standing Committee No 4 inquiry into the Designer Outlets Centre, Liverpool, the committee twice ordered the production of papers. On the first occasion, the documents were 'voluntarily' provided to

---

268 *Attorney-General (Canada) v MacPhee* (2003) PESCTD 6 at [44] per Cheverie J.

269 Department of Premier and Cabinet Circular C2003-47, 'Guidelines for appearing before Parliamentary Committees', 17 November 2003, para 9.

270 Crown Solicitor, 'Production of Documents to Legislative Council Standing Committee No 1', 28 September 2001, para 3.3.

271 *Minutes,* NSW Legislative Council, 25 February 2004, pp 548-549; 26 February 2004, p 561. For further information, see L Lovelock and J Evans, *New South Wales Legislative Council Practice*, 1st ed, (Federation Press, 2008), p 539.

the committee, on the second they were obtained through an order of the House and subsequently made available to the members of the committee.[272]

- In 2008, during a General Purpose Standing Committee No 1 inquiry into the need for a mini-budget, the committee chose not to press a request to the Secretary of Treasury to provide a copy of a briefing note, whilst emphasising that it did not support the interpretation of the Crown Solicitor concerning the power of committees to order the production of State papers.[273]
- In January and February 2011, during a General Purpose Standing Committee No 1 inquiry into the Gentrader transactions, in response to an order for papers relating to the energy reform transaction, the Department of Premier and Cabinet delivered some documents but declined to provide other documents over which it claimed privilege.[274]
- In 2014, during a General Purpose Standing Committee No 1 inquiry into allegations of bullying in WorkCover NSW, the committee ordered the production of documents by the Public Service Commissioner regarding an investigation into an allegation of bullying, however the Commissioner declined on the basis of privacy concerns. Once again, the documents were ultimately obtained through an order of the House.[275]

Up until 2014, orders for State papers adopted by standing committees of the Legislative Council were expressed in terms of the common law power and the provisions of standing order 208(c). However, in 2015, Mr Bret Walker SC provided advice in relation to the production of documents in the possession, custody or control of Greyhound Racing NSW. Whilst this advice mainly concerned the production of documents to the House, Mr Walker also canvassed the provisions of section 4 of the *Parliamentary Evidence Act 1901* concerning a person summonsed to attend and give evidence.

---

272 For further information, see *New South Wales Legislative Council Practice,* 1st ed, (n 271), pp 539-541.

273 General Purpose Standing Committee No 1, *The need for a mini-budget*, Report No 32, October 2008, pp 2-3.

274 General Purpose Standing Committee No 1, *The Gentrader transactions*, Report No 36, February 2011, pp 12-13. A notable feature of this inquiry was that it continued notwithstanding the prorogation of the Parliament. The Crown Solicitor's advice in those circumstances was that there was a risk that documents provided to the committee would not be protected by parliamentary privilege.

275 *Minutes*, NSW Legislative Council, 13 November 2013, p 2172; 20 November 2013, p 2239. A claim of privilege was made over the documents. The chair, on behalf of the committee, subsequently disputed the validity of the claim. The Independent Legal Arbiter appointed to evaluate the claim, the Hon Keith Mason AC QC, did not uphold the claim of privilege. On tabling the Arbiter's report in the House, a committee member moved a motion to enable a copy of the privileged documents to be provided to the committee for the purposes of its inquiry. The House unanimously agreed to the motion. See *Minutes*, NSW Legislative Council, 6 March 2014, pp 2346-2347. See also General Purpose Standing Committee No 1, *Allegations of bullying in WorkCover NSW*, Report No 30, June 2014, pp 4-9.

Mr Walker posited that the giving of evidence on summons may include a requirement for witnesses to produce documents as part of their evidence.[276]

In April 2017, the Department of Premier and Cabinet issued new 'Guidelines for Government Sector Employees dealing with the Legislative Council's Portfolio Committees' which specifically stated:

> The *Parliamentary Evidence Act 1901* does not give committees the power to send for documents. This power is claimed by Legislative Council Standing Order 208. While the High Court has held that the Legislative Council has the power to compel the Executive Government to produce State papers (*Egan v Willis* (1998)), it is arguable that it is not 'necessary' to give such a power to a committee. The extent of this power is therefore uncertain and may be challenged where necessary.
>
> Where a Committee requires the production of a document which is likely to be subject to privilege or where it is anticipated that at the Committee's hearing the production of documents will be required in relation to potentially privileged matters, advice should be sought from the Crown Solicitor as to whether privilege can be claimed. If so, the Minister should be advised and a determination will need to be made as to whether privilege should be claimed in the particular circumstances.[277]

The power of committees of the Legislative Council to order the production of State papers subsequently arose again on three separate occasions in 2017 and 2018.

At the end of 2017 and in the first half of 2018, Portfolio Committee 5 – Industry and Transport conducted an inquiry into the Windsor Bridge replacement project. Following several requests from the committee to Transport for NSW to produce an unredacted version of the Final Business Case for the project, each of which was declined, the committee, based on the 2015 advice of Mr Bret Walker SC, resolved under section 4 of the *Parliamentary Evidence Act 1901* that the Secretary of Transport for NSW be summoned to attend a hearing on 29 May 2018 and produce the document. In the event, on 28 May 2018, the secretary produced an unredacted copy of the document 'on a voluntary basis'.[278] In adopting this approach, the secretary was likely informed by an advice from the Solicitor General, in which he provided the following significant observation on the power of Council committees to order the production of documents:

> I should add, however, that it is more likely than not, in my view, that, if this question of the powers of a parliamentary Committee were to be the subject of a decision of a court, a finding would be made that a Committee of the NSW Parliament has the power to call for a witness to attend and give evidence, including by the production of a document, subject to claims of privilege, such as

276 B Walker SC, 'Parliament of New South Wales Legislative Council – orders for papers from bodies not subject to direction or control by the Government', 18 November 2015, pp 13-15.

277 Department of Premier and Cabinet Memorandum M2017-01, 'Guidelines for Government Sector Employees dealing with the Legislative Council's Portfolio Committees', 3 April 2017.

278 Portfolio Committee No 5 – Industry and Transport, *Windsor Bridge replacement project*, Report No 48, August 2018, pp xi-xii.

> public interest immunity and legal professional privilege, that may be made by a witness. There may be some argument as to whether such a power resides in the Parliamentary Evidence Act, Standing Order 208(c) of the Legislative Council or a power based on reasonable necessity, but if the power does exist, it would be likely to emerge in any court proceedings on the basis that such proceedings would be difficult to confine to the limited question of the construction of the Parliamentary Evidence Act.[279]

This advice of the Solicitor General was subsequently cited in an entirely separate legal advice provided by the Acting Crown Solicitor to the Auditor General, published on 19 October 2018 as part of the Audit Office's Report on State Finances. Having noted that her predecessor had taken the view that it should not be conceded that parliamentary committees have the power to require the production of documents, and also the advice of Mr Bret Walker in relation to the *Parliamentary Evidence Act*, the Acting Crown Solicitor concluded by referencing the opinion of the Solicitor General:

> The Solicitor General recently indicated that, in his view, it is 'more likely than not' that if the question were to be the subject of a decision of a court, a finding would be made that a committee of the NSW Parliament has the power to call for a witness to attend and give evidence, including by the production of a document. This would, however, be subject to claims of privilege, such as public interest immunity and legal professional privilege, that might be made by the witness.
>
> The Solicitor General considered that there may be some argument as to whether such a power resides in the *PE Act*, Standing order 208(c), or a power based on reasonable necessity. If the power does exist, however, it would be likely to emerge in any court proceedings (even if the only basis initially relied upon by the committee was a summons issued under the *PE Act*).
>
> I defer to the opinion of the Solicitor General.[280]

In a follow-up legal advice dated 12 September 2018 to the Auditor General concerning the power of the Legislative Assembly Public Accounts Committee to compel the production of documents, the Acting Crown Solicitor further indicated:

> I have shown a draft of this advice to the Solicitor General, who has indicated that he agrees with it. The Solicitor General also observed (whilst the Walker view is arguable) there is a good argument that the *PE Act* itself does not confer power on a non-statutory committee to compel the production of documents. That power is, instead, more likely to be found to derive from Standing Order

279 Solicitor General, 'Question of powers of Legislative Council Committees to call for production of documents from witnesses' (redacted), 2018, p 2. This advice was not provided as part of the Inquiry into the Windsor Bridge replacement project. However, a redacted version of the advice was later provided to Portfolio Committee No 4 – Legal Affairs as part of the budget estimates inquiry 2018-2019. See Portfolio Committee No 4 – Legal Affairs, *Budget Estimates 2018-2019*, Report No 39, February 2019, Appendix 3, Item 6.

280 Crown Solicitor, 'Section 38 *Public Finance and Audit Act* and powers of Parliamentary Committees', Advice to the Auditor General, 10 August 2018, paras 3.28-3.30; published in Audit Office, *Report on State Finances*, 19 October 2018, Appendix 2.

> 288 and the principle that the Legislative Assembly has all the powers that are 'reasonably necessary' to exercise its functions.[281]

The matter arose again in October 2018 during budget estimates, when Portfolio Committee 4 – Legal Affairs sought provision of a draft report of the Inspector of Custodial Services into the use of force in the juvenile justice system. During the course of the inquiry, the committee ordered the production of the draft report under standing order 208(c). However this was resisted by the responsible minister, on the advice of the Acting Crown Solicitor, on the basis that production of the draft report would be inconsistent with or interfere with the statutory scheme established by the *Inspector of Custodial Services Act 2012*, and that such production to the committee was not reasonably necessary.[282]

Under section 4 of the *Parliamentary Evidence Act 1901*, the committee subsequently summoned both the Inspector and the Secretary of the Department of Justice to attend a hearing and produce the draft report. Both parties attended the hearing but still resisted production of the draft report. In this instance, they relied on advice from the Acting Crown Solicitor that the *Parliamentary Evidence Act 1901* does not of itself confer power on a committee to compel the production of documents. This position was based on both the language of the *Parliamentary Evidence Act 1901* and its legislative history and that of its predecessor, the *Parliamentary Evidence Act 1881*. Rather, the Acting Crown Solicitor again cited the Solicitor General's opinion that the 'power is, instead, more likely to be found to derive from Standing Order 208(c) and the principle that the Legislative Council has all the powers that are "reasonably necessary" to exercise its function'.[283]

The Inspector subsequently provided the committee with a further legal advice prepared by Ms Mitchelmore SC in which she agreed with the Acting Crown Solicitor's opinion that in the circumstances, requiring the production of the draft report 'would involve a significant degree of inconsistency, if not interference with, the operation of the statutory scheme … under which the Inspector reports to the House'.[284] However, in relation to the broader power of committees to order the production of State papers, she observed:

---

281 Crown Solicitor, 'Section 38 *Public Finance and Audit Act* and powers of Parliamentary Committees - Advice 2', Advice to the Auditor General, 12 September 2018, para 3.22; published in Audit Office, *Report on State Finances*, 19 October 2018, Appendix 2.

282 Portfolio Committee No 4 – Legal Affairs, *Budget Estimates 2018-2019*, Report No 39, February 2019, pp 5-6. See also Acting Crown Solicitor, 'Draft Report of Inspector of Custodial Services', 24 October 2018, para 1.3; published in Portfolio Committee No 4 – Legal Affairs, *Budget Estimates 2018-2019*, Report No 39, February 2019, Appendix 3, Item 3. In passing, it is to be noted that the test of necessity is determinative of whether a power of the House or its committees exists at common law, not whether a particular document is 'necessary' or otherwise to a particular inquiry.

283 Acting Crown Solicitor, 'Request by Committee for draft report of Inspector of Custodial Services', 29 October 2018; published in Portfolio Committee No 4 – Legal Affairs, *Budget Estimates 2018-2019*, Report No 39, February 2019, Appendix 3, Item 5.

284 A Mitchelmore SC, 'Powers of Legislative Council Portfolio Committee No 4 in the context of its Inquiry into Budget Estimates 2018-2019', Legal Advice, 19 November 2018, p 2; published

> The proposition that the Committee does not have the power to require provision to it of the Draft Report applies whether the Committee relies upon an implication from standing order 208(c), or from the terms of s 4 of the PE Act, as the source of its power. For completeness, however, I note that in a letter of advice to the Inspector of 29 October 2018, the Acting Crown Solicitor noted the view of the Solicitor General that the power was more likely to derive from standing order 208(c), and the principle that the Legislative Council has all of the powers that are reasonably necessary to exercise its functions, rather than s 4 of the PE Act. …
>
> I consider that the reasoning of the Acting Solicitor for agreeing with a view apparently recently expressed by the Solicitor General has force. However, in circumstances where a general power resides in standing order 208(c), or otherwise arises as a matter of reasonable necessity, it is not necessary to express a concluded view as to the scope of s 4 of the PE Act.[285]

Ultimately, on 23 November 2018, the final report of the Inspector of Custodial Services was tabled and published.

In summary of these various legal advices from 2018, the Solicitor General, Acting Crown Solicitor and Ms Mitchelmore all recognised that were the question of the power of committees to order the production of State papers to go to court, it is more likely than not that a finding would be made that committees have the power to compel the production of such papers.[286] The most likely source of that power remains the common law principle of necessity. Although his comment was *obiter*, McHugh J accepted as much in *Egan v Willis*.[287]

Noting these developments in 2018, on 8 May 2019, at the commencement of the 57th Parliament, the Legislative Council adopted a sessional order establishing procedures for committees to order the production of State papers under standing order 208(c).[288] The sessional order referred explicitly to the various legal opinions cited above, notably that of the Solicitor General, called on the Premier to reissue the guidelines for public officials appearing before parliamentary committees, and affirmed the view of the House that committees possess the power to order the production of State papers. It also established a framework for orders for State papers by committees. Under this framework:

- The terms of the order must specify the inquiry to which the order relates and the date by which the documents are to be returned.

---

in Portfolio Committee No 4 – Legal Affairs, *Budget Estimates 2018-2019*, Report No 39, February 2019, Appendix 3, Item 7.

285 Ibid.

286 However, as per the advice of Ms Mitchelmore SC, there may arguably be some question as to the operation of the power in respect of reports produced according to specific and prescriptive statutory requirements.

287 (1998) 195 CLR 424 at 468 per McHugh J.

288 *Minutes*, NSW Legislative Council, 8 May 2019, pp 81-83. The House adopted the sessional order on division, 24 votes to 15, all opposition and cross-bench members voting in support of the motion.

- The order is to be communicated by the Clerk to the Director General of the Department of Premier and Cabinet. (The department coordinates returns to order on behalf of the government.)
- A summary of the terms of the order is to be reported to the House by the President on the next sitting day.
- The return to order is to be lodged with the Clerk and made available to all members of the House.
- The return is to include an indexed list of all documents returned, providing the date of creation of the document, the author of the document and a description of the document.
- Privilege may be claimed over a document or documents in a return, in which case a separate index is to be prepared with reasons for the claim of privilege.
- A member of the committee may, by communication in writing to the Clerk, dispute the validity of a claim of privilege. On receipt of such communication, the Clerk is authorised to release the document or documents to an Independent Legal Arbiter for evaluation and report as to the validity of the claim.
- On completion, the report of the Independent Legal Arbiter is to be made available to members of the committee only. It may be published by order of the committee.
- The committee may authorise the publication of any document or documents received, subject to any process for evaluation of claims of privilege as outlined above.

These arrangements for the production of documents to committees closely mirror those for the production of documents to the House under standing order 52.[289] As in the House, it is incumbent on a committee to use the power to order the production of State papers in a measured and considered manner. In particular, committees should in all instances request the provision of information before seeking to compel it.[290] It is possible that the House would not support an unreasonable or punitive demand by a committee for State papers.

The key difference between the power of the House to order the production of State papers and the power of a committee to do so is that if an order by a committee is resisted, the committee itself does not have the power to deal with that refusal. Where a formal order for the production of documents by a committee is not met, and the committee takes the view that such a failure represents a substantial interference with

289 For further information, see the discussion in Chapter 19 (Documents tabled in the Legislative Council) under the heading 'Current procedures for the production of State papers under standing order 52'.

290 For example, it would not be fair for witnesses who are appearing voluntarily before a committee to be compelled to produce documents in their possession.

the committee's capacity to undertake its inquiry, the committee may consider making a special report to the House. The House would then need to consider its response to the special report, including sanctioning the relevant minister.

The sessional order was used for the first time on 19 March 2020 as part of the Inquiry into the Budget Estimates 2019-2020, when Portfolio Committee No 7 – Planning and Environment ordered the production of papers in relation to the Liddell Power Station taskforce.[291] In the event, the documents were not provided, the executive government continuing to contest the power of committees to order the production of State papers, in this instance making particular reference to the commercial sensitivity of the documents.[292] Due to circumstances relating to the COVID-19 pandemic, the documents were subsequently sought through the House.

THE EFFECT OF PROROGATION ON COMMITTEES

Prorogation of the Legislative Council is discussed in Chapter 9 (Meetings of the Legislative Council).[293] In general terms, prorogation is considered to prevent the House from meeting, although there is some uncertainty as to this. However, for committees, the consequences of prorogation vary according to the type of committee. This is discussed below.

Statutory committees

Statutory committees generally have power under the relevant act constituting the committee to 'sit and transact business despite any prorogation of the Houses of Parliament or any adjournment of either House of Parliament'.[294] As such they may meet during periods of prorogation.

Standing committees

Standing order 206(1), adopted in 2004, provides that 'The House may establish standing committees which have power to sit during the life of the Parliament'.

---

291 *Minutes*, NSW Legislative Council, 24 March 2020, p 8.

292 Correspondence from the Secretary of the Department of Premier and Cabinet to the Clerk, 'Liddell Taskforce report and related papers', 1 April 2020. See *Minutes*, NSW Legislative Council, 12 May 2020, p 892. See also Portfolio Committee No 7 – Planning and Environment, Budget Estimates 2019-2020, Report No 2, May 2020, pp 3-5 and Appendix 1.

293 See the discussion under the heading 'Prorogation'.

294 See, for example, the Committee on the Independent Commission Against Corruption, *Independent Commission Against Corruption Act 1988*, s 68(8); the Committee on the Ombudsman, the Law Enforcement Conduct Commission and the Crime Commission, *Ombudsman Act 1974*, s 31F(8); and the Legislation Review Committee, *Legislation Review Act 1987*, s 8(8). This approach is not new. Section 7(2) of the *Public Works Act 1912* provides that the Parliamentary Standing Committee on Public Works shall 'hold office as a joint committee … for the duration of the Parliament for the time being, but shall cease to hold office as soon as such Parliament expires by dissolution or effluxion of time'.

The background to this standing order is significant in understanding its operation.

From 1966 onwards, the Parliament from time to time passed various parliamentary committee enabling acts in order to enable certain committees to sit during periods of prorogation.

Subsequently, in 1982, as part of the reforms to the standing orders of the Legislative Council to facilitate the establishment of the standing committees, the Council adopted standing order 257C which provided that standing committees shall 'have power to sit during the life of the Parliament in which they are appointed'.[295] In speaking to the motion for the adoption of the new and revised standing orders, the Leader of the Government in the Council, the Hon Paul (DP) Landa, stated:

> The proposed term of the standing committees is the term of the Parliament and the work will be of a continuing nature.[296]

Consistent with this interpretation of standing order 257C, in early 1993, despite the prorogation of the Parliament at the time, the President referred to the Privileges Committee an inquiry into a special report from the Joint Select Committee upon Police Administration concerning the unauthorised disclosure of *in camera* evidence.[297] The first two meetings of the Privileges Committee to consider the matter on 2 February 1993 and 8 February 1993 were held whilst the House was prorogued.

It is also notable that the *Parliamentary Committees Enabling Act 1993* did not include the standing committees under its operation, presumably on the basis that these committees were now understood to have the power to sit during periods of prorogation under standing order 257C.

However, on 13 December 1994, following the prorogation of the Parliament on 7 December 1994,[298] the Crown Solicitor provided written advice to the Clerk of the Legislative Assembly stating that then Assembly standing order 374A and the equivalent Council standing order 257C were invalid, to the extent that they purported to authorise committees to sit after prorogation.[299] The Crown Solicitor argued:

> I consider that a Standing Committee cannot function while the House of Parliament which created it, and to which it is responsible and accountable, stands prorogued, in the absence of an Act of Parliament authorising the

295 *Minutes,* NSW Legislative Council, 17 March 1982, pp 262-263. Standing order 257C was adopted as part of a set of amendments to the standing orders of the Council to permit the establishment of standing committees. See the discussion earlier in this chapter under the heading 'Development of the Legislative Council committee system'.

296 *Hansard,* NSW Legislative Council, 17 March 1982, p 2681.

297 *Minutes*, NSW Legislative Council, 2 March 1993, p 20.

298 The prorogation of the Parliament on 7 December 1994 was unusual in that it came several months before the election on 25 March 1995. At the time, the government was accused of using prorogation to avoid parliamentary debate on a number of issues, including potentially damaging reports on the superannuation payout to a former government minister.

299 The advice was sought in response to uncertainty concerning the status of various committees, notably the Standing Committee on the Environmental Impact of Capital Works.

> transaction of Committee business despite prorogation. … The rationale for this view appears to be that a committee only exists, and only has power to act; as far as directed by an order of the House which brings it into being. The committee is subject to the will of the House. The House may at any time dissolve a committee or recall its mandate, and it follows from the principle laid down that the work of every committee comes to an absolute end with the close of the session.[300]

Upon receipt of the advice, the Premier's Department issued a memorandum indicating that any transfer of documents, including submissions, to standing committees should cease immediately.[301] The President also wrote to the chairs of the Council's standing committees advising that in view of the Crown Solicitor's advice, committees should not hold deliberative meetings, conduct hearings or table reports; nor should the chairs carry out any functions as committee chair. As a result, several active inquiries were terminated.

On two subsequent occasions on the prorogation of the Parliament in 1996 and 1999, the Clerk issued memoranda to members of the Council drawing attention to the content and effect of the Crown Solicitor's advice.[302] In addition, the *Parliamentary Committees Enabling Act 1996* contained, for the first time, provision for the three Council subject standing committees and the Standing Committee on Parliamentary Privilege and Ethics to meet after prorogation, presumably as a direct result of the Crown Solicitor's advice.

Nonetheless, as expressed in the first edition of *New South Wales Legislative Council Practice*, the Clerks of the Legislative Council have consistently taken the view that, at least in modern times, the Crown Solicitor's position adopted in 1994 was based on 'an extremely restrictive view of the powers of the Council'.[303] In a legal opinion dated 9 October 1984 and tabled in the Senate on 19 October 1984, the Solicitor General of the Commonwealth concluded that the 'House of Commons in 1901 was empowered to authorise its committees to sit during a period of its prorogation'.[304] Consistent with this, there are many examples from other houses of parliament in Australia, including the Senate and the South Australian Legislative Council, of committees being authorised, either through resolution or the standing orders, to sit and transact business despite prorogation.[305]

In 2004, the provisions of standing order 257C were adopted in the new standing order 206(1).

---

300 Crown Solicitor, 'Status of standing committees after prorogation of the Parliament', 13 December 1994, p 2.

301 Premier's Department, 'Status of standing committees after prorogation of the Parliament', Circular 94-29, 15 December 1994.

302 Memorandum to members, 30 January 1996; Memorandum to members, 11 August 1999. The Clerk's advice of 1999 was premised on the stated assumption that the Crown Solicitor's advice was correct.

303 *New South Wales Legislative Council Practice,* 1st ed, (n 271), pp 575-577.

304 *Odgers*, 14th ed, (n 150), p 609.

305 J Davis, 'Matters concerning the effect of Prorogation: An Argument of Convenience', Paper presented to the 41st Conference of Presiding Officers and Clerks, Darwin, 2010.

The matter arose again at the end of the 54th Parliament in December 2010 and January 2011. On 15 December 2010, the government announced the sale of the State's electricity assets under a 'Gentrader' transaction model. Subsequently, on 22 December 2010, the Parliament was prorogued by the Governor on the advice of the Premier several months before the 26 March 2011 election. At the time, the government was accused of using prorogation to attempt to avoid parliamentary scrutiny of the 'Gentrader' transaction.

Despite the prorogation of the Parliament, the following day, 23 December 2010, General Purpose Standing Committee No 1 self-referred terms of reference for an inquiry into the 'Gentrader' transaction, following advice from the Clerk that it had the power to do so.

The government subsequently sought updated legal advice from the Crown Solicitor on the matter. In his advice dated 2 January 2011, the Crown Solicitor reiterated the previous advice of 1994 that a standing committee of the Legislative Council cannot function whilst the House is prorogued unless it has legislative authority to do so. The Crown Solicitor again argued that standing order 206(1), to the extent to which it purported to authorise a committee to sit after prorogation, was invalid, and that a committee would have no power to compel the attendance of witnesses or require them to answer questions under the *Parliamentary Evidence Act 1901*. The Crown Solicitor also indicated that there was a risk that statements made and documents provided to the committee would not be protected by parliamentary privilege.[306]

By contrast, in a separate advice to the President dated 11 January 2011, the Clerk indicated that there is no restriction on the capacity of a standing committee to meet and transact business during a period of prorogation. The Clerk's position was as follows:

- There is no statutory or judicial warrant for treating prorogation as effectively ending the life of a parliament. Rather, under section 22F of the *Constitution Act 1902*, it is only in the event that the Assembly is dissolved that a standing committee of the Legislative Council must cease to meet and dispatch business.[307]
- The High Court in *Egan v Willis*[308] explicitly acknowledged that under a contemporary reading of the system of responsible government in New South Wales, the role of the Council in scrutinising the actions of the executive and holding it to account is paramount. Under this modern system of responsible government, standing committees must have the power to conduct inquiries after prorogation as a matter of 'reasonable necessity'.

306 Crown Solicitor, 'Prorogation: effect on standing committees', 2 January 2011, p 2.

307 Section 22F of the *Constitution Act 1902* provides that the Council is not competent to dispatch any business during the period commencing on the day of the termination, either by dissolution or expiry, of the Assembly and ending on the day fixed for the return of the writ for the periodic Council election held after that termination.

308 (1998) 195 CLR 424.

- In relation to the legality of standing order 206, the standing orders may regulate the powers of the Council, including the power to conduct inquiries.[309]

The position adopted by the Clerk was supported by Mr Bret Walker SC in a legal opinion dated 21 January 2011. Mr Walker agreed with the Clerk's view regarding the present day understanding of responsible government and the ability of committees to continue functioning following prorogation:

> It is clear from the reasoning of all justices in the High Court in *Egan v Willis*, various as their approaches were, that questions of parliamentary power depend not only on statutory wording but also their broad, beneficial and purposive reading of provisions for such a central institution. And at the heart of that functional approach, in my opinion, lies a paramount regard for responsible government in the sense of an Executive being answerable to the people's elected representatives. It is not possible, in my view, to read any of the historical and especially English accounts and explanations of prorogation without noting the radical shift from a King against Parliament to Ministers responsible to democratically elected representatives of the people. What possible justification could there be, in modern terms, for permitting the Executive to evade parliamentary scrutiny by taking care to time controversial or reprehensible actions just before advising the Governor to prorogue the chambers?[310]

In relation to the legality of standing order 206, Mr Walker cited section 15 of the *Constitution Act 1902* which provides that the Legislative Council may adopt 'as there may be occasion' standing rules and orders 'regulating … the orderly conduct of such Council'. Mr Walker argued that it is not in question that the standing orders may regulate some aspects of prorogation, such as the revival of bills in a new session of parliament, and that such matters legitimately fall within the 'orderly conduct' of proceedings. By extension, there is no reason why the standing orders should not be held to regulate other aspects of prorogation, such as allowing a committee to sit 'during the life of a Parliament', including after prorogation, and to report in the next session.[311]

After weighing up the various advice and opinions, President Fazio authorised the continuation of the General Purpose Standing Committee No 1 inquiry, in accordance with the advice of the Clerk, by not acceding to requests that resources of the Council be withheld from the inquiry.[312]

The Premier, Treasurer and Leader of the Opposition subsequently all appeared voluntarily before the committee and gave evidence. However, a number of key

309 Clerk of the Parliaments, 'Advice to the President of the Legislative Council on the power of standing committees to sit during the prorogation of the House', 11 January 2011, p 8.

310 B Walker SC, 'Legislative Council's General Purpose Standing Committee No 1 – Effect of prorogation', 21 January 2011, p 7.

311 Ibid, pp 2-5.

312 The Crown Solicitor indicated in a separate advice dated 11 January 2011 that should General Purpose Standing Committee No 1 nevertheless seek to compel witnesses to attend and give evidence under the *Parliamentary Evidence Act 1901*, neither the President nor the Legislative Council would be vicariously liable for any torts for defamation. See Crown Solicitor, 'Liability in respect of witnesses at Gentrader Transactions Inquiry', 11 January 2011, p 2.

witnesses refused to appear before the committee, even after having been summoned under the *Parliamentary Evidence Act 1901*, citing concerns as to whether their evidence would be protected by parliamentary privilege. The committee subsequently wrote to the President requesting that the President seek a warrant from a judge of the Supreme Court for the apprehension of these witnesses under the provisions of section 7 of the *Parliamentary Evidence Act 1901*, with a view to compelling them to appear. However the President refused this request, indicating her view that the refusal of the witnesses to attend was, in the circumstances, with 'just cause or reasonable excuse' under section 7, given that they had no guarantee that they would be protected by privilege should they appear and give evidence.[313]

Following the Gentrader inquiry, at the commencement of the 55th Parliament in 2011, the newly elected Coalition Government steered through the Parliament legislation to amend the *Constitution Act 1902* to limit the period in which the government can advise the Governor to prorogue the Parliament prior to an election. This is discussed further in Chapter 9 (Meetings of the Legislative Council).[314]

The matter has arisen from time to time since. For example, the Standing Committee on Law and Justice met to consider its report on the inquiry into the family response to the murders in Bowraville following the prorogation of the Council on 8 September 2014.[315] It is also now routine for reports of committees to be tabled with the Clerk after prorogation.[316]

It is also notable that Senate standing committees may continue to meet and transact business after prorogation.[317] Whilst the legal basis for Senate committees continuing to do so is very different from the legal basis for Council committees, the role of Senate and

313 The Hon Amanda Fazio MLC, 'Statement by the President of the Legislative Council on the Request for Orders from the Supreme Court', 27 January 2011; cited in the Hon Amanda Fazio MLC, *Proceedings of the C25 Seminar marking 25 years of the committee system in the Legislative Council*, 20 September 2013, p 20.

314 See the discussion under the heading 'The restriction on prorogation prior to an election'. During the Council's consideration of the relevant bill, the Constitution Amendment (Prorogation of Parliament) Bill 2011, a motion was moved that it be an instruction to the Committee of the whole House that it have power to consider amendments to the bill that would allow committees of either or both Houses of Parliament to lawfully sit during the life of a Parliament, despite any prorogation of the Legislative Council and the Legislative Assembly. Such an amendment, if passed, would have put beyond doubt the capacity of committees of any type to sit after prorogation. In the event, the motion was negatived. See *Minutes,* NSW Legislative Council, 10 May 2011, pp 85-86.

315 Standing Committee on Law and Justice, *The family response to the murders in Bowraville*, Report No 55, November 2014, pp 160-170.

316 For example, after the prorogation of the 56th Parliament on 25 February 2019, five standing committees tabled reports. See *Minutes*, NSW Legislative Council, 8 May 2019, pp 53-54. After the prorogation of the 54th Parliament on 22 December 2010, General Purpose Standing Committee No 1 tabled its report on the Gentrader transactions on 23 February 2011. See *Minutes*, NSW Legislative Council, 4 May 2011, p 45.

317 *Odgers*, 14th ed, (n 150), pp 608-610.

Council committees in the system of responsible government at the Commonwealth and State levels are comparable.

For further information on the power of standing committees to meet and transact business following prorogation of the House, see the *Annotated Standing Orders of the New South Wales Legislative Council*.[318]

Select committees

Standing order 207(1), adopted in 2004, provides that 'a select committee has power to sit during the life of the Parliament'. Consistent with the interpretation of standing order 206(1) outlined above in relation to standing committees, this standing order is interpreted as enabling select committees to continue to meet and transact business notwithstanding prorogation. For example, the Select Committee on the Planning Process in Newcastle and the Broader Hunter Region tabled its final report on 3 March 2015, one day after the prorogation of the 55th Parliament.

President's rulings from the 19th century that select committees cease to exist on prorogation are of little or no ongoing relevance.[319]

In modern times, when select committees are routinely established to undertake inquiries, there is no reason to restrict the work of select committees to a session of parliament and no reason for prorogation to affect their work.

For further information on the power of select committees to meet and transact business following prorogation of the House, see the *Annotated Standing Orders of the New South Wales Legislative Council*.[320]

STAFFING AND RESOURCES

Standing order 234(1) requires that a committee be provided with the resources necessary to carry out its functions. In particular, standing order 234(4) requires the Clerk to appoint an officer of the Council to act as committee clerk. Other staff may also be appointed to a committee as required. The Legislative Council Committee Office maintains a pool of permanent staff available to work on committee inquiries according to need.

The role of committee staff is to facilitate the effective operation of a committee. Generally, this involves the following functions:

- providing procedural advice to the chair and other committee members;
- organising committee meetings and hearings;

318 *Annotated Standing Orders of the New South Wales Legislative Council*, (n 35), pp 677-680.

319 Rulings: Hay, *Sydney Morning Herald*, 5 June 1879; Hay, *Sydney Morning Herald*, 8 October 1886, p 5550; Lackey, *Hansard*, NSW Legislative Council, 4 May 1893, pp 6694-6695.

320 *Annotated Standing Orders of the New South Wales Legislative Council*, (n 35), pp 681-683.

- preparing meeting agendas and minutes;
- researching issues and providing material required by the committee;
- maintaining committee records and ensuring their security;
- responding to committee correspondence and public inquiries; and
- preparing draft reports.

Standing order 234(2) also provides that a committee may, with the consent of the appropriate minister, make use of the services of any staff or facilities of a government department, administrative office or public body.[321] This provision is not generally used, although it is routine for public servants to provide briefings to committees at the commencement of an inquiry.

With the approval of the President, a committee may also engage consultants to provide professional expertise. In the past consultants have been engaged to provide actuarial advice, to write a background chapter on complex legal matters and to consult on behalf of the committee with groups with specific needs.[322]

On occasion, issues have arisen in relation to a possible conflict of interest held by consultancy firms engaged by a committee. For example, in 2002 the legal firm Ernst & Young was engaged to work on a General Purpose Standing Committee No 1 inquiry into matters relating to WorkCover NSW, but was also invited to bid for a project with the Insurance Council of Australia relating to WorkCover and licensed workers compensation insurance companies. In the event, the committee was satisfied that a conflict of interest did not arise.[323]

321 For further information, see the *Annotated Standing Orders of the New South Wales Legislative Council*, (n 35), pp 760-762.

322 See, for example, Standing Committee on Social Issues, *Group homes proposal*: *First report*, Report No 19, December 1999, pp 4, 115-126; and Standing Committee on Social Issues, *Enhancing Aboriginal political representation*, Report No 18, November 1998, Appendices 6 and 7.

323 General Purpose Standing Committee No 1, *NSW Workers compensation scheme – Third interim report*, Report No 18, April 2002, pp 300-301. See also advice of the Clerk Assistant – Committees, 'GPSC No 1 Deliberative 7 March – possible conflict of interest issue – Ernst & Young', 5 March 2002, pp 1-2.

CHAPTER 21

WITNESSES

This chapter examines the power of Legislative Council committees to call for and examine witnesses at hearings.[1] In summary, Council committees have significant statutory and inherent powers to summon witnesses and compel answers to any 'lawful question'. However, these powers are balanced by appropriate legal and procedural protections for witnesses in the giving of evidence, together with processes for dealing with evidence reflecting adversely on others as well as false or misleading evidence.

SUMMONING WITNESSES

Most witnesses appear before Legislative Council committees on a voluntary basis. Witnesses are usually very willing to place their views and information in their possession before committees to assist in the understanding of an issue and the framing of policy and legislation.

However, in certain circumstances, a committee may summon a witness or witnesses to attend and give evidence before it under section 4 of the *Parliamentary Evidence Act 1901*.[2] Section 4 provides:

> (1) Any person not being a Member of the Council or Assembly may be summoned to attend and give evidence before the Council or Assembly by notice of the order of the Council or Assembly signed by the Clerk of the Parliaments or Clerk of the Assembly, as the case may be, and personally served upon such person.

1 The House also has the power to call for and examine witnesses. Of note, in 1998 the House resolved that the Auditor-General be summoned to appear and give evidence at the Bar of the House. For further information, see the discussion in Chapter 3 (Parliamentary privilege in New South Wales) under the heading 'The power to call witnesses and compel evidence'. However, as the power is normally exercised by committees rather than the House, the focus of this chapter is on witnesses before committees.

2 For further information on the enactment of the *Parliamentary Evidence Act 1901*, see the discussion in Chapter 3 (Parliamentary privilege in New South Wales) under the heading 'The *Parliamentary Evidence Acts* of 1881 and 1901'.

(2) Any such person may be summoned to attend and give evidence before a committee by an order of such committee signed by the Chair thereof and served as aforesaid.

Prior to 2000, the practice of Council committees was to summon all witnesses, other than members, to a hearing. This was done somewhat artificially by serving witnesses with a summons upon their arrival at a venue for a hearing. However, in 2000, on receipt of advice from Mr Bret Walker SC that summoning witnesses as a general practice was supererogatory, and should be avoided,[3] this practice was discontinued.[4]

Since this change of practice in 2000, there have been relatively few examples of committees summoning a witness or witnesses to attend and give evidence.

The most obvious scenario in which a committee may summon a witness or witnesses to attend and give evidence is where a witness or witnesses decline an invitation to give evidence voluntarily. As an example, in 2004, during an inquiry into the Designer Outlets Centre, Liverpool, General Purpose Standing Committee No 4 summoned the Chief of Staff to the Minister Assisting the Minister for Infrastructure and Planning (Planning Administration) to attend and give evidence after he refused to appear voluntarily before the committee. He duly attended and gave evidence.[5]

In practice, the threat of being summoned is often sufficient to persuade a reluctant witness to appear before a committee voluntarily. For example, in 2010, the Select Committee on the NSW Taxi Industry wished to take evidence from Mr Kermode, Chairman and Chief Executive Officer of Cabcharge Australia Ltd. In response to Mr Kermode's reluctance to attend, the committee resolved that, should Mr Kermode not accept the committee's further invitation to attend and give evidence, a summons be issued to require his attendance. Mr Kermode subsequently appeared without being summoned.[6]

---

3 Mr Walker argued that summoning a witness unnecessarily could be used, unmeritoriously, to bolster an argument, perhaps in defence of an action for refusal to answer a 'lawful question', to the effect that the witness ceased to be a voluntary witness when he or she received the summons.

4 B Walker SC, 'Legislative Council: Parliamentary privilege and witnesses before General Purpose Standing Committee No 4', 2 November 2000, pp 15-16.

5 General Purpose Standing Committee No 4, *Inquiry into the Designer Outlets Centre, Liverpool*, Report No 11, December 2004, pp 4-5. In another example, in 2011, during the General Purpose Standing Committee No 1 inquiry into the Gentrader transactions, 10 key witnesses were summoned to attend and give evidence after declining to appear voluntarily. However, due to the contested status of the proceedings which were being held whilst the Parliament was prorogued, the witnesses did not attend. This is discussed further later in this chapter under the heading 'Failure to attend and give evidence'. See General Purpose Standing Committee No 1, *The Gentrader transactions*, Report No 36, February 2011, pp 9-11.

6 Select Committee on the NSW Taxi Industry, *Inquiry into the NSW taxi industry,* June 2010, pp 250, 254. For another example, see Select Committee on the Planning Process in Newcastle and the Broader Hunter Region, *Inquiry into the planning process in Newcastle and the broader Hunter region,* March 2015, pp 161, 163.

A second scenario in which committees have summoned witnesses is where witnesses have refused to provide certain information to committees voluntarily:

- In 2010, as part of the inquiry by the Select Committee on the NSW Taxi Industry cited above, on Mr Kermode declining to provide answers to three questions taken on notice during his initial appearance before the committee, the committee summoned him to attend and give evidence at a further hearing. In response, Mr Kermode provided written answers to the questions, and the summons was deemed to have lapsed.[7]

- In May 2018, as part of an inquiry into the Windsor Bridge replacement project, Portfolio Committee No 5 – Industry and Transport summoned the Secretary of Transport for NSW to appear and produce an unredacted version of the Final Business Case for the project. In the event, the report was produced in advance of the witness's appearance.[8]

- In October 2018, as part of the annual budget estimates inquiry, Portfolio Committee No 4 – Legal Affairs summoned both the Inspector of Custodial Services and the Secretary of the Department of Justice to seek to compel the production of a draft report of the Inspector. In the event provision of the report was still resisted before ultimately the final report was tabled and made public less than a month later.[9]

- In November 2018, as part of an inquiry into the impact of the CBD and South East Light Rail Project, the Public Accountability Committee summoned a witness to attend and give evidence after he declined to answer a supplementary question on notice. The witness subsequently appeared and provided answers.[10]

A third scenario in which committees have summoned witnesses is where witnesses have themselves requested that they be summoned, in order to ensure the protection of parliamentary privilege. For example, in 2015, during an inquiry by the Select

---

7 Select Committee on the NSW Taxi Industry, *Inquiry into the NSW taxi industry,* June 2010, pp 258-259. In a somewhat similar example also from 2010, during the General Purpose Standing Committee No 4 inquiry into Badgerys Creek land dealings and planning decisions, the lobbyist and former federal minister, Mr Graham Richardson, refused to provide answers to questions submitted on notice by the committee after his initial appearance before the committee. On the committee subsequently indicating he would be issued with a summons to attend, he chose to appear voluntarily at a public hearing to provide verbal answers to the questions lodged. See General Purpose Standing Committee No 4, *Badgerys Creek land dealings and planning decisions: Second report*, Report No 22, February 2010, p 2.

8 Portfolio Committee No 5 – Industry and Transport, *Windsor Bridge replacement project*, Report No 48, August 2018, pp xi-xii. For further information, see the discussion in Chapter 20 (Committees) under the heading 'Orders for the production of State papers by committees'.

9 Portfolio Committee No 4 – Legal Affairs, *Budget Estimates 2018-2019*, Report No 39, February 2019, pp 7-9. For further information, see the discussion in Chapter 20 (Committees) under the heading 'Orders for the production of State papers by committees'.

10 Public Accountability Committee, *Impact of the CBD and South East Light Rail Project*, Report No 2, January 2019, pp 155-156, 164.

Committee on the Conduct and Progress of the Ombudsman's Inquiry 'Operation Prospect', representatives of the Police Association of NSW indicated that their members would prefer to be summoned rather than invited to attend and give evidence before the committee. This was apparently based on a belief that, if a witness were to answer questions in a way that breached statutory secrecy provisions, there would be greater protection if that information were provided under compulsion. In advice to the committee, Mr Bret Walker SC indicated that, as witnesses were likely to be asked to provide information that would be covered by statutory secrecy provisions, and as witnesses were likely to be compelled to answer such questions, there was merit in the witnesses being summoned in those circumstances.[11] The committee subsequently resolved to summon all witnesses, notwithstanding the Council's position that all evidence is protected by parliamentary privilege whether or not a witness is summoned. A total of 22 summonses were issued.[12]

A similar scenario arose in 2017 during an inquiry by the Select Committee on Off-protocol Prescribing of Chemotherapy, when one of the key witnesses requested that he be summoned, out of concern that without having been summoned, he would not be protected from legal action that could stem from breaching confidentiality obligations. The committee noted that under the law of privilege, a witness is not required to be summoned to receive such protection, but acknowledged that in the circumstances being summoned provided a level of assurance to the witness, and accordingly proceeded in that manner.[13]

Summoning witnesses is an exercise of significant coercive power by a committee and should only occur after careful consideration of the repercussions and alternatives, such as:

- whether the information can be obtained from another witness or by other means;
- whether the witness's non-attendance will diminish the quality of the evidence obtained by the committee; and
- the political ramifications of summoning a witness, particularly if the witness is a public official or ministerial adviser.

Requirements of a summons

A summons issued to a witness to attend and give evidence before a Legislative Council committee pursuant to section 4(2) of the *Parliamentary Evidence Act 1902* must specify the name of the committee and inquiry to which the summons relates, together with the

11 B Walker SC, 'Parliament of New South Wales – Legislative Council Select Committee on Ombudsman's "Operation Prospect"', 14 January 2015, pp 3-4.

12 Select Committee on the Conduct and Progress of the Ombudsman's inquiry 'Operation Prospect', *The conduct and progress of the Ombudsman's inquiry 'Operation Prospect'*, February 2015, p 5.

13 Select Committee on Off-protocol Prescribing of Chemotherapy, *Off-protocol prescribing of chemotherapy*, May 2017, p xiii.

time, date and place of the hearing. It must be signed by the committee chair on behalf of the committee.[14] A summons for a particular purpose, such as to answer specific questions or to produce particular documents, should specify as much.[15]

The summons must be served on the recipient personally.[16] In 1993, the Crown Solicitor advised that personal service under the *Parliamentary Evidence Act 1901* would be construed in the same way as personal service under the *Supreme Court Act 1970*, citing part 9 of the Supreme Court Rules. Those rules were repealed in 2005. However, regulation 10.21.1 of the Uniform Civil Protection Rules 2005 now provides:

> Personal service of a document on a person is effected by leaving a copy of the document with the person or, if the person does not accept the copy, by putting the copy down in the person's presence and telling the person the nature of the document.

Generally a summons is served by the Usher of the Black Rod, although it can be served by any officer of the Legislative Council. Once a summons is served, it is practice for the Usher of the Black Rod or other person serving the summons to present to the committee an affidavit of service, although again this is not required under the Uniform Civil Procedure Rules.

Under section 6 of the *Parliamentary Evidence Act 1901*, a witness summoned to attend and give evidence is entitled to be paid 'at the time of service' reasonable expenses of attendance calculated 'in accordance with the scale in force … for the payment of witnesses in actions in the Supreme Court'. An applicable 'Scale of allowances paid to witnesses' is published from time to time in the *Government Gazette*. The witness may accept or decline the payment. Failure to pay, or at least offer, reasonable expenses at the time of service of a summons would likely constitute 'just cause or reasonable excuse' for a witness not to attend and give evidence before a committee within the meaning of section 7 of the *Parliamentary Evidence Act 1901*.[17] This is discussed below.

Failure to attend and give evidence

If a witness is summoned by a committee pursuant to section 4 of the *Parliamentary Evidence Act 1901* to attend and give evidence at a hearing but fails to do so, the committee may report the matter to the President and request that the President certify the facts to a judge of the Supreme Court under section 7 of the act, with a view to having the witness apprehended for the purposes of being brought before the committee to give evidence. In certifying the facts to the judge, the President must be satisfied of the failure of the

14 Crown Solicitor, 'Plain English Summons to be issued by Parliamentary Committees', Advice to the Clerk of the Legislative Assembly, 28 March 2001, pp 1-2.

15 B Walker SC, 'Advice on email from Clerk of the Parliaments to Clerk Assistant – Committees and Director – Committees', 25 October 2018, published in Portfolio Committee No 4 – Legal Affairs, *Budget Estimates 2018-2019*, Report No 39, February 2019, p 7.

16 *Parliamentary Evidence Act 1901*, s 4(1).

17 Crown Solicitor, 'Plain English Summons to be issued by Parliamentary Committees', Advice to the Clerk of the Legislative Assembly, 28 March 2001, p 3.

witness to attend and that the failure was 'without just cause or reasonable excuse'. Under section 8 of the act, upon receipt of such communication from the President, the judge shall issue a warrant for the apprehension of the witness, for the purpose of bringing the person before the committee to give evidence. Under section 9 of the act, such warrant shall be sufficient authority for all persons acting thereunder[18] to apprehend the person named in the warrant, and to retain the person in custody, for the purposes of giving evidence, until discharged by order of the President.[19]

A committee of the Legislative Council has never followed these procedures to the point where a warrant has been issued for the arrest of a person. The furthest a committee of the Council has gone was in 2011, during the General Purpose Standing Committee No 1 inquiry into the Gentrader transactions, when seven key witnesses failed to appear before the committee despite being summoned to do so. Following a resolution of the committee, the Chair wrote to the President, the Hon Amanda Fazio, requesting that she seek a warrant from a judge of the Supreme Court for the apprehension of the witnesses. However, the President declined to seek the warrant, indicating that in her view the refusal of the witnesses to attend was with 'just cause or reasonable excuse' under section 7. The basis for this position was that the inquiry was being conducted whilst the Parliament was prorogued, prompting legal argument that the application of parliamentary privilege to the proceedings was uncertain.[20]

ATTENDANCE OF DIFFERENT CATEGORIES OF INDIVIDUALS AS WITNESSES

As noted above, the *Parliamentary Evidence Act 1901* provides Legislative Council committees with a broad power to summon individuals to attend and give evidence at hearings. However, there are certain limitations on this power. The most notable is that individuals summoned to attend and give evidence must have a territorial connection to New South Wales.[21] Certain other limitations also apply to certain categories of individuals as witnesses. This is discussed below.

Members, including ministers, as witnesses

Under section 4 of the *Parliamentary Evidence Act 1901*, members of the Legislative Council and Legislative Assembly may not be summoned to attend and give evidence

18 The warrant would be executed by the police rather than officers of the House.

19 For a critique of the appropriateness of these provisions in modern times, see B Duffy and S Ohnesorge, 'Out of step? The New South Wales *Parliamentary Evidence Act 1901*', *Parliamentary Law Review*, (Vol 27, 2016), p 37.

20 General Purpose Standing Committee No 1, *The Gentrader transactions*, Report No 36, February 2011, p 52. For further information, see the discussion in Chapter 20 (Committees) under the heading 'The effect of prorogation on committees'.

21 For further information, see the discussion in Chapter 15 (Legislation) under the heading 'Territorial connection with New South Wales'.

before a Council committee. Rather, under section 5 of the act, their attendance 'shall be procured in conformity (so far as practicable) with the mode of procedure observed in the British House of Commons'.

In the United Kingdom, members of the House of Commons, including ministers, may not be formally summoned to attend as witnesses before House of Commons select committees. However, they may be requested to attend by written communication from the committee chair, and if they fail to attend the House may order their attendance. Members of the House of Lords, including ministers, may also not be formally summoned to attend as witnesses before House of Commons select committees, but are given leave under a standing order of the House of Lords to attend if they think fit. No messages are exchanged between the Houses.[22]

Consistent with these procedures in the United Kingdom Parliament, Legislative Council committees routinely invite ministers from either House to appear as witnesses, and there are many examples of ministers from both Houses accepting such invitations, but they do not seek to compel the appearance of ministers from either House.

Examples of ministers in the Legislative Assembly voluntarily appearing before a Council committee include the appearance of the Premier, the Hon Barry O'Farrell, and three other ministers before the Select Committee on the Kooragang Island Orica Chemical Leak in 2011,[23] and the appearance of the Premier, the Hon Michael Baird, and Treasurer, the Hon Gladys Berejiklian, before the Select Committee on the Leasing of Electricity Infrastructure in 2015.[24]

Examples of ministers in the Legislative Council voluntarily appearing before a Council committee include the appearance of the Treasurer, the Hon Michael Egan, before the General Purpose Standing Committee No 1 inquiry into the Mini Budget in 2004,[25] and the appearance of the Treasurer, the Hon Eric Roozendaal, before the General Purpose Standing Committee No 1 inquiry into the Gentrader transactions in 2011.[26]

There is also an example from 2008 when President Primrose accepted an invitation to appear before the Joint Committee on the Independent Commission Against

22 D Natzler KCB and M Hutton (eds), *Erskine May's Treatise on The Law, Privileges, Proceedings and Usage of Parliament,* 25th ed, (LexisNexis, 2019), para 38.34.

23 Select Committee on the Kooragang Island Orica Chemical Leak, *Kooragang Island Orica chemical leak*, February 2012, p 3. In another example in 2007, the Hon Reba Meagher, Minister for Health, voluntarily appeared before the Joint Select Committee on the Royal North Shore Hospital. See Joint Select Committee on the Royal North Shore Hospital, *The Royal North Shore Hospital*, December 2007, p 155.

24 Select Committee on the Leasing of Electricity Infrastructure, *Leasing of electricity infrastructure,* June 2015, pp 91-92.

25 General Purpose Standing Committee No 1, *Inquiry into the 2004 Mini Budget*, Report No 25, June 2004, p 29.

26 General Purpose Standing Committee No 1, *The Gentrader transactions*, Report No 36, February 2011, p 52. The Premier, the Hon Kristina Keneally, also gave evidence before the inquiry.

Corruption as part of its inquiry into the protection of public sector whistleblower employees.[27]

It is also standard practice for ministers from both Houses and the President to appear voluntarily before the Legislative Council's Portfolio Committees during the annual budget estimates inquiry.

The Council has not adopted a standing order authorising its members to appear before Legislative Assembly committees or joint committees as the House of Lords has done. However, there is nothing to prevent members from doing so at their discretion.

Former members, including ministers, as witnesses

There is no restriction in the *Parliamentary Evidence Act 1901* on former members, including ministers, being summoned to attend and give evidence before a Council committee, although they have invariably appeared voluntarily. In 2013, the former Minister for Mineral Resources and former Minister for Primary Industries, the Hon Ian MacDonald, appeared voluntarily before the Privileges Committee as part of its inquiry into the 2009 Mt Penny return to order.[28] In 2015, the former member for Newcastle, Mr Tim Owen, appeared voluntarily before the Select Committee on the Planning Process in Newcastle and the Broader Hunter Region.[29] Also in 2015, the former Treasurer, the Hon Michael Egan, appeared voluntarily before the Select Committee on the Leasing of Electricity Infrastructure.[30] In 2018, the former Premier, the Hon Michael Baird, appeared voluntarily (although under threat of summons) before Portfolio Committee No 4 – Legal Affairs as part of its inquiry into museums and galleries.[31]

In 2002, at the Commonwealth level, the Senate Select Committee on a Certain Maritime Incident, known colloquially as the 'children overboard inquiry', was at the centre of considerable controversy about the accountability of former Commonwealth ministers to the Commonwealth Parliament. Further information is provided in *Odgers*.[32]

---

27 Joint Committee on the Independent Commission Against Corruption, *Protection of public sector whistleblower employees*, Report No 8/54, November 2009, pp 24-25.

28 Privileges Committee, *The 2009 Mt Penny return to order*, Report No 69, October 2013, pp 4, 19. Another former Minister for Mineral Resources, the Hon Peter Primrose, also appeared before the committee.

29 Select Committee on the Planning Process in Newcastle and the Broader Hunter Region, *The planning process in Newcastle and the broader Hunter region*, Final Report, March 2015, pp 161-163.

30 Select Committee on the Leasing of Electricity Infrastructure, *Leasing of electricity infrastructure*, June 2015, p 92.

31 Portfolio Committee No 4 – Legal Affairs, *Museums and galleries in New South Wales*, Report No 40, February 2019, pp 43-45. Mr Baird declined the committee's initial invitation, prompting the committee to resolve that if he declined a further invitation, he be summoned to attend. Mr Baird subsequently attended without being summoned.

32 R Laing (ed), *Odgers' Australian Senate Practice*, as revised by H Evans, 14th ed, (Department of the Senate, 2016), p 566. See also L Lovelock and J Evans, *New South Wales Legislative Council Practice*, 1st ed, (Federation Press, 2008), pp 500-502.

Ministerial staff as witnesses

There is no restriction in the *Parliamentary Evidence Act 1901* on ministerial staff being summoned to attend and give evidence before a Council committee.

At various times it has been asserted that there is a convention that ministerial staff should not be required to appear and give evidence before committees. This claimed convention appears to have gained some support in other jurisdictions. For example, it was asserted, ultimately successfully, during the 2002 inquiry by the Senate Select Committee into a Certain Maritime Incident, despite advice from the Clerk of the Senate to the contrary.[33] However, there are many other precedents in the Senate of ministerial staff appearing both voluntarily and under summons.[34] The issue has also arisen in Victoria.[35]

In New South Wales, the claimed convention has been asserted but not accepted. In 2004, during the General Purpose Standing Committee No 4 inquiry into approval of the Designer Outlets Centre – Liverpool, the committee invited a number of ministerial staff to give evidence. The Premier gave permission for his Chief of Staff to appear, and he subsequently did so whilst making it clear that in his opinion the Premier had waived the claimed convention that staffers do not appear. However, the Chief of Staff of the Minister Assisting the Minister for Infrastructure and Planning (Planning Administration) declined the committee's invitation to appear on the basis that the minister had not authorised him to appear. After he declined a further invitation, the committee summoned him to appear, which he ultimately did. The committee subsequently invited other ministerial staff, and staff of the Leader of the Opposition, to give evidence. All attended voluntarily.[36]

For a convention to have any force, it must be generally accepted by all sides of politics. At least in New South Wales, it is clear that there is no such acceptance of the claimed convention that ministerial staff are immune from being summoned as witnesses. However, whilst ministerial staffers have no immunity against being summoned, it is generally recognised that ministerial staff should not be held accountable for the actions or policy decisions of ministers or their departments, and they are not frequently summoned as witnesses.

---

33 Senate Select Committee on a Certain Maritime Incident, *A certain maritime incident*, October 2002, pp xxxiv-xxxv.

34 See *Odgers*, 14th ed, (n 32), pp 566-567.

35 Select Committee on the Urban and Regional Land Corporation Managing Director, Victorian Legislative Council, *Report*, September 2002, pp 38-40; Standing Committee on Finance and Public Administration, Victorian Legislative Council, *Inquiry into Victorian government decision making, consultation and approval processes*, First interim report, April 2010; Second interim report, August 2010.

36 General Purpose Standing Committee No 4, *Inquiry into the Designer Outlets Centre, Liverpool*, Report No 11, December 2004, pp 4-5.

Members' staff as witnesses

There is no restriction in the *Parliamentary Evidence Act 1901* on members' staff being summoned to attend and give evidence before a Council committee. However, under the principle of comity between the Houses, staff of members of the Legislative Assembly should not be asked questions concerning the operation or administration of that House.

There are few examples of staff of members of the Legislative Assembly being invited to appear and give evidence before Council committees. One occurred in 2015 during the inquiry by the Select Committee on the Planning Process in Newcastle and the Broader Hunter Region, when staff from the electoral offices of a number of members of the Legislative Assembly were invited to attend and give evidence. All did so voluntarily.[37]

Public officials as witnesses

There is no restriction in the *Parliamentary Evidence Act 1901* on public officials[38] being summoned to attend and give evidence before a Council committee. However, public officials should not be asked questions concerning the merits of government policy. By convention, committees should direct such questions to the responsible minister. The Premier's guidelines for public officials appearing before parliamentary committees state:

> Officers should only give evidence of a factual nature and should refer questions seeking opinions or judgments of a political nature to the Minister (when in attendance) or take them on notice for a written response from the Minister.[39]

Whilst public officials may not be asked questions concerning the merits of government policy, they may be asked to explain how a policy operates, to describe how it has been formulated and how it differs from past policies.

Judges and magistrates as witnesses

As enacted, there is no restriction in the wording of the *Parliamentary Evidence Act 1901* on judges and magistrates being summoned to attend and give evidence before a Council committee.

In 1889, Judge Alfred McFarland, a judge of the District Court, and Magistrate Edwin MacNevin appeared before the Select Committee on the case of On Ling under the

37 Select Committee on the Planning Process in Newcastle and the Broader Hunter Region, *The planning process in Newcastle and the broader Hunter region*, Final Report, March 2015, pp 106, 167 and 171.

38 The term 'public officials' as used here refers to government sector employees and to officers of statutory bodies and state owned corporations.

39 Department of Premier and Cabinet Memorandum M2017-01, 'Guidelines for Government Sector Employees dealing with the Legislative Council's Portfolio Committees', 3 April 2017; Department of Premier and Cabinet circular C2011-27, 'Guidelines for appearing before parliamentary committees', 20 October 2011, para 1.

provisions of the former *Parliamentary Evidence Act 1881*. The inquiry was remarkable because the House appointed the committee specifically to examine whether the sentence in the case was appropriate. In addition, as part of the inquiry, the committee summoned Judge McFarland and compelled him to produce the notes he took during the trial of On Ling.[40]

However, in modern times, under the doctrine of the separation of powers and the constitutional provisions which recognise the independence of the judiciary, it may be argued that it would not be appropriate for the House or a committee to seek to summon the attendance of a judicial officer to give evidence.[41] Nor would it be appropriate for committees to seek to question judges about the merits of individual cases, the merits of judicial appointments, or the merits of proposed bills or government policy.

In modern times, most committee inquiries are conducted without the involvement of judicial officers. However, there have been a few inquiries where judicial officers have appeared and given evidence voluntarily.[42]

Custodial inmates as witnesses

There is no restriction on Council committees taking evidence from inmates in custody. In 2001, the Select Committee on the Increase in the Prisoner Population took evidence from 10 inmates of the Goulburn Correctional Centre and 10 inmates of the Junee Correctional Centre.[43] In 2005, as part of its inquiry into back-end home detention, the Standing Committee on Law and Justice took evidence from a witness who was serving a sentence of home detention.[44]

Members of parliament and public officials in other jurisdictions

Members of other parliaments and public officials of other jurisdictions, notably members of the Commonwealth Parliament and Commonwealth public officials, are

40 'Report from the select committee on the case of On Ling', *Journals*, NSW Legislative Council, 1889, vol 45, pt 1, pp 381-398.

41 *Odgers*, 14th ed, (n 32), pp 687-688.

42 In 2002, the Hon Justice Alistair Nicholson, Chief Justice of the Family Court of Australia, and the Hon Justice Richard Chisholm appeared and gave evidence before the Standing Committee on Social Issues as part of its inquiry into child protection services. See Standing Committee on Social Issues, *Care and support: Final report on child protection services*, Report No 29, December 2002, p 176. In 2005, Magistrate David Heilpern, a magistrate of the Local Court, appeared and gave evidence before the Standing Committee on Law and Justice as part of its inquiry into community based sentencing options for rural and remote areas and disadvantaged populations. See Standing Committee on Law and Justice, *Community based sentencing options for rural and remote areas and disadvantaged populations*, Report No 30, March 2006, p 275.

43 Select Committee on the Increase in the Prisoner Population, *Increase in the prisoner population*, November 2001, pp 177-178.

44 Standing Committee on Law and Justice, *Back-end home detention*, Report No 28, June 2005, pp 5, 51 and 110.

only ever invited to appear before Council committees. They are never summoned or attempted to be summoned.

Potentially, in circumstances where there is a territorial connection with New South Wales,[45] the *Parliamentary Evidence Act 1901* may provide a basis for seeking to compel evidence from such witnesses.[46] However, it is not clear whether the *Parliamentary Evidence Act 1901* purports to bind members of the Commonwealth Parliament and Commonwealth public officials, and if it does, whether it does so validly. Twomey has identified a number of arguments as to why the *Parliamentary Evidence Act 1901* may be inoperative in respect of such witnesses. The *Parliamentary Privileges Act 1987* (Cth) also provides certain immunities to members of the Commonwealth Parliament.[47]

Other witnesses in other jurisdictions

Witnesses from another State or Territory of Australia, or another country, where there is no territorial connection with New South Wales,[48] may only be invited to give evidence before a Council committee on a voluntary basis. Whilst fully protected in New South Wales in respect of evidence they may give, they cannot be protected by the New South Wales law of privilege in their own jurisdiction.

THE POWER TO COMPEL AN ANSWER TO ANY 'LAWFUL QUESTION'

As indicated previously in Chapter 20 (Committees), committee hearings proceed by way of questions from members and answers from witnesses. In the vast majority of cases this happens in a straightforward manner, with witnesses voluntarily and willingly providing answers to questions.

However, where a witness does not wish to provide answers to questions, section 11 of the *Parliamentary Evidence Act 1901* provides extensive power for a committee to compel answers to any 'lawful question'. Section 11(1) provides:

> Except as provided by section 127 (Religious confessions) of the *Evidence Act 1995*, if any witness refuses to answer any *lawful question* during the witness's examination, the witness shall be deemed guilty of a contempt of Parliament,

45 For further information, see the discussion in Chapter 15 (Legislation) under the heading 'Territorial connection with New South Wales'.

46 In 2003 in *Attorney General (Canada) v MacPhee* (2003) PESCTD 6 in the Supreme Court of the Province of Prince Edward Island in Canada, Cheverie J held that officers of a federal government agency had no immunity from a summons issued by a committee of the Legislative Assembly of the province in the course of an inquiry. It is noted, however, that this power was found to exist based not on legislation in Prince Edward Island but on its 'constitutionally protected privilege'. See *Attorney General (Canada) v MacPhee* (2003) PESCTD 6 at [36] per Cheverie J. The officers subsequently appeared before the committee.

47 A Twomey, *The Constitution of New South Wales*, (Federation Press, 2004), pp 527-528.

48 For further information, see the discussion in Chapter 15 (Legislation) under the heading 'Territorial connection with New South Wales'.

> and may be forthwith committed for such offence into the custody of the usher of the black rod or serjeant-at-arms, and, if the House so order, to gaol, for any period not exceeding one calendar month, by warrant under the hand of the President or Speaker, as the case may be. (emphasis added)

It is notable that the punishment stipulated in section 11 for refusal to answer any 'lawful question', that is imprisonment 'for any period not exceeding one calendar month', is determined by the House itself, rather than a court. This is a remarkable provision, and one of only two instances where Parliament has legislated to give the Houses a statutory power to punish a person by imprisonment.[49]

In 2000, Mr Bret Walker provided advice to the Clerk that, in his opinion, the sanction in section 11 applies only where a witness has been duly sworn in as a witness under section 10 of the *Parliamentary Evidence Act 1901*, but that the sanction is applicable regardless of whether the witness was summoned to attend and give evidence. Mr Walker observed:

> In my opinion, the provisions of sec 10 of the *Parliamentary Evidence Act* impose a prerequisite of an oath or affirmation (relevantly). It follows that the 'examination' referred to in sec 11 is one which involves questions put following that compulsory oath or affirmation. If that prerequisite has not been observed, what ensues is not an 'examination' within the meaning of sec 11, and thus there would be no statutorily deemed contempt of Parliament for refusal to answer.
>
> …
>
> On the other hand, although a witness 'attending to give evidence' must be sworn or examined under sec 10, in my opinion the need for a summons by order is not mandatory. The language of sec 4 empowers rather than obliges the issue of a summons. Furthermore, it would be curious if a citizen could not demonstrate respect for and co-operation with the Houses by attending voluntarily to give evidence. Thus, the lack of a summons will not prevent the sanctions under sec 11 being imposed. There is a broad analogy in a court of law, where a witness is not entitled to refuse to answer questions simply because he or she did not require a subpoena in order to step into the witness box.[50]

The sanction in section 11 of the *Parliamentary Evidence Act 1901* for refusal by a witness to answer any 'lawful question' has never been invoked. Were it ever to be, its application would likely raise challenging legal and practical issues. For example, the validity of any committal would likely be reviewable by a court if there were doubt as to whether a question was a 'lawful question'.[51] It has also been argued that application of the sanction in section 11 would be out of keeping with modern community expectations of the appropriate functions and powers of the Parliament.[52]

---

49 The other is the *Public Works Act 1912*, s 22.

50 B Walker SC, 'Legislative Council: Parliamentary privilege and witnesses before General Purpose Standing Committee No 4', 2 November 2000, p 15.

51 Solicitor General, 'Powers and procedures of Joint Select Committees', 20 October 1992.

52 See Duffy and Ohnesorge, (n 18), pp 37-53.

What is a 'lawful question'?

The sanction in section 11 of the *Parliamentary Evidence Act 1901* for refusal to answer a question depends upon the witness having been asked a 'lawful question'. This raises the issue: what is a 'lawful question'?

It is clear that a question would not be a 'lawful question' if it was outside the terms of reference of a committee inquiry.[53] In addition, section 11 expressly applies protection for religious confessions, as set out in the *Evidence Act 1995*.

However, the position beyond these clear restrictions is less certain. Crown Solicitors and Solicitors General have consistently advised that section 11, and particularly the expression 'lawful question', introduces into committee proceedings common law privileges that apply in the courts, such as the privilege against self-incrimination, legal professional privilege and public interest immunity.[54] In an advice provided in 1990, the Assistant Crown Solicitor cited with approval the following opinion expressed by the Crown Solicitor in 1960:

> The witness called under the Parliamentary Evidence Act may, in general, refuse to answer questions in the like circumstances that a witness called in any civil or criminal proceedings could refuse to answer. Thus he could not be compelled to answer a question which might incriminate him. Further, the witness could refuse to answer on the grounds of privilege, including, in my opinion, the so-called Crown privilege. He could not, in my opinion, be compelled to give evidence on matters of opinion or inference. Speaking very generally, he is simply a witness as to facts.[55]

In support of this position, the Assistant Crown Solicitor cited the 1941 decision of the Full Court of the Supreme Court of South Australia in *Crafter v Kelly*,[56] in which Parsons J, with whom Murray CJ agreed, held that:

> The expression 'lawful question' … connotes one which calls for an answer according to law, one that the witness is compellable to answer according to established usage of the law.[57]

In other words, a 'lawful question' excludes a question which a witness could refuse to answer according to established common law privileges. As Napier J noted in *Crafter*

---

53 Twomey, (n 47), p 517.

54 Claims of public interest immunity may, for example, include prejudice to law enforcement activities, unreasonable invasion of privacy and prejudice to the relation of the State with the Commonwealth and other States.

55 Assistant Crown Solicitor, 'Power of Standing Committee on State Development to Require Production of Documents and Things', 16 March 1990, p 4.

56 [1941] SASR 237. The case concerned the meaning of 'any lawful question' used in the *Primary Producers Debts Act 1935* (SA). The act created an offence for refusal to answer 'any lawful question' of a person authorised by the Farmers' Assistance Board. A witness had refused to answer a question on the ground that his answer might tend to incriminate him.

57 *Crafter v Kelly* [1941] SASR 237 at 242 per Parsons J.

v Kelly, if the purpose was to confer a power to compel an answer to any question, why add the word 'lawful'?[58]

Former Solicitors General Mary Gaudron QC and Keith Mason AC QC provided similar advice in 1983 and 1992.[59] Professor Twomey adopts the same position.[60]

Reflecting this advice, the Premier's guidelines for public officials appearing before parliamentary committees state:

> The Committees only have power to ask 'lawful questions' under the Parliamentary Evidence Act. Failure to answer a question which is not a 'lawful question' cannot result in the punishment of the witness. A question may not be a 'lawful question' if the answer is privileged (eg legal professional privilege, public interest immunity – which includes the confidentiality of Cabinet documents – or the privilege against self-incrimination) or if the question falls outside of the Committee's terms of reference.[61]

It is a fundamental common law principle that common law rights can only be abrogated by sufficiently clear statutory provisions.[62] Clearly there is no such wording in the *Parliamentary Evidence Act 1901* or other New South Wales legislation dealing with questions to witnesses.[63]

However, notwithstanding such authority, there is an argument that common law privileges observed in the courts, such as the privilege against self-incrimination and legal professional privilege, are not applicable to committee proceedings. In advice provided in January 2015 to the Select Committee on the Conduct and Progress of the Ombudsman's Inquiry 'Operation Prospect', Mr Bret Walker SC expressed the view that 'parliamentary proceedings are by their special nature an exception to the general common law rule that renders the privilege against self-incrimination a substantive immunity protecting a person against all kinds of compulsory questioning', and that

58 Ibid, at 246 per Napier J.

59 Solicitor General (M Gaudron QC), 'Parliamentary Evidence Act', 8 September 1983; Solicitor General (K Mason QC), 'Powers and procedures of joint select committees', 20 October 1992.

60 Twomey, (n 47), p 517.

61 Department of Premier and Cabinet circular C2011-27, 'Guidelines for appearing before parliamentary committees', 20 October 2011, para 3.

62 See, for example, section 37(2) of the *Independent Commission Against Corruption Act 1988*, which provides in relation to the privilege against self-incrimination: 'A witness summoned to attend or appearing before the Commission at a compulsory examination or public inquiry is not excused from answering any question or producing any document or other thing on the ground that the answer or production may incriminate or tend to incriminate the witness, or on any other ground of privilege, or on the ground of a duty of secrecy or other restriction on disclosure, or on any other ground.'

63 T Prince, 'Parliamentary privilege in the 21st century: Is it finally time for reform?', Paper presented to the UNSW Legalwise Seminar on Practice, Procedure and the Law of Parliament, Sydney, 27 March 2019.

'there is no privilege against self-incrimination before the Select Committee by force of law'.[64]

Mr Walker's line of reasoning was that the *Parliamentary Evidence Act 1901* should not be seen as the origin of the power of the House to compel the provision of information. Rather, he contended that the nature and function of the Houses of the Parliament of New South Wales, as recognised in the *Egan* decisions, 'justify cautious resort' to the precedents of the House of Commons at Westminster. He stated:

> Although New South Wales lacks a House of Commons equivalency provision (such as sec 49 of the *Commonwealth Constitution*), and although its colonial history marked its Parliament as a so-called inferior legislature, the nature and function of the Houses of Parliament themselves, recognized in *Egan v Willis* (1998) 195 CLR 424 and *Egan v Chadwick* (1999) 46 NSWLR 563, justify cautious resort to the precedents at Westminster. It was clear by 1828 that the House of Commons had the power, being an aspect of parliamentary privilege, to compel questions to be answered and documents to be produced notwithstanding a claim of self-incrimination of a kind that would have provided a privilege to refuse to answer or produce, had the question or demand been made in or for the purposes of a court of law.[65]

As to the position in the United Kingdom Parliament, the current edition of *Erskine May* states:

> Witnesses are bound to answer all questions which the committee sees fit to put to them, and cannot excuse themselves, for example, on the ground that they may thereby subject themselves to a civil action, or that they have taken an oath not to disclose the matter about which they are required to testify, or that the matter was a privileged communication, as where a solicitor is called upon to disclose the secrets of a client; or on the ground that they are advised by counsel that they cannot do so without incurring the risk of self-incrimination or exposure to a civil suit, or that it would prejudice them as defendant in litigation which is pending, some of which would be sufficient grounds of excuse in a court of law.[66]

Referring specifically to the common law privilege against self-incrimination, Professor Enid Campbell has also expressed the view that '[t]here is certainly nothing in Australian judicial case law to suggest that parliamentary powers of inquiry are *prima facie* constrained by the privilege against self-incrimination'.[67] By analogy, the same principle would presumably also apply in relation to other common law claims of immunity, such as public interest immunity and legal professional privilege.

---

64 B Walker SC, 'Parliament of New South Wales – Legislative Council: Select Committee on Ombudsman's "Operation Prospect"', 14 January 2015, pp 4-5.

65 Ibid.

66 *Erskine May*, 25th ed, (n 22), para 38.36. For further information on the historical precedents in the House of Commons, see B Walker SC, 'Parliament of New South Wales – Legislative Council: Select Committee on Ombudsman's "Operation Prospect"', 14 January 2015, p 5.

67 E Campbell, *Parliamentary Privilege*, (Federation Press, 2003), p 166.

It is undoubtedly the case that the power of committees of the Parliament of New South Wales to call witnesses and compel answers to questions existed prior to the adoption of the *Parliamentary Evidence Act 1901*, and its predecessor the *Parliamentary Evidence Act 1881*, notwithstanding that prior to the passing of these acts, the Houses and their committees were at times frustrated in the taking of evidence.[68]

Accordingly, although the matter certainly cannot be said to be free from doubt, there is cautious reason to assert that common law privileges in the courts are not of direct application to proceedings before committees.[69]

However, that is not to say that witnesses' objections to answering questions on the basis of common law immunities are ignored by Legislative Council committees. Often claims of immunity to answering a 'lawful question' are accepted as reasonable objections by committees. If such objections are not accepted immediately, the committee should consider whether to press a question, having regard to:

- the grounds of the objection;
- the relevance of the question to the committee's inquiry;
- the necessity to the inquiry of the information sought;
- the possible repercussions for the witness, the committee and the Legislative Council; and
- alternative means of obtaining the information.

If a committee determines to insist on an answer to a question the witness should be informed of the reasons why. A committee may allow the witness to answer the question *in camera* as a means of preventing the disclosure of sensitive or confidential information. Alternatively, a committee may permit the witness to take the question on notice for a written answer and consider keeping the written answer confidential.

If a witness continues to refuse to answer a question, the committee may resolve to summon the witness to reappear at a later date to provide an answer. Mr Walker has advised that, whilst a summons is not essential to compel an answer to a 'lawful question', the use of a summons in this circumstance is advisable:

> The advantage of a summons is to signify the compulsion under which the witness attends and answers. As I have previously advised, in my opinion a summons is not strictly necessary in order to compel answers, but is necessary

68 For further information, see the discussion in Chapter 3 (Parliamentary privilege in New South Wales) under the heading 'The *Parliamentary Evidence Acts* of 1881 and 1901'.

69 For further detailed discussion of these matters, see Duffy and Ohnesorge, (n 18). In 2018, the Crown Solicitor noted the position expressed by Mr Walker, but indicated: 'It is possible that the Committees may proceed on the basis of the alternate view, but it is not a view that I or the Solicitor General favour.' See Crown Solicitor, 'Section 38 of the *Public Finance and Audit Act* and powers of Parliamentary Committees', Advice to the Auditor General, 10 August 2018, published in Audit Office, *Report on State Finances*, 19 October 2018, Appendix 2, para 3.5.

> to compel attendance, without which a witness cannot be compelled if he or she chooses to leave the premises.[70]

In this regard, *Odgers* states: 'It would not be fair for a witness who appears voluntarily by invitation to be required to answer a question; only a witness under summons should be so required.'[71]

If a witness who has been summoned to appear continues to refuse to answer a question, this may constitute a contempt of parliament under section 11 of the *Parliamentary Evidence Act 1901*. In such circumstances, the committee may report the matter to the House. The power of the House to deal with contempts is discussed in Chapter 3 (Parliamentary privilege in New South Wales).[72]

These matters are covered by the 'Procedural fairness resolution for inquiry participants' adopted by the House on 25 October 2018. It relevantly provides:

> **Objections to answering questions**
>
> Where a witness objects to answering a question, they will be invited to state the grounds for their objection. If a member seeks to press the question, the committee will consider whether to insist on an answer, having regard to the grounds for the objection, the relevance of the question to the inquiry terms of reference, and the necessity to the inquiry of the information sought. If the committee decides that it requires an answer, it will inform the witness of the reasons why and may consider allowing the witness to answer the question on notice or in private (in camera).
>
> **Witness appearing by invitation**
>
> (a) If a witness who appears by invitation continues to refuse to answer the question, the committee may consider summoning the witness to reappear later, and will advise the witness that as they will be under oath and so subject to section 11 of the Parliamentary Evidence Act 1901, they may be compelled to answer the question.
>
> **Witness appearing under summons**
>
> (b) The continued refusal by a witness, having been summoned, to answer the question while under oath, may constitute a contempt of parliament under the Parliamentary Evidence Act 1901, and the committee may report the matter to the Legislative Council.[73]

Statutory secrecy provisions and questions

As indicated previously in Chapter 3 (Parliamentary privilege in New South Wales), it is well established that the privileges of parliaments generally at common law are not affected by a statutory provision unless the provision alters the common law of privilege

70 B Walker SC, 'Legislative Council Committee – Secrecy Provisions', 12 November 2012, p 3.

71 *Odgers*, 14th ed, (n 32), p 501.

72 See the discussion under the heading 'Contempts'.

73 *Minutes*, NSW Legislative Council, 25 October 2018, pp 3138-3140.

by express words or by 'necessary implication', and that the presumption against alteration of the common law of privilege by necessary implication is very strong.[74]

Accordingly, it is clear that statutory secrecy provisions that do not expressly alter the law of privilege are not a lawful basis for refusing to answer questions.

In the past, this position has been contested by the executive government, based on advice from the Crown Solicitor:

- In 1988, during an inquiry by the Select Committee into the Police Regulation (Allegations of Misconduct) Amendment Bill, the Crown Solicitor advised that the Ombudsman is not required by section 11(1) of the *Parliamentary Evidence Act 1901* to provide information in an answer where section 34 of the *Ombudsman Act 1974* would preclude the divulgence of the information.
- In 2000, during the inquiry by General Purpose Standing Committee No 4 into the budget estimates, the Crown Solicitor advised that committees were prohibited from requiring representatives of the Casino Surveillance Division of the Department of Gaming and Racing to divulge information under section 148(3) and (4) of the *Casino Control Act 1992*.[75]

These two instances are discussed in detail in the first edition of *New South Wales Legislative Council Practice*.[76]

In 2012, during another General Purpose Standing Committee No 4 budget estimates hearing, a Deputy Police Commissioner declined to answer questions relating to an internal police report, on the basis that doing so would breach secrecy provisions in the *Crime Commission Act 2012*.[77]

The matter has arisen again in 2014, 2015 and in 2018.

In 2014, a legal opinion of the Solicitor General and Ms Mitchelmore of Counsel was tabled in the House concerning the power of the House to compel the production of documents.[78] The Solicitor General and Ms Mitchelmore observed that authorities such as *Odgers*, the Commonwealth Attorney General and Solicitor General and Mr Bret Walker hold the view that statutory non-disclosure provisions can only affect the powers of parliament by express reference or necessary implication. They continued:

74 See the discussion under the heading 'Common law privileges generally altered only by express words'.

75 Advice provided by Mr Bret Walker SC took the opposite view that section 148 of the act was not apt to deprive the committee of its power to compel answers.

76 *New South Wales Legislative Council Practice*, 1st ed, (n 32), pp 512-516.

77 During the course of the inquiry, Mr Bret Walker provided advice confirming his previous advice in 2000 cited above that a person bound by statutory secrecy provisions could disclose such information to a committee of the Legislative Council. See B Walker SC, 'Legislative Council committee – secrecy provisions', 12 November 2012, pp 2-3.

78 *Minutes*, NSW Legislative Council, 6 May 2014, pp 2458-2459.

> We are inclined to agree that this view accords with the role of Parliament in a system of responsible and representative government, although the matter can hardly be free from doubt …[79]

The issue arose again in 2015[80] after the House established a Select Committee on the Conduct and Progress of the Ombudsman's inquiry 'Operation Prospect'.[81] Police officers, journalists and other individuals who had participated in the Ombudsman's inquiry wished to provide evidence to the committee but were concerned about the potential to be in breach of section 19A(1) of the *Ombudsman Act 1974* and other provisions.[82] In order to enhance the confidence of these parties to participate in the inquiry, advice was once again sought from Mr Walker on a number of matters, including the effect on parliamentary privilege of the relevant provisions in the *Ombudsman Act 1974*. Mr Walker's advice again confirmed the Council's position on statutory secrecy, stating:

> It remains the case that there are no words or necessary implication to be seen in these statutory provisions that amount to the abrogation by Parliament of this aspect of parliamentary privilege – meaning, in this case, that aspect of the power of the democratic institution to investigate matters in the discharge of its function in our system of responsible government.[83]

Indeed, Mr Walker further argued that the provisions of the *Ombudsman Act 1974* suggest that the Parliament clearly did not intend that the executive government or executive agencies be paramount over one of its Houses (or its committees) and that sections 19A and 19B of the *Ombudsman Act 1974* 'cannot sensibly be read as substituting the Ombudsman as an authority superior to the Legislative Council concerning the publication of evidence'.[84]

Following the publication of Mr Walker's advice, former and current serving police officers, journalists and lawyers provided submissions to the committee which would have breached statutory secrecy provisions except for the protection provided by parliamentary privilege. Subsequently the Ombudsman, the Police Commissioner and two Deputy Police Commissioners provided evidence both in written form and in public hearings that disclosed information covered by statutory secrecy provisions under several statutes. No direct challenge was made to the committee's powers to seek the information, in contrast to earlier occasions on which this issue had arisen. In its report, the committee stated:

---

79 Solicitor General and A Mitchelmore, 'Question of powers of Legislative Council to compel production of documents from executive', 9 April 2014, p 7.

80 The committee was established in November 2014.

81 Operation Prospect was an investigation undertaken by the Ombudsman into allegations and complaints about the conduct of officers of the NSW Police Force, the NSW Crime Commission and the Police Integrity Commission. Those complaints and allegations related to certain investigations conducted by those bodies, separately and jointly, between 1999 and 2002.

82 Section 19A of the *Ombudsman Act 1974* deals with restriction by the Ombudsman on publication of evidence.

83 B Walker SC, 'Parliament of New South Wales – Legislative Council: Select Committee on Ombudsman's "Operation Prospect"', 14 January 2015, p 2.

84 Ibid, p 3.

> [We] note the acceptance by the executive and the Ombudsman of the power of the Legislative Council to seek information that would otherwise be covered by statutory secrecy provisions. This inquiry is one of the most significant in any Australian parliamentary jurisdiction in its use of committee powers to obtain evidence under privilege that is subject to statutory secrecy provisions. The Legislative Council will not accept attempts by future state governments and their agencies to hide behind statutory secrecy when the Council or its committees are seeking to comply with the key role of scrutiny of the executive.[85]

Finally, in August 2018, in a legal opinion provided to the Auditor-General concerning the powers of parliamentary committees, the Crown Solicitor observed:

> The Solicitor General expressed the general view that a statutory prohibition on disclosure of information will only be held to apply to disclosure to a Parliamentary committee if that is done *expressly* or by *necessary implication*.
>
> I defer to the views of the Solicitor General. It is therefore not necessary for me to consider this issue in further detail, or to refer to any of the differing legal opinions (including of my predecessor) that the Solicitor General referred to. I would only add that the principle applied by the Solicitor General – that legislation will be presumed not to diminish the 'privileges' of Parliament or its committees, unless it does so expressly or by necessary implication – has been accepted in several Australian cases.[86]

In the absence of any further developments, this question now appears settled.

Deeds of release and confidentiality agreements

Committees on occasion examine issues where potential witnesses and submission authors have entered into a deed of release or other type of confidentiality agreement. Such persons are free to give evidence to a committee without fear of legal action being taken against them because any disclosure made in a submission or in evidence is protected by parliamentary privilege, unless they circulate their submission or evidence without the authority of the committee. However, notwithstanding the protection provided to witnesses in such circumstances, any decision to breach the terms of a deed of release or other confidentiality agreement is a serious matter, given that the previous legal undertakings were presumably made in good faith. Any individuals considering breaching such an agreement should seek their own legal advice. In regard to oral evidence, a committee should consider whether, initially at least, to hear such evidence *in camera*.

---

85 Select Committee on the Conduct and Progress of the Ombudsman's inquiry 'Operation Prospect', *The conduct and progress of the Ombudsman's inquiry 'Operation Prospect'*, February 2015, p 5. See also S Reynolds, S Griffith and T Higgins, 'Asserting the inquiry power: parliamentary privilege trumps statutory secrecy in New South Wales', Paper presented to the 46th Conference of Presiding Officers and Clerks, Hobart, July 2015.

86 Crown Solicitor, 'Section 38 of the *Public Finance and Audit Act* and powers of Parliamentary Committees', Advice to the Auditor General, 10 August 2018, published in Audit Office, *Report on State Finances*, 19 October 2018, Appendix 2, paras 3.10-3.11, 3.19.

This issue arose in 2005 during the General Purpose Standing Committee No 4 inquiry into Pacific Highway upgrades. The committee took evidence from members of community liaison groups who were subject to confidentiality requirements in relation to certain information provided by the Roads and Traffic Authority.[87] A similar issue arose in 2014 during the General Purpose Standing Committee No 1 inquiry into allegations of bullying in WorkCover NSW. The committee was approached by the Public Service Association of NSW with a request for advice regarding the legal position of PSA members who wished to provide evidence to the inquiry, but who had signed a deed of release with WorkCover as part of a dispute settlement or unfair dismissal claim. These deeds of release contained broad confidentiality and/or non-disparagement clauses.[88] In both inquiries stakeholders gave evidence on matters covered by the deeds of release and no action was taken against them for any potential breach of confidentiality.

PROTECTION OF WITNESSES

The counterpart to the extensive coercive powers of committees to compel witnesses to appear and give evidence at hearings and to answer questions, as discussed above, is that witnesses are given broad legal and procedural protections in the giving of their evidence. This is discussed below.

Absolute legal protection under parliamentary privilege

Evidence given by witnesses at hearings is protected by the immunity that attaches to parliamentary action articulated in Article 9 of the *Bill of Rights 1689*, as in force in New South Wales. In addition, section 12(1) of the *Parliamentary Evidence Act 1901* provides:

> No action shall be maintained against any witness who has given evidence, whether on oath or otherwise, under the authority of this Act, for or in respect of any defamatory words spoken by the witness while giving such evidence.

This immunity permits witnesses to speak freely in committee hearings whilst enjoying absolute protection from legal action for statements they may make, whether in defamation or other legal proceedings in courts or tribunals.

This immunity is discussed in detail in Chapter 3 (Parliamentary privilege in New South Wales).[89]

87 General Purpose Standing Committee No 4, *Interim report: Pacific Highway upgrades, Ewingsdale – Tintenbar and Ballina – Woodburn,* Report No 14, December 2005, pp 16-18.

88 General Purpose Standing Committee No 1, *Allegations of bullying in WorkCover NSW*, Report No 30, June 2014, pp 12-13.

89 See the discussion under the heading 'The immunities that attach to parliamentary action'.

Procedural protections

On 25 October 2018, the House, on the recommendation of the Privileges Committee,[90] adopted a 'Procedural fairness resolution for inquiry participants', which codified a range of longstanding practices for the protection of witnesses. Amongst other things, the 'Procedural fairness resolution for inquiry participants' sets out the procedures to be followed by Legislative Council committees to ensure proper process and fair treatment of witnesses, submission authors and other inquiry participants. A copy of the resolution is at Appendix 15 (Procedural fairness resolution for inquiry participants). All witnesses are given a copy of the resolution as part of their participation in committee inquiries.

In summary, the 'Procedural fairness resolution for inquiry participants' provides that:

- parties are normally invited to make a written submission to an inquiry before being invited to give oral evidence;
- witnesses are normally invited to appear at a hearing and a summons is only issued where a committee decides that it is warranted;
- witnesses are normally given reasonable notice of a hearing to which they are invited or summoned to appear, and are supplied with a copy of the committee's terms of reference, membership and other information prior to appearing;[91]
- witnesses may request to give their evidence *in camera*, either before or during a hearing, and any such request will be considered by a committee;[92]
- a committee chair will ensure that all questions put to witnesses are relevant to the inquiry, that is to say, within the terms of reference of the inquiry;
- with the prior agreement of a committee, witnesses may be accompanied by, and may consult, a legal adviser[93] or support person;
- witnesses may object to answering a question, and a committee should consider any such objection;[94]

90 Privileges Committee, *Procedural fairness for inquiry participants*, Report No 75, June 2018. For the genesis of this matter, see Select Committee on the Legislative Council Committee System, *The Legislative Council committee system*, November 2016.

91 However, there have been occasions on which a committee has requested witnesses to appear at very short notice. An example is the appearance of witnesses before the Standing Committee on Social Issues as part of its 2019 inquiry into the Reproductive Health Care Reform Bill 2019. See Standing Committee on Social Issues, *Reproductive Health Care Reform Bill 2019*, Report No 55, August 2019, pp 3-4.

92 A notable exception to this is the annual budget estimates inquiry. The terms of the resolution adopted by the House for the annual budget estimates inquiry has always required that the committees conducting the inquiry take evidence in public.

93 For further information, see the discussion later in this chapter under the heading 'Legal advisers to witnesses'.

94 For further information, see the discussion earlier in this chapter under the heading 'The power to compel an answer to any 'lawful question''.

- public officials may not be asked to give opinions on matters of policy, and must be given reasonable opportunity to refer such questions to more senior officials or to a minister;
- witnesses may take questions on notice;
- witnesses must be treated with courtesy at all times;
- witnesses and other persons or bodies may be given an opportunity to respond to adverse comments made about them;[95]
- where evidence is given that places a person at risk of serious harm, a committee will immediately consider expunging the information from the transcript of evidence;[96] and
- where a committee has reason to believe that witnesses have been influenced in their evidence, or have been penalised or threatened in respect of that evidence, the committee may report the matter to the House as a possible contempt.

The requirement that witnesses be treated with courtesy at all times places a responsibility on all committee members, and in particular the chair, to ensure that the questioning of witnesses is always respectful and civil. Questioning should not be aggressive or personal.[97]

Committees have also developed additional systems to protect particularly vulnerable witnesses. In 2008, during the General Purpose Standing Committee No 2 inquiry into the management and operations of the Ambulance Service of NSW, several inquiry participants demonstrated significant personal distress. In response, the committee adopted a mental health support plan developed by the secretariat in consultation with NSW Health.[98] The plan enabled the committee, through its secretariat, to consult with relevant health professionals about the most appropriate response to participants who demonstrated a risk of self-harm or suicide. Committees have subsequently utilised a 'Mental health protocol' when responding to participants in any inquiry who are at risk of suicide, self-harm or harm to others. The protocol provides for referral of such inquiry participants to appropriate mental health and support services.

In relation to children and young people appearing as witnesses, general practice is for evidence which may be sensitive to be taken *in camera* and later published with

95 For further information, see the discussion later in this chapter under the heading 'Adverse reflections'.

96 For further information, see the discussion in Chapter 20 (Committees) under the heading 'Expunging and redacting transcripts'.

97 The risks of overly aggressive or personal questioning of a witness during an inquiry were demonstrated most tragically in the United Kingdom in July 2003 following the appearance of defence consultant Dr David Kelly before the House of Commons Select Committee on Foreign Affairs. Dr Kelly subsequently took his own life. See Lord Hutton, Report of the Inquiry into the Circumstances Surrounding the Death of Dr David Kelly CMG, 28 January 2004, chs 4 and 5.

98 General Purpose Standing Committee No 2, *Inquiry into the management and operations of the Ambulance Service of NSW,* Report No 27, October 2008, p 3.

any potentially identifying information suppressed. Committees generally require parental consent for children under 16 to give evidence or to make a submission, whilst those aged 16 and over are able to make their own decisions after consulting with a trusted adult. This approach was adopted during the 2009 General Purpose Standing Committee No 2 inquiry into the bullying of children and young people[99] and has been used in subsequent inquiries involving young people.[100]

Committees and the House take very seriously any suggestion that witnesses have been interfered with in respect of their evidence. The 'Procedural fairness resolution for inquiry participants' provides:

> **Improper treatment of inquiry participants**
>
> Where a committee has reason to believe that a person has been improperly influenced in respect of the evidence they may give to a committee, or has been penalised, injured or threatened in respect of evidence given, the committee will take all reasonable steps to ascertain the facts of the matter. If the committee is satisfied that such action may have occurred, the committee may report the matter to the Legislative Council.[101]

As discussed in Chapter 3 (Parliamentary privilege in New South Wales), the House has twice asked the Privileges Committee to investigate instances of potential interference with committee witnesses.[102]

Individual committees can also address such matters directly. For example, in 2008, during the General Purpose Standing Committee No 2 inquiry into the Ambulance Service, an ambulance officer who had made a submission to the inquiry alleged to the committee that he had been subject to extremely denigrating and threatening comments by a colleague as a result of his submission. The committee considered that the comments could have the effect of discouraging the officer and others in his workplace from making submissions in any future parliamentary inquiry. In response, the committee wrote to the Chief Executive of the Ambulance Service setting out two options. The first was that the committee itself investigate the matter by calling the officer involved to appear and give evidence under oath. The second was that the Ambulance Service conduct its own internal investigation. In response, the Chief Executive undertook to investigate the

---

99 The distinction on the basis of age adopted by the committee during this inquiry was based on the provisions of the *Children (Criminal Proceedings) Act 1987*, sections 15A and 15D, which allow 'a person who is of or above the age of 16 years' who is involved in criminal proceedings to consent to his or her name being published.

100 See, for example, Standing Committee on Social Issues, *Strategies to reduce alcohol abuse among young people in New South Wales,* Report No 48, December 2013, p 137. The committee held a roundtable discussion with 11 young people in the presence of two youth workers. For an occasion on which a child aged 13 gave evidence in public accompanied by her mother, see Standing Committee on Social Issues, *Transition support for students with additional or complex needs and their families,* Report No 45, March 2012, p 160.

101 *Minutes*, NSW Legislative Council, 25 October 2018, pp 3138-3140.

102 See the discussion of the cases of the Hon Dr Andrew Refshauge MP (1998) and the NSW Police Service (2001) under the heading 'Cases of contempt and matters of privilege in the Council'.

matter internally and subsequently reported the investigation findings, and the actions arising from it, to the committee.[103]

In some instances, committees may also take pre-emptive steps to prevent any interference with witnesses. For example, in 2013, during the General Purpose Standing Committee No 1 inquiry into allegations of bullying in WorkCover NSW, the Committee Chair wrote to the Chief Executive of WorkCover noting that in similar inquiries involving evidence from employees of a public sector agency, the agency concerned had issued a circular to staff advising them of the inquiry, and informing managers that they should do nothing that could be construed as discouraging or intimidating employees under their supervision from making a submission or giving evidence. The Chief Executive agreed to the request and issued an appropriate circular to WorkCover staff.[104]

In 2005, during the General Purpose Standing Committee No 5 inquiry into the operation of Mona Vale Hospital, an allegation was made that a committee member had interfered with a witness immediately after a hearing. A second person also wrote to the committee alleging that she had witnessed the incident. The member involved tabled at a subsequent committee meeting a written statement of his view of the incident. The member also advised the committee that he would take no part in the committee's deliberations on the matter. In the event, the committee resolved to take no further action other than to note that appearing before a committee inquiry itself can be an intimidating and daunting experience for witnesses, and that all committee members should exercise caution and sensitivity in any dealings with witnesses.[105]

CONTENT OF EVIDENCE

Adverse reflections

Committee inquiries by their nature seek as many considered views on a subject matter as possible. Often those views will, and should, differ; contradicting each other and criticising the rationality, accuracy or acceptability of other views. This is an accepted part of the committee inquiry process.

However, evidence may sometimes go beyond competing views and arguments to reflect adversely on a person or organisation in a personal or reputational way. This is

103 General Purpose Standing Committee No 2, *The management and operations of the Ambulance Service of NSW,* Report No 27, October 2008, p 204; unpublished letter from Committee Chair to Mr Greg Rochford, Chief Executive Officer, Ambulance Service of NSW, 20 October 2008; and unpublished letter from Mr Greg Rochford, Chief Executive Officer, Ambulance Service of NSW to Committee Chair, 15 July 2009.

104 Correspondence from the Revd the Hon Fred Nile, Chair, General Purpose Standing Committee No 1, to Ms Julie Newman PSM, Chief Executive Officer, WorkCover NSW, 28 June 2013; and Correspondence from Ms Julie Newman PSM, Chief Executive Officer, WorkCover NSW, to Revd the Hon Fred Nile, Chair, General Purpose Standing Committee No 1, 10 July 2013.

105 General Purpose Standing Committee No 2, *Operation of Mona Vale Hospital,* Report No 19, May 2005, pp 5, 196-197.

referred to as adverse reflection. The test of adverse reflection articulated in *Odgers* is as follows:

> Generally, a reflection of poor performance (for example, that relevant matters have been overlooked) is not likely to be viewed as adverse. On the other hand, a statement that a professional person lacks the ability to understand an important conceptual or practical aspect of their profession and, therefore, is not a reliable witness, would be regarded as an adverse reflection. Reflections involving allegations of incompetence, negligence, corruption, deception or prejudice, rather than lesser forms of oversight or inability which are the subject of criticism in general terms, are regarded as adverse reflections. Mere disagreement with another person's views, methodology or premises is not considered as an adverse reflection.[106]

Under the 'Procedural fairness resolution for inquiry participants' adopted by the House on 25 October 2018, committees must attempt to keep adverse reflections confidential, or alternatively, if that is not possible, to give the person or organisation the subject of adverse reflection an opportunity to respond in writing or at a hearing. The resolution provides:

> **Evidence that may seriously damage the reputation of a third party**
>
> **Evidence about to be given**
>
> (a) Where a committee anticipates that evidence about to be given may seriously damage the reputation of a person or body, the committee may consider hearing the evidence in private (*in camera*).
>
> **Evidence that has been given**
>
> (b) Where a witness gives evidence in public that may seriously damage the reputation of a person or body, the committee may consider keeping some or all of the evidence confidential.
>
> **Opportunity to respond**
>
> (c) Where a witness gives evidence that may seriously damage the reputation of a person or body, the committee may give the person or body reasonable access to the evidence, and the opportunity to respond in writing or at a hearing.[107]

When considering which of these procedures should be adopted, a committee needs to balance the potential harm caused by adverse reflections, the importance of the evidence to the inquiry and the public interest in committees conducting their proceedings as far as practicable in public. If evidence is taken *in camera*, the committee may consider later whether all or part of the evidence should be published. The principles applied in the expunging and redacting of evidence are discussed in more detail in Chapter 20 (Committees).[108]

106 *Odgers*, 14th ed, (n 32), pp 553-554.

107 *Minutes*, NSW Legislative Council, 25 October 2018, pp 3138-3140.

108 See the discussion under the heading 'Expunging and redacting transcripts'.

Adverse reflections, in addition to being harmful to individuals and organisations, are usually not helpful in that they can divert the focus of an inquiry from the terms of reference. In 2002, during a review conducted by General Purpose Standing Committee No 3 into its inquiry into Cabramatta policing, attempts by witnesses to use the process to make adverse reflections about others became increasingly common. In its report the committee noted:

> The Committee believes the various adverse comments made have done nothing to advance the purpose of the inquiry, and are irrelevant to the terms of reference of the Committee. The Committee has made no use of any of the adverse comments in preparing this report.[109]

Adverse reflections can also arise in submissions. This is often dealt with by a committee resolving to publish submissions with any adverse reflections redacted. It is also fairly common for entire submissions to be kept confidential by resolution of a committee as a result of adverse reflections. Alternatively, a committee may choose to publish the adverse reflections and provide the named parties with a right of reply. For example, in 2015, during the inquiry by the Select Committee on the Planning Process in Newcastle and the Broader Hunter Region, a number of submissions made adverse reflections about individuals and organisations involved in projects identified in the terms of reference. Many of those individuals and organisations had already been prominently identified in the media regarding certain alleged activities in relation to those projects. The committee resolved to publish those submissions and provide the relevant individuals and organisations with an opportunity to respond in writing or by giving evidence. Those who responded did so in writing, and those who requested their correspondence be published had their responses published on the committee's website.[110]

If a document tendered by a witness contains adverse reflections, a committee may decline to accept it, or follow the same process as for submissions.

False or misleading evidence

Section 13 of the *Parliamentary Evidence Act 1901* concerns the giving of false or misleading evidence by a witness to a committee. It provides:

> If any such witness wilfully makes any false statement, knowing the same to be false, the witness shall, whether such statement amounts to perjury or not, be liable to imprisonment for a term not exceeding five years.

The sanction under section 13 applies to all witnesses who are sworn and give evidence before a committee, whether or not they were summoned to appear.

---

109 General Purpose Standing Committee No 3, *Review of Inquiry into Cabramatta Policing*, Report No 12, September 2002, p 3.

110 Select Committee on the Planning Process in Newcastle and the Broader Hunter Region, *Inquiry into the planning process in Newcastle and the broader Hunter region*, Final report, March 2015, pp 2, 130-131.

The provisions of section 13 have never been used by a Council committee. In practice, where an allegation is made that a witness has provided false or misleading evidence, a committee generally offers the person against whom the allegation is made the opportunity to respond in writing or at a hearing. The procedures are similar to those concerning adverse reflections, set out above.

However, in 2016, in unusual circumstances, General Purpose Standing Committee No 5 self-referred an inquiry into aspects of the evidence given by the Office of Environment and Heritage (OEH) to the committee's 2014-2015 inquiry into a fire at the Wambelong campground, near Coonabarabran.[111] This second inquiry was established to examine allegations by an inquiry participant that the CEO of the OEH had given false and misleading evidence to the committee in the form of photographs provided in answers to supplementary questions, evidence which was relied upon in the committee's 2015 report. The committee provided both parties with each other's correspondence on a confidential basis and invited them to make a submission. A short *in camera* hearing was then held on 22 August 2016 to test the information provided.[112]

In its submission the OEH accepted that some photographs provided to the earlier inquiry were not properly described, and apologised for any confusion this may have caused. Whilst the committee did not reach adverse findings on the issues raised, it expressed concern that the OEH failed to detect the errors which were subsequently reproduced in the committee's report:

> OEH, and any other government agency invited to participate in a parliamentary inquiry, should … take the requisite care and attention required to ensure the reliability and accuracy of its evidence. Failure to do so may lead to further inquiries being established to review the accuracy of public servants' evidence (as occurred in this instance), with the worst case scenario being the imposition of serious sanctions under the *Parliamentary Evidence Act 1901* if a committee finds that a witness knowingly provided false evidence.[113]

The committee subsequently recommended that the Premier's Guidelines for government sector employees dealing with the Legislative Council's General Purpose Standing Committees be amended to ensure government agencies and their officers are aware of their obligation to provide accurate and complete information when participating in parliamentary inquiries. In accordance with this recommendation, the guidelines were subsequently amended and reissued in 2017.[114]

111 General Purpose Standing Committee No 5, *Wambelong fire inquiry evidence*, Report No 43, October 2016.

112 Ibid, pp 4-5.

113 Ibid, p 21.

114 Department of Premier and Cabinet Memorandum M2017-01, 'Guidelines for government sector employees dealing with the Legislative Council's Portfolio Committees', 3 April 2017.

Evidence of potential criminal activity

Although unusual, a committee may receive evidence during an inquiry of potential criminal activity. In such instances, the committee should consider referring the evidence to the police or appropriate investigative agency for examination. The rationale for this is that committees, as with other persons and organisations in the community, have an obligation to assist in the detection and investigation of criminal offences by bringing to the notice of appropriate investigative agencies matters that may warrant further investigation.[115] Alternatively, the committee may advise the person submitting the evidence to provide it directly to the police or appropriate investigative agency. On one occasion, a committee also made a recommendation to the House that the House refer a matter to ICAC.[116] The House subsequently did so.[117]

In considering such issues, a committee should have regard to the nature of its inquiry and to the risk of creating material which is unexaminable in the courts because of parliamentary privilege and which may thereby cause difficulties in those proceedings.[118]

If during a public hearing a committee believes that it is about to hear evidence which relates to potential criminal activity, the committee should consider whether it would be more appropriate to hear that evidence *in camera*. This allows the committee to assess the evidence and decide on an appropriate course of action. There is nothing to prevent a committee referring evidence taken *in camera* to police or other investigative agencies.

LEGAL ADVISERS TO WITNESSES

Standing order 225 precludes a witness from being legally represented by counsel or a solicitor at a hearing of a committee unless the committee decides otherwise. The reason for this restriction is that committee hearings are not court proceedings: witnesses are given full legal immunity for what they say such that evidence from committee proceedings cannot be used to affect a witness's legal rights.

However, whilst a witness cannot be legally represented, with the prior permission of a committee, a witness may be accompanied by legal counsel in an advisory capacity. In such circumstances, unless the committee decides otherwise, the adviser is not sworn in and cannot give evidence on behalf of the witness. Nor may the adviser otherwise participate in the hearing, such as objecting to lines of questioning, cross-examining another witness or intervening during the committee's examination of another witness.

---

115 Whilst a submission or oral evidence referred to an investigatory body cannot be used as evidence in legal proceedings because of parliamentary privilege, the matters raised in the submission or evidence may be used as the basis for independent investigation and the gathering of admissible evidence to support prosecutions. Such evidence may refer to the same facts and circumstances as are referred to in the submission or evidence.

116 General Purpose Standing Committee No 3, *Inquiry into Aspects of the Department of Corrective Services*, Report No 10, July 2002, p 20.

117 *Minutes*, NSW Legislative Council, 28 August 2002, p 312.

Paragraph 6 of the 'Procedural fairness resolution for inquiry participants' adopted by the House on 25 October 2018 specifically provides:

> **Attendance with a legal adviser**
>
> With the prior agreement of the committee, a witness may be accompanied by and have reasonable opportunity to consult a legal adviser during their hearing. The legal adviser cannot participate in the hearing and will not be sworn in or give evidence, unless the committee decides otherwise.[119]

In 2001, during an inquiry by General Purpose Standing Committee No 3 into Cabramatta policing, counsel for the NSW Police sought but was refused the right to appear with the Deputy Police Commissioner as his legal representative.[120]

In 2015, during the inquiry by the Select Committee on the Conduct and Progress of the Ombudsman's Inquiry 'Operation Prospect', almost all witnesses were accompanied by legal advisers, who attended with the witnesses but were not sworn or allowed to address the committee. The committee agreed to this approach in light of the sensitive nature of the inquiry and the fact that many of the witnesses had been legally represented at the Ombudsman's own inquiry.[121]

Whilst these arrangements are appropriate for most committee inquiries, particular considerations arise in relation to inquiries conducted by the Privileges Committee into matters of contempt or breaches of privilege. Such inquiries have the potential to significantly adversely affect the reputation and career of individuals. In some cases, this has justified the adoption by the Privileges Committee of additional procedures in hearings in order to ensure procedural fairness for witnesses. This is examined in Chapter 3 (Parliamentary privilege in New South Wales).[122] Of particular note is the 1998 inquiry by the Standing Committee on Parliamentary Privilege and Ethics into the conduct of the Hon Franca Arena.[123] On the advice of the Clerk, lawyers for Mrs Arena were permitted to attend the committee's hearings and provided advice to Mrs Arena in answering questions. In addition, due to the highly controversial nature of the inquiry and in order to ensure procedural fairness, Mrs Arena's lawyers were permitted to:

- submit written questions to be put to other witnesses by committee members on Mrs Arena's behalf;
- make submissions in relation to the committee's proposed editing of Mrs Arena's evidence before its publication; and

---

119 *Minutes*, NSW Legislative Council, 25 October 2018, pp 3138-3140.

120 General Purpose Standing Committee No 3, *Cabramatta Policing*, Report No 8, July 2001, pp 2-3, 232-233. See also General Purpose Standing Committee No 4, *Inquiry into the Designer Outlets Centre, Liverpool*, Report No 11, December 2004, p 171.

121 Select Committee on the Conduct and Progress of the Ombudsman's Inquiry 'Operation Prospect', *The conduct and progress of the Ombudsman's inquiry 'Operation Prospect'*, February 2015, p 5.

122 See the discussion under the heading 'The conduct of proceedings before the Privileges Committee'.

123 For further information, see the discussion in Chapter 3 (Parliamentary privilege in New South Wales) under the heading 'The Arena case'.

- make submissions in relation to Mrs Arena's conduct before the committee commenced its final deliberations.[124]

The Council does not provide financial assistance for witnesses engaging a solicitor or counsel. However, an exception was made during the inquiry into the conduct of the Hon Franca Arena. During the conduct of the inquiry, Mrs Arena wrote to the committee requesting financial assistance for her legal representation. The committee subsequently sought and was granted funding from Treasury for Mrs Arena's legal representation. Funding was also provided for legal representation of other parties.[125]

WITNESSES' EXPENSES

Witnesses generally attend committee hearings at their own expense. However, committees may in certain circumstances resolve to meet reasonable travel and accommodation expenses, particularly those of witnesses travelling long distances. In such instances, travel and accommodation are arranged by the secretariat. Further, witnesses summoned to appear before a committee under section 4 of the *Parliamentary Evidence Act 1901* are required to be paid, or at least offered, reasonable expenses of attendance.[126]

124 Standing Committee on Parliamentary Privilege and Ethics, *Report on the inquiry into the conduct of the Honourable Franca Arena MLC,* Report No 6, June 1998, pp 9-10.

125 Ibid, p 9.

126 For further information, see the discussion earlier in this chapter under the heading 'Requirements of a summons'.

CHAPTER 22

RELATIONS WITH THE LEGISLATIVE ASSEMBLY

The chapter examines relations between the Legislative Council and the Legislative Assembly, including the various means of communication between the two Houses and comity between the two Houses.

COMMUNICATION BETWEEN THE HOUSES

As indicated in Chapter 1 (The New South Wales system of government), the *Constitution Act 1902* establishes the two Houses of the Parliament of New South Wales as separate and sovereign bodies with complete autonomy, subject to constitutional constraints, over their internal proceedings. The Legislative Council is a continuing body, although it can be prorogued and its business suspended before a periodic Council election, whereas the Legislative Assembly is dissolved for a general election every four years, except in the very unlikely event of the early dissolution of the Assembly[1] or the even more unlikely event that the Governor exercises his or her reserve power to dismiss the Premier and dissolve the Parliament.

Whilst the two Houses are constituted as separate and sovereign bodies, under the bicameral parliamentary system in New South Wales, an effective relationship between the two Houses is vital to the operation of the Parliament and the government more generally, particularly as the two Houses must reach agreement on proposed legislation before it can become law.[2] The two Houses must also reach agreement on a range of other issues. Accordingly, the two Houses frequently need to communicate with one another.

There are various means of formal communication between the two Houses: messages, conferences, committees conferring together and joint sittings under section 5B of the

1 Since 1995 with the entrenchment of fixed four-year terms for the Legislative Assembly by sections 24(1) and 24B of the *Constitution Act 1902*, the early dissolution of the Assembly will only happen in the very rare circumstances provided for within section 24B. These include where a motion of no confidence in the government is passed in the Assembly or where the Assembly rejects an appropriation bill 'for the ordinary annual services of the Government'.

2 Subject to sections 5A and 5B of the *Constitution Act 1902*.

Constitution Act 1902. Of these four mechanisms, messages, conferences and committees conferring together have been in place since the advent of responsible government in 1856.[3] Joint sittings under section 5B of the *Constitution Act 1902* for the specific purpose of resolving deadlocks between the Houses over bills originating in the Legislative Assembly have been in place since 1933.

By far the most common of these methods of communication is messages between the Houses. It would be unusual for a sitting day to pass without messages being exchanged between the two Houses. By contrast, the use of the other means of communication between the two Houses is rare. Conferences may be used as a mechanism for finding agreement between the Houses where resolution of an issue cannot be reached by message, however the holding of conferences has fallen into disuse since 1927, with one exception in 1978. Joint sittings under section 5B of the *Constitution Act 1902* are also extremely rare: there has been only one such joint sitting, in 1960. Finally, whilst members of the Legislative Council regularly sit on joint committees with members of the Legislative Assembly, there are relatively few examples of committees of the two Houses meeting and conferring together for the purpose of reaching agreement on matters of mutual concern to the two Houses.

These different means of communication between the Houses are discussed in further detail below.

Messages between the Houses

Messages between the Houses are the most simple and direct means of communication between the two Houses of the Parliament. They have been used since the advent of bicameralism in 1856, having been adopted from the Westminster Parliament.

Most commonly, messages are used to forward and return bills and schedules of amendments to bills between the Houses. Standing order 151(2) provides for the forwarding by message of a Legislative Council bill to the Assembly for concurrence, standing order 155(1) provides for the return by message of a Legislative Assembly bill, and standing orders 152 and 153,[4] and 156 and 157,[5] variously provide for the further exchange of messages on amendments to bills.[6] Whether the Assembly responds to a Council message on a bill will depend on the circumstances in which the message is sent. For example, a response is not expected when the Council returns an Assembly bill without amendment, but conversely a response is expected when the Council returns an Assembly bill with amendments.

3 For further information, see S Want and J Moore, edited by D Blunt, *Annotated Standing Orders of the New South Wales Legislative Council*, (Federation Press, 2018), p 397.

4 Standing orders 152 and 153 relate to Legislative Council bills.

5 Standing orders 156 and 157 relate to Legislative Assembly bills.

6 When messages are exchanged between the Houses on amendments to a bill, the bill itself is transferred between the Houses along with the message and any schedule of amendments.

Messages are also routinely used to advise the other House of the appointment of or changes to the membership of joint committees. Standing order 220(2) provides that a proposal for a joint committee agreed to by the Council, which under standing order 220(1) must contain the names of members of the House appointed to serve on the committee, will be forwarded to the Assembly by message. In such circumstances, the Council would expect a response from the Assembly. However, in circumstances where the Council advises the Assembly of changes in the Council members appointed to a joint committee, a response from the Assembly is not expected.

Messages are also commonly exchanged between the Houses (and with the Governor) in relation to the holding of joint sittings of both Houses to elect members to fill casual vacancies in the Council under section 22D of the *Constitution Act 1902* and casual vacancies in the representation of New South Wales in the Australian Senate under section 15 of the Commonwealth Constitution.

Less commonly, messages may be used to:

- convey resolutions of one House in which the concurrence of the other House is requested;[7]
- arrange the attendance of the Treasurer in the Legislative Assembly to deliver the budget speech in circumstances where the Treasurer is a member of the Legislative Council;[8]
- seek the concurrence of the other House in the referral of a matter to the Independent Commission Against Corruption under section 73(1) of the *Independent Commission Against Corruption Act 1988*;[9]
- request and respond to requests for conferences between the Houses;
- convey the views of the Council on matters of principle such as the Council's right to amend certain money bills; and
- respond to invitations from the Assembly to amend standing orders in line with amendments made by the Assembly.[10]

---

7 Past examples are resolutions to adopt memoranda of understanding with the Commissioner of the Independent Commission Against Corruption and the Commissioner of Police, and resolutions to adopt the *Code of Conduct for Members* or a revised code.

8 On 4 April 1995, the Governor appointed the Hon Michael Egan as Treasurer, the first time a Treasurer had been appointed from the Legislative Council since the advent of responsible government in 1856. Subsequently, on 21 September 1995, the House agreed to a request from the Assembly for the Treasurer to attend at the table of the Legislative Assembly on 10 October 1995 for the purpose of giving the budget speech. See *Minutes,* NSW Legislative Council, 21 September 1995, p 186. This practice has continued for all subsequent budgets when the Treasurer has been a member of the Council.

9 For further information, see the discussion in Chapter 5 (Members) under the heading 'Reporting possible corrupt conduct to ICAC'.

10 For further information, see the *Annotated Standing Orders of the New South Wales Legislative Council*, (n 3), pp 400-401.

In order for the Council to send a message, standing order 125 provides that a motion may be moved at any time when there is no other business before the House, that a resolution of the House be communicated by message to the Assembly.[11] Standing order 128(1) also provides for the sending of a message where the Council requests a conference on a bill.

A message from the Legislative Council to the Legislative Assembly must be in writing,[12] signed by the President, Deputy President and Chair of Committees or other occupant of the Chair (SO 124). The practice of the House is that a message to the Assembly is always signed by the occupant of the Chair at the time the message was agreed to. The message is conveyed by the Usher of the Black Rod or another officer of the Legislative Council to a clerk in the Legislative Assembly.[13] If that House is not sitting at the time, the message is conveyed to the Clerk of the Legislative Assembly. The subject matter of a message and to whom it was delivered in the Assembly are recorded in a message book maintained by the clerks.

In turn, a message from the Legislative Assembly to the Legislative Council received when the House is sitting is delivered by the Serjeant-at-Arms or another officer of the Assembly to one of the clerks, who receives it at the Bar of the House (SO 126).[14] The Clerk or occupant of the Clerk's chair in turn informs the President who reports the message to the House as soon as practicable without interrupting business (SO 126(1) and (2)).[15] If any action is necessary on receipt of a message from the Assembly, a future day must be fixed for its consideration (SO 126(3)). However, under standing orders 152(1) and 156(1), this requirement is modified in respect of messages from the Assembly returning Council bills with amendments or Assembly bills with Council amendments disagreed to, provision being made for such messages to be considered forthwith. Other messages from the Assembly may be considered immediately on suspension of standing and sessional orders by leave[16] or on contingent notice.

A message from the Legislative Assembly to the Legislative Council received when the House is not sitting is delivered to the Clerk (SO 126(1)). The message is subsequently

---

11 There is no requirement that the member moving the motion that a message be sent to the Assembly be the member who moved the substantive motion. For further information, see the *Annotated Standing Orders of the New South Wales Legislative Council*, (n 3), pp 400-402.

12 Traditionally, messages were in handwriting. For further information, see the *Annotated Standing Orders of the New South Wales Legislative Council*, (n 3), pp 399-400.

13 Standing order 68 of the Legislative Council, adopted at the outset of responsible government in 1856, provided for messages to the Legislative Assembly to be conveyed by two or more members named by the President. However, within a year, it quickly became the norm for messages to be conveyed by the clerks. For further information, see the *Annotated Standing Orders of the New South Wales Legislative Council*, (n 3), pp 398-399.

14 For further information, see the *Annotated Standing Orders of the New South Wales Legislative Council*, (n 3), pp 403-404.

15 However, from time to time, the adjournment debate has been interrupted prior to the question on adjournment being put for the reporting of messages from the Legislative Assembly.

16 See, for example, *Minutes*, NSW Legislative Council, 21 June 2007, p 157.

reported to the House by the President on the next sitting day during formalities at the commencement of proceedings.[17]

Every message sent by the Legislative Council, and every message received from the Legislative Assembly, is recorded in the *Minutes of Proceedings* (SO 127).

Almost all disagreements between the two Houses are resolved through the exchange of messages. Of note, disagreement between the Houses concerning bills may be resolved through the repeated exchange of messages, as discussed in detail in Chapter 15 (Legislation). There are also instances where messages have been exchanged repeatedly in relation to the appointment of a joint committee before an agreement between the Houses has been reached.[18]

Conferences between the Houses

Where the Houses cannot reach agreement through the exchange of messages, a conference between representatives of the two Houses, called managers, provides another mechanism for communication between the Houses in an attempt to reach agreement. Conferences may be held in relation to both bills and other matters.

At the outset of responsible government in 1856, the *Constitution Act 1855* did not refer to the holding of conferences. However, whilst they had already by that time fallen into disuse in the Westminster Parliament,[19] both Houses adopted provision for conferences in their standing orders soon after the achievement of responsible government.[20] Subsequently, in 1933, section 5B was also inserted into the *Constitution Act 1902* to provide for the holding of a free conference of managers of both Houses on the initiative of the Legislative Assembly where the Legislative Council twice rejects or fails to pass a bill originating in the Assembly, or passes it with any amendment to which the Assembly does not agree.[21]

Today, the relevant standing orders dealing with conferences, including conferences under section 5B of the *Constitution Act 1902*, are standing orders 128 to 134 and 153.

---

17 For further information, see the discussion in Chapter 10 (The conduct of proceedings) under the heading 'Messages from the Legislative Assembly'.

18 See, for example, messages concerning the appointment and membership of the Joint Standing Committee on Electoral Matters in 2007. See *Minutes*, NSW Legislative Council, 21 June 2007, pp 154-155; 26 June 2007, pp 173-174; 27 June 2007, p 184; 28 June 2007, p 199.

19 In the Westminster Parliament, the last free conference was held in 1836, and its immediate predecessor in 1740. The last ordinary conference was held in 1860. See D Natzler KCB and M Hutton (eds), *Erskine May's Treatise on The Law, Privileges, Proceedings and Usage of Parliament,* 25th ed, (LexisNexis, 2019), para 9.16.

20 The Council standing orders adopted in 1856 made provision for conferences in standing orders 70 to 95.

21 For further information on the operation of section 5B, see the discussion in Chapter 15 (Legislation) under the heading 'Bills under section 5B of the *Constitution Act 1902*'.

Types of conferences

There are two types of conferences which may be held between the Houses: free conferences and ordinary conferences. At a free conference, managers from each House may communicate both orally and in writing (SO 133(2)). No formal written record of the proceedings is kept, allowing members to voice their opinions freely. At an ordinary conference managers may communicate in writing only (SO 132(1)).

Requests for conferences

Conferences between the Houses on a bill or other matter are initiated by one House sending a message to the other requesting a conference, subject to the restriction under section 5B of the *Constitution Act 1902* that only the Legislative Assembly may request a free conference on an Assembly bill twice rejected or not passed by the Council if the subsequent deadlock provisions under section 5B are to be activated.

Standing order 128 sets out the procedure to be followed by the Council if it wishes to request a conference with the Assembly. The request must be by message (SO 128(1)), must state the general object of the conference and the names of the Council managers proposed to serve (SO 128(2)), and must not be in respect of a bill of which the Assembly is in possession or a matter under consideration by the Assembly at the time of the request (SO 128(4)),[22] the rationale being that a conference should only be held if the Council is in disagreement with the position of the Assembly as established by message. Standing order 153 makes further provision for the Council to request a conference on a Council bill returned by the Assembly.

Since 1856, there have been only four requests for a conference initiated by the Legislative Council, although a conference was subsequently held on only two of those four occasions.[23]

The first two requests for conferences by the Council were made in 1856 and 1857, in the early years of responsible government. Both requests involved proposals for a joint Address to the Governor, which under the standing orders at the time required a conference with the Assembly to obtain the Assembly's concurrence.[24] The details are as follows:

- On 11 December 1856, the Council sent a message to the Assembly transmitting a copy of an Address to Her Majesty and the two Houses of the Imperial Parliament on the subject of the separation of the Northern Districts to form a

22 Standing order 346 of the Assembly is in similar terms. The standing order is expressed as not precluding a demand being made for a free conference in any case where the Council has rejected a bill transmitted by the Assembly to the Council, or has failed within the meaning of section 5B of the *Constitution Act 1902* to pass it, or has passed it with any amendment to which the Assembly does not agree.

23 For further information, see the *Annotated Standing Orders of the New South Wales Legislative Council*, (n 3), pp 407-410.

24 Standing orders 63 and 65 of 1856.

new colony,[25] and requesting a free conference with the Assembly in order to obtain the concurrence of the Assembly therein.[26] The Assembly refused the request, the Speaker ruling that the request was in contravention of Assembly standing orders.[27]

- On 13 November 1857, the Council sent a message to the Assembly forwarding a copy of the Report of the Select Committee on Australian Federation,[28] together with a resolution of the Council in relation to federation, requesting an (ordinary) conference[29] with the Assembly in order to obtain the Assembly's concurrence in an Address to the Governor on the matter.[30] The Assembly agreed to the Council's request and the conference was held on 9 December 1857.[31] This was the first ever conference between the Houses, and the only occasion on which an ordinary conference has been held.

The third request by the Council for a conference was on 6 August 1875, when the Council requested a second free conference on the Lands Acts Amendment Bill 1875,[32] the first free conference having been held the previous day at the request of the Assembly.[33] In the event, the conference proceeded immediately following the exchange of messages with the Assembly. This was the first time the Council had requested a free conference on a bill, and the only time a free conference initiated by the Council has been held.

The fourth request by the Council for a conference was more recent. On 13 September 2011, the Council requested a free conference on the Graffiti Legislation Amendment Bill 2011,[34] after the Assembly disagreed with Council amendments to the bill by message dated 26 August 2011.[35] As discussed in Chapter 15 (Legislation), the occasion was somewhat unusual, as the circumstances did not meet those for the resolving of

25 By the *Australian Colonies Government Act 1850* (Imp), the Imperial Parliament had legislated to enable the creation of new Australian colonies similar to that in New South Wales, and anticipated that Port Phillip in what is now Victoria and Moreton Bay in what is now Queensland would likely become separate colonies in the foreseeable future. The separation of the Moreton Bay area from New South Wales was opposed by the Legislative Council and Legislative Assembly.

26 *Minutes*, NSW Legislative Council, 11 December 1856, p 33.

27 *Votes and Proceedings*, NSW Legislative Assembly, 30 December 1856, p 369. The Speaker did not give reasons.

28 The Council established a select committee on 'the expediency of establishing a Federal Legislature' on 19 August 1857. See *Minutes*, NSW Legislative Council, 19 August 1857, p 7. The committee tabled its report on 20 October 1857, in which it recommended that delegates of all the colonies assemble to frame a plan for federation. See *Minutes*, NSW Legislative Council, 20 October 1857, p 13.

29 The request was for a 'conference'. According to standing order 175 in force at the time, a request for a 'conference' was taken to mean an ordinary conference, unless a free conference was specifically requested.

30 *Minutes*, NSW Legislative Council, 13 November 1857, p 22.

31 *Minutes*, NSW Legislative Council, 9 December 1857, pp 34-35.

32 *Minutes*, NSW Legislative Council, 6 August 1875, pp 159-160.

33 *Minutes*, NSW Legislative Council, 5 August 1875, p 157.

34 *Minutes*, NSW Legislative Council, 13 September 2011, pp 426-427.

35 *Minutes*, NSW Legislative Council, 26 August 2011, pp 387-388.

disagreement with the Assembly on an Assembly bill under standing orders 156 and 157,[36] nor the requirements for resolving deadlocks under section 5B of the *Constitution Act 1902*. Nonetheless, there was nothing to prevent the Council from requesting a free conference on the bill under standing order 128. In the event, almost a year later on 21 August 2012, the Assembly rejected the Council's request for a free conference.[37] The matter was finally resolved when the Council chose not to insist on its original amendments and instead proposed further amendments,[38] to which the Assembly subsequently agreed.[39]

The use of a free conference was also raised but not pursued in the Legislative Council on two other occasions in 1996[40] and 2000.[41]

Whilst the Legislative Council has only requested a conference with the Legislative Assembly on four occasions, the Legislative Assembly has requested a conference with the Legislative Council on 25 occasions, with the Council agreeing to the request on 23 of those occasions. In each of these instances, the Assembly requested a free conference (as distinct from an ordinary conference), and each request was in relation to a bill. These matters are discussed in detail in Chapter 15 (Legislation).[42] In summary, between 1867 and 1927, free conferences were requested by the Assembly in respect of 23 bills, with 22 free conferences subsequently convened.[43] Subsequently, however, the procedure fell into disuse. It was not revived again until 7 April 1960, when the Assembly requested a free conference on the Constitution Amendment (Legislative Council Abolition) Bill 1959-1960. This was the first time a request for a free conference had been made by the Assembly under section 5B of the *Constitution Act 1902*. In the event the Council declined the request, arguing that it had neither rejected nor failed to pass the bill within

36 See the discussion under the heading 'The Assembly returns an Assembly disagreeing with Council amendments'.

37 *Minutes*, NSW Legislative Council, 21 August 2012, p 1144.

38 Ibid, pp 1148-1149.

39 *Minutes*, NSW Legislative Council, 22 August 2012, p 1156.

40 On 29 October 1996, the Standing Committee on Parliamentary Privilege and Ethics tabled a report which recommended that a free conference be convened to consider a single code of conduct for all members of the Parliament. See Standing Committee on Parliamentary Privilege and Ethics, *Report on inquiry into the establishment of a draft code of conduct for members*, Report No 3, October 1996, Recommendation 5. The Leader of the Government in the Legislative Council, the Hon Michael Egan, subsequently moved that the House take note of the report. See *Minutes*, NSW Legislative Council, 29 October 1996, p 401. In the event, however, the matter was not debated further.

41 On 29 June 2000, the Deputy Leader of the Opposition in the Legislative Council, the Hon Duncan Gay, sought leave to suspend standing orders to allow a motion to be moved forthwith to request a free conference with the Assembly on the Dairy Industry Bill 2000. Leave was not granted. See *Minutes*, NSW Legislative Council, 29 June 2000, pp 575-576. This instance is discussed in more detail in Chapter 15 (Legislation), under the heading 'Conferences on bills'.

42 See the discussion under the heading 'Conferences on bills'.

43 The Assembly's request for a free conference on the Crown Lands Bill 1898 was declined by the Council owing to the lateness of the session. See *Minutes*, NSW Legislative Council, 7 July 1898, p 48.

the meaning of section 5B.[44] The procedure was revived again on 25 January 1978, when the Assembly again requested a free conference under section 5B on the Constitution and Parliamentary Electorates and Elections (Amendment) Bill of 1977-1978, a bill to reconstitute the Legislative Council.[45] On this occasion, the free conference proceeded and was used to great effect leading to a settlement on the bill, as discussed in Chapter 2 (The history of the Legislative Council).[46]

No further conferences have been held since 1978, a period of over 40 years. However, recent instances where the Council has either made or considered further requests for a conference suggest that they continue to be regarded as a viable means of communication with the Legislative Assembly for the resolving of deadlocks. In addition, there is always the possibility that a conference will be initiated by the Legislative Assembly under the provisions of section 5B of the *Constitution Act 1902*.

Appointment of managers

At a conference between the Houses, both Houses are represented by managers.

The number of managers representing the Legislative Council at a conference must be not fewer than five at an ordinary conference and not fewer than 10 at a free conference (SO 128(3)). If the Council requests a conference, the request must contain the names of members proposed to be the managers for the Council (SO 129(1)). In turn, if the Assembly requests a conference, and the Council by return message agrees, the number of the managers appointed by the Council must be the same as the number appointed by the Assembly (SO 129(3)). The return message also nominates the Council managers. These requirements have been adopted consistently in the standing orders since the advent of responsible government in 1856.[47]

In accordance with the above requirements, on the three occasions in 1856, 1875 and 2011 on which the Council requested a free conference, the Council appointed 10 managers.[48]

---

44 *Minutes*, NSW Legislative Council, 7 April 1960, pp 213-215. As discussed in Chapter 2 (The history of the Legislative Council), the Governor subsequently convened a joint sitting of the two Houses on the bill on 20 April 1960 which only government (Labor) members from the Council attended. The bill was subsequently the subject of court proceedings in the Supreme Court and the High Court, before being rejected by the people at a referendum. For further information, see the discussion in Chapter 2 (The history of the Legislative Council) under the heading '1934–1961: Labor's further attempts to abolish the Council'. See also the *Annotated Standing Orders of the New South Wales Legislative Council*, (n 3), pp 418-419.

45 *Minutes*, NSW Legislative Council, 25 January 1978, pp 752-753.

46 See the discussion under the heading '1978: Direct election and reconstitution from 60 to 45 members'.

47 For further information, see the *Annotated Standing Orders of the New South Wales Legislative Council*, (n 3), pp 410-413.

48 *Minutes*, NSW Legislative Council, 11 December 1856, p 33; 6 August 1875, pp 159-160; 13 September 2011, pp 426-427.

On the one occasion in 1857 on which the Council requested an ordinary conference, it appointed five managers.[49]

On those occasions on which the Assembly has requested a free conference, it has always appointed 10 managers, with the exception of the very first occasion on which it requested a free conference in 1867, when it appointed only five managers for the conference on the St Andrew's College Bill 1867.[50] The Council in turn also appointed five managers.[51]

Managers are usually appointed from amongst those members who hold the view of the majority in the House. For example, where the House by message to the Assembly insists on amendments to a bill, managers appointed by the House would be expected to support and have voted for those amendments.

This issue arose in 1867 in the lead-up to the conference on the St Andrew's College Bill 1867 cited above, the first conference requested by the Assembly on a bill and only the second conference between the two Houses. On the Clerk calling over the names of the five members appointed as managers for the Council, it was found that three of the five members were not present.[52] On a motion being moved for the appointment of three new managers, one of the members so proposed, the Hon Edward Deas Thomson, took a point of order objecting to being named a manager, on the basis that he was not prepared to argue the questions that might arise at the conference. In support, he cited the following passage from *Erskine May*:

> [I]t is not customary nor consistent with the principles of a conference to appoint any Members as Managers unless their opinions coincide with the objects for which the Conference is held.[53]

The President did not uphold the point of order, indicating that the motion before the House was in order. However, he indicated that there was good reason why Mr Deas Thomson should not be appointed as a manager. The House by motion subsequently replaced Mr Deas Thomson with the Hon John Blaxland for the conference.[54]

There is also precedent for the House to give an instruction to its managers upon their appointment. In 1927 the Council agreed to the Assembly's request for a free conference on the Industrial Arbitration (Living Wage Declaration) Bill of 1926-1927. In its return

---

49 *Minutes*, NSW Legislative Council, 13 November 1857, p 22.

50 *Minutes*, NSW Legislative Council, 16 October 1867, p 83. This was an irregularity, inconsistent with standing order 80 of the Legislative Assembly at the time. See *Votes and Proceedings*, NSW Legislative Assembly, 30 October 1867, p 368 per Speaker Arnold.

51 *Minutes*, NSW Legislative Council, 23 October 1867, pp 87-88.

52 For other instances where a member failed to answer on being called at the time appointed for a conference, see the free conference on the Crown Lands Act Amendment Bill 1891-1892, *Minutes,* NSW Legislative Council, 7 October 1891, p 103; and the free conference on the Hunter District Water and Sewerage Act Amendment Bill 1897, *Minutes*, NSW Legislative Council, 20 October 1897, p 161.

53 *Minutes*, NSW Legislative Council, 14 November 1867, p 101.

54 Ibid, pp 101-102.

message to the Assembly, the Council indicated that it had instructed its managers to consider family endowment in relation to the bill.[55]

If the House requires, the Council managers at a conference may be selected by ballot (SO 129(2)). There is one instance when this occurred. On 20 November 1895, on the House receiving a request from the Assembly for a free conference on the Land and Income Tax Assessment Bill 1895, the House determined the matter by ballot after objection was taken to five of the 10 managers proposed.[56]

Time and place

When the Council requests a conference, and the Assembly by return message agrees, the Assembly in its return message appoints the time and place for the conference. The Council must in turn agree to this time and place by further message to the Assembly (SO 131(2)).

Conversely, when the Assembly requests a conference, to which the Council by return message agrees, the Council's return message must appoint the time and place for the conference (SO 131(1)), to which the Assembly must agree.

In the particular circumstances when the Assembly requests a free conference on an Assembly bill under section 5B of the *Constitution Act 1902*, the Council must agree to it without delay (SO 133(1)).[57] Once again, the Council appoints the time and place for the conference, in accordance with standing order 131(1), to which the Assembly must agree.

The motion fixing the time and place for the holding of a conference requested by the Assembly may be amended. For example, on 23 March 1899, on the Assembly sending a message requesting a free conference on the Australasian Federation Enabling Bill 1899, a motion that the free conference be held forthwith was amended to set down the conference for a later day.[58] As another example, on 25 January 1978, on the Assembly sending a message requesting a free conference on the Constitution and Parliamentary Electorates and Elections (Amendment) Bill of 1977-1978, a motion that the free conference be held in the 'Public Works Committee Room' was amended by substituting the 'Legislative Council Committee Room'.[59]

---

55 *Minutes*, NSW Legislative Council, 10 March 1927, p 143.

56 *Minutes*, NSW Legislative Council, 20 November 1895, pp 123-124; *Hansard*, NSW Legislative Council, 20 November 1895, p 2760. At the time, standing order 145 did not provide for a ballot to be conducted for the appointment of managers for a conference requested by the Assembly. The House held a ballot anyway. For further information, see the *Annotated Standing Orders of the New South Wales Legislative Council*, (n 3), p 411.

57 This variation between standing orders 131(1) and 133(1) reflects the fact that the Council must agree to a request from the Assembly for a conference under section 5B of the *Constitution Act 1902*, whereas it may decline a request from the Assembly for a conference in other circumstances.

58 *Minutes*, NSW Legislative Council, 23 March 1899, pp 31-32.

59 *Minutes*, NSW Legislative Council, 25 January 1978, pp 752-753.

In most instances, the time set by the Houses for the holding of a conference has been a later hour, either on the same day or on a subsequent day. In such circumstances, at the appointed time, the Clerk, by direction of the President, calls over the names of the managers appointed to act on behalf of the Council, who then proceed to the conference. However, there have been four occasions on which a conference has proceeded immediately following the exchange of messages between the Houses, the appointed time for the conference having already arrived.[60]

During the holding of a conference, the business of the House is suspended (SO 130). In practice, on the Council's managers proceeding to a conference, the President leaves the Chair until a fixed time. When the House resumes, if the managers have not yet returned from the conference, the President once again leaves the Chair until a later agreed time. This procedure of suspending and resuming business can occur over a series of days until such time as the managers have concluded their business and returned to the House.[61] Of note, in 1978, the Council managers at the free conference on the Constitution and Parliamentary Electorates and Elections (Amendment) Bill of 1977-1978 met a number of times over three days before the report of the managers was tabled and adopted in the House.[62] Indeed, even after the report was adopted, the managers were given leave by the House to continue to meet with the Assembly managers to work on the bill.[63] The managers subsequently met on a further two occasions.[64]

It is notable that the timing of early conferences between the Houses did not always run smoothly. For the first conference between the Houses on 9 December 1857, the Assembly had specified the time of the conference as three o'clock.[65] In the event, the Council did not meet until three o'clock, and it was only at ten minutes past three, on the Usher of the Black Rod announcing to the House that the Assembly Managers

60 On 6 August 1875 when the Council requested a second free conference on the Lands Acts Amendment Bill 1875, a return message from the Assembly agreeing to the conference was received without any other business intervening, whereupon the Council managers proceeded immediately to the further free conference, as the appointed time for the conference had arrived. See *Minutes*, NSW Legislative Council, 6 August 1875, pp 159-160. There have also been three instances where, on the Council agreeing to a free conference requested by the Assembly, and sending a message to the Assembly to that effect, the Council managers were required to proceed directly to the conference without further business intervening, again as the appointed time for the conference had arrived. See the conferences on the Gas Bill 1912, *Minutes*, NSW Legislative Council, 2 December 1912, p 154; the Fair Rents Bill 1915-1916, *Minutes*, NSW Legislative Council, 15 December 1915, p 230; and the Industrial Arbitration (Living Wage Declaration) Bill of 1926-1927, *Minutes*, NSW Legislative Council, 11 March 1927, pp 147-148.

61 For further information, see the *Annotated Standing Orders of the New South Wales Legislative Council*, (n 3), pp 413-414.

62 *Minutes*, NSW Legislative Council, 31 January–1, 2, 7 February 1978, pp 768-770. For further information, see the *Annotated Standing Orders of the New South Wales Legislative Council*, (n 3), p 422.

63 *Minutes*, NSW Legislative Council, 31 January–1, 2, 7 February 1978, p 769.

64 For further information, see the *Annotated Standing Orders of the New South Wales Legislative Council*, (n 3), p 414.

65 *Minutes*, NSW Legislative Council, 1 December 1857, p 31.

were waiting in the Assembly's Committee Room No 1, that the Clerk by direction of the President called over the names of the Council managers and they proceeded to the conference.[66]

The timing of the second conference between the Houses on the St Andrew's College Bill 1867 also did not run smoothly. The Council initially appointed 30 October 1867 for the conference. However, the Assembly managers failed to attend after the Council's message appointing the date and time for the conference was not reported in the Assembly until after the appointed time.[67] The Council subsequently appointed 6 November 1867 for the conference, but again the Assembly managers failed to attend, this time because the Assembly did not meet that day for lack of a quorum.[68] It was only on the third day appointed by the Council for the conference, 14 November 1867, that the Assembly managers finally attended.[69]

Proceedings during conferences

Under standing order 131(3), at a conference requested by the Assembly, the Council managers receive the Assembly managers. Conversely, although not stated in the Council or Assembly standing orders, at a conference requested by the Council, the Assembly managers receive the Council managers.

By convention, Council managers attending a conference are accompanied by the Usher of the Black Rod, although there has never been a provision in the standing orders for the attendance of an officer of the House. However, the attendance of an officer of the House is necessary to assist in the preparation of the report of the managers to the House.

At a free conference, as noted earlier, managers from each House may communicate both orally and in writing (SO 133(2)). No formal written record of the proceedings is kept, allowing members to voice their opinions freely. At an ordinary conference, managers may communicate in writing only (SO 132(1)).[70]

Aside from these rules, there are no additional standing orders regulating the conduct of managers during a conference. Nor does section 5B of the *Constitution Act 1902* impose any additional requirements in relation to conferences on Assembly bills.

66 *Minutes*, NSW Legislative Council, 9 December 1857, p 34.

67 *Votes and Proceedings*, NSW Legislative Assembly, 30 October 1867, pp 367-368.

68 *Votes and Proceedings*, NSW Legislative Assembly, 7 November 1867, pp 389-390.

69 *Minutes*, NSW Legislative Council, 14 November 1867, pp 101-102.

70 As noted previously, the only ordinary conference between the Houses in New South Wales was held on 9 December 1857 in relation to Australian federation. The Council managers subsequently reported that they had presented the Assembly managers with a draft joint Address to the Governor which had been agreed to by the Council, and had requested the concurrence of the Legislative Assembly. The Assembly managers had replied that they would present the draft Address to the Speaker. See *Minutes*, NSW Legislative Council, 9 December 1857, pp 34-35. In the event, the matter was interrupted by prorogation before the Assembly replied.

As there is no formal record of proceedings at conferences, there is only limited information available as to how they have been conducted in the past. However, following the free conference convened on the Constitution and Parliamentary Electorates and Elections (Amendment) Bill of 1977-1978, opposition managers in the Legislative Council published a 'Record of proceedings as kept by opposition managers' providing details of discussions held at the conference, and in particular the positions and arguments adopted by the Premier, the Hon Neville Wran, and the Leader of the Opposition in the Legislative Council, the Hon Sir John Fuller.[71] Unofficial notes were also kept by the Usher of the Black Rod at the time, Mr John Evans.[72] The Clerk of the Parliaments at the time, Mr Les Jeckeln, subsequently described the proceedings in *The Table*:

> The first meeting of Managers was to take place on Tuesday, 31st January 1978, at 2.15 pm. The Council met at 2 pm and all its Managers were present. Business of the House was then suspended and the Managers proceeded to the Council Committee Room to receive the Assembly Managers. As the last Free Conference had taken place 50 years earlier – in the 1926-27 Session – no officer from either House had experience in the arrangements essential to such a conference and only the scantiest of guidance was available from past records.
>
> Prior to the first meeting a small but important matter required to be decided: the layout of the room for the purpose of the conference. A long narrow table was placed down the centre of the room to permit the ten Managers from one House to sit opposite the Managers from the other House. As this would have brought the representatives within an arm's length of each other the room was re-arranged in favour of the Managers being seated at each end of the room in 'U' formations. The Premier sat in front of and acted as spokesman for the Assembly Managers and Sir John Fuller sat in front of and spoke for the Council Managers.
>
> The room was not the most comfortable in the premises; and the fact that Managers quickly discarded their coats was due not to the fervour with which they might support their points of view but to the sticky conditions of a humid January and the lack of air conditioning.
>
> … The first meeting of the Managers took place as planned. Council Managers were attended by the Usher of the Black Rod and Assembly Managers by the Serjeant-at-Arms. No official record of proceedings was kept.
>
> The conference proceeded over a period of three days during which the points of difference and areas of compromise were considered. It is understood that the conference was conducted with decorum, the Premier, the Hon Neville Wran,

71 'Record of proceedings as kept by Opposition Managers', Free Conference of Managers of Legislative Council and Legislative Assembly on the Constitution and Parliamentary Electorates and Elections (Amendment) Bill, January 31–March 8 1978.

72 J Evans, Usher of the Black Rod, 'Constitution and Parliamentary Electorates and Elections (Amendment) Bill: Record of proceedings of Free Conference of managers and associated documents', 1978. See also D Clune, 'Connecting with the People: The 1978 reconstitution of the Legislative Council', Part Two of the Legislative Council's Oral History Project, February 2017, which includes accounts from two members and Mr Evans present at the free conference.

> and the Leader of the Opposition in the Council, the Hon Sir John Fuller, doing the great bulk of negotiating with very little participation from other managers.[73]

The outcome of this free conference in 1978, which led to a settlement on the bill and the reconstitution of the Legislative Council, is discussed in Chapter 2 (The history of the Legislative Council).[74]

Reports of conferences

At the conclusion of a conference the managers for the Council are required to report in writing the outcome of the proceedings to the House as soon as practicable (SO 134).

Managers have reported a range of outcomes from conferences including agreement, failure to reach agreement and a requirement for further instruction.[75]

The standing orders do not prescribe the form or content of a report of a conference. However, where agreement has been reached, it is expected that the report should detail the agreement. For example, in the case of a conference to consider a bill, a report might indicate amendments to the bill agreed to, amendments no longer insisted upon or further amended, and any additional amendments.

In 1978, following the free conference on the Constitution and Parliamentary Electorates and Elections (Amendment) Bill of 1977-1978, the Hon Sir John Fuller, on behalf of the Council managers, read the report of the conference to the House, together with the agreement reached by the managers. Subsequently, a motion was moved, by leave, that the report and attached agreement be adopted, which question was put and passed.[76]

On previous occasions, after the tabling of a report of a conference, a motion has been agreed to for the President to leave the chair and the House to resolve itself into a Committee of the whole House to consider the report in detail. The committee would then report to the House as to whether it agreed with the report. A committee and in turn the House is not bound by an agreement reported from a conference.[77]

Chapter 15 (Legislation) cites those instances when the Assembly has requested a free conference to resolve disagreement between the Houses on a bill. As indicated, in the vast majority of those cases, the usual settlement of the disagreement was either one

---

73 LA Jeckeln, 'Reform of the Legislative Council of New South Wales', *The Table*, (Vol XLVII, 1979), pp 81-82.

74 See the discussion under the heading '1978: Direct election and reconstitution from 60 to 45 members'.

75 Further instructions from the House were sought from managers appointed to each of the first four free conferences initiated by the Assembly on bills in 1867, 1875, 1879 and 1881. For further information, see the *Annotated Standing Orders of the New South Wales Legislative Council*, (n 3), p 421.

76 *Minutes*, NSW Legislative Council, 31 January–1, 2, 7 February 1978, pp 768-769.

77 For further information, see the *Annotated Standing Orders of the New South Wales Legislative Council*, (n 3), p 420.

House no longer maintaining its stand or further amendments being agreed to, thus allowing the bill to pass.[78]

Joint sittings under section 5B of the *Constitution Act 1902*

Under section 5B of the *Constitution Act 1902* dealing with deadlock between the Houses on all bills initiated in the Assembly other than a bill to which section 5A applies, if the Legislative Council twice rejects or fails to pass such a bill, or passes it with any amendment to which the Assembly does not agree, the Governor may convene a joint sitting of the members of both Houses to deliberate together upon the bill as last proposed by the Assembly and any amendments made by the Council to which the Assembly does not agree.

Only one bill, the Constitution Amendment (Legislative Council Abolition) Bill of 1959-1960, has been submitted to a joint sitting of both Houses in accordance with this provision. As discussed in Chapter 2 (The history of the Legislative Council),[79] on 13 April 1960 both Houses received separate messages from the Governor convening a joint sitting in the Council chamber on 20 April 1960 for the purposes of meeting and deliberating on the bill. Despite the Council resolving on division that a situation had not arisen conferring constitutional power on His Excellency to convene the joint sitting, and an Address-in-Reply being sent to the Governor to that effect,[80] the joint sitting ultimately took place in accordance with section 5B of the *Constitution Act 1902* and lasted for nearly two hours. Only government (Labor) members from the Council attended the joint sitting, the opposition refusing to participate.[81]

Committees conferring together

Standing order 123 provides that the Houses may communicate by way of committees conferring together. For this purpose, standing order 219 authorises any committee of the Legislative Council to join with any committee of the Legislative Assembly to take evidence, deliberate and make joint reports on matters of mutual concern to the two Houses.

Examples of such collaboration date back to 1856.[82] However, in recent times, there are few examples of such collaboration. The most notable are two occasions in

78 For further information, see the discussion under the heading 'Conferences on bills'. However, the chapter also notes a small number of exceptions to this pattern.

79 See the discussion under the heading '1934–1961: Labor's further attempts to abolish the Council'.

80 *Minutes*, NSW Legislative Council, 13 April 1960, pp 231-233.

81 The bill was subsequently the subject of court proceedings in the Supreme Court and the High Court, before being rejected by the people at a referendum. For further information, see the *Annotated Standing Orders of the New South Wales Legislative Council*, (n 3), pp 418-419.

82 On 6 June 1856, the sixth day of sitting of the Legislative Council following the advent of responsible government, the Legislative Council instructed its Standing Orders Committee to confer with the Standing Orders Committee of the Legislative Assembly on the subject of communications between the two Houses, the instituting and numbering of acts of the Legislature, and in respect

1995-1996[83] and 2013-2014[84] when the Legislative Council Privileges Committee collaborated or conferred with its counterpart committee in the Legislative Assembly on matters of mutual concern to the two Houses.[85]

The Legislative Assembly has not adopted a standing order equivalent to standing order 219, with the result that committees of the Legislative Assembly require a resolution of that House in order to be able to confer with Council committees.[86]

A different example of collaboration between the Houses by way of a committee occurred in 2010, when both Houses passed resolutions establishing a Joint Select Committee on Parliamentary Procedure to inquire into and report on reforms to parliamentary processes and procedures proposed to be implemented by the Commonwealth Parliament.[87] The committee comprised members from both Houses, with the President and Speaker appointed as joint Chairs.[88] However, in the event, the collaboration was limited, as the committee split into two working groups made up of the members of the respective Houses to consider each House's proceedings.[89]

---

of all other matters in which the two Houses, or committees, may have occasion to act conjointly. See *Minutes*, NSW Legislative Council, 6 June 1856, p 8. Whilst the resolution agreed to by the Legislative Assembly to establish its own Standing Orders Committee included provision for that committee to consult with its Council counterpart, the Assembly committee was not tasked with recommending new standing orders for that House until August, several months after the respective committees began the process of considering rules governing joint proceedings. See *Votes and Proceedings*, NSW Legislative Assembly, 3 June 1856, p 28; 6 August 1856, p 45.

83 In 1995, the Legislative Council Privileges Committee and the Legislative Assembly Standing Committee on Parliamentary Privilege and Ethics were both referred inquiries by the respective Houses into the establishment of a draft code of conduct for members. The committees met to conduct joint hearings, hold informal meetings and confer on a draft code of conduct. See Standing Committee on Parliamentary Privilege and Ethics, *Report on inquiry into the establishment of a draft code of conduct for Members*, Report No 3, October 1996, p 8.

84 In 2013, the Legislative Council Privileges Committee and the Legislative Assembly Standing Committee on Parliamentary Privileges and Ethics were both referred inquiries by the respective Houses into the recommendations of the Independent Commission Against Corruption regarding aspects of the *Code of Conduct for Members*, the interest disclosure regime and a parliamentary investigator. The two committees jointly sought submissions and met to discuss the outcomes of their respective inquiries. See Privileges Committee, *Recommendations of the ICAC regarding aspects of the Code of Conduct for Members, the interest disclosure regime and a parliamentary investigator*, Report No 70, June 2014, pp 15-16.

85 For further information, see the discussion in Chapter 20 (Committees) under the heading 'Conferring with other committees'.

86 *Annotated Standing Orders of the New South Wales Legislative Council*, (n 3), pp 717-718.

87 The inquiry arose out of a proposal for reform of the Commonwealth House of Representatives contained in the 'Agreement for a Better Parliament: Parliamentary Reform', which was developed following the 2010 Federal Election and the return of a minority Labor Government.

88 *Minutes*, NSW Legislative Council, 23 September 2010, pp 2080-2083; *Votes and Proceedings*, NSW Legislative Assembly, 22 September 2010, pp 2317-2319; 23 September 2010, pp 2329-2331.

89 Joint Select Committee on Parliamentary Procedure, *Reforms to parliamentary processes and procedures*, October 2010, p 1.

SEEKING INFORMATION ON THE PROCEEDINGS OF THE OTHER HOUSE

When members of the Legislative Council or Legislative Assembly wish to be acquainted with the proceedings of the other House, they should consult the official *Minutes of Proceedings* or *Votes and Proceedings*.[90]

This matter arose in April and May 1879. On 9 April 1879, the Council agreed to a request from the Assembly for a free conference on the Parliamentary Powers and Privileges Bill 1879.[91] The free conference was held the following day, 10 April 1879, and the report of the conference set down for consideration in committee for 17 April 1879.[92] However, on the appointed day, the motion that the President leave the chair and that the House resolve itself into committee to consider the report was negatived on division.[93] Effectively the matter lapsed.

Subsequently, on 29 April 1879, a message from the Assembly dated 24 April 1879 was reported to the House requesting that it 'be informed of the steps taken by the Council on the report of its Managers of the said Conference'. The message was also set down for consideration in committee.[94] When the order of the day for consideration of the Assembly's message was called on, the motion that the President leave the chair and that the House resolve itself into committee to consider the message was amended to appoint a select committee 'to search the Journals of both Houses of the Imperial Parliament, and also the Records of both Houses of our Legislature, to ascertain and report on the Practice of Parliament in reference to sending Messages from one House to the other requesting information as to their Votes and Proceedings'.[95]

Later that same day, consideration of the report of the conference, which as noted had lapsed, was restored to the *Notice Paper*.[96]

The select committee's report on the practice of requesting information from the other House[97] was tabled in the House on 13 May 1879.[98] It found no evidence of a House sending a message to another House requesting information as to its proceedings. During subsequent debate on this matter, several members claimed that the independence and

90 Rulings: Lackey, *Hansard,* NSW Legislative Council, 5 July 1888, p 6104; Hay, *Hansard,* NSW Legislative Council, 2 May 1894, p 2747.
91 *Minutes*, NSW Legislative Council, 9 April 1879, p 166.
92 *Minutes*, NSW Legislative Council, 10 April 1879, p 169.
93 *Minutes*, NSW Legislative Council, 17 April 1879, p 174.
94 *Minutes*, NSW Legislative Council, 29 April 1879, p 192.
95 *Minutes*, NSW Legislative Council, 6 May 1879, p 199.
96 Ibid, p 200.
97 'Report from the Select Committee on the Parliamentary Powers and Privileges Bill (In reference to the Assembly's message, dated 24 April, 1879),' May 1879, cited in *Journals,* NSW Legislative Council, 1878-1879, vol 29, pt 1, pp 381-384.
98 *Minutes*, NSW Legislative Council, 13 May 1879, p 207.

integrity of the Houses were at issue.[99] The House adopted the report of the committee on 14 May 1879,[100] and sent the following message to the Assembly in reply:

> The Legislative Council now informs the Legislative Assembly that on the 17th day of April the Council declined to resolve itself into a Committee of the Whole for the consideration of its Manager's Report, 'as will appear from an Extract from the Minutes of the Council's Proceedings forwarded herewith.'
>
> But the Legislative Council having been led to infer from the Report of 'its Committee' that the Message from the Legislative Assembly of the 24th of last month does not seem to be in accordance with the mode sanctioned by Parliamentary usages of obtaining information with reference to any Bill while it is pending in the Legislative Council, requests that this answer to the Assembly's Message, which is now made out of the Council's unfeigned respect for the Assembly, may not be drawn into a precedent.[101]

On 20 May 1879, the order of the day for consideration of the report on the conference on the Parliamentary Powers and Privileges Bill 1879 was again discharged from the *Notice Paper*.[102]

COMITY BETWEEN THE HOUSES

As indicated, the *Constitution Act 1902* establishes the two Houses of the Parliament of New South Wales as separate and sovereign bodies with complete autonomy, subject to constitutional constraints, over their internal proceedings.

From this constitutional foundation arises the principle of comity or mutual respect between the two Houses. This principle has a number of aspects.

First, and most importantly, as a matter of comity, although not as a matter of law, a bill affecting the constitution or powers of one House alone should not be introduced in the other House.[103] This principle was first expressed in the Legislative Council on 2 April 1873, when a bill to reconstitute the Council and alter its legislative powers, the Legislative Council Bill 1873, was received from the Legislative Assembly. Before putting the question that the bill be read a first time, President Murray, after referring to various authorities, observed that where any alteration was to be made in the constitution of one House of Parliament, that alteration must be introduced in the House immediately affected by it.[104] An amendment was then successfully moved to the question that the bill be read a first time to omit all words after 'That' and insert instead: 'this Council declines to take into consideration any Bill repealing those sections of the Constitution

99 *Sydney Morning Herald*, 15 May 1879, p 4.
100 *Minutes*, NSW Legislative Council, 14 May 1879, p 220.
101 Ibid, p 221.
102 *Minutes*, NSW Legislative Council, 20 May 1879, p 227.
103 At law, the argument is not valid. See *Clayton v Heffron* (1960) 105 CLR 214 at 241 per Dixon CJ, McTiernan, Taylor and Windeyer JJ, at 276 per Menzies J. See also A Twomey, *The Constitution of New South Wales*, (Federation Press, 2004), p 258.
104 *Minutes*, NSW Legislative Council, 2 April 1873, p 111.

Act which provide for the Constitution of the Legislative Council, unless such Bill shall be originated in this Chamber.'[105]

This aspect of comity between the Houses was subsequently reiterated on a number of occasions: on 4 November 1896 in relation to the Referendum Bill 1896,[106] on 16 and 17 August 1916 in relation to the Members of Parliament (Agents) Bill 1916,[107] and on 28 November 1918 in relation to the Women's Legal Status Bill 1918.[108] Most significantly, however, the matter arose in 1959 and 1960 in relation to the Constitution Amendment (Legislative Council Abolition) Bill of 1959-1960, which passed the Legislative Assembly on 2 December 1959. On receipt of the bill in the Legislative Council, the Hon Colonel Clayton successfully moved, as a matter of privilege, that the bill be returned to the Legislative Assembly with the following message:

> Mr Speaker,
>
> The Legislative Council, in accordance with long established precedent, practice and procedure, and for that reason, declines to take into consideration a Bill which affects those sections of the Constitution Act providing for the constitution of the Legislative Council unless such Bill shall have originated in this House, and returns a Bill … without deliberation thereon, and requests that the Legislative Assembly will deem this reason sufficient.[109]

As discussed in Chapter 2 (The history of the Legislative Council),[110] after the necessary interval of three months, in accordance with the deadlock provisions of section 5B of the *Constitution Act 1902*, the Assembly again sent the bill to the Council on 6 April 1960, and the Council again resolved on the same day to return the bill to the Assembly on the same grounds as before.[111] The Council also subsequently declined the Assembly's request for a free conference on the bill,[112] and certain members of the House further declined to attend a joint sitting on the bill convened by the Governor.

This aspect of comity between the Houses also finds expression in the Legislative Assembly. In December 1920, the Legislative Council passed the Parliamentary Select Committees (Agricultural and Metalliferous Industries) Enabling Bill 1920 which amongst other things provided that two select committees, one of the Legislative Council and the other of the Legislative Assembly, could continue to sit whilst Parliament stood adjourned or prorogued. On 21 December 1920, the Hon Sir Daniel Levy, Speaker of the Legislative Assembly, observed:

> There is, however, another and a very serious point to which, as the custodian of the rights and privileges of this Chamber, it is my duty to direct the attention

105 Ibid, pp 110-111.
106 *Minutes*, NSW Legislative Council, 4 November 1896, p 203.
107 *Minutes*, NSW Legislative Council, 16 August 1916, p 34; 17 August 1916, p 40.
108 *Minutes*, NSW Legislative Council, 28 November 1918, pp 114-115.
109 *Minutes*, NSW Legislative Council, 2 December 1959, pp 137-138.
110 See the discussion under the heading '1934–1961: Labor's further attempts to abolish the Council'.
111 *Minutes*, NSW Legislative Council, 6 April 1960, pp 203-205.
112 *Minutes*, NSW Legislative Council, 7 April 1960, pp 213-215.

> of hon members. It is a well-known rule, for which there is abundant authority, that neither of the two Houses of Parliament should initiate legislation affecting the proceedings or functions of the other Chamber; or, to put it in another way, any bill concerning the privileges or proceedings of either House should commence in that House to which it relates. This is not a musty rule, culled from the archives of parliamentary antiquity. It is a rule which is in full force and vigor at the present day.[113]

The Speaker subsequently ruled the bill out of order, the order of the day for the bill was discharged and the bill withdrawn.[114]

A second aspect of the principle of comity between the Houses is that neither House may exercise authority over a member of the other House. In support, Hatsell's *Precedents of Proceedings in the House of Commons* of 1818 observes:

> The leading principle, which appears to pervade all the proceedings between the two Houses of Parliament, is, That there shall subsist a perfect equality with respect to each other; and that they shall be, in every respect, totally independent one of the other. – From hence it is, that neither House can claim, much less exercise, any authority over a Member of the other; but if, there is any grounds of complaint against an Act of the House itself, against any individual Member, or against any of the Officers of either House, this complaint ought to be made to that House of Parliament, where the offence is charged to be committed; and the nature and mode of redress, or punishment, if punishment is necessary, must be determined upon and inflicted by them.[115]

This principle is reflected in sections 4 and 5 of the *Parliamentary Evidence Act 1901*, which provides that members of one House should not be summoned to appear and give evidence before the other House or a committee of that House. Rather, their attendance shall be procured in conformity (so far as practicable) with the mode of procedure observed in the House of Commons.[116]

It is clear, however, that whilst the Legislative Council cannot exercise authority over members of the Legislative Assembly in their capacity as a member, or *vice versa*, this does not extend to members of the Legislative Assembly in their capacity as ministers. Under the system of responsible government in New South Wales, the government, through its ministers, including ministers in the Legislative Assembly, is accountable to the Council. Whilst ministers in the Assembly may not be compelled to give evidence to a Council committee, they are nevertheless accountable in other ways.[117]

---

113 *Hansard,* NSW Legislative Assembly, 21 December 1920, pp 3998-3999.

114 *Votes and Proceedings*, NSW Legislative Assembly, 21 December 1920, pp 227-228.

115 J Hatsell, *Precedents of Proceedings in the House of Commons with Observations*, 4th ed, vol III, (Irish University Press, 1818), p 67.

116 For further information, see the discussion in Chapter 21 (Witnesses) under the heading 'Members, including ministers, as witnesses'.

117 For example, ministers in the Legislative Assembly may be the subject of censure and no confidence motions in the Legislative Council. For further information, see the discussion in Chapter 7 (Parties, the Government and the Legislative Council) under the heading 'Censure and no confidence motions'. On one occasion, the House departed from this principle by the moving

A third aspect of the principle of comity between the Houses is that neither House may inquire into the operations of the other. For example, on 8 December 1965, when the Council established a Parliament House Building Committee to inquire into and report upon proposals for the site and erection of a new Parliament House, the House specifically restricted the operations of the committee to considering the accommodation needs of members, officers and staff of the Legislative Council, together with the reporting staff and joint staff. The committee's terms of reference did not allow the committee to consider the needs of members, officers or staff of the Legislative Assembly.[118]

More recently, on 14 October 2019 the Council's Public Accountability Committee self-referred terms of reference for an inquiry into the budget process for independent oversight bodies and the Parliament, however only the Department of the Legislative Council and the Department of Parliamentary Services (and not the Department of the Legislative Assembly) were included within the scope of the inquiry.[119]

Another example of the application of this principle occurred in 2008, when President Primrose on two occasions ruled out of order a notice of motion or part of a notice of motion for the appointment of a select committee to inquire into the treatment of an officer employed by the Legislative Assembly. On the first occasion, President Primrose observed:

> A committee of this House should not investigate the proceedings in the other House, even where members and officers of that House are willing to appear and give evidence voluntarily. Such matters are properly investigated by the Legislative Assembly as the sole arbiter of its own procedures and proceedings.[120]

This principle is, by convention, extended to the administration and staffing of the other House. Notably, committees of the Legislative Council do not examine the proposed expenditure by the Legislative Assembly during the annual budget estimates inquiry.

A final aspect of the principle of comity between the Houses is the respect paid to the members and officers of the Legislative Assembly. Standing order 91(3) prohibits the use of offensive words against any member of the Legislative Assembly, and any imputations of improper motive or personal reflections on members or officers of the Legislative Assembly are considered disorderly.

By inheritance from the Westminster Parliament, it is also conventional in the House to refer to the Legislative Assembly as 'the other place'. Although the origins of this tradition in the Westminster Parliament are not entirely clear, it seems to be rooted in the need to moderate the sometimes tense relationships between the two Houses, helping to prevent disrespectful reflections on the other House.

---

of a censure motion concerning a private member in the Legislative Assembly. See *Minutes*, NSW Legislative Council, 1 March 2006, pp 1857-1858, 1858-1861.

118 *Minutes*, NSW Legislative Council, 8 December 1965, p 176.

119 *Minutes*, NSW Legislative Council, 15 October 2019, p 504.

120 *Hansard*, NSW Legislative Council, 4 June 2008, p 8101. See also H Evans, 'The Senate's power to obtain evidence and parliamentary "conventions"', 8 September 2003, p 4.

CHAPTER 23

RELATIONS WITH THE JUDICIARY

A significant feature of the broader 'Constitution' of New South Wales, and one which is essential for good government, is that the judicial function of government is separate from and independent of the legislative and executive functions, with judicial power vested in judges and judicial officers with security of tenure and financial independence. This is examined in detail by Professor Anne Twomey in *The Constitution of New South Wales*.[1]

Parliament plays no role in the appointment of judges and judicial officers in New South Wales.[2] However, one of the many guarantees of the independence of the judiciary in New South Wales is that the removal of judges and judicial officers is a matter for Parliament. A judicial officer can only be removed from office by the Governor on an address from both Houses of the Parliament in the same session, seeking removal on the ground of proved misbehaviour or incapacity. The Parliament also has certain other residual functions in relation to the judiciary.

APPOINTMENT OF JUDICIAL OFFICERS

Judges and other judicial officers in New South Wales are appointed by the Governor, by commission under the public seal of the State, on the recommendation of the Executive Council.[3] The appointment of judges and judicial officers is therefore at the sole discretion of the executive government.[4] This reflects the practice in Britain, where judges have traditionally been appointed by the Crown. There is no provision in New South Wales, as there is in the United States of America and some other countries, for appointment of judges or approval of appointment of judges by the Houses of the Parliament.

---

1 A Twomey, *The Constitution of New South Wales*, (Federation Press, 2004), ch 13.

2 This contrasts with the potential for some parliamentary committees to veto the appointment of independent statutory officers. See, for example, the *Independent Commission Against Corruption Act 1988*, s 64A and the *Ombudsman Act 1974*, s 31BA.

3 See the *Supreme Court Act 1970*, s 26; the *District Court Act 1973*, s 13; the *Land and Environment Court Act 1979*, s 8; the *Local Court Act 2007*, s 13; and the *Industrial Relations Act 1996*, s 148.

4 For further information, see Twomey, (n 1), p 721.

REMOVAL OF JUDICIAL OFFICERS

By contrast with the appointment of judicial officers, the removal of judicial officers in New South Wales is a matter for the Parliament as well as the executive. This has its origins in British law. Whilst for many years judges and judicial officers in New South Wales did not have security of tenure,[5] they now have tenure until retirement age,[6] unless removed from office by the Governor, on an address from both Houses of the Parliament in the same session, under part 9 of the *Constitution Act 1902* and section 41 the *Judicial Officers Act 1986*. The purpose of these provisions is the protection of the public and the system of justice.[7] These arrangements are discussed below.

Part 9 of the *Constitution Act 1902*

Section 53 of part 9 ('The judiciary') of the *Constitution Act 1902* provides:

> **Removal from judicial office**
>
> (1) No holder of a judicial office can be removed from the office, except as provided by this Part.
>
> (2) *The holder of a judicial office can be removed from the office by the Governor, on an address from both Houses of Parliament in the same session, seeking removal on the ground of proved misbehaviour or incapacity.* (emphasis added)
>
> (3) Legislation may lay down additional procedures and requirements to be complied with before a judicial officer may be removed from office.
>
> (4) This section extends to term appointments to a judicial office, but does not apply to the holder of the office at the expiry of such a term.
>
> (5) This section extends to acting appointments to a judicial office, whether made with or without a specific term.[8]

This section protects the tenure of a wide range of judicial officers, including judges of the Supreme Court and District Court and magistrates of the Local Court. These judicial officers are listed in section 52(1) of the *Constitution Act 1902*.

The wording of section 53(2) derives from section 72 of the Commonwealth Constitution, which provides for the removal of federal judges by the Governor-General in Council

---

5 For further information, see L Lovelock and J Evans, *New South Wales Legislative Council Practice*, 1st ed, (Federation Press, 2008), pp 581-582; and Twomey, (n 1), pp 730-734.

6 Twomey, (n 1), pp 742-744.

7 *Bruce v Cole* (1998) 45 NSWLR 163 at 181 per Spigelman CJ.

8 Part 9 of the *Constitution Act 1902*, including section 53, was inserted into the *Constitution Act* in 1992 by the *Constitution (Amendment) Act 1992*. The *Constitution Act 1902* was amended in response to a requirement in the 'Memorandum of Understanding between the Hon Nick Greiner MP, Premier, For and on behalf of the Liberal/National Party Government and Mr John Hatton MP, Ms Clover Moore MP, and Dr Peter Macdonald MP', 1991. A copy of the memorandum is at *Hansard,* NSW Legislative Assembly, 31 October 1991, pp 4004-4033. The memorandum required 'Constitutional recognition of the independence of the Judiciary'.

on an address from both Houses of the Commonwealth Parliament on the grounds of 'proved misbehaviour or incapacity', and not otherwise. As expressed in *Odgers*, this provision is quite different from the much broader provisions of the *Act of Settlement 1701* (Imp), still in force in the United Kingdom, which is not limited to any specific grounds for removal such as misbehaviour.[9]

Nevertheless, uncertainty remains as to what is meant by the phrase 'proved misbehaviour or incapacity', and in particular the meaning of 'misbehaviour'. *Odgers* traces various meanings of the term, including meanings based on 17th century English case law and the interpretation given by the Congress of the United States of America. It concludes that judicial misbehaviour extends to any conduct indicating unfitness for office.[10]

Part 9 of the *Constitution Act 1902* is purportedly entrenched, in that a bill to amend or repeal it cannot be presented to the Governor for assent without approval of the people at a referendum,[11] although questions arise as to whether its purported entrenchment is valid.[12] Nevertheless, the purported entrenchment of part 9 is a significant statement of the importance with which judicial independence is viewed in New South Wales.[13]

The *Judicial Officers Act 1986*

As noted above, section 53(3) of the *Constitution Act 1902* provides that legislation may lay down additional procedures and requirements to be complied with before a judicial officer may be removed from office. Such additional requirements are set out in the *Judicial Officers Act 1986*.

The *Judicial Officers Act 1986* was enacted following a series of incidents in the early to mid-1980s involving judicial officers. These included the prosecution of a High Court judge, a District Court judge and a former Chief Stipendiary magistrate, on charges of

9 R Laing (ed), *Odgers' Australian Senate Practice*, as revised by H Evans, 14th ed, (Department of the Senate, 2016), pp 678-679.

10 Ibid, pp 679-681.

11 At the time part 9 was enacted, section 7B of the *Constitution Act 1902* (Referendum for Bills with respect to Legislative Assembly and certain other matters) was amended to include reference to part 9. The amendment of section 7B itself required approval at a referendum, which occurred on 25 March 1995.

12 The validity of the entrenchment of part 9 has been questioned on the basis that a bill in respect of part 9 is unlikely to be a bill respecting the 'constitution, powers or procedure' of the Parliament within the meaning of section 6 of the *Australia Acts* of 1986. For further information, see the discussion in Chapter 15 (Legislation) under the heading ''Manner and form' restrictions on bills to amend the *Constitution Act 1902*'. See also Twomey, (n 1), pp 310-311, 736-737; and V Mullen and G Griffith, 'The Independence of the Judiciary: Commentary on the Proposal to Amend the NSW Constitution', NSW Parliamentary Library Research Service Briefing Paper No 9/1995.

13 *Bruce v Cole* (1998) 45 NSWLR 163 at 166 per Spigelman CJ and at 203 per Priestley JA.

attempting to pervert the course of justice.[14] Such incidents gave rise to concerns that public confidence in the administration of justice was being undermined.[15]

As enacted, section 4 of the *Judicial Officers Act 1986* provided that, subject to the act, 'every judicial officer remains in office during ability and good behaviour', and that a judicial officer could not be suspended or removed from office except by or in accordance with an act of Parliament. Section 4 has since been repealed, with security of tenure now dealt with in section 53(1) of part 9 of the *Constitution Act 1902*, as discussed above. However, other provisions of the *Judicial Officers Act 1986* setting out the procedures and requirements to be complied with before a judicial officer may be removed from office remain in force. This is discussed below.

Investigation of judicial officers by the Conduct Division

The major innovation of the *Judicial Officers Act 1986* was the establishment of a Judicial Commission of New South Wales and a complaints procedure against judicial officers thereunder.[16]

Section 5 of the *Judicial Officers Act 1986* establishes the Judicial Commission of New South Wales. It is comprised of ten members: six official members including the Chief Justice and Chief Judges of various courts, and four appointed members.

Section 13 of the *Judicial Officers Act 1986* in turn establishes the Conduct Division of the Judicial Commission. The Conduct Division consists of two judicial officers (but one may be a retired judicial officer) and one community representative, being a person of high standing in the community, nominated by the Parliament in accordance with schedule 2A to the act.[17]

The functions of the Judicial Commission of New South Wales include receiving complaints against judicial officers under part 6 of the *Judicial Officers Act 1986* and requests for investigation of judicial officers on the basis of physical or mental impairment under part 6A of the act.[18] These two provisions are discussed below.

---

14 In 1985 and 1986 Justice Lionel Murphy of the High Court was acquitted of such charges; in October 1985 Judge Foord of the District Court was also acquitted; in March 1985 a former New South Wales Chief Stipendiary Magistrate, Murray Farquhar, was convicted and sentenced to prison on charges of perverting the course of justice. For further information, see Mullen and Griffith, (n 12), p 7.

15 *Hansard*, NSW Legislative Council, 21 October 1986, pp 4997-4998.

16 The decision to establish a statutory commission to deal with complaints against judges was made in light of the experience of the Commonwealth Parliament in 1986, when it established a parliamentary commission of inquiry to investigate the conduct of Justice Murphy. Nevertheless, the creation of a permanent body for the purpose was unprecedented in Australia, having been influenced by models in the United States and Canada.

17 *Judicial Officers Act 1986*, s 22. Previously the Conduct Division consisted of three judicial officers, but the *Judicial Officers Amendment Act 2007* amended section 22 to provide for two judicial officers and one community representative nominated by the Parliament.

18 *Judicial Officers Act 1986*, s 14. Other functions include the provision of statistical information relating to sentencing (s 8) and the organisation and supervision of judicial training and education (s 9).

Complaints against judicial officers under part 6

Part 6 of the *Judicial Officers Act 1986* sets out procedures for the making of complaints against judicial officers. In summary, any person may complain to the Judicial Commission 'about a matter that concerns or may concern the ability or behaviour of a judicial officer'.[19]

After a preliminary examination,[20] the Judicial Commission may deal with the complaint in one of three ways: it can be summarily dismissed;[21] it can be referred to the Conduct Division;[22] or, if the complaint appears to be wholly or substantially substantiated but nonetheless does not justify the attention of the Conduct Division, it can be referred to the relevant head of jurisdiction.[23]

Where the Judicial Commission refers a matter to the Conduct Division, the Conduct Division is required to investigate the complaint.[24] In undertaking an investigation, the Conduct Division has the powers and immunities of a royal commission in relation to the holding of hearings.[25]

At the conclusion of its investigation, the Conduct Division has three options open to it:

- to dismiss the complaint;[26]
- to decide that the complaint is wholly or partially substantiated but does not justify parliamentary consideration, in which case the matter is referred back to the head of jurisdiction;[27] or
- to decide that the complaint is wholly or partially substantiated, and that the matter could justify parliamentary consideration of the removal of the judicial officer,[28] in which case a report must be provided to the Governor setting out the division's findings of fact and opinion. That report is also to be laid by the responsible minister before both Houses of the Parliament.[29]

A report of the Conduct Division is subject to judicial review on the basis of legal error, but not on the basis of merit.[30]

It is notable that at the time of its establishment, the relationship between the Conduct Division and the Parliament was the focus of some attention. It was initially

19 Ibid, s 15(1).
20 Ibid, s 18.
21 Ibid, s 20.
22 Ibid, s 21(1).
23 Ibid, s 21(2).
24 Ibid, s 23.
25 Ibid, s 25.
26 Ibid, s 26.
27 Ibid, s 28(1)(b).
28 Ibid, s 28(1)(a).
29 Ibid, s 29.
30 *Bruce v Cole* (1998) 45 NSWLR 163 at 183 per Spigelman CJ and at 207 per Priestley JA.

proposed that the Conduct Division would have the power to recommend directly to the Governor that judicial officers be removed, without reference to Parliament. This was contrary to the method of removal for superior court judges which, since the *Act of Settlement 1701* (Imp), required an address of both Houses of Parliament. Following unprecedented protests from members of the judiciary, Parliament's role in the dismissal process was re-instated before the Judicial Officers Bill 1986 was introduced into Parliament.[31]

Separately, section 37 of the *Judicial Officers Act 1986* prohibits the disclosure of any information relating to a complaint against a judicial officer except in certain limited circumstances, including: with the consent of the person from whom the information was obtained; in connection with the administration of the act; and for the purposes of any legal proceedings arising out of the act. Unlawful disclosure of information is an offence, attracting a fine or up to a year's imprisonment.

However, section 37A of the *Judicial Officers Act 1986*, inserted in 2012,[32] requires the Judicial Commission to provide the Attorney General, at the request of the Attorney General, with certain information in relation to a complaint about a judicial officer, unless the commission considers it is not in the public interest to provide the information. The commission must also notify the Attorney General when a complaint has been referred to the Conduct Division and when and the manner in which it was disposed of, whether or not the Attorney General has requested the information.

Requests for investigation of judicial officers under part 6A

Under part 6A of the *Judicial Officers Act 1986*, where it is suspected that a judicial officer has an impairment, including a physical or mental impairment, that affects his or her performance of judicial or official duties, the head of a jurisdiction may formally request that the Judicial Commission investigate the matter.[33]

Once again, after a preliminary investigation,[34] the Judicial Commission may deal with the matter in one of three ways: it may dismiss the request, it may refer the matter back to the relevant head of jurisdiction, or it may refer the matter to the Conduct Division.[35]

Where the Judicial Commission refers a matter to the Conduct Division under part 6A, the Conduct Division is required to conduct an examination, treating the matter as if it were a complaint.[36]

---

31 G Griffith, 'Removal of judicial officers: An update', NSW Parliamentary Library Research Service Briefing Paper No 9/2012, p 4; Judicial Commission of NSW, 'From controversy to credibility: 20 years of the Judicial Commission of New South Wales', 2008, p 2; and *Hansard*, NSW Legislative Assembly, 24 September 1986, pp 3877-3881 per the Hon Terry Sheahan.

32 *Judicial Officers Amendment Act 2012*.

33 *Judicial Officers Act 1986*, s 39B.

34 Ibid, s 39C.

35 Ibid, s 39E.

36 Ibid, s 39F.

At the conclusion of its investigation, the Conduct Division has two options open to it:

- if it is of the opinion that the judicial officer is physically or mentally unfit to exercise efficiently the functions of a judicial office, it must report its conclusions to the Governor, in which case, by the operation of section 29, the report will also be laid before the Houses of Parliament, or
- if it is not of the opinion that the judicial officer is physically or mentally unfit to exercise efficiently the functions of a judicial office, it must report its conclusions to the head of jurisdiction.[37]

Removal of judicial officers under the *Judicial Officers Act 1986*

Section 41 of the *Judicial Officers Act 1986* provides that the Governor may remove a judicial officer from office on receipt of an address from both Houses of the Parliament, following a report of the Conduct Division setting out its opinion that a matter could justify parliamentary consideration of the removal of the judicial officer from office. Section 41 provides:

> (1) A judicial officer may not be removed from office in the absence of a report of the Conduct Division to the Governor under this Act that sets out the Division's opinion that the matters referred to in the report could justify parliamentary consideration of the removal of the judicial officer on the ground of proved misbehaviour or incapacity.[38]
>
> (2) The provisions of this section are additional to those of section 53 of the *Constitution Act 1902*.

Section 41 was adopted in this form in 1992 at the same time that part 9 of the *Constitution Act 1902* was adopted.[39] It deliberately replicates the same provision for the removal of judicial officers on 'proved misbehaviour or incapacity' as adopted in section 53(2).[40]

Parliamentary review of a report of the Conduct Division

If the Conduct Division decides that:

- a complaint against a judicial officer is wholly or partly substantiated and forms an opinion that the matter could justify parliamentary consideration of the removal of the judicial officer from office, or

37 Ibid, s 39G.

38 Originally, the Judicial Officers Bill provided for the Conduct Division to recommend to Parliament that a judicial officer be removed. However, following submissions from members of the judiciary, the bill was changed so that the Conduct Division would be limited to making findings of fact, and reporting an opinion that the matter 'could' justify parliamentary consideration of removal. It was argued that only by this delineation of functions could the primacy of the parliamentary role and the independence of the judiciary be assured. See Mullen and Griffith, (n 12), pp 8-9.

39 *Constitution (Amendment) Act 1992*.

40 In addition to the provisions of section 41, section 40 of the *Judicial Officers Act 1986* provides for the suspension of judicial officers by the 'appropriate authority', being the judicial officer who is head of the jurisdiction, if the Conduct Division has reported that a matter could justify parliamentary consideration of the removal of the judicial officer from office where the judicial officer is charged with or convicted of an offence punishable by imprisonment for 12 months or more.

- a judicial officer is physically or mentally unfit to exercise efficiently the functions of a judicial office,

a copy of the report must be furnished to the Governor and the responsible minister forthwith.[41]

The responsible minister is subsequently required to table the report in both Houses of the Parliament.[42] If Parliament is not sitting, the minister may present the report to the Clerks of both Houses,[43] although the minister is still required to table the report as soon as practicable after Parliament resumes.[44]

On receipt of such a report, it is a matter for each House of the Parliament to determine what action it will take. There is no requirement for either House to take any action. If action is to be taken, the House is not bound by the opinion of the Conduct Division. The House may also take into account facts other than those reported by the Conduct Division, including events which have taken place since evidence was given before the Conduct Division. Further, the material before one House need not be the same as the material before the other.[45]

Since the establishment of the complaints procedure against judicial officers under the *Judicial Officers Act 1986*, there have been seven occasions on which the Conduct Division has provided a report on a judicial officer that a matter could justify parliamentary consideration of the removal of the officer on the grounds of proved misbehaviour (part 6) or incapacity (part 6A), or both. However, there have been only three occasions on which the Parliament subsequently considered removal of the judicial officer concerned.[46] On each of these three occasions, the matter was considered first by the Legislative Council, although there would have been nothing to prevent the matter being considered first by the Legislative Assembly. On each occasion, the Council invited the judge or judicial officer to appear at the Bar of the House, in person or by legal representative, to address the House as to why he or she should not be removed from office. Subsequently, a motion was moved for an Address to the Governor for the removal of the judge or magistrate, thereby allowing the House to debate the matter. The motion also proposed that the Assembly be requested to adopt an Address in similar terms and that a copy of the judge or magistrate's address to the Council be transmitted to the Assembly. However, on each occasion, the Council voted against the motion, and the matter went no further. As a result, there is no precedent that establishes the processes that would be followed should both Houses adopt an Address to the Governor for removal of a judge or judicial officer on the grounds of proved misbehaviour or incapacity. All seven cases are examined further below.

---

41 *Judicial Officers Act 1986*, ss 29 and 39G.

42 Ibid.

43 The report may be printed by authority of the Clerk of the House and is deemed to be a document published by order or under the authority of the House. See *Judicial Officers Act 1986*, ss 29(5) and 39G(2).

44 *Judicial Officers Act 1986*, ss 29(4) and 39G(2).

45 *Bruce v Cole* (1998) 45 NSWLR 163 at 207-208 per Priestley JA.

Should the Parliament ever adopt an Address to the Governor for the removal of a judicial officer, it is unclear whether the removal could be the subject of judicial review. However, with regard to the equivalent Commonwealth provision, section 72 of the Commonwealth Constitution, *Odgers* argues that the section 'strongly indicates that the two Houses are the only judges of misbehaviour and that their Address and the action of the Governor-General upon it would not be reviewable by the High Court'.[47] Further, there is authority at the Commonwealth level that the courts will not interfere with the parliamentary procedure for removal of a judge.[48]

Cases involving the possible removal of a judicial officer

Magistrate Barry Wooldridge (1993)

The first case in the Legislative Council involving the possible removal of a judicial officer is that of Magistrate Barry Wooldridge, a magistrate of the Local Court of New South Wales, in 1993.

The report of the Conduct Division on Magistrate Wooldridge, dated 17 December 1992,[49] was tabled in the House on 2 March 1993.[50] Following receipt of the report, the Clerk pointed out that, as a consequence of the enactment of part 9 of the *Constitution Act 1902*, section 41 of the *Judicial Officers Act 1986* required that a judicial officer could only be removed on the ground of proved misbehaviour or incapacity, which the report failed to address. The matter was referred back to the Conduct Division for further review. The further report of the Conduct Division, dated 10 March 1993,[51] included the opinion that the matters referred to could justify the magistrate's removal on the ground of incapacity. In the event, the magistrate retired.[52]

Magistrate Ian McDougall (1998)

The second case in the Legislative Council involving the possible removal of a judicial officer is that of Magistrate Ian McDougall, a magistrate of the Local Court of New South Wales, in 1998.

47 *Odgers*, 14th ed, (n 9), p 681.

48 *Re Reid; Ex parte Bienstein* (2001) 182 ALR 473 at [25]-[26] per Kirby J.

49 Judicial Commission, Conduct Division, 'Report of the Conduct Division concerning the conduct of Magistrate Barry John Wooldridge', 17 December 1992.

50 *Minutes*, NSW Legislative Council, 2 March 1993, p 18.

51 Judicial Commission, Conduct Division, 'Further Report of the Conduct Division concerning the conduct of Magistrate Barry John Wooldridge', 10 March 1993. The further report was not tabled in the House until 20 May 1993. See *Minutes*, NSW Legislative Council, 20 May 1993, p 162.

52 Elizabeth Jurman, 'Magistrate retires unfit', *Sydney Morning Herald*, 15 September 1993, p 2.

The report of the Conduct Division on Magistrate McDougall, dated 11 May 1998,[53] was tabled in the House on 26 May 1998.[54] The report included an opinion that the magistrate was incapable of performing his judicial duties, which could justify parliamentary consideration of his removal. In a ministerial statement to the House following the tabling of the report, the Attorney General indicated that Magistrate McDougall had twice tendered letters of resignation during the investigation by the Conduct Division. On the Attorney's recommendation, the first resignation letter had not been accepted by the Governor owing to the ongoing investigation. However, the Attorney informed the House that he intended to advise the Governor that Magistrate McDougall's second resignation letter be accepted.[55] The matter did not arise again in the House.

Justice Vince Bruce (1998)

The third and most significant case in the Legislative Council involving the possible removal of a judicial officer is that of Justice Vince Bruce, a judge of the Supreme Court of New South Wales, also in 1998.

The report of the Conduct Division on Justice Bruce, dated 15 May 1998,[56] was tabled in the House by the Attorney General on 26 May 1998, at the same time as the report on Magistrate McDougall.[57] The report included a finding that Justice Bruce was incapable of performing his judicial duties, which had led to unreasonable delay in the provision of judgments, and that this could justify parliamentary consideration of his removal as a judge of the Supreme Court.[58] However, the Attorney General also tabled a minority report by one of the members of the Conduct Division, Justice Mahoney, which found that following medical treatment, Justice Bruce was now able to discharge his functions and that the matter could not justify parliamentary consideration of his removal from office.[59] The Attorney General also tabled a response to the Conduct Division's report, prepared by Justice Bruce's lawyers at the Attorney General's invitation, which concluded that the view expressed by the majority of the Conduct Division was erroneous.[60] In a ministerial statement to the House following the tabling of these various papers, the Attorney General further indicated that, the previous day, Justice Bruce had initiated Supreme Court proceedings in an attempt to restrain the presentation of the report of the Conduct Division to the Parliament, but that a bench of five judges of the Court of Appeal had declined to grant an injunction.[61]

---

53 Judicial Commission, Conduct Division, 'In the matter of Ian Lanham Ross McDougall and the Judicial Officers Act 1986', 1 May 1998.

54 *Minutes*, NSW Legislative Council, 26 May 1998, p 461.

55 *Hansard*, NSW Legislative Council, 26 May 1998, pp 5094-5095.

56 Judicial Commission, Conduct Division, 'Report of the Conduct Division to the Governor regarding complaints against the Honourable Justice Vince Bruce', 15 May 1998.

57 *Minutes*, NSW Legislative Council, 26 May 1998, p 461.

58 Judicial Commission, Conduct Division, 'Report of the Conduct Division to the Governor regarding complaints against the Honourable Justice Vince Bruce', 15 May 1998, pp 48-49.

59 The Hon DL Mahoney AO QC, 'Re: The Honourable Justice Bruce', 14 May 1998.

60 Holman Webb, 'Report regarding the Honourable Justice Vince Bruce: Response', 26 May 1998.

61 *Hansard*, NSW Legislative Council, 26 May 1998, p 5096.

The next day, 27 May 1998, the Attorney General moved a motion in the Council proposing that, in view of the Conduct Division's report, Justice Bruce be called on to appear at the Bar of the House on 3 June 1998 to show cause why he should not be removed from office. The motion also proposed that Justice Bruce be granted leave to attend in person or by his legal representative and address the House for a specified time, and that the President seek a reply as to whether or not Justice Bruce would attend. In support of the motion, the Attorney General argued that it was 'essential' that the House extend to the judge the opportunity to make an address and 'as a matter of procedural fairness' allow him to state his case or have his case presented. He also pointed out that it was 'entirely a matter for Justice Bruce' as to whether or not he wished to accept the 'invitation' of the House.[62] The House agreed to the motion.[63]

On 2 June 1998 the President reported receipt of a letter from Justice Bruce's solicitors advising that the Court of Appeal, having previously declined to grant an injunction against the tabling of the report of the Conduct Division in Parliament, had agreed to hear a challenge to the legal validity of the Conduct Division's report, and that the matter had been set down for 2 June 1998. The letter also requested that the judge's leave to appear at the Bar of the House be deferred pending determination of the appeal.[64]

Later that same day, the Attorney General moved a motion to supersede the House's earlier resolution that Justice Bruce be called on to attend at the Bar of the House on 3 June, proposing instead a date of 16 June. In support of the motion, the Attorney General argued that deferral of the judge's address was justified as 'the judge could say he needs to be in the precincts of the Court of Appeal during the conduct of his case'. However, he did not accept that the House should refrain from acting until the challenge was determined, drawing a distinction between the process for the judge to appear at the Bar of the House to address the House and the House's subsequent adjudicating on the judge's conduct on a separate motion.[65] A number of other members took a different view, arguing that the judge's attendance should be deferred until after the court decision.[66] An amendment to that effect was moved and negatived on division. Ultimately, the House agreed to the terms of the motion as moved by the Attorney General.[67]

On 12 June 1998 the Court of Appeal dismissed Justice Bruce's challenge to the Conduct Division's report on all grounds.[68]

On 16 June 1998, in accordance with the resolution of the House, Justice Bruce attended in person at the Bar of the House and delivered an address in accordance with the House's resolution.[69] No questions were put during the proceedings as the House's resolution

62 *Hansard*, NSW Legislative Council, 27 May 1998, pp 5205-5206.
63 *Minutes*, NSW Legislative Council, 27 May 1998, p 470.
64 *Minutes*, NSW Legislative Council, 2 June 1998, pp 498-499.
65 *Hansard*, NSW Legislative Council, 2 June 1998, p 5501.
66 Ibid, pp 5501-5502 per the Hon Richard Jones, pp 5502-5503 per the Hon Franca Arena, p 5504 per Revd the Hon Fred Nile.
67 *Minutes*, NSW Legislative Council, 2 June 1998, pp 520-521.
68 *Bruce v Cole* (1998) 45 NSWLR 163 at 168.
69 *Minutes*, NSW Legislative Council, 16 June 1998, pp 553, 557.

did not provide for questions.[70] After the judge had withdrawn, the Attorney General gave a ministerial statement, during which he tabled the transcript of proceedings before the Conduct Division and exhibits tendered in those proceedings, 'so that honourable members … might have complete access to the relevant material'.[71] He also addressed a question of procedure, stating that it would not be appropriate to hold a joint sitting of both Houses of the Parliament to consider the matter, as separate debate and a separate vote by each House was required before any disciplinary action could be taken against Justice Bruce.[72] The Premier later confirmed in the Legislative Assembly that if the Legislative Council passed a resolution for the removal of Justice Bruce, he would equally be entitled to be heard in his defence in the Legislative Assembly.[73]

On 25 June 1998, the Attorney General moved that the House adopt and present an Address to the Governor for the removal of Justice Bruce on the ground of incapacity. The motion also proposed that the Legislative Assembly be requested to adopt an address in similar terms and that a copy of Justice Bruce's address to the Council be transmitted to the Assembly. Members were allowed a conscience vote by their parties on the question. After a lengthy debate, the question was resolved in the negative, 16 votes to 24.[74]

Subsequently, during the adjournment debate, the Leader of the Opposition, the Hon John Hannaford, argued that a motion for the adoption of an Address to the Governor for the removal of Justice Bruce should now be moved in the Assembly and that, if that House took a view contrary to the Council, the matter should be returned to the Council for further consideration.[75] The Government decided, however, that it would not be appropriate for such a motion to be moved in the Assembly as it had already failed in the Council. On 22 February 1999, eight months after the debate in the House, Justice Bruce announced his resignation.[76]

Magistrate Jennifer Betts (2011)

The fourth case in the Legislative Council involving the possible removal of a judicial officer is that of Magistrate Jennifer Betts, a magistrate of the Local Court of New South Wales, in 2011.

The report of the Conduct Division on Magistrate Betts, dated 21 April 2011,[77] was tabled in the House on 26 May 2011, together with a response from the magistrate.[78]

---

70 *Hansard*, NSW Legislative Council, 16 June 1998, p 5862 per the President.
71 Ibid, p 5870.
72 Ibid. There is no express provision in the *Constitution Act 1902* for a joint sitting to consider removal of a judge. For further information, see Twomey, (n 1), p 739.
73 *Hansard*, NSW Legislative Assembly, 24 June 1998, p 6442.
74 *Minutes*, NSW Legislative Council, 25 June 1998, pp 597-598, 601-602; *Hansard*, NSW Legislative Council, 25 June 1998, pp 6524-6587.
75 *Hansard*, NSW Legislative Council, 25 June 1998, pp 6587-6588.
76 D Murphy, 'Judge jumps before Parliament pushes', *Sydney Morning Herald*, 23 February 1999, p 4.
77 Judicial Commission, Conduct Division, 'Report of an Inquiry by the Conduct Division of the Judicial Commission of New South Wales in relation to Magistrate Jennifer Betts', 21 April 2011.
78 *Minutes*, NSW Legislative Council, 26 May 2011, p 134.

The report included a finding of both misbehaviour and incapacity which could justify parliamentary consideration of Magistrate Betts' removal. An amended response of the magistrate was subsequently tabled on 30 May 2011.[79]

On 2 June 2011, in keeping with the practice established in the case of Justice Bruce, the Leader of the Government in the Legislative Council moved a motion proposing that, in view of the Conduct Division's report, Magistrate Betts be called on to appear at the Bar of the House on 15 June 2011 to show cause why she should not be removed from office. As in the case of Justice Bruce, the motion granted leave to Magistrate Betts to attend in person or by legal representative. The House agreed to the motion.[80]

On 15 June 2011, Magistrate Betts attended at the Bar of the House and delivered an address in accordance with the House's resolution.[81] As in the case of Justice Bruce, no questions were put during the proceedings as the House's resolution did not provide for questions.[82]

On 16 June 2011, the Leader of the Government in the Legislative Council moved that the House adopt and present an Address to the Governor for the removal of Magistrate Betts on the ground of incapacity. As in the case of Justice Bruce, the motion also proposed that the Assembly be requested to adopt an address in similar terms and that a copy of Magistrate Betts' address to the Council be transmitted to the Assembly. Once again members were allowed a conscience vote by their parties. In the event, after a lengthy debate, the question was resolved in the negative on the voices.[83]

Magistrate Brian Maloney (2011)

The fifth case in the Legislative Council involving the possible removal of a judicial officer is that of Magistrate Brian Maloney, a magistrate of the Local Court of New South Wales, also in 2011.

The report of the Conduct Division on Magistrate Maloney, dated 6 May 2011,[84] was tabled in the House by the Leader of the Government in the Legislative Council on 2 June 2011, together with a response from the magistrate.[85] The report included a finding of incapacity which could justify parliamentary consideration of Magistrate Maloney's removal. The Leader of the Government in the Legislative Council also tabled the judgment of Justice Hoeben in the Supreme Court in the matter of *Maloney v The Honourable Michael Campbell QC*,[86] delivered on 24 May 2011. The decision dismissed

79 *Minutes*, NSW Legislative Council, 30 May 2011, p 156.
80 *Minutes*, NSW Legislative Council, 2 June 2011, p 186.
81 *Minutes*, NSW Legislative Council, 15 June 2011, pp 204-205.
82 *Hansard*, NSW Legislative Council, 15 June 2011, p 2305 per the President.
83 *Minutes*, NSW Legislative Council, 16 June 2011, p 210; *Hansard*, NSW Legislative Council, 16 June 2011, pp 2479-2496.
84 Judicial Commission, Conduct Division, 'Report of the Conduct Division to the Governor regarding complaints against his Honour Justice Maloney', 6 May 2011.
85 *Minutes*, NSW Legislative Council, 2-4 June 2011, p 185.
86 [2011] NSWSC 470.

proceedings brought by Magistrate Maloney seeking to prevent the Conduct Division's report being acted upon by the Parliament on the grounds that it was invalid.

On 17 June 2011, in accordance with previous practice, the Deputy Leader of the Government in the Legislative Council moved a motion proposing that, in view of the Conduct Division's report, Magistrate Maloney be called on to appear at the Bar of the House on 21 June 2011 to show cause why he should not be removed from office. As with Justices Bruce and Betts previously, the motion granted leave to attend in person or by legal representative. The House agreed to the motion.[87]

On 21 June 2011, Magistrate Maloney attended at the Bar of the House and delivered an address in response to the House's resolution.[88] As on previous occasions, the House's resolution did not provide for questions.[89]

On 22 June 2011, in keeping with now established practice, the Leader of the Government in the Legislative Council moved that the House adopt and present an Address to the Governor for the removal of Magistrate Maloney on the ground of incapacity, that the Assembly be requested to adopt an address in similar terms and that a copy of Magistrate Maloney's address to the Council be transmitted to the Assembly. The Leader of the Government also tabled two items of correspondence: a letter from the Attorney General to the Chief Justice, in his capacity as President of the Judicial Commission, and a reply from the Chief Executive of the Judicial Commission. The correspondence concerned advice in relation to further complaints about Magistrate Maloney. In view of the tabling of this new material, the Deputy Leader of the Government in the Legislative Council further moved that debate on the matter be adjourned in order that Magistrate Maloney have an opportunity to respond to the new material, either in writing or in person.[90]

On 23 August and 13 October 2011, the President reported receipt of further material from Greg Walsh & Co, representing Magistrate Maloney, in relation to the further complaints.[91]

Debate on the motion of the Leader of the Government in the Legislative Council for an Address to the Governor for the removal of Magistrate Maloney resumed on 13 October 2011. As on previous occasions, members were allowed a conscience vote by their parties. Once again, after extensive debate, the question was resolved in the negative, 15 votes to 22.[92]

Magistrate Dominique Burns (2019)

The sixth case in the Legislative Council involving the possible removal of a judicial officer is that of Magistrate Dominique Burns, a magistrate of the Local Court of New South Wales, in 2019.

---

87 *Minutes*, NSW Legislative Council, 17 June 2011, pp 218-219.
88 *Minutes*, NSW Legislative Council, 21 June 2011, p 237.
89 *Hansard*, NSW Legislative Council, 21 June 2011, p 2897 per the President.
90 *Minutes*, NSW Legislative Council, 22 June 2011, pp 254-255.
91 *Minutes*, NSW Legislative Council, 23 August 2011, p 353; 13 October 2011, p 494.
92 *Minutes*, NSW Legislative Council, 13 October 2011, pp 495-497; *Hansard*, NSW Legislative Council, 13 October 2011, pp 6149-6178.

The report of the Conduct Division on Magistrate Burns, dated 21 December 2018,[93] was tabled in the House on 8 May 2019.[94] The report included a finding of serious misbehaviour and likely future incapacity to exercise the functions of a judicial officer which could justify parliamentary consideration of Magistrate Burns' removal.

In keeping with previous practice, later in the day on 8 May 2019, on motion moved by the Leader of the Government in the Legislative Council, the House resolved that Magistrate Burns be called on to address the House and show cause why she should not be removed from office.[95] However, in the event, the magistrate resigned before the House took any further action.

Judge Peter Maiden (2019)

The seventh case in the Legislative Council involving the possible removal of a judicial officer is that of Judge Peter Maiden SC, a judge of the District Court of New South Wales, also in 2019.

The report of the Conduct Division on Judge Peter Maiden, dated 26 March 2019,[96] was tabled in the House on 8 May 2019, at the same time as the report on Magistrate Burns.[97] The report included a finding of both proved misbehaviour and incapacity such as to impact adversely on the future reputation and standing of the District Court, which could justify parliamentary consideration of Judge Maiden's removal. However, in the event, the judge retired before the House took any further action.[98]

PARLIAMENTARY SCRUTINY OF JUDICIAL ADMINISTRATION

The Parliament also plays a role in the scrutiny of some aspects of judicial administration.

Rules of court, which are made by a court under the authority of an act,[99] must be tabled in Parliament[100] and are subject to disallowance by either House.[101] They are also considered by the Legislation Review Committee.[102] Similarly, practice notes issued by or on behalf of a court under the authority of an act are tabled in Parliament and may be

93 Judicial Commission, Conduct Division, 'Report of inquiry in relation to Magistrate Dominique Burns', 21 December 2018.
94 *Minutes*, NSW Legislative Council, 8 May 2019, p 39.
95 Ibid, pp 87-88.
96 Judicial Commission, Conduct Division, 'Report of an inquiry by a Conduct Division of the Judicial Commission of New South Wales in relation to Judge Peter Maiden SC', 26 March 2019.
97 *Minutes*, NSW Legislative Council, 8 May 2019, p 39.
98 Judicial Commission of NSW, *Judicial Officers' Bulletin*, (Vol 31, No 6, July 2019), p 12.
99 See, for example, the *Supreme Court Act 1970*, pt 9 and the *District Court Act 1973*, ss 161 and 171.
100 *Interpretation Act 1987*, ss 21 (definition of 'statutory rule') and 40.
101 Ibid, s 41.
102 *Legislation Review Act 1987*, ss 3 (definition of a 'statutory rule') and 9.

disallowed by either House.[103] Thus, just as Parliament has supervision of and ultimate veto over legislative instruments made by the executive, it also has that role with respect to legislative instruments made by the judiciary.

Legislative instruments made by the courts are distinguished from instruments made by the executive which relate to the courts. The latter include regulations determining the amount of court fees.[104] The House may also debate motions for the disallowance of such regulations.[105]

JUDICIAL AND NON-JUDICIAL FUNCTIONS RELATED TO PARLIAMENT

There are certain non-judicial functions related to Parliament that are or may be performed by judicial officers or former judicial officers.

At the advent of responsible government in New South Wales in 1856, there was no formal constitutional separation of powers, and it was not considered inappropriate for judges to perform non-judicial tasks or hold non-judicial offices. For example, the three Justices of the Supreme Court at the advent of responsible government in 1856 were also all appointed as members of the Legislative Council.[106]

Even today, the Chief Justice of the Supreme Court holds the office of Lieutenant-Governor of New South Wales, and as such performs the Governor's constitutional functions when the Governor is absent from the State. Another example where a non-judicial role may be held by a judicial officer or former judicial officer is set out under the *Parliamentary Remuneration Act 1989*. Clause 1(1) of schedule 2 to that act provides that the Parliamentary Remuneration Tribunal 'is to consist of a person, appointed by the Governor on a part-time basis, who holds or has held a judicial office of this State'.

The Council has also frequently engaged retired judges as Independent Legal Arbiters to review claims of privilege over documents provided by the government in returns to order under standing order 52. This is discussed in detail in Chapter 19 (Documents tabled in the Legislative Council).[107]

---

103 See, for example, the *Supreme Court Act 1970*, s 124(11); the *District Court 1973*, s 161(7); and the *Interpretation Act 1987*, ss 40 and 41.

104 See, for example, the *Supreme Court Act 1970*, s 130 and the *District Court 1973*, s 150.

105 For an instance where such a regulation was disallowed, see *Minutes*, NSW Legislative Council, 20 November 2003, pp 448-449.

106 Twomey, (n 1), p 747.

107 See the discussion under the heading 'Current procedures for the production of State papers under standing order 52'.

CHAPTER 24

CASUAL VACANCIES IN THE AUSTRALIAN SENATE

This chapter examines the filling of casual vacancies in the representation of New South Wales in the Australian Senate. A list of casual vacancies in the representation of New South Wales in the Australian Senate is shown at Appendix 16 (Casual Vacancies – Senate (New South Wales) since 1901).

CAUSES OF CASUAL VACANCIES IN THE AUSTRALIAN SENATE

Casual vacancies in the Australian Senate are caused by the resignation, death, disqualification or absence without permission of a senator. These causes are discussed in detail in *Odgers*.[1]

PROCEDURE FOR THE FILLING OF CASUAL VACANCIES IN THE AUSTRALIAN SENATE

Under section 21 of the Commonwealth Constitution, whenever a casual vacancy arises in the representation of New South Wales in the Australian Senate, the President of the Senate, or the Governor-General if there is no President of the Senate or if the President of the Senate is absent from the Commonwealth, notifies the Governor of New South Wales by correspondence that a vacancy has occurred.

The casual vacancy is subsequently filled in accordance with section 15 of the Commonwealth Constitution. Under section 15, a casual vacancy in the representation of New South Wales in the Australian Senate is to be filled by the two Houses of the Parliament of New South Wales, sitting and voting together, choosing a person to fill the vacancy until the expiration of the term of the former senator. However, if the Parliament of New South Wales is not 'in session' when the vacancy is notified to the Governor, the Governor may, with the advice of the Executive Council, appoint a person to hold the place until the expiration of 14 days from the beginning of the next session

1 R Laing (ed), *Odgers' Australian Senate Practice*, as revised by H Evans, 14th ed, (Department of the Senate, 2016), pp 135-137.

of the Parliament of New South Wales (or the expiry of the former senator's term if that happens first), pending confirmation of the appointment by a joint sitting of the two Houses of the Parliament of New South Wales. These procedures are discussed further below.

Eligibility to fill a casual vacancy in the Australian Senate

Section 15 of the Commonwealth Constitution requires that a person chosen or appointed to fill a casual vacancy in the representation of New South Wales (or any other Australian State) in the Australian Senate according to the arrangements outlined above is to be, where relevant and possible, a member of the same party as the member whose death, resignation, disqualification or absence without permission caused the vacancy. The relevant paragraph of section 15 provides:

> Where a vacancy has at any time occurred in the place of a senator chosen by the people of a State and, at the time when he was so chosen, he was publicly recognized by a particular political party as being an endorsed candidate of that party and publicly represented himself to be such a candidate, a person chosen or appointed under this section in consequence of that vacancy, or in consequence of that vacancy and a subsequent vacancy or vacancies, shall, unless there is no member of that party available to be chosen or appointed, be a member of that party.

The purpose of this provision is to ensure that the person chosen or appointed to fill a casual vacancy in the Australian Senate is a *bona fide* representative of the party of which the senator whose seat has become vacant was a member at the time of his or her election, except in circumstances where 'there is no member of that party available to be chosen or appointed'.

Section 15 further provides that where before taking his or her seat the person chosen or appointed to fill a casual vacancy ceases to be a member of the relevant party (other than because the party has ceased to exist), that person shall be deemed not to have been chosen or appointed and the vacancy shall again be notified in accordance with section 21 of the Commonwealth Constitution. This is an additional safeguard that effectively ensures that a party's endorsed candidate is chosen or appointed to fill a casual vacancy: should a member of the party other than the party's endorsed candidate be chosen or appointed to fill a vacancy, the party's governing body has the option of expelling that person from the party, rendering the filling of the casual vacancy void.[2]

These provisions were inserted into section 15 in 1977 following agreement at a referendum. They were inserted following the controversial filling of two casual vacancies in the Senate in 1975. In February 1975, the Parliament of New South Wales chose an independent (Mr Cleaver Bunton) to fill a seat in the Senate vacated by Senator Murphy (Labor Party),[3] despite the Leader of the Labor Party in New South Wales, the

2 A Twomey, *The Constitution of New South Wales*, (Federation Press, 2004), p 829.

3 Senator Murphy had resigned to accept an appointment to the High Court.

Hon Neville Wran, nominating a person from the Labor Party to fill the vacant seat.[4] In September 1975, the Queensland Parliament chose a rebel member of the Labor Party (Mr Albert Field) to fill the seat in the Senate vacated by Senator Milliner (Labor Party).[5]

While the amendments to section 15 in 1977 addressed key concerns arising from the events of 1975, other potential issues remain. For one, there is nothing to compel a State Parliament to fill a vacancy.[6] Difficult questions would also arise in relation to the filling of the seat of an 'independent' senator, or the seat of senator whose party has split or restructured since the senator was elected, or the seat of a senator where there is 'no member of that party available to be chosen or appointed'.[7]

Other grounds for disqualification from election to and membership of the Australian Senate are discussed in *Odgers*.[8]

Joint sitting of the Houses to fill a casual vacancy

A joint sitting of the Houses of the Parliament of New South Wales to fill a casual vacancy in the representation of New South Wales in the Australian Senate is an entirely separate proceeding from a meeting of the Legislative Council. The lead-up to and conduct of a joint sitting is discussed below.

On the Governor receiving correspondence under section 21 of the Australian Constitution that a vacancy in the representation of New South Wales in the Australian Senate has occurred, the Governor communicates that correspondence by message to the President of the Legislative Council and the Speaker of the Legislative Assembly. In the Legislative Council, the President reports the Governor's message and accompanying correspondence to the House when it next meets. According to practice, the Legislative Assembly subsequently sends a message to the Legislative Council proposing a joint sitting to fill the vacancy. On receipt of such a message, the Council resolves to meet the Assembly at a joint sitting of the two Houses in accordance with section 15 of the Commonwealth Constitution to be held in the Council chamber at a date and time specified in the Council's resolution.

4 *Hansard*, NSW Legislative Council, 27 February 1975, pp 4003-4011. These proceedings are discussed further below under the heading 'Joint sitting of the Houses to fill a casual vacancy'.

5 For further information, see JR Odgers, *Australian Senate Practice*, 6th ed, (Royal Australian Institute of Public Administration, 1991), pp 151-152.

6 *Odgers* cites a case involving a vacancy in the seat of a Tasmanian senator, where the Tasmanian Parliament accepted that the person to replace the senator must be of the same political party, but did not accept the person nominated by the leader of the party in question. On the joint sitting failing to resolve the matter, the sitting was adjourned. In the event, the filling of the casual vacancy was overtaken by the dissolution of the Senate and House of Representatives. See *Odgers*, (n 1), pp 139-140.

7 Twomey, (n 2), p 829.

8 *Odgers*, (n 1), pp 165-172.

At the time appointed for the joint sitting, the President leaves the Chair of the House until the conclusion of the joint sitting. The proceedings of the Council are effectively suspended.

For the joint sitting, members of the Council and the Assembly assemble in the Council chamber. At the appointed time for the joint sitting, the first item of business of the joint sitting is the election of a member to chair the proceedings. The Clerk calls for nominations. Practice is for the Premier to move that the President of the Legislative Council be the President of the joint sitting, which question is put to the joint sitting by the Clerk.[9] Assuming it is agreed to, the President then takes the chair. The Speaker of the Legislative Assembly occupies a seat on the dais to the right of the President's chair.

After the election of the Chair, the practice has been for the joint sitting to adopt rules for the conduct of proceedings, on the motion of the Premier. The main features of the rules adopted in recent years are:

- The standing orders of the Council apply to the joint sitting.
- A member proposing any person to fill the vacant place in the Senate must state that the person is willing to hold the vacant place, and is a member of the same political party as that to which the senator vacating the seat belonged at the time of his or her election.
- If only one person is proposed and seconded, the Chair must put the question 'That [name of person] be chosen to hold the place in the Senate rendered vacant by the [resignation/death or other cause] of Senator [name of person]' and, if the question is passed in the affirmative, must declare that person to have been so chosen.
- If more than one person is proposed, the person to fill the vacant seat must be chosen by open voting.
- In the case of an equality of votes in any division the Chair must give a casting vote, and any reasons stated by the Chair may be entered in the record of the joint sitting.
- The Chair must inform the Governor as soon as practicable of the name of the person chosen to hold the vacant seat in the Senate.

The Chair then calls for nominations to fill the casual vacancy. In normal circumstances, the leader of the party of which the senator whose seat has become vacant was a member at the time of his or her election then proposes a person to fill the vacant place. Assuming there is no other person proposed, reflecting the intent of the 1977 reforms cited above, the Chair puts the question that the proposed person be chosen to hold the vacant seat in the Senate, and if the question is resolved in the affirmative, declares that person to have been so chosen. The Premier then moves that the Chair inform the Governor of the

9 In the absence of the President, the Acting or Deputy President acts in that capacity. For an example, see *Hansard*, NSW Legislative Council, 2 July 2014, p 29980.

choice of the joint sitting, which question is put and passed. The Chair then declares the joint sitting closed.

When the Legislative Council resumes the President announces the name of the person chosen to fill the vacant seat in the Senate, and tables the minutes of the joint sitting. The Speaker does the same in the Legislative Assembly. The President also notifies the Governor in writing.

There has been one occasion, however, on which the above procedures were not followed: the joint sitting to fill the seat of Senator Murphy in 1975 cited above. On that occasion, the Houses separately adopted identical rules for the joint sitting prior to the joint sitting taking place.[10] On the President taking the Chair of the joint sitting, a point of order was taken by the Leader of the Opposition in the Legislative Assembly, the Hon Neville Wran, that the rules adopted by the Houses were invalid, on the basis that they had not been agreed to at the joint sitting in accordance with section 15 of the Commonwealth Constitution. The President did not uphold the point of order, and the proceedings were conducted in accordance with the rules previously agreed to separately by the Houses.[11]

The temporary filling of a casual vacancy by the Governor

As indicated, under section 15 of the Commonwealth Constitution, if the Parliament of New South Wales is not 'in session' when a vacancy in the representation of New South Wales in the Australian Senate is notified to the Governor, the Governor, with the advice of the Executive Council, may appoint a person to hold the place until the expiration of 14 days from the beginning of the next session of the Parliament of New South Wales (or the expiry of the former senator's term if that happens first), pending confirmation of that appointment by a joint sitting of the two Houses.

This provision has been utilised in New South Wales on six occasions.[12] On each occasion, the senator appointed by the Governor was subsequently chosen to fill the vacancy at a joint sitting of the two Houses of the Parliament within the 14 days deadline.

However, the procedure cannot be used in circumstances where the Parliament is 'in session', that is, where it has not been prorogued or the Assembly dissolved.[13]

---

10 See *Votes and Proceedings*, NSW Legislative Assembly, 25 February 1975, pp 312-316; *Minutes*, NSW Legislative Council, 25 February 1975, pp 275-277.

11 *Hansard*, NSW Legislative Council, 27 February 1975, pp 3994-4002.

12 The appointment of Senator Ormonde to replace Senator Ashley in 1958, the appointment of Senator Cotton to replace Senator Spooner in 1965, the appointment of Senator Puplick to replace Senator Cotton in 1978, the appointment of Senator Sibraa to replace Senator McClelland in 1978, the appointment of Senator Tierney to replace Senator Baume in 1991, and the appointment of Senator Spender to replace Senator Leyonhjelm in 2019.

13 Crown Solicitor, 'Filling of vacancy in the Senate on resignation of the Honourable Bob Carr', 12 June 2014, paras 3.1-3.13 and Crown Solicitor, 'Whether notification of a Senate vacancy under s 21 of Constitution (Cth) may be given more than once,' 24 February 2015, para 3.5. Other States may interpret this provision differently, allowing their governors to fill casual vacancies when their Houses are adjourned. See *Odgers*, (n 1), p 141.

The Senate itself has acknowledged that the choosing of a person to fill a casual vacancy in the Senate may be delayed where State Parliaments stand adjourned but not prorogued. On 3 June 1992, the Senate adopted the following resolution:

> That the Senate —
>
> (a) believes that casual vacancies in the Senate should be filled as expeditiously as possible, so that no State is without its full representation in the Senate for any time longer than is necessary;
>
> (b) recognises that under section 15 of the Constitution an appointment to a vacancy in the Senate may be delayed because the Houses of the Parliament of the relevant State are adjourned but have not been prorogued, which, on a strict construction of the section, prevents the Governor of the State making the appointment; and
>
> (c) recommends that all State Parliaments adopt procedures whereby their Houses, if they are adjourned when a casual vacancy in the Senate is notified, are recalled to fill the vacancy, and whereby the vacancy is filled:
>
> (i) within 14 days after the notification of the vacancy, or
>
> (ii) where under section 15 of the Constitution the vacancy must be filled by a member of a political party, within 14 days after the nomination by that party is received,
>
> whichever is the later.[14]

The recommendation in paragraph (c) in relation to the recall of State parliaments for the specific purpose of filling casual vacancies in the Senate has not been acted on by the Parliament of New South Wales.

The matter arose in New South Wales in February 2015. On 9 February 2015, the Governor received from the President of the Senate notification of the resignation on 6 February 2015 of Senator Faulkner, a senator from New South Wales.[15] At the time the Parliament of New South Wales was not sitting, in advance of the State election due to be held on 28 March 2015, and it was not due to sit again until early May after the election. However, as at 9 February 2015, the Parliament had not been prorogued.[16] In those circumstances, the Crown Solicitor advised that the Governor was not able to temporarily appoint a replacement for Senator Faulkner under the provisions of section 15, as the session had not been ended by prorogation (or dissolution of the Assembly), and the Parliament was still 'in session'. Nor on subsequent prorogation of the Parliament of New South Wales could the Governor then act to temporarily appoint a replacement, as that would require the issuing of a second or further notice of the vacancy to the Governor, for which there is no provision in section 21.[17] Accordingly, short of the two Houses being

14 *Journals of the Senate*, 3 June 1992, p 2401. This resolution was reaffirmed by the Senate on 4 March 1997. See *Journals of the Senate*, 4 March 1997, p 1538.

15 *Minutes*, NSW Legislative Council, 6 May 2015, pp 31-32.

16 The Parliament was not prorogued until 2 March 2015.

17 Crown Solicitor, 'Whether notification of a Senate vacancy under s 21 of Constitution (Cth) may be given more than once,' 24 February 2015, para 3.5.

recalled for the sole purpose of filling the vacancy, unlikely in the run-up to an election, there was nothing that could be done to fill the vacancy until the Houses met again after the election. Ultimately, the Houses moved expeditiously to fill the vacancy on the second sitting day of the new Parliament.[18]

Odgers discusses other circumstances in other States where there have been delays in the filling of casual vacancies in the Australian Senate.[19]

Casual vacancies in respect of a seat in a forthcoming Senate

In 2013, interesting questions arose in relation to a forthcoming vacancy in the representation of New South Wales in the Australian Senate. On 24 October 2013, Senator Carr resigned as a senator for New South Wales. However, in unusual circumstances, Senator Carr resigned not only his existing seat in the Senate until 30 June 2014, but also a seat in the Senate to which he had been elected at the Senate half-election held on 7 September 2013 for a new six-year term commencing on 1 July 2014.[20]

On the House's receipt of a message from the Governor conveying the terms of the resignation, the Clerks of the two Houses jointly sought advice from the Crown Solicitor as to whether there was any impediment to the Parliament of New South Wales at one joint sitting choosing a person to fill both the existing vacant seat in the Senate until 30 June 2014, and also the anticipated vacant seat for the six-year term starting on 1 July 2014. In response, the Crown Solicitor advised:

> … I am of the opinion that the place Mr Carr would hold from 1 July 2014 has not become vacant as a result of his purported resignation and therefore it cannot be filled now as a casual vacancy. It follows … that I consider there is an impediment to the Parliament of New South Wales now filling at the one joint sitting not only the current casual vacancy in the Senate, but also the place Mr Carr would hold from 1 July 2014. That place can only become vacant on or after 1 July 2014.[21]

In accordance with this advice, at a joint sitting of the two Houses of the Parliament of New South Wales held on 13 November 2013, the Houses chose Ms Deborah O'Neill to fill the vacant seat in the Senate until 30 June 2014 only.[22]

On 12 June 2014, at the request of the Clerks, the Crown Solicitor provided further advice as to whether the two Houses could make arrangements in advance for the filling of the further anticipated vacant seat in the Senate from 1 July 2014, in the expectation of receipt of further correspondence from the President of the Senate notifying the vacancy. The Crown Solicitor advised that such an approach would likely not be beyond the power of the two Houses, but that it would be open to the Presiding Officers to

18 *Minutes*, NSW Legislative Council, 6 May 2015, p 74.
19 See *Odgers*, (n 1), pp 139-142.
20 *Minutes*, NSW Legislative Council, 29 October 2013, pp 2114-2115.
21 Crown Solicitor, 'Filling of vacancies following the resignation of the Honourable Bob Carr', 1 November 2013, p 7.
22 *Minutes*, NSW Legislative Council, 13 November 2013, p 2191.

view such an approach as inappropriate and to rule it out of order.[23] Based on this advice, the Parliament took no further action in relation to the matter. Accordingly, it was only on 2 July 2014, after the House received a further message from the Governor conveying further correspondence from the President of the Senate in relation to the casual vacancy,[24] that a further joint sitting was held to fill the vacant seat in the Senate from 1 July 2014. Once again, Ms Deborah O'Neill was chosen to fill the vacant seat.[25]

23 Crown Solicitor, 'Filling of vacancy in the Senate on resignation of the Honourable Bob Carr', 12 June 2014, para 3.23.

24 *Minutes*, NSW Legislative Council, 2 July 2014, pp 2624-2625.

25 Ibid, p 2632.

CHAPTER 25

THE PARLIAMENT BUILDINGS AND THE LEGISLATIVE COUNCIL CHAMBER

This chapter provides a short history of the buildings and grounds of the Parliament of New South Wales, including the Legislative Council chamber. It also examines the modern features of the chamber.

THE TRADITIONAL OWNERS OF THE LAND

The Parliament of New South Wales meets on the traditional land of the Gadigal clan of the Eora nation. The territory of the Gadigal people stretches along the southern side of Port Jackson (Sydney Harbour) from South Head to around Petersham. The southern boundary is marked approximately by the Alexandra canal and Cooks River. The Eora nation consists of about 29 clans across the Sydney metropolitan area.[1]

THE PARLIAMENT BUILDINGS AND GROUNDS

The Parliament of New South Wales is situated in a prominent position at number 6 Macquarie Street, Sydney, occupying what was the northern wing of the former Sydney General Hospital.

The location of the Hospital, and indeed the alignment of Macquarie Street itself, was established in 1810 by Governor Macquarie, Governor of New South Wales from 1810 to 1821. Running along what was then Farm Cove Ridge, Macquarie Street was envisaged by Governor Macquarie as Sydney's premier street, forming a link between the commercial centre of Sydney to the west and the green spaces, now the Domain and Royal Botanic Gardens, to the east. During his time in office, Governor Macquarie commissioned many public buildings on Macquarie Street – the General Hospital (1810),

1 As a matter of practice, on the first sitting day of each week immediately following the reading of the Prayers, the President acknowledges the Gadigal clan of the Eora nation. The traditional owners are also acknowledged at the commencement of all committee meetings and other functions at Parliament House. A Welcome to Country and a smoking ceremony is performed in the Parliament House forecourt on the opening of a new Parliament.

the stables for the proposed Government House (now the Sydney Conservatorium of Music) (1815), the Hyde Park Barracks (1817) and St James' Church (1819) – all of which remain in place or partially in place today.

The General Hospital was built between 1811 and 1816 by three men: merchants Alexander Riley and Garnham Blaxcell, and colonial surgeon D'Arcy Wentworth. Governor Macquarie initially requested the funds to build the hospital from the British Government. However, when this request was refused, he entered into a contract with Riley, Blaxcell and Wentworth for the building of the hospital. In return, they received a monopoly on the import of rum into the colony, from which the men were expected to recoup the cost of the building.[2] To this day, the historic General Hospital is more commonly referred to as the 'Rum Hospital'.

The General Hospital itself consisted of three two-storeyed buildings in Georgian style facing Macquarie Street: a larger central building containing the hospital wards, a northern wing to house the principal surgeon, and a southern wing to house his two assistants. Governor Macquarie himself likely played a role in the hospital's design.[3]

The larger central wing was demolished in 1879 to make way for the present Sydney Hospital, but the two smaller wings remain to this day. The northern wing, the former Principal Surgeon's Quarters, now forms the central colonnaded building of the present Parliament House. The southern wing, the former Assistant Surgeons' Quarters, is now 'the Mint'.[4]

As the Parliament developed, the original Principal Surgeon's Quarters or northern wing of the 'Rum Hospital' was modified in various ways. Of note, in 1843, the original Legislative Council chamber, now the Legislative Assembly chamber, modelled in a gothic style, was added to the northern end of the 'Rum Hospital' building. In 1856, the current Legislative Council chamber was added to the southern end of the 'Rum Hospital' building.[5] In 1906, a Library Reading Room, today known as the Jubilee Room,[6] modelled in the style of an Edwardian reading room, was appended to the back of the 'Rum Hospital' to house the Parliamentary Library.

Given its origins, the Parliament building was long viewed as temporary accommodation for the Parliament to be replaced by a more efficient and purpose-built structure. In 1879,

---

2 The contract allowed the men to import 45,000 (later increased to 60,000) gallons of rum to sell to colonists.

3 D Ellsmore, 'The Colony's first Parliament House', cited in M Stapleton (ed), *Australia's First Parliament: Parliament House, New South Wales*, 2nd ed, (Parliament of New South Wales, 1995), pp 35-37.

4 In 1855, after being used for various other purposes, the former Assistant Surgeons' Quarters building was converted into the first overseas branch of London's Royal Mint, from which it derives its name today.

5 For further information, see the discussion below under the heading 'History of the Legislative Council chamber'.

6 The name commemorates the opening of the new Library Reading Room on the 50th anniversary of the granting of responsible government in New South Wales.

the Parliament passed the *Macquarie Street Resumption Act 1879* which resumed all the land north of the Principal Surgeon's Quarters to the Bent Street entrance to the Domain for public purposes, principally the erection of a new Parliament building.[7]

Many schemes for the replacement of the Parliament were proposed over the years. For example, in 1888 during celebrations marking the centenary of the founding of the colony, the Governor, Lord Carrington, laid a foundation stone for a new Parliament building on the site now occupied by the State Library. In 1897, the Government Architect, Walter Liberty Vernon, prepared a grand classical scheme for a new Parliament House, featuring a dome and cupola over a central hall and two octagonal chambers under smaller domes in the wings. However, this scheme, like all schemes before it, was ultimately rejected owing to a shortage of funds, and more modest modifications costing £15,000 were made to the existing structures instead. In 1906 the foundation stone for the unrealised new Parliament was removed, 18 years after it was laid, to enable construction of the Mitchell Wing of the State Library to proceed. In 1964, development plans envisaged the removal of the Sydney Hospital to another location to make way for a new Parliament House.

It was not until the 1970s that a plan for a new Parliament House was developed which was ultimately put into effect. In 1975, construction commenced on a new multi-storey building to the rear of the 'Rum Hospital' building and appended chambers. The new building faced the Domain, and housed new members' offices, a library, meeting rooms, dining rooms and associated catering facilities, a car park and delivery dock, a gym and swimming pool and other facilities for members and staff. The new building was designed so that it would not be seen from Macquarie Street, maintaining the historic relationship of the 'Rum Hospital' to Sydney's 'premier' street with its extensive sequence of heritage-listed public buildings. To allow for construction of the new building, certain historic buildings on the parliamentary estate, notably Richmond Villa, had to be removed.[8]

In 1979, once the initial multi-storey tower had been completed, construction commenced on a further building linking the 'Rum Hospital' building and appended chambers to the new tower. This new building included an extensive central lobby built around an open atrium, housing a central reflection pool and fountain designed by Robert Woodward, and providing natural light to an adjacent exhibition and events space. It also included an auditorium, media centre, post office and roof garden. It was officially opened in 1984.

The construction of the new buildings was accompanied by a major restoration of the 'Rum Hospital' building, the chambers and the Jubilee Room, completed in 1985. As part of the restoration, the interiors of the Legislative Council and Legislative Assembly chambers were restored to their appearance in 1892.

Since their completion, the multi-storey tower and fountain-court buildings have proved to be well-conceived and workable buildings within the constraints imposed

7 Parliamentary reports, *Sydney Morning Herald,* 3 July 1879, p 3 per the Hon Sir Henry Parkes.

8 Richmond Villa was originally built in 1849 by the Colonial Architect as his own residence. It was later used as accommodation for the Parliamentary Librarian. In 1977 it was relocated to a new site on 120 Kent Street where it became home to the Society of Australian Genealogists.

by the heritage precinct of Macquarie Street and the colonial architecture of the 'Rum Hospital' building, adjacent public buildings and the Domain to the east. At the same time, maintaining this complex set of buildings, especially the heritage listed 'Rum Hospital' building, the chambers and the Jubilee Room, remains a constant challenge.

In 2007, a Conservation Management Plan was produced to provide a clear philosophy to guide decision making about the Parliament buildings, based on a thorough understanding of their significance, components and contents. To quote from the Conservation Management Plan:

> The NSW Parliament House is of exceptional social and historical significance to the people of NSW as the seat of the State's legislature since 1829. The Rum Hospital, which formed the nucleus for the Parliament building complex as it grew with the changing requirements for the legislature over the 19th and 20th centuries, is historically significant as part of Governor Macquarie's grand plan for Sydney and, together with the Mint Building to the south, as one of the earliest extant public buildings in Australia. Both the Mint and Parliament House are of exceptional aesthetic significance for their contribution to the streetscape of Macquarie Street, one of Sydney's finest streets, and as rare examples of Georgian architecture and detailing typically found in the British colonies but now rare in Australia … the interiors of the Rum Hospital, two chambers, Jubilee Room and the lobby are of outstanding aesthetic significance.[9]

In 2014, in response to limitations on office space at the Parliament, a new office wing was opened on level 9 of the Parliament complex above the Jubilee Room and beside the roof garden.

In 2015, funding was obtained from Treasury for essential restoration and maintenance of the historic precincts of the Parliament buildings. Amongst other heritage conservation measures, the Jubilee Room was returned to the configuration it had in its heyday as the Parliamentary Library reading room. Interior finishes and fittings were restored, particularly the original cedar bookcases lining the walls on the ground floors.[10]

The control of the parliamentary precincts is discussed in Chapter 3 (Parliamentary privilege in New South Wales).[11]

HISTORY OF THE LEGISLATIVE COUNCIL CHAMBER

Following its inception in 1823,[12] between 1824 and 1829 the colonial Legislative Council met at various locations including Government House, then located on the corner of

9 C Lucas, Stapleton and Partners Pty Ltd, *New South Wales Parliament House: Conservation Management Plan*, 2007, p 1. The plan was updated in 2012.

10 The Hon D Harwin and D Blunt, 'Preserving the past, preparing for the future', Paper presented to the 47th Conference of Presiding Officers and Clerks, Tonga, July 2016.

11 See the discussion under the heading 'The parliamentary precincts'.

12 For further information, see the discussion in Chapter 2 (The history of the Legislative Council) under the heading 'Phase one (1823–1855): The early colonial Council'.

Bridge and Phillip Streets, the residence of the Chief Justice in Bent Street, and later in another building in the same street known as the 'Council Chamber'.

An increase in the number of members of the Council to between 10 and 15 members in 1828 necessitated larger premises to conduct business. On 3 January 1829, Governor Darling approved the appropriation and conversion of part of the northern wing of the 'Rum Hospital', the Principal Surgeon's Quarters, for this purpose.

The Council was given use of six of the eight rooms of the Principal Surgeon's Quarters. It met for the first time in its new chamber, the northern room on the ground floor, on 21 August 1829. This room adjoins the present day Legislative Assembly chamber and is today known as the Wentworth Room. The room above was retained for Executive Council meetings and the four other rooms allocated for committee use and the clerk's office.

A desire to permit members of the public to observe Council proceedings, which was first officially recognised by Governor Bourke in a despatch to Whitehall in December 1833, was fulfilled in June 1838 when a small gallery was erected within the chamber to accommodate some 30 to 40 'strangers'. At the same time a press gallery was provided at the opposite end of the chamber. A description of the interior represented it as a 'close chamber with its dozen nominees with its abominable little galleries, like side boxes in a theatre'.[13]

In 1843, the Council was increased to 36 members, with 24 elected and 12 nominated members. To accommodate this larger House, a new dedicated chamber, modelled in a gothic style, was added at the northern end of the 'Rum Hospital' building. Today this chamber is the Legislative Assembly chamber.

With the impending introduction of responsible government in 1856, the need for more accommodation, including a second chamber for the new bicameral Parliament, became imperative.

On 7 August 1855, the Council appointed a select committee to investigate accommodation for the new Houses of the Parliament. On 11 August 1855, the Colonial Architect, William Weaver, was requested to attend a meeting of the select committee. Three proposals were put forward for accommodation for the new Parliament. The first involved the rent or purchase of suitable premises in the immediate neighbourhood. Efforts to rent Burdekin House, a mansion on the opposite side of Macquarie Street, subsequently fell through. The second proposal involved a new suite of buildings at the rear of the exisitng chamber fronting the Domain, however a plan could not be agreed on and this proposal also lapsed.

The third suggestion, which was ultimately pursued, was the erection of a new chamber at the southern end of the existing 'Rum Hospital' building. It was intended that this new chamber house the new Legislative Assembly, leaving the Council in its existing

13 PL Reynolds, *Legislative Architecture in New South Wales 1788-1974*, (Parliament of New South Wales, 1976), p 15.

chamber. The proposal, which also involved a suite of 10 or 12 rooms for offices and committees and a new library, was to cost £10,000.

On 12 September 1855, William Weaver was again requested to attend the select committee and explain defects in the plans for additions at the southern end of the building. The inquiry heard of a state of disorganisation and inefficiency within the government building authority. The outcome of the inquiry was the dismissal of the Colonial Architect. It was also realised that virtually no progress had been made on the urgent and necessary preparation of the new building design.

To cope with this emergency, the Governor and Executive Council authorised the purchase of a prefabricated iron store and dwelling house with ornamental cast iron front from James Dean of Melbourne for a lump sum payment of £1,835. The building, made in Scotland by the engineering firm Robertson & Lister,[14] was one of many prefabricated buildings that the company had shipped to colonies in Australia and other parts of the British Empire. Their 'portable iron houses and stores for exportation', predominantly designed by local architects Bell & Miller, were available in 'the most classic as well as plain designs'.[15] It is said that the building had been intended for a church in Bendigo, but had been hastily put up in response to the demand for accommodation in Melbourne.[16]

In December 1855, the new Colonial Architect, Alexander Dawson, issued tenders to transport and erect the building by 1 May 1856. On 28 February 1856, a tender was accepted to transport the iron building from Melbourne at a cost of £1,760. The building was brought to Sydney on the ship *Callender,* leaving Melbourne on 13 March 1856. The numbered packing crates used to transport the building from Melbourne were reused as internal boarding in the walls and roof of the new chamber. Today, visitors to the Legislative Council chamber may view a section of the original cast iron frame and wall covered in the packing timber, hessian and wallpaper through a small aperture cut into the northern wall of the chamber.

In March 1856, the Colonial Architect issued specifications for the erection of the building. On 18 April 1856, two days after tenders closed, the Sydney firm Spence, Dawson and Reilly was contracted to erect the new parliamentary chamber on the southern end of the former Surgeon's Quarters, together with adjacent rooms and offices, and to provide internal fittings, for the sum of £4,475. Internally, the building provided a chamber some 50 feet long and 35 feet wide with a clear height to the ceiling of 21 feet, with ancillary rooms for the President, committees, clerks and the press. Although the building was not entirely completed the new chamber was sufficiently advanced to allow for the opening of the first bicameral Parliament on Monday, 22 May 1856. Contrary to the original plan, it was decided that the Legislative Council should occupy the new chamber, allowing

14 Ironically this company of smiths, engineers, millwrights, iron roof constructors and iron house builders occupied offices at 340 Parliamentary Road, Glasgow.

15 Unpublished correspondence from Prof M Lewis, Faculty of Architecture, University of Melbourne, to the Clerk, May 2002.

16 WK Charlton, Clerks of the Parliaments, 'Parliament House, Sydney', *Journal of the Royal Australian Historical Society*, (Vol XXX, 1945), p 256.

the new Legislative Assembly to occupy the Legislative Council's former chamber on the northern end of the 'Rum Hospital' building.

This iron chamber has remained the meeting place for the Legislative Council ever since.[17]

On the opening of the first Parliament on 22 May 1856, a writer in the *Empire* described the chamber in detail:

> The front or western face of the building presents the appearance of having two storeys … The exterior of the building is painted of a light stone colour. The design can scarcely be said to come under the designation of any order, and may be best described as being in the Italian style of architecture.[18]

As with other cast iron fronted buildings, the side and rear walls were of corrugated iron running horizontally between cast iron stanchions, with bow string trusses holding the building together. The chamber was the first recorded use in New South Wales' architectural history of iron stanchions and bow string trusses spanning a major architectural space to provide a column free interior. Internally it was gas-lit.

The new chamber, like the building to which it was attached, had its faults, particularly in ventilation, lighting and acoustics. Within two years of construction there were complaints that the original curved corrugated iron roof covered in Duchess slate was leaking, there were ventilation problems, the chamber was too hot in summer and the rain beating on the roof caused serious acoustic problems. In 1859, the iron roof was replaced with a timber trussed pitched roof of slate. This also necessitated modifications to the curved pediment iron façade.

In 1892-1893, the chamber was enlarged when the façade was moved three metres closer to Macquarie Street.

By the 1920s the building was showing signs of imminent collapse due to the deterioration of the southern outer corrugated iron wall. Large wooden props were installed in the chamber to support the ceiling, whilst the south wall was buttressed to the adjacent wall of the nurses' quarters of Sydney Hospital to prevent it from falling outwards. These makeshift arrangements were rectified when the southern wall and ceiling of the chamber were finally reconstructed between 1934 and 1937.

In 1974, when the carpet of the chamber was removed to be replaced, it was discovered that a colony of termites had damaged the floor joists and floorboards. This resulted in replacement of the whole floor of the chamber and lower gallery. Many things were found beneath the floor: 'heavy, roughly hewn timbers from the veranda roof[19] had been used as floor joists; original sandstone columns lay where they had been toppled

17 In 1859, following an increase in the size of the Legislative Assembly to 80 members, the Assembly called for an exchange of chambers, but the Council demurred, and instead the Assembly chamber was lengthened and redecorated.

18 *The Empire*, Sydney, 22 May 1856, p 4.

19 Meaning the verandah roof of the original 'Rum Hospital' building.

over into the rubble below the chamber and much of the veranda surface was still in position'.[20] The sandstone columns were subsequently used in the restoration of the Mint building.

Before the floorboards were re-laid, numerous items were placed below for future generations to discover. At the same time, when the members' benches were stripped by the upholsterer it was discovered that, although their cedar scroll work had been doctored and covered up, they were the original benches from 1856. One of these benches was restored to its appearance in 1886 and may now be seen, and indeed sat on, in the Council lobby.

The chamber was further renovated in the period 1974-1980 to appear as it did in photographs of 1892 as part of the restoration work of the whole Parliament described earlier. At the time, some of the original wallpaper and paint was found behind the white 'public works' paint of later eras. The wallpaper was used to determine the decoration of the renovated chamber.

Whilst the Council chamber was thus hastily erected, and has since been propped up, eaten by termites, painted and finally restored to its 1890s internal appearance, the original prefabricated iron building remains in use after more than 160 years. Today, only the façade, eastern and northern walls remain of the original cast iron building - the remainder is brick and timber.

THE MODERN LEGISLATIVE COUNCIL CHAMBER

The modern Legislative Council chamber incorporates a number of prominent features and visual elements. These are discussed below.

The red colour scheme

The Legislative Council chamber is predominantly burgundy red. This colour scheme is one of the many traditions inherited from the Westminster system, red being the colour of the House of Lords. Many second chambers in bicameral Parliaments throughout the world have red as the dominant colour scheme, including the Australian Senate. There are various accounts of the origins of the colour scheme, but the use of red in the House of Lords is documented at least back to the beginning of the 15th century and seems to arise from the traditional use of red or scarlet as royal colours.[21]

The Vice-regal Chair

At the eastern end of the chamber is a raised platform or dais on which sits the Vice-regal Chair and the President's chair and desk. The Vice-regal Chair is flanked by the

20 LA Jeckeln, 'Renovation of the New South Wales Legislative Council Chamber, 1974', *The Table*, (Vol XLIII, 1975), p 72.

21 The use of red in the House of Lords is discussed in JM Davies, 'Red and green', *The Table*, (Vol XXXVII, 1968), pp 33-34.

Australian flag, State flag and Aboriginal flag. The Chair is used by the Monarch or Governor when present in the chamber, which is usually at the opening of a new session of Parliament. The position of the Chair reflects the layout of the House of Lords where the Throne stands on a platform behind the Woolsack.

The Chair was made in 1856 by the Sydney firm John Hill and Son, and was originally intended as the President's chair. It is made of Australian red cedar, ornately carved in Louis XV revival style, and upholstered in crimson velvet. The back of the chair features the Prince of Wales' 'feathers' surmounted by the Royal Coat of Arms, marking the presence of His Royal Highness the Prince of Wales in the House on 15 October 1974 on the occasion of the 150th anniversary of the first meeting of the Council in 1824. Beside the Vice-regal Chair are two small tables, also made from red cedar by Jack Evans of Tamworth in 1990.

President's chair and desk

In front of the Vice-regal Chair is the President's chair and desk, affording a view of the entire chamber. The original President's chair acquired in 1856 is now used as the Vice-regal Chair, discussed above. The current President's chair is a more modern, ergonomically designed chair.

The President's desk was also replaced in 1990 by a new desk constructed from red cedar by Jack Evans.

Members' seating

Members' seating in the chamber consists of two tiers of benches along the northern and southern sides of the chamber, and a row of benches across the western side, facing the dais. The current benches were installed as part of the chamber's refurbishment in the 1980s.

There are no fixed seat allocations in the Legislative Council chamber. However, as in the Houses of the UK Parliament, government members sit on the benches to the right of the Chair whilst opposition members sit to the left of the Chair. The front benches are normally reserved for ministers and the government whip on the one side, and leading opposition members and the opposition whip on the other, although other members sit there as well.

Minor party and independent members traditionally sit on the benches across the western end of the chamber, which are referred to as the 'cross-benches'.[22] Some cross-bench members also make use of the back benches on the northern and southern sides. The back benches have pull out tables and data outlets for the use of laptop computers.

22 The term 'cross-benches' refers to the benches in the House of Lords at right angles to the government and opposition benches, and facing the Lord Speaker, where Lords not affiliated to any party sit.

The table of the House

The table of the House stands between the government and opposition benches a short distance in front of the President's chair. When the House is sitting, the Clerk and Deputy Clerk or other officers on duty sit at the eastern end of the table, immediately in front of the President's chair and desk on the dais. The clerks provide procedural advice to the President and other members as required and keep official records of the proceedings. The Deputy President and Chair of Committees sits between the two clerks during proceedings in a Committee of the whole House. The Usher of the Black Rod sits at the opposite end of the table, with the Black Rod resting on the table. Along the northern and southern sides of the table are chairs for the Leader and Deputy Leader of the Government and the Leader and Deputy Leader of the Opposition respectively.

The eastern end of the table was originally curved and used by the Chairman of Committees (today known as the Deputy President and Chair of Committees), with the clerks sitting on either side. However, a rectangular extension to the eastern end of the table was later built from red cedar by Jack Evans to match the 1856 table. This extension provides dedicated seating for the Chair of Committees and the clerks, as well as incorporating shelving for reference material and working papers, data and network cabling for laptop computers, an electronic timing system and video titling system.

Items on the table include speakers' lecterns, microphones, telephones, reference books on parliamentary practice (including this book ☺) and a bills box containing multiple copies of the bills expected to be discussed during the sitting.

The table of the House is constructed in sections and can be dismantled and removed when necessary. For example, before the opening of a new session of Parliament by the Governor, the table is removed to accommodate seating for members of the Assembly on the floor of the chamber. For joint sittings of both Houses the table remains in place, with members of the Assembly being accommodated on the floor of the chamber and in the lower galleries.

The Black Rod

The Black Rod is the symbol of the authority of the Usher of the Black Rod and reflects the history of that position in England. The origin of the position can be traced to the 14th century when an usher appointed by the sovereign had functions connected with the Order of the Garter.[23] The parliamentary association of the position dates from the reign of King Henry VIII when the Gentleman Usher of the Black Rod kept the doors of the High Court of Parliament.[24] From at least the early 17th century, the duties of the Usher of the Black Rod encompassed summoning the House of Commons to attend the sovereign in the House of Lords. Following the struggle between the Stuart Kings and the House of Commons for supremacy culminating in the English Civil War, the

23 M Bond and D Beamish, *The Gentleman Usher of the Black Rod*, (House of Lords Information Service, 1976), pp 1-2.

24 Ibid, p 2.

tradition developed of closing the door of the Commons to the Usher who had to knock three times with the Rod for admission, a ritual which is still re-enacted at the opening of Parliament today.

The Council possesses three Black Rods, the earliest dating from 1856 and the second from Federation in 1901.[25] The current Black Rod was presented to the House by the Bank of New South Wales, Australia's first bank, on 15 October 1974 to commemorate the 150th anniversary of the first meeting of the original Legislative Council on 25 August 1824.[26] It was manufactured by the Royal Jewellers, Garrard and Company Ltd, and is modelled on the House of Lords' Black Rod. It is made of black enamelled ebony topped by a silver gilt lion supporting an enamelled shield featuring the State Coat of Arms. The Prince of Wales' 'feathers' badge is affixed near the top, marking the presence of His Royal Highness the Prince of Wales in the House on 15 October 1974. The centre knob is embossed with waratahs, the State's floral emblem. The base knob is similarly embossed and bears the donor's inscription at the base.

At the beginning and end of a sitting, the Usher of the Black Rod carries the Rod on the right shoulder into and out of the chamber. During a sitting the Rod is placed at the end of the table in front of the Usher with the crest pointing towards the government benches. The Usher also carries the Rod when executing orders of the House or directions of the President to remove members or other persons from the chamber.

During non-sitting periods all three black rods are on display in a case in the Council lobby.

The Bar of the House

The Bar of the House is the boundary which persons who are not members or officers of the Legislative Council may not cross when the House is sitting. Traditionally it is considered to lie at the western end of the chamber which is marked by two brass gates between the floor of the chamber and the public gallery, but it also includes the northern entry to the chamber from the members' lounge delineated by a swinging wooden 'gate' and the two eastern entry points to the chamber, delineated by a rope barrier. Unlike the western end, the northern and eastern entry points are only physically barred during a division, following the direction of the Chair to 'Lock the doors', a practice which is designed to ensure that the counting of the votes is not confused by members entering or leaving the chamber during the count.

The Bar of the House plays a role in various parliamentary procedures. Persons who have committed an offence against the House may be ordered to attend at the Bar of the

25 The 1856 Rod is of enamelled black wood capped with a silver crown and silver band embossed on opposite sides with a kangaroo and emu. The second Rod dates from around 1901, is also of enamelled black wood and has a silver cap incorporating a replica of St Edward's Crown above two shields, the one inscribed with the letters 'LC', the other bearing an early unofficial Australian coat of arms.

26 *Minutes,* NSW Legislative Council, 15 October 1974, p 124.

House to be reprimanded or admonished, unless the offender is a member of the House, in which case the member may be ordered to attend in his or her place. Witnesses may also be examined at the Bar of the House.[27] Judicial officers the subject of a report of the Conduct Division of the Judicial Commission may also be invited to appear at the Bar of the House to show cause why they should not be removed from office.[28] In the past, representatives of petitioners also routinely appeared at the Bar of the House.

The State Coat of Arms

The State Coat of Arms is mounted above the dais. The State Coat of Arms was granted by royal warrant of King Edward VII dated 11 October 1906. It bears the Latin inscription '*Orta recens quam pura nites*' which, in English, means 'Newly risen, how brightly you shine'.

For many years, the Royal Coat of Arms, rather than the State Coat of Arms, was mounted above the dais. In 2004, a member of the House gave notice of a motion to replace the Royal arms with the State arms 'in compliance with the spirit' of the *State Arms, Symbols and Emblems Act 2004*,[29] but the motion lapsed in 2006. The notice was subsequently revived and the motion ultimately passed by the House on 26 September 2006.[30] The Royal Coat of Arms was replaced by the State Coat of Arms above the dais on 9 October 2006.[31] The Royal Coat of Arms was later placed on display outside the chamber.

Busts of former members

Around the walls of the chamber there are seven busts of prominent former Presidents and members of the House, made from high grade Italian Carrara marble and completed in the neo-classical style.[32] The individuals depicted are the Hon Sir John Hay, the Hon Sir John Lackey, the Hon Sir Alfred Stephen, the Hon William Bede Dalley, the Hon Sir Francis Suttor, the Hon John Blaxland, and the Hon James Macarthur. All were former members of the Legislative Council, with four – Hay, Lackey, Stephen, and Suttor – being former Presidents. The earliest member depicted is the Hon John Blaxland, a prominent

27 For an occasion in 1998 when the House required the Auditor General to appear at the Bar of the House, see the discussion in Chapter 3 (Parliamentary privilege in New South Wales) under the heading 'The power to call witnesses and compel evidence'.

28 For further information, see the discussion in Chapter 23 (Relations with the Judiciary) under the heading 'Cases involving the possible removal of a judicial officer'.

29 The *State Arms, Symbols and Emblems Act 2004* provides for the use of the State arms, rather than the Royal arms, where arms representing the authority of the Crown or the State are to be used, including in 'a Parliament building', but does not specifically refer to the display of arms in the parliamentary chambers.

30 *Minutes*, NSW Legislative Council, 26 September 2006, pp 218-222.

31 *Minutes*, NSW Legislative Council, 17 October 2006, p 253 per President Burgmann.

32 The busts were created between 1869 and 1899 by four notable sculptors: Achille Simonetti (1838-1900), Nelson William Illingworth (1862-1926), Joseph Durham (1814-1877) and Charles Summers (1825-1878).

colonial landowner and merchant, who became a member in 1829.[33] The earliest President depicted is the Hon Sir Alfred Stephen, the first President of the Legislative Council (1856-1857) following the advent of responsible government.

On 9 March 2016, the House adopted a motion calling on the President 'to consider placing a bust of the first woman President of the Legislative Council, the late the Hon Virginia Chadwick AO, in the chamber, as a small but significant step towards pledging for parity'.[34] At the time of publication this project was underway, the bust being sculptured by renowned Australian sculptor Peter Schipperheyn.

Plaques of former Presidents

At the end of the public gallery at the western end of the chamber are plaques inscribed with the names of the 21 past and present Presidents of the Council since 1856. These plaques were an initiative of President Willis.

The Aboriginal message stick

An Aboriginal message stick is on display at the eastern entrance to the chamber from the Council lobby. On 11 October 2017, during a special ceremony to commemorate the introduction of the Aboriginal Languages Bill 2017 into the Parliament, the message stick was passed between Aboriginal elders representing Aboriginal language groups and the Minister for Aboriginal Affairs. According to resolution of the House of continuing effect of 21 June 2018, the message stick is now on permanent display in the chamber.[35] The display cabinet bears the following inscription:

> This original message stick, presented to the Parliament of New South Wales, is a physical symbol of the Languages that the Aboriginal Languages Act 2017 seeks to acknowledge, nurture and grow.
>
> It is a commemoration of the introduction of the bill in the Legislative Council, the first of its kind in the world, and the first occasion on which an Aboriginal Language was spoken in debate by a non-member.
>
> It is a reminder of the two-way ongoing dialogue between the Aboriginal community and the New South Wales Parliament.

In accordance with the resolution of the House of continuing effect of 21 June 2018,[36] the message stick was removed from the display case during the proceedings to mark the opening of the 57th Parliament on 7 May 2019. On the attendance of Her Excellency

33 See 'Portrait Busts in Parliament House', *Parliament of New South Wales History Bulletin 5*, Ch 10.

34 *Minutes*, NSW Legislative Council, 9 March 2016, pp 703-704.

35 *Minutes*, NSW Legislative Council, 21 June 2018, pp 2804-2815. For further information, see the discussion in Chapter 9 (Meetings of the Legislative Council) under the heading 'Joint sitting to hear the Governor's speech'.

36 Minutes, NSW Legislative Council, 21 June 2018, pp 2804-2805.

the Governor in the chamber for the purposes of delivering the Governor's speech opening the Parliament, Donna McLaren, Aunty Maureen and Keith Munro of the Gamilaraay nation addressed assembled members of both Houses from the Bar of the House in their language and handed the message stick to the Usher of the Black Rod for placement on the dais.[37]

Modern adaptations

The historic significance and heritage value of the Council chamber have imposed constraints on the extent to which the efficiency and functionality of the chamber can be enhanced in line with developments in technology. However, despite these constraints, a number of improvements to the chamber have been made. In the 1980s, when the re-creation of 19th century bracket lights around the walls proved to be more decorative than functional, modern downlights were incorporated into the ventilation grille around the chamber's perimeter. The ceiling lights were also replaced by four central halogen lights to replicate the original gas lighting in the chamber. In the same period, sound amplification was installed by the use of microphones and loudspeakers mounted in the ceiling over the public gallery and in the *Hansard* reporters' desks. These later proved to be inadequate, necessitating the installation of additional speakers in the backs of the members' benches and audio loops in the public galleries. More recent developments have included the installation of an electronic timing system reflecting the introduction of time limits for certain debates in the House, the integration of power points and wireless internet access for laptop computers, a modern digital camera system with six cameras throughout the chamber and an in-house video system with video titling feeding to live broadcasts of the proceedings of the House.

Accessibility

Despite the limitations imposed by the heritage value of the chamber, efforts have also been made to make the chamber more accessible to people with a disability. For example, during the opening of the Parliament in 2019, a temporary ramp was installed to the side entrance of the chamber, complete with wooden hand rails and carpet, to facilitate wheelchair access for a member of the Legislative Assembly who uses a wheelchair. All members of the Assembly entered the chamber in procession via the ramp. A hearing loop has also been installed in the chamber.[38]

37 *Minutes*, NSW Legislative Council, 7 May 2019, p 14; *Hansard*, NSW Legislative Council, 7 May 2019, pp 9-10.

38 The Hon J Ajaka MLC, President, 'Election and Beyond – the role of Parliament in facilitating persons with disabilities as legislators', Paper presented to the 64th Commonwealth Parliamentary Conference in Uganda, September 2019.

The galleries

The President's gallery

The President's gallery is located on either side of the dais (on which stand the Vice-regal Chair and President's chairs). When the House is sitting, the President may admit visitors to the gallery.[39] The gallery is also often used by government and opposition advisers, most notably during Question Time, in order to assist members and ministers with briefing material and advice.

The Press and *Hansard* galleries

The Press and *Hansard* galleries are located on an upper level of the chamber above the Vice-regal Chair. They are reserved for accredited members of the media and *Hansard* staff.

Whilst the galleries form part of the original fabric of the chamber, certain changes have been made over the years such as wiring for the sound system to enable the use of headphones by *Hansard* staff and ergonomic modifications to the desks.

The public gallery

The public gallery is at the western end of the chamber on two levels. Both levels were enhanced in 1954 to accommodate additional visitors for the opening of the Parliament by Her Majesty Queen Elizabeth II. Visitors may attend in the gallery during a sitting of the House (SO 196(1)). The gallery was also reconstructed as part of the refurbishment of the chamber in the 1980s.[40]

Access to the public gallery is discussed in Chapter 11 (Publication of and access to the proceedings of the Legislative Council).[41]

The upper section of the gallery contains a small control room which was once used to control the broadcasting of proceedings of the House. A separate more modern control room was installed on level 6 of the new Parliament building near the Parliamentary Library in 2012, however the small control room remains.

Other uses of the chamber

With prior approval of the President, the chamber is sometimes used for purposes other than sittings of the House. For example, it is routinely used for school visits and public

39 Distinguished visitors may also be admitted to a seat on the dais. For further information, see the discussion in Chapter 10 (The conduct of proceedings) under the heading 'Distinguished visitors'.

40 In 2020, in very unusual circumstances during the COVID-19 pandemic, members used the upper and lower public galleries to participate in the proceedings of the House whilst socially distancing from one another. The parliament was closed to the public at the time.

41 See the discussion under the heading 'Public access to proceedings in the chamber'.

tours. It has also been the venue for the plenary sessions of summits established by resolutions of the Houses on drug and alcohol abuse, for Commonwealth Parliamentary Association and other conferences, and for summits established by the executive government on other public policy issues. In the past, it was also sometimes used for committee hearings when no other hearing rooms were available.

THE MEMBERS' LOUNGE

The members' lounge is adjacent to the Council chamber, opening off the northern entrance to the chamber. It was at one time the southernmost ground floor room of the 'Rum Hospital' to which the Council chamber was appended in 1856. The members' lounge is available to members as a place to meet and confer privately whilst the House is sitting. It is also routinely used for committee deliberative meetings.

THE LOBBY

The Legislative Council lobby is adjacent to the chamber and connected by the Premiers' corridor to the Legislative Assembly lobby. As it is open to the public, it provides a convenient space where members can meet with constituents, advisers and others when the House is sitting without having to return to their offices in remoter parts of the building. When the House is sitting, a broadcast of the proceedings is available on a television screen in the lobby. The Council front desk is located in the lobby from which staff control public access to the chamber and members' offices. The furniture in the lobby includes many historic pieces including one of the original 1856 benches from the chamber and the display case for the Council's three black rods.

COMMITTEE ROOMS

Committees meet in a number of rooms at Parliament House: the historic Jubilee Room, the Macquarie Room, which is a dedicated committee room, and two newer rooms, the Preston Stanley Room and the McKell Room. All have infrastructure for recording and broadcasting the proceedings. The rooms are also used for other purposes, such as party meetings, staff meetings and training.

For committee hearings, the tables in the room are usually arranged in a square or rectangular formation, with the chair at one end, the witness at the other and members of the committee and *Hansard* in the remaining places. The clerk to the committee usually sits next to the Chair. Additional seats are normally provided behind the witness for the public, the media and any advisers.

MEMBERS' OFFICES

Members' offices are located in the modern multi-story office tower facing onto the Domain behind the historic 'Rum Hospital' building on Macquarie Street. Ministers also have offices there which they use mainly when the House is sitting. When the Parliament is not sitting, ministers tend to use off-site offices.[42]

Offices for individual Council members are allocated by the President in consultation with the government and opposition whips and members of the cross-bench. Offices are equipped with a range of facilities broadly determined by the Parliamentary Remuneration Tribunal and detailed in the *Members' Guide*.

A suite of offices for the President and the Deputy President and Chair of Committees is located behind the chamber.

42 Currently at 52 Martin Place, Sydney.

APPENDIX 1

MEMBERS OF THE LEGISLATIVE COUNCIL AT THE DATE OF PUBLICATION

Ajaka[A] The Honourable John George — LIB
President

Amato[A] The Honourable Lou — LIB

Banasiak[B] The Honourable Mark Jared — SFF

Borsak[A] The Honourable Robert — SFF
BBus FCPA JP

Boyd[B] Ms Abigail — G

Buttigieg[B] The Honourable Mark — ALP
BA BEc(Hons)
Opposition Whip

Cusack[B] The Honourable Catherine Eileen — LIB
BEc(SocSc)
Parliamentary Secretary

D'Adam[B] The Honourable Anthony — ALP
Deputy Opposition Whip

Donnelly[B] The Honourable Gregory John — ALP
BEc MIR

Faehrmann[A] Ms Cate[3] — G

Fang[B] The Honourable Wes — NAT

Farlow[A] The Honourable Scott — LIB
Parliamentary Secretary

Farraway[B] The Honourable Sam Jacob[6] — NAT
Deputy Government Whip

Field[A] Mr Justin[1] — IND

Franklin[A] The Honourable Ben[5] — NAT
Parliamentary Secretary

Graham[A] The Honourable John[2] — ALP

Harwin[A] The Honourable Donald Thomas — LIB
BEc(Hons)
Special Minister of State, Minister for the Public Service and Employee Relations, Aboriginal Affairs, and the Arts and Vice-President of the Executive Council Leader of the Government

Houssos[A] The Honourable Courtney — ALP
Temporary Chair of Committees

Hurst[B] The Honourable Emma — AJP

Jackson[A] The Honourable Rose[4] — ALP

Khan[A] The Honourable Trevor John — NAT
B Juris LLM (UNSW)
Deputy President and Chair of Committees

Latham[B] The Honourable Mark — PHON

Maclaren-Jones[B] The Honourable Natasha — LIB
BN MHSM
Parliamentary Secretary, Government Whip

Mallard[A] The Honourable Shayne — LIB
Temporary Chair of Committees

Martin[B] The Honourable Taylor Mitchell BCom (UoN) LIB
Temporary Chair of Committees

Mason-Cox[A] The Honourable Matthew Ryan LIB

Mitchell[B] The Honourable Sarah Ann NAT
Minister for Education and Early Childhood Learning

Mookhey[B] The Honourable Daniel ALP

Moriarty[B] The Honourable Tara ALP

Moselmane[A] The Honourable Shaoquett Chaher *

Nile[A] The Revd the Honourable Frederick John Ed LTh CDP

Pearson[A] The Honourable Mark AJP

Primrose[B] The Honourable Peter Thomas BSocStud (Syd) ALP

Roberts[B] The Honourable Rod PHON
Assistant President

Searle[A] The Honourable Adam ALP
Leader of the Opposition in the Legislative Council

Secord[A] The Honourable Walt ALP

Sharpe[B] The Honourable Penelope Gail ALP
Deputy Leader of the Opposition in the Legislative Council

Shoebridge[B] Mr David G

Taylor[A] The Honourable Bronnie NAT
Minister for Mental Health, Regional Youth and Women

Tudehope[B] The Honourable Damien LIB
Minister for Finance and Small Business
Leader of the House

Veitch[A] The Honourable Michael Stanley ALP

Ward[B] The Honourable Natalie Peta LIB
Parliamentary Secretary

* *Elected to represent the ALP. At the time of publication, suspended by the ALP since 27 June 2020.*
A. *Elected Members whose term of service expires on dissolution or expiry of 57th Parliament.*
B. *Elected Members whose term of service expires on dissolution or expiry of 58th Parliament.*

1. Elected (24.08.2016) to vacancy caused by the death of Dr John Roland Kaye. Term of service expires on the dissolution or expiry of the 57th Parliament.
2. Elected (12.10.2016) to vacancy caused by the resignation of the Hon Sophie Cotsis. Term of service expires on the dissolution or expiry of the 57th Parliament.
3. Elected (15.08.2018) to vacancy caused by the resignation of Dr Mehreen Faruqi. Term of service expires on the dissolution or expiry of the 57th Parliament.
4. Elected (08.05.2019) to vacancy caused by the resignation of the Hon Lynda Voltz. Term of service expires on the dissolution or expiry of the 57th Parliament.
5. Elected (08.05.2019) to vacancy caused by the resignation of the Hon Ben Franklin. Term of service expires on the dissolution or expiry of the 57th Parliament.
6. Elected (17.10.2019) to vacancy caused by the resignation of the Hon Niall Blair. Term of service expires on the dissolution or expiry of the 58th Parliament.

Key

AJP	Animal Justice Party
ALP	Australian Labor Party
CDP	Christian Democratic Party (Fred Nile Group)
G	The Greens
IND	Independent
LIB	Liberal Party of Australia (NSW Division)
NAT	The Nationals
PHON	Pauline Hanson's One Nation
SFF	Shooters, Fishers and Farmers Party

APPENDIX 2

EXPIRY OR DISSOLUTION OF A PARLIAMENT

A Parliament ends on the expiry or dissolution of the Legislative Assembly.

Section 24 of the *Constitution Act 1902* provides for the expiry or dissolution of the Assembly every four years:

> **24 Duration of Assembly**
>
> (1) A Legislative Assembly shall, unless sooner dissolved under section 24B, expire on the Friday before the first Saturday in March in the fourth calendar year after the calendar year in which the return of the writs for choosing that Assembly occurred.
>
> (2) In this section, a reference to a writ does not include a reference to a writ issued because of the failure of an election, including a failure of an election because of its being declared void in accordance with law.

Section 24B(2) to (4) of the *Constitution Act 1902* in turn sets out a number of circumstances in which the Legislative Assembly may be dissolved early by the Governor by proclamation. Those circumstances are:

- On the passage in the Assembly of a motion of no confidence in the Government, being a motion of which not less than three clear days' notice has been given, and provided that the Assembly does not pass a subsequent motion of confidence in the Government in the next eight days. This provision is not triggered by a motion of no confidence in a minister, or even possibly the Premier. Although a motion of no confidence in the Premier has traditionally been regarded as a motion of no confidence in the Government, circumstances may arise where the Premier loses the support of his or her party on the floor of the House, but another minister may step into the position. Standing order 111 of the Legislative Assembly sets out the procedures for the passage of a motion of no confidence in the Government pursuant to section 24B(2) of the *Constitution Act 1902*.
- On the Assembly rejecting a bill which appropriates revenue or moneys for the ordinary annual services of the Government, or failing to pass such a bill before

the time that the Governor considers that the appropriation is required.[1] This section does not apply to a bill which appropriates revenue or moneys for the Legislature only.

- Where the expiry or dissolution of the Assembly will require the holding of a general election during the same period as a Commonwealth election, during a holiday period or at any other inconvenient time. In such circumstances, the Assembly may be dissolved up to two months early.

Section 24B(5) of the *Constitution Act 1902* also specifically preserves the power of the Governor to dissolve the Assembly in circumstances other than those described above, despite any advice of the Premier or Executive Council, if the Governor does so in accordance with established constitutional conventions.[2]

Section 24B(6) of the *Constitution Act 1902* requires that when deciding whether the Assembly should be dissolved in accordance with section 24B, the Governor is to consider whether a viable alternative Government can be formed without a dissolution and, in so doing, is to have regard to any motion passed by the Legislative Assembly expressing confidence in an alternative Government in which a named person would be Premier.

In circumstances where the Assembly is dissolved prior to its scheduled expiration, section 24A of the *Constitution Act 1902* provides that the polling date for the general election is to be a day not later than the 40th day from the date of the issue of the writs.

These provisions of the *Constitution Act 1902* were enacted in accordance with the memorandum of understanding, commonly known as the Charter of Reform, which was signed on 31 October 1991 by Premier Greiner and three non-aligned independents in the Assembly.[3] The memorandum included an undertaking for fixed four-year terms of parliament.[4]

---

1 There are not criteria set out in section 24B to identify when a bill which appropriates revenue or moneys for the ordinary annual services of the Government shall be deemed to have failed to have passed, such as the timeframe set out in section 5A of the *Constitution Act 1902*.

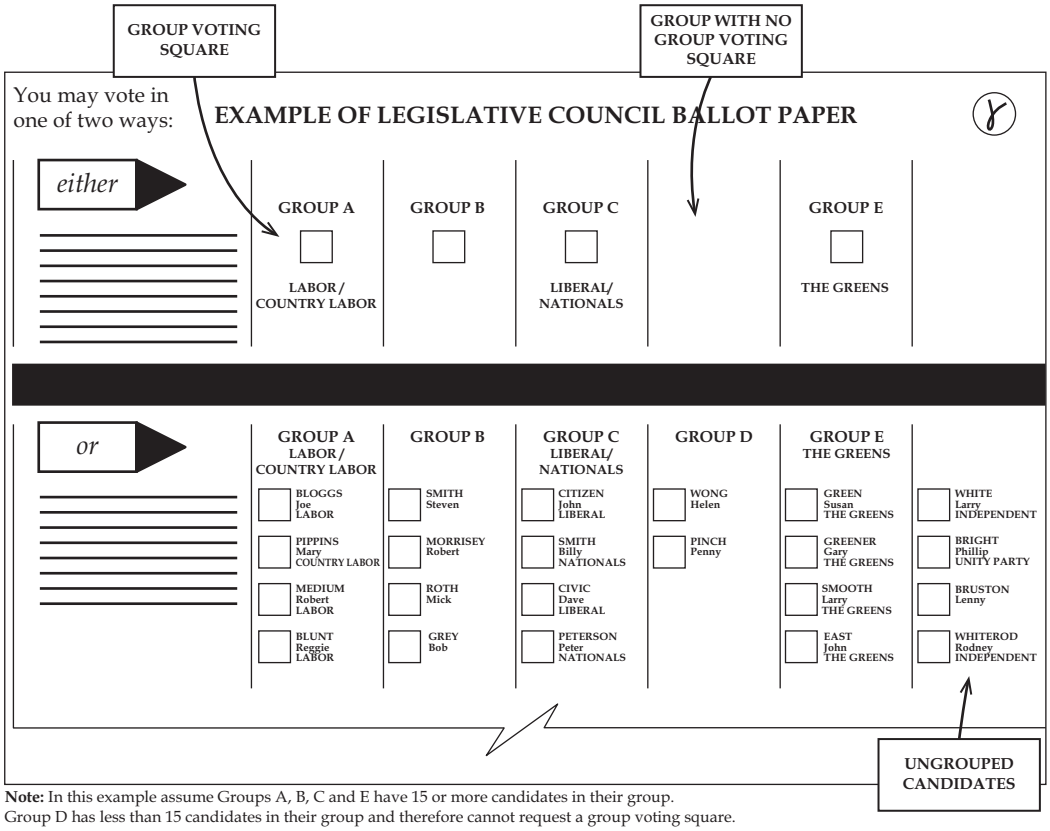
2 For further information, see the discussion in Chapter 1 (The New South Wales system of government) under the heading 'The Governor'.

3 'Memorandum of Understanding between the Hon Nick Greiner MP, Premier, For and on behalf of the Liberal/National Party Government and Mr John Hatton MP, Ms Clover Moore MP, and Dr Peter Macdonald MP', 1991. A copy of the Memorandum is at *Hansard,* NSW Legislative Assembly, 31 October 1991, pp 4004-4033. Under the memorandum, in return for implementation of the Charter of Reform, the independents would support the government on motions regarding supply and confidence.

4 For further information, see the discussion in Chapter 2 (The history of the Legislative Council) under the heading '1991: Fixed four-year terms of the Assembly'.

APPENDIX 3

LEGISLATIVE COUNCIL SAMPLE BALLOT PAPER



Note: In this example assume Groups A, B, C and E have 15 or more candidates in their group.
Group D has less than 15 candidates in their group and therefore cannot request a group voting square.

APPENDIX 4

CASUAL VACANCIES IN THE LEGISLATIVE COUNCIL SINCE 1978

Outgoing member	Date of vacancy	Cause of vacancy	Party	New member	Date new member sworn	Party
J B M Fuller	1/8/1978	Resignation	Country Party	J J Doohan	6/12/1978	National Party
J P Ducker	5/9/1979	Resignation	ALP	R D Dyer	18/9/1979	ALP
F J Darling	3/10/1981	Death	Liberal Party	D D Freeman	24/11/1981	Liberal Party
P J Baldwin	18/8/1982	Resignation	ALP	E A Symonds	21/9/1982	ALP
D P Landa	3/3/1984	Resignation	ALP	F C Hankinson	1/5/1984	ALP
J A Cameron	30/10/1984	Resignation	Independent*	M M Bignold	26/2/1985	Independent*
J J Morris	1/11/1984	Resignation	ALP	J J Walker	26/2/1985	ALP
W L Lange	6/1/1986	Resignation	Liberal Party	H G Percival	19/2/1986	Liberal Party
B J Unsworth	15/7/1986	Resignation	ALP	M R Egan	30/9/1986	ALP
P F Watkins	1/7/1987	Resignation	ALP	A B Kelly	13/10/1987	ALP
J D Garland	9/4/1990	Resignation	ALP	J W Shaw	8/5/1990	ALP
D M Grusovin	31/5/1990	Resignation	ALP	D M Isaksen	14/8/1990	ALP
L Solomons	2/8/1991	Resignation	National Party	L D W Coleman	27/8/1991	National Party
J R Hallam	2/9/1991	Resignation	ALP	E M Obeid	24/9/1991	ALP
R J Webster	5/9/1995	Resignation	National Party	M R Kersten	10/10/1995	National Party
E P Pickering	11/10/1995	Resignation	Liberal Party	C J S Lynn	24/10/1995	Liberal Party
P F O'Grady	3/1/1996	Resignation	ALP	P T Primrose	23/4/1996	ALP
S B Mutch	31/1/1996	Resignation	Liberal Party	M J Gallacher	23/4/1996	Liberal Party
P J Staunton	2/9/1997	Resignation	ALP	A B Kelly	23/9/1997	ALP
E A Symonds	30/4/1998	Resignation	ALP	C M Tebbutt	5/5/1998	ALP
E Kirkby	25/6/1998	Resignation	Australian Democrats	A Chesterfield-Evans	29/6/1998‡	Australian Democrats

Outgoing member	Date of vacancy	Cause of vacancy	Party	New member	Date new member sworn	Party
J W Shaw	4/7/2000	Resignation	ALP	A R Fazio	5/9/2000	ALP
R T M Bull	18/8/2000	Resignation	National Party	R H Colless	5/9/2000	National Party
J P Hannaford	10/10/2000	Resignation	Liberal Party	G S Pearce	14/11/2000	Liberal Party
A B Manson	27/10/2000	Resignation	ALP	I W West	14/11/2000	ALP
J R Johnson	4/9/2001	Resignation	ALP	M Costa	11/9/2001	ALP
D F Moppett	14/6/2002	Resignation	National Party	M J Pavey	17/9/2002	National Party
E B Nile	27/8/2002	Resignation	Christian Democratic Party	G K M Moyes	17/9/2002	Christian Democratic Party
M I Jones	16/9/2003	Resignation	Outdoor Recreation Party	J G Jenkins	11/11/2003	Outdoor Recreation Party
A S Burke	24/6/2004	Resignation	ALP	E M Roozendaal	28/6/2004	ALP
F J Nile	30/08/2004	Resignation	Christian Democratic Party	F J Nile	26/10/2004	Christian Democratic Party
M R Egan	8/2/2005	Resignation	ALP	G J Donnelly	1/3/2005	ALP
C M Tebbutt	26/8/2005	Resignation	ALP	P G Sharpe	18/10/2005	ALP
J S Tingle	2/5/2006	Resignation	Shooters Party	R L Brown	9/5/2006	Shooters Party
P Forsythe	22/9/2006	Resignation	Liberal Party	M R Mason-Cox	17/10/2006	Liberal Party
M Costa	23/9/2008	Resignation	ALP	J C Robertson	28/10/2008	ALP
H S Tsang	3/12/2009	Resignation	ALP	S C Moselmane	23/2/2010	ALP
I M Macdonald	7/6/2010	Resignation	ALP	L A Foley	22/6/2010	ALP
L Rhiannon	19/7/2010	Resignation	The Greens	C Faehrmann	10/9/2010‡	The Greens
J J Della Bosca	30/7/2010	Resignation	ALP	S Cotsis	10/9/2010‡	ALP
R A Smith	31/7/2010	Death	Shooters and Fishers Party	R Borsak	10/9/2010‡	Shooters and Fishers Party
S P Hale	6/9/2010	Resignation	The Greens	D Shoebridge	10/9/2010‡	The Greens
J Robertson	2/3/2011	Resignation	ALP	-[1]	-	-
E M Obeid	10/5/2011	Resignation	ALP	W W Secord	27/5/2011	ALP

1 The Hon John Robertson resigned from the Legislative Council on 2 March 2011, two days before the expiry of the 54th Parliament on 4 March 2011. His seat, which was due to become vacant at the expiry or dissolution of the 54th Parliament, was not filled before the expiry of the Parliament.

Outgoing member	Date of vacancy	Cause of vacancy	Party	New member	Date new member sworn	Party
J Hatzistergos	19/5/2011	Resignation	ALP	A D Searle	27/5/2011	ALP
A B Kelly	6/6/2011	Resignation	ALP	S J R Whan	23/6/2011	ALP
E M Roozendaal	17/5/2013	Resignation	ALP	E Wong	28/5/2013	ALP
C Faehrmann	18/6/2013	Resignation	The Greens	M S Faruqi	25/6/2013	The Greens
S J R Whan	5/3/2015	Resignation	ALP	N D Mookhey	12/5/2015	ALP
P G Sharpe	5/3/2015	Resignation	ALP	P G Sharpe	12/5/2015	ALP
J R Kaye	2/5/2016	Death	The Greens	J R Field	29/8/2016‡	The Greens
S Cotsis	16/9/2016	Resignation	ALP	J E Graham	18/10/2016	ALP
J Barham	13/2/2017	Resignation	The Greens	D E Walker	7/3/2017	The Greens
M J Gallacher	6/4/2017	Resignation	Liberal Party	T M Martin	9/5/2017	Liberal Party
D J Gay	31/7/2017	Resignation	National Party	W J Fang	22/8/2017‡	National Party
G S Pearce	15/11/2017	Resignation	Liberal Party	N P Ward	21/11/2017	Liberal Party
M S Faruqi	14/8/2018	Resignation	The Greens	C Faehrmann	29/8/2018	The Greens
L J Voltz	28/2/2019	Resignation	ALP	R B Jackson	28/5/2019	ALP
B C Franklin	1/3/2019	Resignation	National Party	B C Franklin	28/5/2019	National Party
N M Blair	16/10/2019	Resignation	National Party	S J Farraway	22/10/2019	National Party

* The Hon James Cameron and the Hon Marie Bignold stood at the 1984 election on a group ticket for the Call to Australia Group.

‡ Sworn in before the Governor.

APPENDIX 5

THE CODE OF CONDUCT FOR MEMBERS

PREAMBLE

Members of Parliament acknowledge their responsibility to maintain the public trust placed in them by performing their duties with honesty and integrity, respecting the law and the institution and conventions of Parliament, and using their influence to advance the common good of the people of New South Wales.

THE CODE

1 Purpose of the Code

The purpose of this Code of Conduct is to assist all Members in the discharge of their parliamentary duties and obligations to the House, their electorates and the people of NSW.

The Code applies to Members in all aspects of their public life.

In complying with this Code, Members shall base their conduct on a consideration of the public interest, avoiding conflict between personal interest and their duties as a Member of Parliament. It does not apply to Members in their purely private and personal lives.

Members will not act dishonestly for their own personal gain, or that of another person.

It is recognised that some members are non-aligned and others belong to political parties. Organised political parties are a fundamental part of the democratic process. Participation in the activities of organised political parties is within the legitimate activities of Members of Parliament.

PROPER EXERCISE OF POWER

2 Improper influence

(a) No member shall act as a paid advocate in any proceeding of the House or its committees.

(b) A Member must not knowingly and improperly promote any matter, vote on any bill or resolution or ask any question in the Parliament or its committees in return for any remuneration, fee, payment, reward or benefit in kind, of a private nature, which any of the following persons has received, is receiving or expects to receive as a consequence:

(i) The Member;
(ii) A member of the Member's family;
(iii) A business associate of the Member; or
(iv) Any other person or entity from whom the Member expects to receive a financial benefit.

(c) A Member must not knowingly and improperly use his or her influence as a Member to seek to affect a decision by a public official including a Minister, public sector employee, statutory officer or officer of a public body, to further, directly or indirectly, the private interests of the Member, a member of the Member's family, or a business associate of the Member.

3 Use of public resources

The use of public resources should not knowingly confer any undue private benefit on the Member or, on any other person, or entity.

Members must take reasonable steps to apply the public resources to which they are granted access according to any guidelines or rules about the use of those resources.

Commentary

There is a range of information available to Members to assist them in determining the accurate and appropriate use of resources including:

- *The Legislative Assembly Members' Guide;*
- *The Legislative Council Members' Guide;*
- *The Department of Parliamentary Services Members' Entitlements Handbook; and*
- *The Parliamentary Remuneration Tribunal's Annual Report and Determination of Additional Entitlements for Members of the Parliament of New South Wales.*

In addition it is open to any Member to seek advice on these matters from the Clerks of the House, Senior Parliamentary Officers, or the Parliamentary Ethics Adviser.

4 Use of confidential information

Information which Members receive in confidence in the course of their parliamentary duties should be used only in connection with those duties. It must never be

knowingly and improperly used for the private benefit of themselves or any other person or persons.

5 Limitation on breach of Code

This code is not breached by reason of a benefit or interest that could be or was advanced or received by the persons set out in 2(b)(i)-(iv) by reason of them being a member of the public or a member of a broad class.

OPENNESS AND ACCOUNTABILITY

6 Disclosure of interests

Members shall fulfil conscientiously the requirements of the House in respect of the Register of Disclosures by Members.

Commentary

The Constitution (Disclosures by Members) Regulation 1983 (the Regulation) requires that Members lodge regular returns, disclosing certain interests such as real property, interests and positions in corporations, income, debts and gifts.

The Regulation also requires that each Clerk compile and maintain a Register of Disclosures for their respective Houses. The purpose of the Register of Disclosures is to promote greater transparency, openness, and accountability in the parliamentary process.

Members' attention is drawn to the following sources of information and advice on compliance with the requirements of the Regulation:

- *Schedule 1 of the Regulation outlines the requirements for each type of interest to be disclosed, and gives examples as to how to make entries on the return;*
- *The respective guides for Members of the Legislative Assembly and the Legislative Council explain the requirements of the pecuniary interest disclosure regime in plain language, with examples where possible; and*
- *It is also open to any Member to seek advice on these matters from the Clerks of the House or the Parliamentary Ethics Adviser.*

In conjunction with the Regulation and this code, the following Standing Orders apply in relation to personal or pecuniary interests:

- *Legislative Assembly Standing Orders 176-7 and Legislative Council Standing Order 113(2) on voting in divisions; and*
- *Legislative Assembly Standing Order 276 and Legislative Council Standing Order 210(10) on participating in committee inquiries.*

7 Conflicts of interest

Members must take reasonable steps to avoid, resolve or disclose any conflict between their private interests and the public interest. The public interest is always to be favoured over any private interest of the Member.

Members shall take reasonable steps to draw attention to any conflicts between their private interests and the public interest in any proceeding of the House or its committees, and in any communications with Ministers, members, public officials or public office holders.

A conflict of interest does not exist where the Member is only affected as a member of the public or a member of a broad class.

Commentary

Members should be aware of the important distinction between disclosing an interest and having a conflict of interest.

There are certain pecuniary interests that must be disclosed on the Register of Disclosures although these may never come into conflict with a Members' duties. There are also interests that are not required to be disclosed on the Register of Disclosures but which could give rise to a conflict of interest if they are not managed appropriately.

It is open to any Member to seek advice on these matters from the Clerks of the House or the Parliamentary Ethics Adviser.

8 Gifts

(a) Members must take reasonable steps to disclose all gifts and benefits received in connection with their official duties, in accordance with the requirements for the disclosure of pecuniary interests.

(b) Members must not knowingly accept gifts that could reasonably be expected to give rise to a conflict of interest or could reasonably be perceived as an attempt to improperly influence the Member in the exercise of his or her duties.

(c) Nothing in this Code precludes the giving or accepting of political donations in accordance with the *Electoral Funding Act 2018*.

Commentary

The Constitution (Disclosures by Members) Regulation 1983 (the Regulation) requires that Members lodge regular returns, disclosing certain interests such as real property, interests and positions in corporations, income, debts and gifts.

The Regulation also requires that each Clerk compile and maintain a Register of Disclosures for their respective Houses. The purpose of the Register of Disclosures is to promote greater transparency, openness, and accountability in the parliamentary process.

Members' attention is drawn to the following sources of information and advice on compliance with the requirements of the Regulation:

- *Schedule 1 of the Regulation outlines the requirements for each type of interest to be disclosed, and gives examples as to how to make entries on the return;*
- *The respective guides for Members of the Legislative Assembly and the Legislative Council explain the requirements of the pecuniary interest disclosure regime in plain language, with examples where possible; and*
- *It is also open to any Member to seek advice on these matters from the Clerks of the House or the Parliamentary Ethics Adviser.*

UPHOLDING THE CODE

9 Upholding the Code

Members have a duty to cooperate fully with any processes established under the authority of the House concerning compliance with this Code.

Breaches of this Code may result in actions being taken by the House in relation to the Member. A substantial breach of the Code may constitute corrupt conduct for the purposes of the *Independent Commission Against Corruption Act 1988*.

This Code of Conduct was adopted by the Legislative Council on 24 March 2020 for the purposes of section 9 of the Independent Commission Against Corruption Act 1988.[1] *The resolution of the House adopting the code has continuing effect unless and until amended or rescinded by resolution of the House.*

1 *Minutes*, NSW Legislative Council, 24 March 2020, pp 883-886 (proof).

APPENDIX 6

PRESIDENTS OF THE LEGISLATIVE COUNCIL

Appointed by the Governor

Name	From	To
The Hon Sir Alfred Stephen	20 May 1856	28 Jan 1857*
The Hon John Hubert Plunkett QC	29 Jan 1857	6 Feb 1858*
The Hon Sir William Westbrooke Burton	9 Feb 1858	10 May 1861*
The Hon William Charles Wentworth	24 June 1861	10 Oct 1862*
The Hon Terence Aubrey Murray[1]	14 Oct 1862	22 June 1873†
The Hon John Hay[2]	8 July 1873	20 Jan 1892†
The Hon John Lackey[3]	26 Jan 1892	23 May 1903*
The Hon Francis Bathurst Suttor[4]	23 May 1903	4 April 1915†
The Hon Frederick Flowers	27 April 1915	14 Dec 1928†
The Hon John Beverley Peden KC, BA, LLB[5]	5 Feb 1929	22 April 1934

Chosen by the Legislative Council

The Hon Sir John Beverley Peden KCMG, KC, BA, LLB	24 April 1934	22 April 1946‡
The Hon Ernest Henry Farrar (Acting)[6]	27 July 1938	15 Dec 1938
The Hon Ernest Henry Farrar	30 April 1946	16 June 1952†
The Hon William Edward Dickson	18 Aug 1952	22 April 1964‡
	23 April 1964	22 May 1966†
The Hon Ernest Gerard Wright (Acting)[7]	23 May 1956	5 Dec 1956
The Hon Harry Vincent Budd[8]	9 Aug 1966	22 April 1970‡

1 Afterwards the Hon Sir Terence Murray.
2 Afterwards the Hon Sir John Hay KCMG.
3 Afterwards the Hon Sir John Lackey KCMG.
4 Afterwards the Hon Sir Francis Suttor.
5 Afterwards the Hon Sir John Peden KCMG, KC, BA, LLB.
6 Acting President during the absence of the Hon Sir John Peden.
7 Acting President during the absence of the Hon William Dickson.
8 Afterwards the Hon Sir Harry Vincent Budd.

Name	From	To
The Hon Sir Harry Vincent Budd	23 April 1970	5 Nov 1978‡
The Hon John Richard Johnson	7 Nov 1978	5 March 1984‡
	1 May 1984	3 July 1991δ
The Hon Max Frederick Willis RFD, ED, LLB	3 July 1991	29 June 1998*
The Hon Virginia Anne Chadwick BA, Dip Ed	29 June 1998	5 March 1999‡
The Hon Dr Meredith Anne Burgmann MA (Syd), PhD (Macq)	11 May 1999	2 March 2007‡
The Hon Peter Thomas Primrose B Soc Stud (Syd)	8 May 2007	17 Nov 2009*
The Hon Amanda Ruth Fazio	24 Nov 2009	3 May 2011+
The Hon Donald Thomas Harwin BEc(Hons)	3 May 2011	30 January 2017*
The Hon John Ajaka	21 February 2017	Still holds office

* Resigned
† Deceased
‡ Term as member expired
δ Removed from office
+ Not re-elected

APPENDIX 7

THE TITLE OF OCCUPANTS OF THE CHAIR IN THE CHAMBER

The occupant of the Chair in the House or in a Committee of the whole House is referred to as follows:

Occupant of the Chair in the House	Title
The President	Mr/Madam President
The Deputy President (when presiding in the temporary absence of the President from the chamber)	Mr/Madam Deputy President
The Deputy President (when presiding in the absence of the President due to illness or absence from the State)	Mr/Madam Acting President
The Assistant President	Mr/Madam Assistant President
A temporary Chair	Mr/Madam Deputy President

Occupant of the Chair in a Committee of the whole House	Title
The Deputy President and Chair of Committees	Mr/Madam Chair
A temporary Chair	Mr/Madam Deputy Chair

APPENDIX 8

DEPUTY PRESIDENTS AND CHAIRS OF COMMITTEES OF THE LEGISLATIVE COUNCIL

Chairmen of Committees

Name	From	To
The Hon George Allen	4 June 1856	15 Jan 1873*
The Hon Joseph Docker	15 Jan 1873	9 Feb 1875*
The Hon Sir Joseph George Long Innes	9 Feb 1875	16 Dec 1880
The Hon Joseph Docker	16 Dec 1880	11 Dec 1884†
The Hon William Richard Piddington	17 March 1885	25 Nov 1887†
The Hon Archibald Hamilton Jacob	1 Dec 1887	28 May 1900†
The Hon Joseph Trickett	13 June 1900	23 July 1912*
The Hon Broughton Barnabas O'Conor BA LLB	24 July 1912	22 April 1934
The Hon Ernest Henry Farrar[1]	2 May 1934	22 April 1946‡
Lieut-Colonel The Hon Thomas Steele[2]	30 April 1946	22 April 1949‡
	26 May 1949	11 March 1953
The Hon Ernest Gerard Wright[3]	11 March 1853	22 April 1955‡
	27 April 1955	22 April 1967‡
Brigadier The Hon Stanley Louis Mowbray Eskell ED[4]	2 Aug 1967	6 March 1969δ
The Hon Thomas Sidney McKay BA LLB	12 March 1969	5 Nov 1978‡
The Hon Clive Healey	8 Nov 1978	22 Feb 1988‡
The Hon Sir Adrian Solomons BA LLB	28 April 1988	2 Aug 1991*

1 Appointed Acting President during the absence of the President on leave from 27 July to 15 December 1938. Acted as Deputy President during the absence of the President owing to illness from 25 February to 8 April 1941, and on 28 May 1941.

2 Acted as Deputy President during the absence of the President owing to illness from 1 May to 16 June 1952.

3 Appointed Acting President during the absence of the President on leave from 23 May to 5 December 1956. Acted as Deputy President during the absence of the President on leave from 16 August to 25 October 1961.

4 Afterwards Major-General the Hon Stanley Stanley Louis Eskell ED.

Name	From	To
The Hon Duncan John Gay	3 July 1991	10 May 1999[+]
The Hon Anthony Bernard Kelly	11 May 1999	29 April 2003[+]
The Hon Amanda Ruth Fazio	30 April 2003	13 Oct 2003

Deputy Presidents and Chairs of Committees[5]

The Hon Amanda Ruth Fazio	14 Oct 2003	24 Nov 2009*
The Hon Kayee Frances Griffin	24 Nov 2009	4 March 2011[‡]
The Hon Jennifer Ann Gardiner BBus	3 May 2011	5 May 2015[‡]
The Hon Trevor John Khan B Juris LLB (UNSW)	5 May 2015	Still holds office

* Resigned
† Deceased
‡ Term as member expired
δ Removed from office
+ Not re-elected

5 On 14 October 2003, the Council adopted by sessional order new standing orders which adopted the gender neutral term 'Deputy President and Chair of Committees' instead of 'Chairman of Committees'.

APPENDIX 9

CLERKS OF THE LEGISLATIVE COUNCIL AND CLERKS OF THE PARLIAMENTS[1]

Name	From	To
Mr William Macpherson	15 May 1856	31 Dec 1859*
Mr Richard O'Connor	1 Jan 1860	31 Mar 1871*
Mr John Jackson Calvert ISO	1 April 1871	30 Sept 1914*[2]
Mr Waldemar Lionel Smirnoff Cooper	1 Oct 1914[3]	31 July 1932*
Mr Cecil Harnett Hamilton Calvert	1 Sept 1932	20 Mar 1939*
Mr William Kenneth Charlton	21 Mar 1939	10 Mar 1954*
Major-General John Rowlstone Stevenson CBE DSO ED	11 March 1954	4 July 1971†
Mr Alicen Walter Boxall Saxon	5 July 1971	21 June 1977*
Mr Leslie Arthur Jeckeln	22 June 1977	21 Aug 1989*[4]
Mr John Denton Evans BLegS	29 Aug 1989	28 July 2007*[5]
Ms Lynn Carole Lovelock BA(Hons) DipEd	29 July 2007	7 Oct 2011*
Mr David Michael Blunt MPhil LLB(Hons)	8 Oct 2011	Still holds office

* Resigned
† Deceased

1 The designation 'Clerk of the Parliaments' was adopted 15 February 1864. For further information, see the discussion in Chapter 6 (Office holders and administration of the Legislative Council) under the heading 'The Clerk'.

2 Mr Adolphus Clapin acted as Clerk during the absence of Mr John Calvert from 1 June 1882 to 19 July 1883 and from 15 May 1892 to 15 November 1893.

3 Mr Waldemar Cooper acted as Clerk from 1 October 1914 to 30 June 1915.

4 Mr John Evans acted as Clerk during the absence of Mr Leslie Jeckeln from 16 May 1986 to 17 August 1986 and from 29 May 1989 to 21 August 1989.

5 Ms Lynn Lovelock acted as Clerk during the absence of Mr John Evans from 31 May 1991 to 3 August 1991, from 8 October 2002 to 3 January 2003 and from 13 January 2007 to 28 July 2007.

APPENDIX 10

PARLIAMENTS AND SESSIONS SINCE THE 1978 RECONSTITUTION OF THE LEGISLATIVE COUNCIL

46th Parliament (1978 – 1981)

Session	Opening	Dates	Proclamation proroguing Parliament	Legislative Assembly dissolved
Session 1	Commission	7 Nov 1978 – 20 June 1979	20 June 1979	
Session 2	Official	14 Aug 1979 – 21 May 1980	21 May 1980	
Session 3	Official	12 Aug 1980 – 24 June 1981	24 June 1981	
Session 4	Official	12 Aug 1981 – 28 Aug 1981	28 Aug 1981	28 Aug 1981

47th Parliament (1981 – 1984)

Session	Opening	Dates	Proclamation proroguing Parliament	Legislative Assembly dissolved
Session 1	Commission	28 Oct 1981 – 26 May 1982	26 May 1982	
Session 2	Commission	30 June 1982 – 4 Aug 1982	4 Aug 1982	
Session 3	Official	17 Aug 1982 – 9 June 1983	9 June 1983	
Session 4	Official	16 Aug 1983 – 5 Mar 1984	5 March 1984	5 Mar 1984

48th Parliament (1984 – 1988)

Session	Opening	Dates	Proclamation proroguing Parliament	Legislative Assembly dissolved
Session 1	Commission	1 May 1984 – 25 July 1984	25 July 1984	
Session 2	Official	14 Aug 1984 – 5 Feb 1986	5 Feb 1986	
Session 3	Official	19 Feb 1986 – 22 Feb 1988	22 Feb 1988	22 Feb 1988

49th Parliament (1988 – 1991)				
Session	**Opening**	**Dates**	**Proclamation proroguing Parliament**	**Legislative Assembly dissolved**
Session 1	Commission	27 April 1988 – 10 Aug 1988	10 Aug 1988	
Session 2	Official	17 Aug 1988 – 14 Feb 1990	14 Feb 1990	
Session 3	Official	21 Feb 1990 – 8 Feb 1991	6 Feb 1991	
Session 4	Official	20 Feb 1991 – 3 May 1991	3 May 1991	3 May 1991

50th Parliament (1991 – 1994)				
Session	**Opening**	**Dates**	**Proclamation proroguing Parliament**	**Legislative Assembly expired**
Session 1	Commission	2 July 1991 – 29 Jan 1992	29 Jan 1992	
Session 2	Official[1]	20 Feb 1992 – 13 Jan 1993	13 Jan 1993	
Session 3	Official	24 Feb 1993 – 24 Dec 1993	24 Dec 1993	
Session 4	Official	1 Mar 1994 – 7 Dec 1994	7 Dec 1994	3 Mar 1995

51st Parliament (1995 – 1999)				
Session	**Opening**	**Dates**	**Proclamation proroguing Parliament**	**Legislative Assembly expired**
Session 1	Commission	2 May 1995 – 27 Jan 1996	27 Jan 1996	
Session 2	Commission	16 April 1996 – 30 July 1997	30 July 1997	
Session 3	Official	16 Sept 1997 – 3 Feb 1999	3 Feb 1999	5 Mar 1999

52nd Parliament (1999 – 2003)				
Session	**Opening**	**Dates**	**Proclamation proroguing Parliament**	**Legislative Assembly expired**
Session 1	Commission	11 May 1999 – 11 Aug 1999	6 Aug 1999	
Session 2	Official	7 Sept 1999 – 20 Feb 2002	14 Feb 2002	
Session 3	Official	26 Feb 2002 – 31 Jan 2003	29 Jan 2003	28 Feb 2003

1 The session was opened by Her Majesty Queen Elizabeth II.

53rd Parliament (2003 – 2007)				
Session	**Opening**	**Dates**	**Proclamation proroguing Parliament**	**Legislative Assembly expired**
Session 1	Commission	29 April 2003 – 19 May 2006	19 May 2006	
Session 2	Official	22 May 2006 – 15 Jan 2007	10 Jan 2007	2 Mar 2007

54th Parliament (2007 – 2011)				
Session	**Opening**	**Dates**	**Proclamation proroguing Parliament**	**Legislative Assembly expired**
Session 1	Commission	8 May 2007 – 22 Dec 2010	22 Dec 2010	4 Mar 2011

55th Parliament (2011 – 2015)				
Session	**Opening**	**Dates**	**Proclamation proroguing Parliament**	**Legislative Assembly expired**
Session 1	Commission	3 May 2011 – 8 Sept 2014	3 Sept 2014	
Session 2	Official	9 Sept 2014 – 2 Mar 2015	25 Feb 2015	6 Mar 2015

56th Parliament (2015 – 2019)				
Session	**Opening**	**Dates**	**Proclamation proroguing Parliament**	**Legislative Assembly expired**
Session 1	Commission	5 May 2015 – 25 Feb 2019	20 Feb 2019	1 Mar 2019

57th Parliament (2019 – 2023)				
Session	**Opening**	**Dates**	**Proclamation proroguing Parliament**	**Projected expiry of Legislative Assembly**
Session 1	Commission	2 May 2019 – (ongoing)		3 Mar 2023

APPENDIX 11

TIME LIMITS ON DEBATES AND SPEECHES IN THE LEGISLATIVE COUNCIL

The following time limits on debates and speeches apply in the Legislative Council:

Question time (SO 64) (sessional order adopted 8 May 2019) Question: 1 min Answer: 3 mins Answer to supplementary: 2 mins *Note: A minister may seek the leave of the House to extend the time for an answer by 1 minute.*	**Take note of answers to questions** (sessional order adopted 8 May 2019) Debate: 30 mins Speakers: 3 mins *Debate interrupted 3 minutes before end of debate time (ie after 27 minutes) to allow a minister to speak, if desired.*
Ministerial statements (SO 48) Minister: no time limit Lead opposition: equal time to respond *Note: The clock counts up and down.*	**Adjournment of the House** (SO 31) Debate: 30 mins* Speakers: 5 mins ** Note: In circumstances where a minister wishes to speak or is speaking in reply, the question is put at the conclusion of the minister's remarks.*

Government bills
(sessional order adopted 8 May 2019)

Second and third readings

Minister/lead opposition/ first cross-bench speaker:	40 mins
All other speakers:	20 mins
Minister in reply:	20 mins

Note: Members may move that their time limit be extended by not more than 10 minutes. The question on the motion is put without debate.

Committee of the whole House

All speakers:	15 mins

Note: The member speaking may seek the leave of a committee to continue speaking for a period of no longer than 15 minutes.

Private members' bills
(SO 187)

Leave to bring in bill

Debate:	60 mins
Speakers:	10 mins
Mover in reply:	10 mins

Debate interrupted 10 minutes before the end of the debate time (ie after 50 minutes) to allow the mover to speak in reply.

Second and third readings

Mover:	30 mins
All other speakers:	20 mins
Mover in reply:	20 mins

Private members' motions
(SO 186) (sessional order adopted 8 May 2019)

Debate:	120 mins
Mover:	20 mins
All other speakers:	15 mins
Mover in reply:	5 mins

Debate interrupted after 120 minutes to allow the mover to speak in reply for not more than 5 minutes.

Note: On interruption, the mover or any member who has not already spoken may move a motion to extend overall debate time and set speaker time limits. The question is put without debate, but may be amended.

Private members' short form motions
(sessional order adopted 8 May 2019)

Debate:	30 mins
Mover:	5 mins
Speakers:	3 mins
Mover in reply:	3 mins

Debate is interrupted after 30 minutes to allow the mover to speak in reply for not more than 3 minutes.

Committee reports and government responses
(SO 232) (sessional order adopted 8 May 2019)

Chair/mover:	15 mins
All other speakers:	10 mins
Chair/mover in reply:	10 mins

Private members' statements
(sessional order adopted 8 May 2019)

Debate:	30 mins
Speakers:	3 mins

Matters of public importance (SO 200)	**Urgency motion** (SO 201)
Question of urgency Mover/minister: 10 mins Debate Debate: 90 mins Mover/minister/ lead opposition:* 15 mins All other speakers: 10 mins Mover in reply: 10 mins *Debate interrupted after 90 minutes to allow the mover to speak in reply for not more than 10 minutes.* * *When the motion is moved by a government member.*	Question of urgency Mover/minster: 10 mins Debate Mover/minister/ lead opposition:* 15 mins All other speakers: 10 mins Mover in reply: 10 mins * *When the motion is moved by a government member.*
Disallowance motion (SO 78)	**Suspension of standing orders** (SO 198) (sessional order adopted 8 May 2019)
Debate: 90 mins Mover/minister: 15 mins All other speakers: 10 mins Mover in reply: 10 mins *Debate is interrupted after 90 minutes to allow the mover to speak in reply.*	SSO for an order for papers (SO 52) or an Address to the Governor (SO 53) Mover/minister only: 5 mins SSO for all other purposes Debate: 30 mins Speakers: 5 mins
Adoption of the recommendations of the Selection of Bills Committee (resolution adopted 8 May 2019)	**Cut-off dates for government bills** (sessional order adopted 8 May 2019)
Debate: 30 mins Speakers: 5 mins Mover in reply: 5 mins *Debate is interrupted after 30 minutes to allow the mover to speak in reply for not more than 5 minutes.*	Question that the bill be declared urgent Minister/Lead Opposition: 10 mins Two cross-bench members: 10 mins (from different parties)

Consideration of a document (SO 57) (sessional order adopted 8 May 2019) Debate 60 mins Chair/mover: 15 mins All other speakers: 10 mins Mover in reply: 10 mins *Debate interrupted after 60 minutes to allow the mover to speak in reply for not more than 10 minutes.*	

APPENDIX 12

PRIVATE MEMBERS' BILLS INTRODUCED IN THE COUNCIL THAT HAVE RECEIVED ASSENT SINCE 1978

Private members' public bills are a relatively small proportion of the legislation dealt with by the House. The Council passes very few private members' public bills, and even fewer have been agreed to by the Assembly. Equally, there are few examples of private members' public bills introduced and passed in the Assembly, and subsequently agreed to by the Council.

Nevertheless, there are significant pieces of legislation on the New South Wales statute book that originated as private members' public bills.

The following is a table of private members' public bills that originated in the Council which received assent and became acts of the Parliament since the reconstitution of the Council at the commencement of the 46th Parliament in 1978.[1]

Session	Member who initiated the Bill	Bill name	Bill summary	Assent
46th Parliament (1978 – 1981)				
Session 1		-		
Session 2		-		
Session 3		-		
Session 4		-		
47th Parliament (1981 – 1984)				
Session 1		-		
Session 2		-		
Session 3		-		
Session 4		-		

1 Prior to 1978, the previous private members' public bills that originated in the Council and which received assent and became acts of the Parliament were the Cathedral Close Amending Bill 1916 and the Mackellar's Crimes (Girls' Protection) Bill 1910.

Session	Member who initiated the Bill	Bill name	Bill summary	Assent
48th Parliament (1984 – 1988)				
Session 1		-		
Session 2		-		
Session 3		-		
49th Parliament (1988 – 1991)				
Session 1		-		
Session 2		-		
Session 3		-		
Session 4		-		
50th Parliament (1991 – 1994)				
Session 1	The Revd the Hon F J Nile	The Tobacco Advertising Prohibition Bill 1991	A bill for an Act to prohibit the advertising of tobacco and tobacco products, trademarks, brand names and logos.	17/12/1991
Session 2		-		
Session 3	The Revd the Hon F J Nile	The Constitution (Legislative Council Reconstitution) Savings Bill 1993	A bill for an Act to make savings provisions in respect of certain entitlements of three former members of the Legislative Council.	2/6/1993
	The Revd the Hon F J Nile	The Letona Co-operative (Financial Assistance) Bill 1993	A bill for an Act to recommend the provision of Government financial assistance to the Letona Co-operative Limited.	25/11/1993
Session 4		-		
51st Parliament (1995 – 1999)				
Session 1	The Hon R S L Jones	The National Parks and Wildlife Amendment (Game Birds Protection) Bill 1995	A bill for an Act to prevent certain game birds from being taken or killed for sporting or recreational purposes.	30/11/1995
Session 2	The Revd the Hon F J Nile	The Smoking Regulation Bill 1996	A bill for an Act to regulate smoking in enclosed public places.	29/5/1997
Session 3		-		

Session	Member who initiated the Bill	Bill name	Bill summary	Assent
52nd Parliament (1999 – 2003)				
Session 1		-		
Session 2	The Hon J S Tingle	The Workplace (Occupants Protection) Bill 2000	A bill for an Act to provide protection and immunity to occupants of workplaces who defend themselves, other occupants and their property against suspected offenders.	4/4/2001
	The Hon A G Corbett	The Crimes Amendment (Child Protection – Physical Mistreatment) Bill 2001	A bill for an Act to limit the use of excessive physical force to punish children.	5/12/2001
Session 3	The Hon J S Tingle	The Crimes (Sentencing Procedures) Amendment (General Sentencing Principles) Bill 2001	A bill for an Act to make further provision with respect to sentencing under the Crimes (Sentencing Procedure) Act 1999.	9/4/2002
	The Hon D E Oldfield	The Public Health Amendment (Juvenile Smoking) Bill 2002 (No 2)	A bill for an Act with respect to the use of tobacco products and non-tobacco smoking products by minors and the availability of tobacco products to them.	28/11/2002
53rd Parliament (2003 – 2007)				
Session 1	The Hon P J Breen	The State Arms, Symbols and Emblems Bill 2003	A bill for an Act with respect to the use of the arms, symbols and emblems of the State.	2/3/2004
	The Hon Dr A Chesterfield-Evans	The Sydney University Settlement Incorporation Amendment Bill 2005	A bill for an Act to amend the Sydney University Settlement Incorporation Act 1959 to make further provision with respect to the Constitution of the Sydney University Settlement and the disposal of property of the Settlement.	10/6/2005

Session	Member who initiated the Bill	Bill name	Bill summary	Assent
Session 2	Mr I Cohen	The Snowy Hydro Corporatisation Amendment (Parliamentary Scrutiny of Sale) Bill 2006	A bill for an Act to prevent the sale of shares in Snowy Hydro Limited without the approval of both Houses of Parliament.	13/6/2006
	The Hon J S Tingle	The Firearms Amendment (Good Behaviour Bonds) Bill 2006	A bill for an Act to limit the disqualification of persons subject to good behaviour bonds from holding firearms licences or permits or from dealing in firearms.	27/10/2006
54th Parliament (2007 – 2011)				
Session 1	The Hon R Smith	The Firearms Amendment Bill 2008	A bill for an Act to make further provision with respect to the regulation and control of firearms.	1/7/2008
	The Revd the Hon F J Nile	The Education Amendment (Educational Support for Children with Significant Learning Difficulties) Bill 2008	A bill for an Act to ensure that children with significant learning difficulties are included in the NSW Government's Special Education Initiative for students with special needs.	8/12/2008
	The Revd the Hon F J Nile	The Crimes Legislation Amendment (Possession of Knives in Public) Bill 2009	A bill for an Act to increase the maximum penalty for certain offences relating to the possession of knives and other dangerous implements in public places and schools.	3/11/2009
	The Hon R Smith	The Firearms Legislation Amendment Bill 2010	A bill for an Act to make further provision with respect to the regulation and control of firearms.	4/11/2010
55th Parliament (2011 – 2015)				
Session 1	The Hon R L Brown	The Marine Parks Amendment (Moratorium) Bill 2011	A bill for an Act to amend the Marine Parks Act 1997 to impose a moratorium on the declaration of additional marine parks or the expansion of sanctuary zones within existing marine parks.	13/9/2011

Session	Member who initiated the Bill	Bill name	Bill summary	Assent
	The Revd the Hon F J Nile	The Constitution Amendment (Restoration of Oaths of Allegiance) Bill 2011	A bill for an Act to amend the Constitution Act 1902 to provide that Members of Parliament and Ministers may make an oath or affirmation of allegiance to Her Majesty Queen Elizabeth II, Her heirs and successors as an alternative to the current pledge of loyalty to Australia and the peoples of New South Wales.	5/6/2012
	The Hon R L Brown	The Game and Feral Animal Control Amendment Bill 2012	A bill for an Act to amend the Game and Feral Animal Control Act 2002 to make further provision with respect to the management and regulation of the hunting of game; and for other purposes.	27/6/2012
	The Hon R L Brown	The Game and Feral Animal Control Further Amendment Bill 2012	A bill for an Act to amend the Game and Feral Animal Control Act 2002 and the National Parks and Wildlife Act 1974 to make provision with respect to the killing of native game birds on private land; and for other purposes.	26/11/2012
	The Revd the Hon F J Nile	The Crimes Amendment (Provocation) Bill 2014	A bill for an Act to amend the Crimes Act 1900 in relation to the partial defence of provocation to a charge of murder.	20/5/2014
	The Revd the Hon F J Nile	The St Shenouda Coptic Orthodox Monastery (NSW) Property Trust Bill 2014	A bill for an Act to constitute the St Shenouda Coptic Orthodox Monastery (NSW) Property Trust and to specify its functions, and to provide for the vesting of certain property in the Trust; and for other purposes.	26/8/2014

Session	Member who initiated the Bill	Bill name	Bill summary	Assent
Session 2	The Hon R Borsak	The City of Sydney Amendment (Elections) Bill 2014	A bill for an Act to amend the City of Sydney Act 1988 to make further provision in relation to elections for the Council of the City of Sydney; and for other purposes.	25/9/2014
56th Parliament (2015 – 2019)				
Session 1	The Hon P G Sharpe	The Public Health Amendment (Safe Access to Reproductive Health Clinics) Bill 2018	A bill for an Act to amend the Public Health Act 2010 to provide for safe access zones around reproductive health clinics at which abortions are provided.	15/6/2018
	The Hon P A Green	The Modern Slavery Bill 2018	A bill for an Act to make provision with respect to slavery, slavery-like practices and human trafficking and to provide for the appointment and functions of an Anti-Slavery Commissioner, and for other purposes.	27/6/2018
57th Parliament (2019 – 2023)				
Session 1	-	-		

There is also a number of private members' public bills that originated in the Legislative Assembly which have received assent and become acts of the Parliament. Some of the most significant of those bills are:

- The Endangered Fauna (Interim Protection) Bill 1991, a bill to make further provision for the protection of fauna.
- The Anti-Discrimination (Homosexual Vilification) Amendment Bill 1993, a bill to render vilification on the ground of homosexuality unlawful.
- The Land Acquisition (Just Terms Compensation) Amendment Bill 1993, a bill to amend the Land Acquisition (Just Terms Compensation) Act 1991 relating to the amount of compensation determined by the Valuer-General.
- The Public Servant Housing Authority (Dissolution) Bill 1996, a bill to dissolve the Public Servant Housing Authority of New South Wales.

- The Traffic Amendment (Learner Driver Supervisors) Bill 1996, a bill relating to supervisors of learner drivers.
- The Trustee Amendment Bill 1996, a bill to increase the amount of trust money that trustees may spend on improvements or repairs relating to trust property without first obtaining the authority of the Supreme Court.
- The Parliamentary Precincts Bill 1997, a bill to define the Parliamentary precincts and to provide for the control, management and security of those precincts and adjoining areas.
- The Bail Amendment (Confiscation of Passports) Bill 2000, a bill to require bail granted to persons accused of offences occasioning death to be made subject, except in special circumstances, to conditions requiring the giving up of passports held by them.
- The Environmental Planning and Assessment Amendment (Illegal Backpacker Accommodation) Bill 2002, a bill in relation to evidence about the use of premises as a backpackers' hostel.
- The Constitution Amendment (Pledge of Loyalty) Bill 2006, a bill to require members of Parliament and ministers to take a pledge of loyalty to Australia and to the people of New South Wales instead of swearing allegiance to the Queen, and to revise the oaths taken by Executive Councillors.
- The Freedom of Information Amendment (Open Government – Disclosure of Contracts) Bill 2006, a bill to require publication of government contracts.
- The Food Amendment (Beef Labelling) Bill 2008, a bill with respect to the advertising, packaging and labelling of beef.
- The Parliamentary Remuneration Amendment (Salary Packaging) Bill 2009, a bill with respect to the provision of employment benefits and the making of superannuation contributions for members of Parliament by way of salary sacrifice.
- The Adoption Amendment (Same Sex Couples) Bill 2010 (No 2), a bill to enable couples of the same sex to adopt children.
- The Ombudsman Amendment (Removal of Legal Professional Privilege) Bill 2010, a bill to remove provisions that prevent the Ombudsman from obtaining information that is subject to the client legal privilege of a public authority.
- The Local Government Amendment (Confiscation of Alcohol) Bill 2010, a bill to amend the Local Government Act 1993 to provide for the confiscation of alcohol in alcohol prohibited areas.

- The Local Government Amendment (Roadside Vehicle Sales) Bill 2011, a bill to amend the Local Government Act 1993 to enable councils to prohibit roadside vehicle sales.
- The Criminal Records Amendment (Historical Homosexual Offences) Bill 2014, a bill to allow convictions for certain homosexual sexual conduct offences to become extinguished.
- The Reproductive Health Care Reform Bill 2019, a bill to reform the law relating to terminations of pregnancies and regulate the conduct of health practitioners in relation to terminations.

APPENDIX 13

KEY EVENTS IN THE ANNUAL BUDGET PROCESS IN THE LEGISLATIVE COUNCIL

The key events in the annual budget process in the Legislative Council are described below, although the order in which they occur may vary from year to year.

Commonwealth Government budget handed down	The Commonwealth Government budget, including Commonwealth Government funding for New South Wales, is traditionally handed down on the second Tuesday in May for the forthcoming financial year.
New South Wales Government budget handed down	The New South Wales Government budget is subsequently handed down on the Tuesday of a sitting week in late May or June for the forthcoming financial year. The Treasurer's budget speech is delivered by the Treasurer in the Legislative Assembly and the budget papers tabled in that House by the Treasurer or Premier. Where the Treasurer is a member of the Council, the Assembly by message to the Council requests the attendance of the Treasurer in that House to deliver the budget speech. The appropriation bills are subsequently debated in the Assembly and forwarded to the Council for concurrence, usually by the Thursday of the same sitting week.
Budget papers tabled in the Council	Following the delivery of the Treasurer's budget speech in the Assembly and the tabling of the budget papers in that House, the budget papers are also tabled in the Council, generally on the same day (Tuesday), excluding Budget Paper No 5 (the appropriation bills).
Take note debate on the budget	Following the tabling of the budget papers in the Council, a motion is moved for a take note debate on the budget papers. This debate is wide-ranging, addressing any aspect of the budget and government administration. The debate can take several months to complete. For further information on the budget estimates take note debate, see the discussion in Chapter 10 (The conduct of proceedings) under the heading 'Budget estimates 'take note' debate'.

Appropriation bills debated in the Council

On their receipt from the Assembly, the Council debates the budget bills in the usual way. The capacity of the Council to amend or reject the budget bills is discussed in more detail in Chapter 17 (Financial legislation). Different considerations apply to different types of appropriation bills, and also to the various appropriations within bills. Following debate, the bills are returned to the Assembly, with or without amendments or suggested amendments.

Referral of the budget estimates inquiry

Following the tabling of the budget papers and the passage of the annual appropriation bills, the House adopts a resolution or resolutions referring the budget estimates and related papers for the forthcoming financial year to the Portfolio Committees for inquiry and report. The resolution or resolutions may specify matters such as the timing of estimates hearings and the portfolios allocated to each committee for examination on particular days.

Budget estimates hearings

As part of the budget estimates inquiry, the Portfolio Committees conduct an initial round of public hearings in or around August/ September, a supplementary round as required in or around November and a further additional round of hearings in or around February/ March the following calendar year. For further information on the budget estimates process, see the discussion in Chapter 20 (Committees) under the heading 'Budget estimates'.

Debate on budget estimates reports

At the conclusion of their hearings as part of the budget estimate inquiry, the chairs of the Portfolio Committees table the reports of the committees in the House. These reports are subsequently debated. The government responses to the reports are also later tabled and debated.

APPENDIX 14

THE FORM OF A PETITION TO THE LEGISLATIVE COUNCIL

PETITION

TO THE HONOURABLE THE PRESIDENT AND MEMBERS OF THE LEGISLATIVE COUNCIL OF NEW SOUTH WALES

This Petition of certain … [*Identify here, in general terms, who the petitioners are, eg: citizens of New South Wales or residents of (name of city, town, suburb)*]

states that: … [*Briefly give here the facts or circumstances of the case which the petitioners wish to bring to the notice of the House.*]

Your petitioners request that the House will … [*Outline here the request for action that the House should or should not take.*]

Name	Address	Signature

Subsequent pages of a petition must repeat the request from the first page of the petition.

APPENDIX 15

PROCEDURAL FAIRNESS RESOLUTION FOR INQUIRY PARTICIPANTS

The Legislative Council has adopted the following procedures to provide proper process and fair treatment for inquiry participants:

1. Inviting and summoning witnesses

A witness will be invited to give evidence at a hearing unless the committee decides that a summons is warranted.

2. Information for witnesses

A witness will normally be given reasonable notice of their hearing and will be provided with the inquiry terms of reference, a list of committee members and a copy of these procedures.

3. Opportunity to make a submission before a hearing

A witness will normally be given the opportunity to make a submission before their hearing.

4. **Opportunity to request a private (*in camera*) hearing**

A witness may request, before or during their hearing, that some or all of their evidence be heard in private (*in camera*). The committee will consider this request and if it declines, will advise the witness of the reasons why.

5. Publication of evidence taken in private (*in camera*)

Prior to their private (*in camera*) hearing, a witness will be informed that the committee and the Legislative Council have the power to publish some or all of the evidence given. If the committee intends to publish, it will normally consult the witness, advise them of the outcome, and give reasonable notice of when the evidence will be published.

6. Attendance with a legal adviser

With the prior agreement of the committee, a witness may be accompanied by and have reasonable opportunity to consult a legal adviser during their hearing.

The legal adviser cannot participate in the hearing and will not be sworn in or give evidence, unless the committee decides otherwise.

7. Attendance with a support person

With the prior agreement of the committee, a witness may be accompanied at their hearing by a support person. The support person will not be sworn in or give evidence, unless the committee decides otherwise.

8. Witnesses to be sworn

At the start of their hearing a witness will, unless the committee decides otherwise, take an oath or affirmation to tell the truth, and the provisions of the *Parliamentary Evidence Act 1901* will then apply.

9. Chair to ensure relevance of questions

A committee chair will ensure that all questions put to witnesses are relevant to the inquiry.

10. Questions to public officials

Public officials will not be asked to give opinions on matters of policy, and will be given reasonable opportunity to refer questions to more senior officials or to a minister.

11. Questions on notice

A witness may request to take a question on notice and provide the answer in writing at a later date to be determined by the committee.

12. Objections to answering questions

Where a witness objects to answering a question, they will be invited to state the grounds for their objection. If a member seeks to press the question, the committee will consider whether to insist on an answer, having regard to the grounds for the objection, the relevance of the question to the inquiry terms of reference, and the necessity to the inquiry of the information sought. If the committee decides that it requires an answer, it will inform the witness of the reasons why and may consider allowing the witness to answer the question on notice or in private (*in camera*).

Witness appearing by invitation

(a) If a witness who appears by invitation continues to refuse to answer the question, the committee may consider summoning the witness to reappear later, and will advise the witness that as they will be under oath and so subject to section 11 of the *Parliamentary Evidence Act 1901*, they may be compelled to answer the question.

Witness appearing under summons

(b) The continued refusal by a witness, having been summoned, to answer the question while under oath, may constitute a contempt of parliament under the *Parliamentary Evidence Act 1901*, and the committee may report the matter to the Legislative Council.

13. Evidence that may seriously damage the reputation of a third party

Evidence about to be given

(a) Where a committee anticipates that evidence about to be given may seriously damage the reputation of a person or body, the committee may consider hearing the evidence in private (*in camera*).

Evidence that has been given

(b) Where a witness gives evidence in public that may seriously damage the reputation of a person or body, the committee may consider keeping some or all of the evidence confidential.

Opportunity to respond

(c) Where a witness gives evidence that may seriously damage the reputation of a person or body, the committee may give the person or body reasonable access to the evidence, and the opportunity to respond in writing or at a hearing.

14. Evidence that places a person at risk of serious harm

Where a witness gives evidence that places a person at risk of serious harm, the committee will immediately consider expunging the information from the transcript of evidence.

15. Tendering documents

A witness may tender documents during their hearing. The committee will decide whether to accept and to publish such documents.

16. Inviting and ordering the production of documents

A witness will not be invited to produce documents unless the committee decides that an order to produce the documents is warranted.

17. Requests for confidentiality

A person or body may request that documents provided to a committee be kept confidential in part or in full. The committee will consider the request and if it declines, will advise the person or body of the reasons why, and give reasonable notice of when the documents will be published.

18. Transcripts

A witness will be given the opportunity to correct transcription errors in their transcript of evidence. Amendments to or clarifications of evidence may be requested in writing.

19. Treatment of witnesses

Witnesses will be treated with courtesy at all times.

20. Improper treatment of inquiry participants

Where a committee has reason to believe that a person has been improperly influenced in respect of the evidence they may give to a committee, or has been penalised, injured or threatened in respect of evidence given, the committee will take all reasonable steps to ascertain the facts of the matter. If the committee is satisfied that such action may have occurred, the committee may report the matter to the Legislative Council.

21. Inquiry participants before the Privileges Committee

Where the Privileges Committee inquires into a matter which may involve an allegation of contempt, the committee may adopt additional procedures as it sees fit in order to ensure procedural fairness and the protection of inquiry participants.

This resolution has continuing effect until amended or rescinded.

APPENDIX 16

CASUAL VACANCIES – SENATE (NEW SOUTH WALES) SINCE 1901

Outgoing member	Date of vacancy	Cause of vacancy	Party	New member	Date of becoming a member	Party
R E O'Connor	27/9/1903	Resignation	Protectionist	C K Mackellar	8/10/1903	Protectionist
H E Pratten	23/11/1921	Resignation	Nationalist	H C Garling	15/12/1921	Nationalist
E D Millen	14/9/1923	Death	Nationalist	W Massey-Greene	17/10/1923	Nationalist
A McDougall	14/10/1924	Death	ALP	J M Power	20/11/1924	ALP
J M Power	13/1/1925	Death	ALP	W A Gibbs	1/4/1925	ALP
J Grant	19/5/1928	Death	ALP	A Gardiner	5/6/1928	ALP
W L Duncan	1/12/1931	Resignation	National Party	P F Mooney	23/12/1931	Lang Labor
L T Courtenay	11/7/1935	Death	United Australia	J G D Arkins	26/9/1935	United Australia
W P Ashley	27/6/1958	Death	ALP	J P Ormonde*	30/7/1958	ALP
W H Spooner	14/7/1965	Resignation	Liberal Party	R C Cotton*	4/8/1965	Liberal Party
G C McKellar	13/4/1970	Death	Country	D B Scott	6/8/1970	Country
J P Ormonde	30/11/1970	Death	ALP	J R McClelland	16/3/1971	ALP
L K Murphy	10/2/1975	Resignation	ALP	C E Bunton	27/2/1975	Independent[1]
R C Cotton	13/7/1978	Resignation	Liberal Party	C J G Puplick*	26/7/1978	Liberal Party
J R McClelland	21/7/1978	Resignation	ALP	K W Sibraa*	9/8/1978	ALP
D McClelland	23/1/1987	Resignation	ALP	S M West	11/2/1987	ALP
A T Gietzelt	27/2/1989	Resignation	ALP	J P Faulkner	4/4/1989	ALP
P Baume	28/1/1991	Resignation	Liberal Party	J W Tierney*	11/2/1991	Liberal Party
P A McLean	23/8/1991	Resignation	Australian Democrats	K N Sowada	29/8/1991	Australian Democrats

1 For further information, see the discussion in Chapter 24 (Casual vacancies in the Australian Senate) under the heading 'Eligibility to fill a casual vacancy in the Australian Senate'.

Outgoing member	Date of vacancy	Cause of vacancy	Party	New member	Date of becoming a member	Party
K W Sibraa	1/2/1994	Resignation	ALP	B J Neal	8/3/1994	ALP
B K Bishop	24/2/1994	Resignation	Liberal Party	R L Woods	8/3/1994	Liberal Party
G F Richardson	25/3/1994	Resignation	ALP	M G Forshaw	10/5/1994	ALP
S Loosley	21/5/1995	Resignation	ALP	T C Wheelwright	25/5/1995	ALP
M Baume	9/9/1996	Resignation	Liberal Party	W Heffernan	18/9/1996	Liberal Party
R L Woods	7/3/1997	Resignation	Liberal Party	M Payne	9/4/1997	Liberal Party
B K Childs	10/9/1997	Resignation	ALP	G Campbell	17/9/1997	ALP
B J Neal	3/9/1998	Resignation	ALP	S P Hutchins	14/10/1998	ALP
D Brownhill	14/4/2000	Resignation	National Party	J A L Macdonald	4/5/2000	National Party
J Tierney	14/4/2005	Resignation	Liberal Party	C A Fierravanti-Wells	5/5/2005	Liberal Party
H L Coonan	22/8/2011	Resignation	Liberal Party	A Sinodinos	13/10/2011	Liberal Party
M V Arbib	5/3/2012	Resignation	ALP	R J Carr	6/3/2012	ALP
M J Thistlethwaite	9/8/2013	Resignation	ALP	S Dastyari	21/8/2013	ALP
R J Carr	24/10/2013	Resignation	ALP	D M O'Neill	13/11/2013	ALP
R J Carr	1/7/2014	Resignation[1]	ALP	D M O'Neill	2/7/2014	ALP
J P Faulkner	6/2/2015	Resignation	ALP	J McAllister	6/5/2015	ALP
S Dastyari	25/1/2018	Resignation	ALP	K K Keneally	14/2/2018	ALP
L Rhiannon	15/8/2018	Resignation	The Greens	M S Faruqi	15/8/2018	The Greens
D E Leyonhjelm	1/3/2019	Resignation	Liberal Democrats	D P J Spender*	20/3/2019	Liberal Democrats
A Sinodinos	11/11/2019	Resignation	Liberal Party	A J Molan	14/11/2019	Liberal Party

* Appointed by the Governor with the advice of the Executive Council and later confirmed by the Parliament.

1 For further information, see the discussion in Chapter 24 (Casual vacancies in the Australian Senate) under the heading 'Casual vacancies in respect of a seat in a forthcoming Senate'.

TABLE OF CASES

TABLE OF STANDING ORDERS

INDEX

This is an index to the subjects covered in this work. Cases (see p 935) and Standing Orders (see p 939) have been indexed separately. All entries refer to the Legislative Council and to New South Wales unless otherwise noted. Abbreviations in index: LA for Legislative Assembly; LC for Legislative Council; NSW for New South Wales; s for section. Page numbers in bold indicate major references, and those followed by 'n' indicate a footnote on that page.

WILEY END USER LICENSE AGREEMENT

Go to www.wiley.com/go/eula to access Wiley’s ebook EULA.