



LEGISLATIVE
ASSEMBLY

NSW Legislative Assembly Practice, Procedure and Privilege

Speaker's Foreword

Parliamentary practice and procedure is a topic that few parliamentarians ever really appreciate and become experts in. Accordingly the knowledge and experience of the Clerks at the Table are vital to the effective functioning of the Parliament and to the Presiding Officers in particular.

This publication is valuable piece of work that will assist all parliamentarians and parliamentary staff in their understanding of the way Parliament works in New South Wales. The current Table Officers of the Legislative Assembly have produced practice manual that consolidates and builds on the knowledge that Clerks have accumulated over the past 151 years.

This publication goes beyond anything previously produced by the Legislative Assembly and is a testament to the hard work and dedication of the current Table Officers and other Parliamentary staff.

Richard Torbay
Speaker

Preface

This first edition of *New South Wales Legislative Assembly Practice, Procedure and Privilege* is a culmination of a number of years of work. The publication has been previously published in various forms as a “work in progress” document. The first edition has completed this “work in progress” by expanding the text that had previously been written and including a new section on parliamentary privilege.

The New South Wales Legislative Assembly has 150 years of practice and precedents that supplement the standing and sessional orders adopted by the House. This has meant that there are few instances where the House does not have some precedent to follow. It was felt that it was time to document the practice and procedures of the House so to provide a valuable reference tool. The publication includes reference to both modern and past practice, where it is relevant.

Whilst the House has developed its own practice and precedents, reference is also made to authorities such as *May's Parliamentary Practice*, and *House of Representatives Practice*, where the material enhances the understanding of how certain practices and procedures are applied in the Legislative Assembly.

In relation to parliamentary privilege, reference is made to numerous court cases across Westminster jurisdictions and to the works of Professor Enid Campbell and Professor Gerard Carney on this subject. These references have provided valuable information that contribute to an understanding of the principles of parliamentary privilege that operate in our jurisdiction - one that has not legislated to define its privileges.

The publication is current as at July 2007. It includes newly adopted standing orders that were adopted by the House on 21 November 2006 and took effect from the commencement of the 54th Parliament in May 2007. It also includes reference to the recent amendment to the *Constitution Act 1902*, which enables the Speaker to participate in debate and vote in the House when not presiding in the Chair.

I am grateful for the work of Mark Swinson, who has applied his substantial knowledge of the practice and procedures of the House to ensure that the information provided is accurate and Stephanie Hesford, who has devoted a large proportion of time to update and expand the text that had previously been written on practice and procedure by Mark and others, and for drafting a new section on parliamentary privilege. Thanks are also given to colleagues who have made contributions to the text and have commented on the draft. In particular I would like to thank Les Gönye, Ronda Miller, Russell Keith and Helen Minnican.

It is hoped that this work will prove to be a useful resource for the Speaker, members and staff of the Legislative Assembly and interested observers.

Russell D Grove
Clerk of the Legislative Assembly

The online version of this first edition has been updated to April 2013 to reflect changes to practice and amendments to the Standing Orders since July 2007. The additions appear in blue font and replace or add to certain sections of the text. (added, April 2013).

Under review

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Under review

Chapter 1 Sources of Information

The Legislative Assembly derives its powers from the provisions of the *Constitution Act 1902*, its Standing Orders, sundry State, Commonwealth and Imperial statutes, convention, custom and decisions of Speakers.

1.1 Constitution Act 1902

The New South Wales *Constitution Act 1902* does not contain a definition of "Parliament" nor "Legislative Assembly". It does however, in s. 3, offer a definition of "The Legislature" which is: "...His Majesty the King with the advice and consent of the Legislative Council and Legislative Assembly."

The Legislature, by virtue of s. 5 of the same Act, is charged with power subject to the *Commonwealth of Australia Constitution Act* (which gives the Commonwealth specific law making powers and provides that, in a case of a conflict, a Commonwealth Act will be paramount) "...to make laws for the peace, welfare and good government of New South Wales in all cases whatsoever..." with the proviso 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 Constitution Act also contains other important provisions affecting the operation of the Parliament:

- Section 5A deals with the situation where there is a disagreement between the two Houses in relation to any bill appropriating revenue or moneys for the ordinary annual services of the Government (i.e. the budget). Disagreement arises if the Council rejects or fails to pass such a bill within one month or returns it to the Assembly suggesting an amendment to which the Assembly does not agree.
- Section 5B provides a procedure for the resolution of disagreements over bills other than for appropriation bills. For further information on this procedure see section 10.3.3.2 of Part One.
- Sections 7A and 7B contain "manner and form" prescriptions in regard to a number of important matters in respect of the Legislative Assembly and Legislative Council. Section 7A provides that a bill which proposes to abolish or dissolve the Council, alter its powers, repeal or amend certain sections of the Constitution Act dealing with Council elections, members' term of service, filling of vacancies and other matters, must be given approval by a referendum (held not sooner than two months after its passage) before being presented to the Governor for assent. Provisions touching on those persons capable of being elected and sitting and voting as members of either House and the circumstances in which a seat becomes vacant must also be dealt with in accordance with s. 7A.
- Section 7B provides for a referendum to be held in relation to provisions of bills which repeal or amend the Constitution Act in respect of compulsory voting, single member electorates, distribution of electoral districts and

number of voters in districts, the conduct of elections, and the provisions in Part 9 relating to the judiciary.

Special provisions relating to the Assembly (Part 3, Division 3) contain provisions on:

- convocation of an Assembly by the Governor;
- four year maximum duration of an Assembly;
- number of members 93;
- single member electorates;
- distribution of electoral districts;
- number of voters in a district;
- conduct of Legislative Assembly elections (also Seventh Schedule);
- proceeding to business although up to 5 writs of election are not returned;
- recognition of the Office of Speaker, election of Speaker by secret ballot and casting vote;
- absence of Speaker from the State;
- quorum (20 in addition to the [member presiding](#)); and
- resignation of seats by members.

Other important provisions are:

- Section 10: Powers of the Governor in respect to the prorogation of the Council and Assembly between sessions and the dissolution of the Assembly. The Council is a continuing House and is not dissolved.
- Section 11: At least one session of Parliament must be held in each year.
- Sections 13, 13A, 13B: Disqualification of members (see Appendix F).
- Section 14A: Disclosure of pecuniary and other interests by members.
- Section 15: Powers of the Houses to prepare and adopt Standing Rules and Orders.

1.2 Other legislation

There are many other Acts which have an impact on the Legislative Assembly and its members, such as the *Independent Commission Against Corruption Act 1988*, the *Legislation Review Act 1987*, the *Parliamentary Electorates and Elections Act 1912*, the [Election Funding, Expenditure and Disclosures Act 1981](#), the *Defamation Act 2005*, any Parliamentary Committees Enabling Act, the *Parliamentary Evidence Act 1901*, the *Jury Act 1977*, the *Ombudsman Act 1974*, the *Parliamentary Remuneration Act 1989*, the *Public Finance and Audit Act 1983*, the *Interpretation Act 1987*, the *Annual Reports (Statutory Bodies) Act 1984*, the *Annual Reports (Departments) Act 1985*, the *Parliamentary Precincts Act 1997*, the *Subordinate Legislation Act 1989*, and various Acts establishing statutory oversight committees and for universities.

1.3 Standing orders and sessional orders¹

A "standing order" has been defined in Abraham and Hawtrey's Parliamentary Dictionary (UK) as "an order made by either House of Parliament for the government

¹ See also Chapter 28 of Part One.

or regulation of its proceedings and declared by that House to be a standing order. Orders of this description do not expire with the session in which they are made, but remain in force until they are revoked or repealed by the House by which they are made.”² Section 15 of the Constitution Act requires that standing orders be approved by the Governor and once approved become “binding and of force”.

The courts have ruled that, whilst standing orders that have been approved by the Governor are “binding and of force” under the *Constitution Act 1902*, they are not part of the general law. For instance, in *Namoi Shire Council v Attorney General for New South Wales* there was an attempt to have an Act declared invalid on the basis that its passage through the Legislative Assembly contravened certain standing orders of the House which had been adopted and approved under section 15 of the *Constitution Act 1902*.

Justice McLelland, in this case, noted that the defendant was relying on the circumstance that, due to section 15(2) of the *Constitution Act 1902*, standing orders are given statutory force. However, he was of the view that this was not determinative of the issue but provided the foundation for “whether, on the true construction of the Constitution Act, compliance with standing orders made under s. 15 is a condition of the validity of a law otherwise validly enacted thereunder.”³ Justice McLelland was of the view that it was not and concluded:

*...it would take a clear expression of legislative intention to impose a condition upon the effective exercise of the legislative power thus conferred, additional to the occurrence of the advice and consent of each of the Legislative Council and the Legislative Assembly and the Royal Assent; and s. 15 certainly contains no such expression of intention. Moreover, the fact that the determination of the substantive content of the standing orders is, by s. 15, delegated to the respective Houses of the legislature (albeit requiring approval by the Governor), is itself a strong indication against compliance therewith being a condition of the effective exercise of legislative power, the more so when one considers the great variety of subject matter, including relatively insignificant procedural directions, with which such standing orders might, and do, deal.*⁴

Justice McLelland was also of the view that “...the very nature and function of standing orders of a legislative House indicates that they should be considered as directory, rather than mandatory.”⁵

The power of the Houses of Parliament in New South Wales to make standing orders derives from an inherent right to control their own proceedings due to the principle of necessity. The Constitution Act merely authorises this inherent right by statute.⁶

The current standing orders of the Assembly were adopted by the House on 21 November 2006, replacing the standing orders adopted in 1994 (as amended and reprinted). The standing orders have been subsequently amended in July 2009 and November 2010.

² Abraham, L. A., and S. C. Hawtrey, *A Parliamentary Dictionary*, 1956, p. 191.

³ *Namoi Shire Council v Attorney General for New South Wales* (1980) 2 NSWLR 639 at 644.

⁴ *Ibid.*

⁵ *Ibid.* See also *Clayton v Heffron* (1960) 105 CLR 214 at 240 where Dixon CJ, McTiernan, Taylor and Windeyer JJ express the view that section 15 of the *Constitution Act 1902* does not make standing orders part of the general law.

⁶ See comments made by Gerard Carney in *Members of Parliament: Law and Ethics*, 2000, pp. 180-1. This inherent right is given more consideration in section 2.2 of Part Two.

Before the Assembly agrees to new or amended standing orders they are normally considered by the Standing Orders and Procedure Committee, which comprises, in the main, the principal office holders in the House and is, by convention, chaired by the Speaker. Having a committee which includes representatives from all parties and independent members discuss proposed changes to the standing orders assists their passage through the House. However, there is no requirement for amendments to the standing orders to be considered by the Committee.⁷

While there are 370 standing orders they do not cover all aspects of procedure in the House. Many matters are governed by practice and precedent. For example, standard of dress within the Chamber, matters relating to the use of props in the Chamber and sub judice issues. A number of sessional orders have been adopted for the current Parliament to vary the routine of business, change the terminology regarding the passage of legislation and to provide for new procedures.

The standing orders are not immutable. They can be suspended or varied by sessional orders. Sessional orders are used to vary or suspend the operation of the standing orders or to trial new procedures not provided for in the standing orders.⁸

Any wilful or persistent refusal to conform to the standing orders by a member constitutes disorder and may be dealt with by the House as contempt and suspension may result.

1.4 Speakers' rulings

Rulings are given by the Speaker and other occupants of the Chair from time to time as procedural issues need clarifying or in response to points of order raised by members during the conduct of the business of the House. These rulings apply the standing and sessional orders to new cases. Where the standing and sessional orders do not provide for a particular situation, or an interpretation is needed, the Speaker may also be required to give a ruling. Rulings of the Speaker and other occupants of the Chair form precedents for future practice in respect of a particular matter. This practice strengthens the traditions of the House without compromising the flexibility which the Speaker needs to exercise impartial control of proceedings.

The more important rulings of the Speakers of the Legislative Assembly are collected together and published on a regular basis.

1.5 Other reference material:

The list of publications below is not definitive but highlights significant publications on parliamentary practice, procedure and law.

1.5.1 Parliamentary Practice and Procedure

Malcolm Jack (ed) – *Erskine May's Treatise on The Law, Privileges, Proceedings and Usage of Parliament*, 24th edition, 2011

⁷Section 15 of the Constitution Act enables the House to make and amend standing orders and does not prescribe the manner other than by vote of the House and approval by the Governor. PD 11/11/2010, p. 27754.

⁸ Prior to the adoption of the new standing orders in November 2006 a number of sessional orders were in place that varied the existing rules of the House including the rules relating to petitions, General Notices and the Routine of Business. The majority of those sessional orders have been included in the new standing orders.

The United Kingdom House of Commons practice is found in the latest edition of *May's Parliamentary Practice*. With over 150 years of history and practice and the enactment of the "Australia Acts" effecting the severing of Australia's remaining constitutional links with Great Britain (except the Sovereign) there is no longer a need for the Assembly to follow the practice of the House of Commons. This is not to say *May* is outmoded, as it remains the classic reference work on Westminster parliamentary practice, and is frequently quoted as an authority on parliamentary principles and traditions.

B.C. Wright (ed) – *House of Representatives Practice*, 6th edition, 2012

First published in 1981 and currently in its 6th edition (2012) this work is an important reference book for lower House procedure. It is available from the Federal Parliament's website at www.aph.gov.au

H. Evans (ed) – *Odgers' Australian Senate Practice*, 13th edition, 2012

First published in 1953 and currently in its thirteenth edition (2012) this work documents Senate operations. It is available from the Federal Parliament's website at www.aph.gov.au

D. McGee - *Parliamentary Practice in New Zealand*, 3rd edition, 2005

First published in 1985 and now in its third edition (2005), McGee comprehensively covers the field as far as New Zealand is concerned. The latest edition has been amended to reflect the changes to the standing orders made in 1996 and subsequent amendments due to the introduction of a Mixed Member Proportional voting system (MMP).

B. Okely - *A Guide to Parliamentary Procedure* (1989)

Outlines procedure in the Legislative Assembly of Western Australia.

R. Blackburn and A. Kennon – *Griffith & Ryle on Parliament: Functions, Practice and Procedures*

Published in 2003, the book is the second edition of the work first published by Griffith and Ryle in 1989 on the Parliament of the United Kingdom. It explains the basic rules and procedures of Parliament, and also considers how they operate in practice and are utilised politically.

1.5.2 Parliamentary Law

G. Carney – *Members of Parliament: Law and Ethics*

Published in 2000, it covers parliamentary law and custom, such as the qualification and disqualification of members of Parliament and parliamentary privilege. It also covers ethical obligations of members such as those in relation to the disclosure of pecuniary interests and codes of conduct.

E. Campbell – *Parliamentary Privilege*

Published in 2003, the book concentrates on Australian law concerning the privileges of Australian legislatures and their members. Particular attention is given to issues and problems that have arisen in recent years such as the implied freedom of political communication in the Australian Constitution and Citizens' Right of Reply.

D. Clark – *Principles of Australian Public Law*

Published in 2003, the book concentrates on constitutional law issues, with particular emphasis on the constitutions of the Australian States. It covers dismissals and dissolutions of governments, electoral law, parliamentary privilege, executive power and the limitations of state legislative power.

A. Twomey – *The Constitution of New South Wales*

Published in 2004, the book provides detailed information on the Constitution of New South Wales. It addresses such matters as 'manner and form' provisions, limitations on state legislative power and the status and power of the States within a Federal Commonwealth. It also considers parliamentary procedure and privilege including resolving deadlocks between the Houses, the power of the Houses in respect of money bills and the power to assent to laws. The book covers other aspects related to constitutional law such as electoral law and the disqualification and expulsion of members of Parliament. The theory is given practical meaning by including parliamentary precedents, the practice of the Executive and the conduct of inter-governmental relations.

1.5.3 Historical information

K. Turner - *House of Review?*

Professor Ken Turner formerly of Sydney University⁹ has compiled an historical and political study of the Legislative Council from 1934 to 1968.

G. N. Hawker - *The Parliament of New South Wales 1956–1965*

Dr Hawker's book was written in 1971 at the suggestion of the then Speaker and was financed by a Government grant as an historical work.

M. Hogan & D. Clune (Editors) – *The People's Choice: Electoral Politics in 20th Century New South Wales* (Volume one: 1901 to 1927, Volume Two: 1930 to 1965, Volume Three: 1968 to 1999)

Published in 2001, the series looks at the history of electoral politics in twentieth century New South Wales. It analyses in detail the 34 elections held between 1901 and 1999 including the campaigns, the issues, the personalities and the results.

D. Clune and G. Griffith – *Decisions and Deliberation: The Parliament of New South Wales, 1856-2003*

⁹ Professor Turner whilst officially retired remains an Honorary Research Associate in the Discipline of Government and International Relations at Sydney University.

Published in 2006, the book provides a thorough account of the history of the Parliament of New South Wales since responsible government in 1856 and the political context in which it has operated. It includes statistics on bills, such as private members' bills passed, and procedures used such as the guillotine or gag.

D. Clune & K. Turner (Editors) – *The Premiers of New South Wales, 1856-2005*

Published in 2006 in two volumes, the set contains the biographies of all Colonial and State Premiers from 1856. Volume 1 covers the period from responsible government (1856) to Federation (1901) and Volume 2 covers the Premiers from Federation to 2005. The biographies have been written by academics, writers and politicians, both current and former.

Other historical publications have been produced as part of the sesquicentenary of responsible government in New South Wales. These include:

Michael Hogan, *Local Labor: A History of the Labor Party in Glebe, 1891-2003*, Federation Press, 2004

Michael Hogan (Ed), *A Lifetime in Conservative Politics: political memoirs of Sir Joseph Carruthers*, University of New South Wales press, 2005

Michael Hogan (Ed), *The First New South Wales Labor Government 1910-1916; Two Memoirs: William Holman and John Osbourne*, University of New South Wales Press, 2005

J. M. Bennett, *Sir James Martin: Premier and Chief Justice of New South Wales*, Federation Press, 2005

J. M. Bennett, *Colonial Law Lords: the judiciary and the beginning of responsible government in New South Wales*, Federation Press, 2006

Paul Davey, *The Nationals: the Progressive, Country and national Party in New South Wales 1919 to 2006*, Federation Press, 2006

Clive Beauchamp, *Parliament, Politics and Public Works: a history of the New South Wales Public Works Committee 1888-1930*, NSW Parliamentary Library, 2006

Stephen Chase, *You didn't get it from me: a reporter's account of political life in New South Wales from 1988-2001*, ABC Books, 2006

Jim Hagan (Ed), *People and Politics in Regional New South Wales, 1856-2006*, 2 volumes, Federation Press, 2006

Kevin Rozzoli, *Gavel to gavel: an insider's view of Parliament*, University of New South Wales Press, 2006

Marian Simms, *From Hustings to Harbour Views: electoral institutions in New South Wales 1856-2006*, University of New South Wales Press, 2006

Deborah Brennan and Louise Chappell (Eds), *"No fit place for women"? Women in New South Wales Politics 1856-2006*, University of New South Wales Press, 2006

Rodney Smith, *Against the Machines: minor parties and independents in New South Wales 1910-2006*, Federation Press, 2006

Max Thompson, *The Seeds of Democracy: early elections in colonial New South Wales*, Federation Press, 2006

1.5.4 Journals

The Table

This is the Journal of the Society of Clerks-at-the-Table in Commonwealth Parliaments which is published annually. It contains articles, details of the officers of Commonwealth Parliaments, book reviews and results of surveys conducted on particular topics.

Australasian Parliamentary Review (published from 2001) previously titled *Legislative Studies*

The Journal of the Australasian Study of Parliament Group, published twice yearly.

The Parliamentarian

This is the journal of the Commonwealth Parliamentary Association (CPA). It is published quarterly and contains information on CPA conferences, articles on issues affecting countries throughout the Commonwealth and reports from the various jurisdictions in relation to significant procedures/precedents. It is distributed to all members of Parliament in New South Wales who are members of the CPA.

Parliament Matters

This is the newsletter of the Australia and New Zealand Association of Clerks-at-the-Table (ANZACATT), published twice yearly. It provides information about events, procedural highlights, new administrative policies, committee inquiries and other areas of interest from the Parliaments across Australia and New Zealand. It is available online at

<http://www.anzacatt.org.au/prod/anzacatt/anzacatt.nsf/key/library.html>

Canadian Parliamentary Review

This is the journal of the Association of Canadian Clerks-at-the-Table. It is published quarterly and contains articles on parliamentary practice and procedure, both current and of a historical nature. Many articles are written by members of Parliament providing a member's perspective on parliamentary issues. It also includes book reviews and legislative reports from the Canadian jurisdictions outlining important precedents, Speakers' rulings that have been made and legislation that has been

passed during the quarter. It is available online at <http://www.parl.gc.ca/infoparl/>

1.5.5 NSW Parliamentary Library Research Publications

The Research Section of the Parliamentary Library produces research papers on a large range of topics related to the Parliament and politics in New South Wales, including papers on parliamentary privilege, electoral matters and topical issues related to legislation and policy initiatives.

The research papers are available online at:
<http://www.parliament.nsw.gov.au/prod/parlament/publications.nsf/V3ListRPSubject>

Under review

Chapter 2 The Constituent Parts of Parliament

The “constitution” of New South Wales is drawn from several diverse sources, including certain Imperial, Commonwealth and State statutes, such as the *Statute of Westminster 1931*; the *Commonwealth of Australia Constitution Act 1900*; the *Australia Act 1986*; the Letters Patent and the Instructions to the Governor; an element of inherited English law; the New South Wales *Constitution Act 1902* and certain other State statutes; numerous legal decisions; and a large measure of English and local convention.

The legislature, or law-making entity in New South Wales is composed of the Sovereign, the Legislative Council and the Legislative Assembly.

Subject to the *Commonwealth of Australia Constitution Act*, the Legislature has the power to make laws for the peace, welfare and good government of New South Wales.

Where any inconsistency arises between Commonwealth and State laws, the State law is invalid to the extent of the inconsistency.

2.1 The Governor

In New South Wales, the Governor is the local representative of the Crown. The Governor performs the formal and ceremonial functions which attach to the Crown.

The constitutional functions of the Governor are regulated by various statutes, the Letters Patent constituting the office, and the Instructions to the Governor. The present Letters Patent were given under the Royal Sign Manual in 1900 and amended in 1909, 1935 and 1938. The present Instructions were issued in 1900 and amended in 1909 and 1935.

The functions of the Governor cover a wide range of important duties and the Governor's Instructions require that "in the execution of the powers and authorities vested in him the Governor shall be guided by the advice of the Executive Council". This provision is however modified by the further direction that if in any case the Governor should see sufficient cause to dissent from the opinion of the Council, they may act in the exercise of their powers and authorities in opposition to the opinion of the Council, reporting the matter to Her Majesty without delay.

The Governor possesses important spheres of discretionary action, e.g. in regard to dissolution of Parliament. Moreover, the Governor is entitled to full information on all matters to which their assent is sought and may use personal influence for the good of the State. The general nature of the Governor's position is such that he or she is guardian of the Constitution and is bound to see that the powers with which he or she is entrusted are not used otherwise than in the public interest. In extreme cases, the Governor's discretion constitutes a safeguard against malpractice.

The Governor's more important constitutional duties are to appoint the Executive Council and to preside at its meetings; to summon, prorogue¹, and dissolve the

¹ On one occasion the House presented an address to the Governor requesting the Governor not to prorogue the Parliament prior to the statutory date of 3 March 1995 given that it still had important business outstanding. See VP 24/11/1994, pp. 561-2.

Legislature; to assent to, or refuse to assent to, bills passed by the Legislature; to keep and use the Public Seal of the State; to appoint all Ministers and officers of State and, in appropriate cases, to remove and suspend officers of State. The Governor exercises the Sovereign's prerogative of mercy, but only on the advice of the Executive Council.

According to law laid down in the last century, the Governor is not a viceroy and cannot claim as a personal privilege, exemption from being sued in the courts of the State. In State politics the Governor usually acts on the advice of the Ministers and they take the responsibility for their advice.

The circumstances in which the Governor may grant a dissolution of Parliament are not clearly defined. Strictly speaking, only the Legislative Assembly is dissolved and the Legislative Council prorogued; nonetheless Parliament is ended, because both Houses are necessary for it to be constituted.

Under the *Constitution Act 1902*, 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 is judged advisable and most consistent with general convenience and the public welfare after giving sufficient notice. The Governor may also prorogue the Legislative Council and Assembly by proclamation or otherwise whenever it is deemed expedient.

The Governor does not usually attend in person for the opening of a new Parliament, but may open a subsequent session, after the Legislative Council and Legislative Assembly have been constituted, the Presiding Officers elected and members have taken the pledge of loyalty [or oath of allegiance](#).² Since 2006 the *Constitution Act 1902* has provided that a member of either House cannot sit or vote in the House to which the member has been elected until the member has taken the pledge of loyalty before the Governor or other person authorised by the Governor for that purpose.³ In practice, commissioners are appointed by the Governor for the opening of Parliament. The Governor issues such a commission under the Public Seal of the State. The Commission empowers certain members, usually the Premier, the Deputy Premier and the next senior Minister, to administer the pledge of loyalty to other members.⁴ (See Chapter 3.1 of Part One).

Unless a session is opened by commissioners, on the first sitting day of a new session, the members assemble to hear the Governor's proclamation and then attend the Upper House to hear the Governor's speech opening the session. (see Chapter 3.2 of Part One).⁵

² There is nothing to prevent the Governor from attending in person on the first sitting day of a new Parliament. In 2011, an unusual procedure occurred where the Parliament had the usual commission opening and later that day, after the members had taken the pledge of loyalty and the Presiding Officers had been elected, the Governor made an address to a Joint Sitting of the Houses. See PD 3 May 2011, pp. 6-13.

³ Section 12 of the *Constitution Act 1902*.

⁴ The pledge of loyalty was introduced with the *Constitution Amendment (Pledge of Loyalty) Act 2006*. 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. Prior to this members had to subscribe to an oath or affirmation prior to being able to sit or vote in the House to which they were elected.

⁵ The Sovereign is excluded from the Legislative Assembly as the Lower House in New South Wales on the ancient principle that "the Crown should have no current knowledge of the proceedings in the House of Commons". That is to say that there should be no interference in the House going about its business. The only violation of this principle occurred on 4 January 1642 when Charles I and an escort entered the House in an attempt to arrest five members. Extract from *Balancing Tradition*

Should the Legislative Assembly wish to communicate with the Governor or Sovereign the standing orders of the House set out how such communication is to proceed.

Standing order 354 states that “all Addresses to the Governor shall be presented by the Speaker unless otherwise ordered”⁶ and standing order 355 provides that “when Addresses are presented to the Governor: (1) Members of the House may be present; (2) The Address shall be read by the Speaker and (3) The mover and seconder of the Address shall stand to the left of the Speaker.”

In the case of an Address to the Sovereign, the Speaker forwards the address to the Governor for presentation (S.O. 356). The standing orders also provide that the Governor’s answer to any Address presented shall be reported to the House by the Speaker (S.O. 357).⁷

2.2 The Legislative Council

The Legislative Council consists of 42 members elected for a term of eight years (Const. Act s. 17A; s. 17F).

Half of the members of the Legislative Council are elected at the time of the Legislative Assembly election (every four years). At such elections, the whole of the State of New South Wales is a single electoral district for the return of 21 members, with votes counted according to a proportional preference system (Const. Act ss. 17 & 22A). Until 1934 members of the Legislative Council were nominated by the Governor on the advice of the Executive Council and from 1934 until 1978 members were elected by the members of both Houses of Parliament. In 1978 legislation was enacted to provide for the Legislative Council to be elected by all citizens over the age of 18 years.

Casual vacancies are filled by a person elected at a joint sitting of both Houses called by the Governor. If the casual vacancy was previously filled by a member of a political party, only members of that party may be elected (Const. Act s. 22D).

The Presiding Officer of the Legislative Council is the President. They are elected by the members of the Council and hold office until the first meeting of the Council following a periodic election or until they cease to be a member, resign, or are removed from office by a vote of the Legislative Council. He or she may resign from office by letter addressed to the Governor (Const. Act s. 22G).

Eight members in addition to the member presiding is necessary for a quorum (Const. Act s. 22H). The President has a casting vote only (Const. Act s. 22I).

A member of the Legislative Assembly is not eligible for election to the Legislative Council (Const. Act s. 13C).

and Progress, Procedures for the opening of Parliament, House of Representatives Standing Committee on Procedure, August 2001, p. 10.

⁶ For example, see VP 24/11/1994, pp. 561-2 where a motion was agreed to that because important business was outstanding the Speaker request the Governor not to prorogue the Parliament prior to the statutory date of 3 March 1995.

⁷ See VP 1/12/1994, p. 616 for an example of the Governor’s response to an Address by the House.

2.3 The Legislative Assembly

The Constitution Act 1855-6 (Imperial Act 18 & 19 Vic. C. 54) provided for a Legislative Assembly to consist of 54 elected members. The period since 1856 to 1978 has been notable for the development of the Legislative Assembly as the House of the people. The period from 1856 until the mid 20th century also saw the rapid growth of the Cabinet system and Executive Government, the emergence of the party system within Parliament and the establishment of the Commonwealth of Australia.⁸

The Legislative Assembly for the 55th Parliament (the current Parliament, which commenced in 2011) consists of 93 members, each member representing an electoral district (Const. Act ss.25 & 26).⁹

The term of the Legislative Assembly is fixed at four years unless the House loses confidence in the Government or fails to pass an appropriation bill for the ordinary annual services of Government or, if in accordance with constitutional convention and despite any advice of the Premier or Executive Council, the Governor decides to dissolve the Assembly (Const. Act ss. 24 & 24B).

Any person qualified to vote at an election may be nominated as a candidate for election (Parliamentary Electorates and Elections Act s. 79 (1)).

A member of the Legislative Council is not capable of being elected (s. 13C Const. Act).

The Speaker is the Presiding Officer. The position holder is elected by the members present at the first meeting of the House after a general election and retains office during that Parliament except in the case of death, resignation or removal by a vote of the Legislative Assembly. The Speaker may, when not presiding in the Chair, take part in any debate or discussion and may cast a deliberative vote in the House (Const. Act s. 31.).

During the absence from New South Wales of the Speaker, the Deputy Speaker acts in their place (Const. Act s. 31A).

Twenty members exclusive of the [member presiding](#) form a quorum. The member presiding has a casting vote only (Const. Act s. 32).

A member may by writing, addressed to the Speaker resign the member's seat. The resignation takes effect immediately it is received by the Speaker (Const. Act s. 33).

⁸ Extract from an address delivered to Members of the Royal Australian Historical Society by H. Robbins, Clerk of the Legislative Assembly, 23 June 1951, pp. 13-15.

⁹ The *Constitution and Parliamentary Electorates and Elections Amendment Act 1997* provided for the reduction of the Legislative Assembly from 99 to 93 members following the dissolution of the 51st Parliament.

Chapter 3 The Parliamentary Buildings and Precincts

3.1 The building

The Parliament of New South Wales was the first Parliament to be established in Australia. It occupies the oldest building in the Sydney city centre and is the oldest continuously used legislative chamber in Australia.

The Parliament occupies part of what was once the nation's first permanent hospital. The colonnaded central part of Parliament House facing Macquarie Street was completed in 1816 as part of Governor Macquarie's "Rum Hospital". In 1829 the premises were appropriated to the use of the Executive and the Legislative Council. Minor alterations were carried out in June 1829 to the building and on Friday 21 August 1829 the second session of the Legislative Council in that year was held in the building which, with additions, has housed the Parliament ever since.¹

3.2 The Chamber

As with the majority of Parliaments in the Commonwealth, the New South Wales Legislative Assembly has a debating chamber of rectangular shape with rows of benches facing each other along each of the longer sides. It has been argued by some that this type of set-up in the Chamber, by clearly delineating a side of the Chamber occupied by those members governing and those in opposition, reinforced the two party system.² Many Houses in Australia have replaced their benches with individual seats with desks for members.

A portrait and a memorial tablet have been erected within the Legislative Assembly Chamber. On 11 October 1859, the House agreed that a portrait of William Charles Wentworth (1790-1872) was to be permanently hung in the Chamber. The large portrait was painted in England around 1850 by Richard Buckner, and was paid for by money raised from public subscription. Whilst Wentworth was never a member of the Legislative Assembly³ it was deemed appropriate to hang the portrait in the Chamber "...in consideration of the eminent services...[as] one of the representatives of the City of Sydney, in obtaining Free Institutions for the Colony." Following a sometimes heated debate, an attempt was made to shelve the putting of the motion by moving the previous question.⁴ However, the previous question was not passed on the casting vote of the Speaker, and the House subsequently agreed to the substantive motion before the House, i.e. to place the portrait permanently in the Chamber.⁵

On 11 August 1915 the House agreed unanimously to a motion to erect a permanent memorial in the House to remember two serving members who died in the Great War of 1914 to 1918. Lieutenant-Colonel George Frederick Braund (Member for

¹ See *Parliamentary Government in NSW: A Brief Historical Sketch*, written by W. Kenneth Charlton, Second Clerk, Legislative Council Office, 1924, pp. 49-62. For further information on the history of the Parliament building see Reynolds, P.L., *Legislative Architecture in New South Wales*, 1976; and the Parliament of New South Wales History Bulletins, No. 1, *The Colours and Decorations of the Parliamentary Chambers*, No. 4, *The Architecture of Parliament House*, and No. 9, *The "Rum Hospital" and Parliament House*, 2002.

² See Wilding, Norman and Philip Laundy, *An Encyclopaedia of Parliament*, revised edition, 1961, p. 69.

³ Wentworth was an elected member of the pre-responsible Government Legislative Council from June 1843 to April 1854.

⁴ See section 16.2 of Part One for further information on the previous question procedure.

⁵ See VP 11/10/1859, p. 168.

Armidale) and Sergeant Edward Rennix Larkin (Member for Willoughby) were killed in action fighting at Gallipoli on 8 May and 10 June 1915, respectively. The memorial was unveiled by Speaker Meagher during a ceremony in the Assembly Chamber on 30 November 1915.⁶

The Speaker's Chair in the Legislative Assembly is quite unique in that it was hand carved by a sitting member of the House, Ninian Melville, in 1886. Ninian Melville was a cabinet maker and an undertaker who was elected to the Assembly as the Member for Northumberland in May 1880.⁷ Mr Melville held the seat until 1894 serving as Chairman of Committees from 1889 to 1894.⁸

The names of all previous Speakers, including the names of those members who have acted as the Speaker for a set time period in the Speaker's absence, are placed in small plaques which are located around the gallery level of the Chamber.

3.2.1 The colours of the Chambers

Traditionally in Westminster style Parliaments, such as New South Wales, the two prevailing colours used to decorate the Chamber are green for lower Houses and red for upper Houses.⁹ This tradition stems from the use of the colours red and green in the Houses of Parliament at Westminster.

The use of the red in upper Houses probably stems from the use by the Sovereign of red as a royal colour and as such was employed in the room where the Sovereign met his Court and nobles. The use of green in lower Houses is a little less clear but its use in the furnishings of the House was first authoritatively documented in an early travel book published in Lyon by Monconys in 1663 in which he observed that the House of Commons was set up as an amphitheatre with benches covered in green upholstery – “couverts de sarge verte”.¹⁰ Records of the House of Commons in relation to maintenance and refurbishing of the Chamber for this time indicate that a payment was made in 1670 for “paynting green in oyle the end of the seates, and a Dorecase” and in 1672-73 that green woollen cloth was purchased for use in the Commons Chamber.¹¹ Whilst these official records indicate that green has been used in the House of Commons at least since the mid 17th century it is arguable that the green is symbolic and was used by the Commons much earlier than this. There are a number of different theories that have arisen about where the use of the colour green stems from.

The colours of the Palace of Westminster

It is argued that the colour adopted by the House of Commons in the United Kingdom stems from the use of the colour within the palace of Westminster rather than due to any specific symbolism. The earliest recorded meeting place of the House of Commons is the Painted Chamber of the House of Lords where the knights, citizens and burgesses assembled in 1341. It is argued that the majority of

⁶ See VP 11/08/1915, pp. 82-3 and VP 30/11/1915, p. 257.

⁷ *Australian Dictionary of Biography*, Vol. 5 1851 – 1890, K – Q, edited by Bede Nairn, Geoffrey Serle and Russel Ward, 1974, pp. 237-8.

⁸ *Legislative Assembly of New South Wales Parliamentary Record*, Vol. vii, 1824-2003.

⁹ The red and green style is used in the majority of Parliaments that have adopted the Westminster style of government but not all. For example, the Legislative Assembly of Western Australia is furnished in blue.

¹⁰ See the House of Commons Factsheet G10 entitled “House of Commons Green”, dated September 2003, available from the website www.parliament.uk, accessed 10 October 2003.

¹¹ *Ibid.*

the Palace of Westminster during this time was painted green, including the “Painted Chamber”.

The “Painted Chamber” had been constructed under the reign of Henry III (1216–1272) together with St Stephen’s Chapel, which was to become the permanent meeting place of the Commons from 1548 to 1834, and it is known that they were both furnished in the same colours. However, under Edward I (1272–1307) St Stephen’s Chapel was replaced and during the reign of Edward III (1327–1377) it was painted and redecorated and it is unknown whether green continued to be the predominant colour. Nevertheless it is theorised that the green in the House of Commons stems from this use of green in the Palace of Westminster.¹²

The cost of dyeing cloth

It has also been asserted that the use of the colour green by the House of Commons stems more from the cost of dyeing cloth for hangings than from its continued use throughout the Palace of Westminster. Dull green cloth was one of the cheapest colours to produce and it is argued that this is the main reason behind why the House of Commons is green in that the “Commons”, as the House of the commoner, had to be content with a more sober plumage than that of the House of Lords which was decorated in red. Red cloth was more expensive to produce as it was dyed with imported madder – a plant common to Holland – rather than with woad – a plant native to the United Kingdom – that was used to dye cloth green.¹³

Oak fields of Runnymede

Another theory is that the green is actually symbolic of the oak fields of Runnymede where the Magna Carta was signed in 1215 by King John or that it symbolises the village green and oak trees under which the commoners who later became members of the House of Commons gathered.¹⁴

¹² *Ibid.*

¹³ *Ibid.*

¹⁴ See information on the Bicameral Colours on the Tasmanian Parliament’s website at <http://www.parliament.tas.gov.au/tpl/backq/Parliament.htm>, accessed 13 October 2003.

Chapter 4 Proceedings on the Meeting of Parliament

4.1 Meeting of a new Parliament

Following a general election, the Governor, on the advice of the Premier issues a proclamation setting out the time and place for the meeting of the new Parliament.¹ In answer to the Governor's proclamation, the newly elected lower House members assemble in the Legislative Assembly Chamber at the time specified. Under s. 30 of the *Constitution Act 1902*, the Assembly is able to meet and transact business despite the fact that five or fewer writs for the election of members have not been returned to the Governor.

Under the standing orders and practices of the House the following events then take place:

- The Clerk reads the Governor's proclamation, announces the receipt of the writs and tables the writs and the list of members elected (S.O. 2(1)).
- The Assembly then waits for the message from the Commissioners appointed by the Governor for the opening of Parliament (S.O. 2(2)).
- The Clerk of the Legislative Council informs members of the Council that the Governor has caused a commission to be issued under the Public Seal of the State appointing commissioners for the opening and holding of Parliament. The Usher of the Black Rod is then directed to let the Assembly know to attend in the Council Chamber.
- The Usher of the Black Rod proceeds to the Legislative Assembly Chamber,² and strikes the door of the Chamber three times with the Rod and the Serjeant-at-Arms announces "Black Rod". On indication from the Clerk, the Serjeant-at-Arms calls out "Enter Black Rod", the door is unlocked, the Usher enters and advances to the centre of the Assembly Chamber, bows to both sides of the House and delivers the following message—

"The Commissioners request the immediate attendance of this Honourable House in the Legislative Council Chamber, to hear the commission for the opening of Parliament read."

- Members of the Assembly then proceed to the Legislative Council Chamber (S.O. 2(3)), preceded by the Usher of the Black Rod, Serjeant-at-Arms³ and the Clerks-at-the-Table. On their arrival in the Council Chamber they take seats specially provided for them. They are informed by one of the Commissioners that the Governor has appointed Commissioners to do all things necessary to enable Parliament to proceed to the despatch of business. The Clerk of the Legislative Council then reads the Commission

¹ The Governor may issue a new proclamation calling a new Parliament together on an alternate date to that which has already been proclaimed by the Governor. See for example, VP 20/12/1926, p. 2 where the Parliament was called together on the day prior to date to which previously proclaimed; and VP 24/09/1940, p. 1 where Parliament was called together on a day subsequent to the day previously announced by proclamation as the day of meeting.

² As the Usher approaches the door of the Assembly the ancient ceremony is repeated of the doors being slammed and bolted in their face. Traditionally, the Black Rod is the Royal Messenger. This practice, it is claimed, dates from the stormy period of English constitutional history when Charles I once came with a body of armed men and, to murmurs of "privilege!", walked up the gangway to ask for the surrender of six members. Some historians claim that this colourful story is but a myth. Wherever the truth lies the practice demonstrates the right of the Assembly to close its doors and deliberations against all comers, if it so wishes. See Wilding, Norman and Laundy, Philip, *Encyclopaedia of Parliament*, Revised Edition, 1961, p. 229.

³ The Serjeant-at-Arms is also a Clerk at the Table and the Deputy Serjeant performs a number of the Serjeant's roles.

appointing the commissioners.

- After the Commission has been read one of the Commissioners informs members that "...it is His/Her Excellency's pleasure that you, members of the Legislative Assembly, return to your Chamber, and there, after members have taken the pledge of loyalty or oath of allegiance, proceed to the election of one of your number to be your Speaker".
- On returning to the Legislative Assembly Chamber the Clerk reads a commission empowering certain members, usually the Premier, the Deputy Premier and the next senior Minister, to administer the pledge of loyalty or oath of allegiance to other members.
- The Premier, after having taken to pledge of loyalty or oath of allegiance, administers the same to the other two commissioners. The commissioners, having signed the roll, administer the pledge of loyalty or oath of allegiance to all other members present. The Clerk lays copies of the writs on the Table and members sign the roll as they are called to the Table.⁴
- When members have all taken the pledge of loyalty or oath of allegiance, the House proceeds to the election of the Speaker by secret ballot. When one of the members present has been elected, the Premier informs the House when the Governor will receive the Speaker (S.O. 11).

The Assembly proceeds to Government House.⁵ On being received by the Governor, the Speaker announces that the Assembly in the exercise of their undoubted rights, had proceeded to the election of a Speaker; that their choice had fallen upon them, and they now presented as its Speaker. After being congratulated by the Governor, the Speaker, in the name of and on behalf of the House, lays claim to all members' undoubted rights and privileges, particularly freedom of speech in debate and free access to the Governor when occasion should require (S.O. 11(5)).⁶ The first record of a speech by the Speaker of the House of Commons asserting the right of free speech and declaring the loyalty of the House to the throne was by Sir James Pickering in 1378.⁷

When the House returns, the Speaker reports the attendance upon the Governor. This announcement by the Speaker is usually followed by some business of a formal nature. Standing order 3(5) states that at the commencement of a new session the House shall "*in assertion of its rights transact some business of a formal nature without notice*". In accordance with tradition a bill is presented to the House pro forma.⁸ Since 1901 the Law of Evidence Bill has been the bill used for this procedure. The bill is introduced but is not listed on the business paper and does not

⁴ Members sign the roll with their full name (no initials). The Member's address is transcribed from the writs. For further information on the pledge of loyalty taken by members see section 6.1 of Part One.

⁵ At the commencement of the 55th Parliament in 2011, the Governor received the Speaker and the President of the Legislative Council at Parliament House rather than at Government House because the Governor made an address to both Houses on the first sitting day.

⁶ See for example VP 29/04/2003, pp. 37-8.

⁷ Laundy, Philip, *The Office of Speaker in the Parliaments of the Commonwealth*, 1984, p. 13.

⁸ The practice of presenting a bill in the House of Commons without immediately addressing the Sovereign's causes for the calling of Parliament has been traced as far back as 1558 and became established by resolution of the House in 1604. (Extract from *Balancing tradition and progress, Procedures for the opening of a new Parliament*, House of Representatives Standing Committee on Procedure, August 2001, p. 16). Even though the Governor does not usually give a speech on the opening of a new Parliament as to the reasons why the Parliament has been summoned, the tradition of the House asserting its right is maintained.

progress through any subsequent stage.⁹ However, there is no requirement for the business that is transacted to be a bill.

This formal business is usually followed by announcements made by the Premier of the new Ministry; by party leaders of their election as leaders and the election of their deputies. In addition, the Deputy Speaker and Assistant Speaker are elected¹⁰ and messages from the Governor informing assents to bills received since the last meeting of Parliament are reported. In recent years sessional orders such as the Citizens' Right of Reply and the Code of Conduct for Members have also been adopted at the first sitting.

A new Parliament is usually opened by the Commissioners appointed by the Governor. However, there is nothing to prevent the Governor from delivering a speech opening a new Parliament. This occurred for the commencement of the 55th Parliament in 2011, when the Governor made an address to a joint sitting of both Houses on the first sitting day after the usual commission opening.¹¹

4.2 Meeting for new session

The duration of a Parliament is broken up into periods called "sessions".¹² A session begins when the Governor issues a proclamation summoning the Houses and ends when the Governor issues a proclamation proroguing both Houses of Parliament.

At the opening of a session of Parliament both Houses meet at the time specified in the proclamation summoning Parliament. The Speaker takes the Chair and the proclamation is read by the Clerk. The Usher of the Black Rod then delivers a message from the Governor (or if the Governor is not present, the Commissioners) requesting that the House go to the Legislative Council Chamber. In the Legislative Council Chamber the Governor reads their speech and afterwards hands it to the President and a copy to the Speaker.

The Governor's speech is couched in general terms and usually summarises the Government's achievements and outlines proposed legislation for the forthcoming session. This speech is prepared following advice from The Cabinet Office.¹³

If the Governor is not present to give the speech, the Clerk reads the commission for the opening of the session and the Commissioner reads a message from the Governor, which entreats them to give due consideration to the matters submitted to them.¹⁴

After delivering the speech the Governor departs, and the Assembly returns to its own chamber.

⁹ The practice varies across other jurisdictions with a number of Houses introducing a bill under this procedure that is later enacted including the Victorian Legislative Assembly and the Western Australian Legislative Assembly.

¹⁰ See section 5.2.2 of Part One.

¹¹ PD 3 May 2011, pp. 6-13.

¹² See section 9.6 of Part One.

¹³ If the Governor is absent from the State and the administration of the State has been assumed by the Lieutenant Governor, a speech can be delivered by the Lieutenant Governor instead. See for example, PD 22/05/2006, p. 1.

¹⁴ See PD 16/04/1996, p. 1.

Before the Governor's speech is reported, a pro forma bill (i.e. the Law of Evidence Bill) is introduced in order for the House to assert its right to meet and legislate without a summons from the Governor. No business should intervene between the introduction of the bill and the report of the Governor's speech.

The Speaker lays upon the Table of the House the copy of the speech made by the Governor. An Address in Reply to the speech may be immediately moved.

4.3 Address in Reply debate

The Address in Reply is a motion (moved and seconded by members supporting the Government) addressed to the Governor in response to the Governor's speech on the opening of the session (standing orders 4 to 7). As the speech outlines the Government's proposed legislative program for the session, debate on the Address in Reply motion is necessarily wide-ranging.¹⁵

In modern times, the motion for the Address in Reply does not change in substance from Parliament to Parliament. The motion moved at the commencement of the current Parliament was in the following terms:

May it please Your Excellency —

We, the Members of the Legislative Assembly 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.*¹⁶

The motion is open to amendment and such amendments usually address themselves to the omission of items from the legislative program¹⁷ or the omission in the Governor's speech of some proposed legislative action.¹⁸ Any division called is usually on the amendment as it would be discourteous to the Governor to oppose the Address itself.

The debate on the Address in Reply has precedence of general business but can be interrupted by government business in accordance with standing order 5.¹⁹ Prior to

¹⁵ The adoption of an Address in Reply in the New South Wales Parliament first occurred in 1843, when an Address was presented to Governor Sir George Gipps by the partly elective and partly nominee Parliament which met that year. See Short Address delivered to Members of the Royal Australian Historical Society by W.K. Charlton, Clerk of the Parliaments, 22 July 1944, p. 5.

¹⁶ VP 03/05/2011, pp. 44-5.

¹⁷ See for example, VP 20/08/1952, p. 26; VP 02/09/1953, p. 38; VP 13/09/1955, p. 34; and 06/09/1962, p. 25.

¹⁸ See for example, VP 19/08/1969, p. 39.

¹⁹ Government Business includes all procedures except general business motions and private members' bills such as the adoption of sessional orders, dissent from rulings of the Chair and disallowance of statutory rules. Under the previous standing

the adoption of the new standing orders in 2006 the Address in Reply had precedence of all business unless standing orders were suspended to allow for other business to be conducted or a sessional order was adopted.²⁰

Prior to the enactment of section 24B of the *Constitution Act 1902* in 1995, which provides that the Governor may dissolve the Legislative Assembly if a motion of no confidence in the Government is passed by the House, amendments moved to the Address in Reply invariably were attempts to inform the Governor that the Government did not possess the confidence of the House. This is no longer the case given the legislative provisions that have been enacted and the adoption of standing orders²¹ relating to such procedures in the House (S.O. 111). On occasions when amendments are moved to the Address in Reply the Government has often moved the closure (i.e. "That the question be now put") and the amendment has been negated.²² In other cases, the Government has moved that the member be not further heard²³ or has moved to adjourn the debate to prevent the consideration of amendments.²⁴ In one case an amendment that the Government does not possess the confidence of the House was ruled out of order by the Speaker on the basis of relevance – it raised matters that were not mentioned in the Governor's speech.²⁵ However, it should be noted that historically the purpose of the vote on the Address in Reply was to act as the first confidence test for the government, which might be a pre-election incumbent administration seeking to demonstrate its continued fitness to govern, or a new administration that had taken power.

Standing and sessional orders were suspended on one occasion to enable the House to debate a motion to take note of the Address in Reply on a particular day and to enable those members who had not spoken to the Address in Reply to speak to the motion, which had already been agreed to, for a period not exceeding 20 minutes each.²⁶ Standing and sessional orders have also been suspended to permit a concurrent debate on the Appropriation Bill and cognate bills and the motion to take note of the Address in Reply.²⁷

After the debate is concluded and the Address is adopted by the House, the Speaker informs the House that the Address in Reply is to be presented to the Governor at Government House by all members of the Assembly. The procedure relating to the presentation of the Address in Reply to the Governor is as follows:

The Speaker, accompanied by the Serjeant-at-Arms, heads the procession to Government House. On arrival at Government House the Speaker is met by an Aide-de-camp and the Official Secretary and is escorted to meet the Governor:

orders, when the Address in Reply had precedence of all business, a standing order specifically allowed a number of items of business to be conducted during the currency of the Address in Reply debate.

²⁰ For example, during the 52nd Parliament a sessional order was adopted that provided: "That, during the current session, unless otherwise ordered, government business may be conducted during the currency of the Address in Reply debate." VP 26/2/2002, p. 12.

²¹ The standing orders were first adopted in 1994 and are included in the current standing orders adopted in 2006.

²² VP 10/11/1927, p. 30; VP 01/10/1940, p. 23; and VP 16/09/1980, p. 74.

²³ VP 22/09/1921, p. 41.

²⁴ VP 31/08/1921, pp. 16-17; VP 04/07/1922, p. 8; VP 08/08/1923, p. 15; and VP 19/09/1928, p. 26.

²⁵ VP 18/08/1983, p. 29.

²⁶ VP 6/6/2002, p. 275.

²⁷ VP 7/6/2002, p. 281.

- (1) The Speaker takes up a position in front of the step to the alcove in front of and facing the position the Governor will take up.
- (2) The mover and seconder of the Address in Reply stand side by side on the left of the Speaker with the Chamber Officers standing in a line behind the Speaker, the Clerk on the right, while the Serjeant-at-Arms stands to the left of the seconder of the Address.
- (3) The members, headed by the Premier and the Ministers, stand along the wall opposite and facing the alcove.

At the appointed time –

- (1) The Official Secretary announces the Governor, who enters and takes up their position opposite and facing the Speaker.
- (2) The Speaker then reads the Address in Reply, bows and hands the Address to the Governor. The Governor then reads their response which is then handed to the Speaker.
- (3) The Speaker asks permission to present the mover and seconder of the Address. Following their presentation the Speaker moves to the Governor's right hand.
- (4) The Speaker, with the Serjeant-at-Arms on their right hand side, presents the Premier, who is then invited by the Governor to stand to their left, then Ministers, and after that all members present.²⁸
- (5) The Chamber Officers are then presented to the Governor by the Speaker.
- (6) The Serjeant-at-Arms takes charge of the Governor's answer to the Address in Reply and later hands it to the Clerk.
- (7) At the time previously arranged between Government House and the Clerk, the Speaker takes leave of the Governor, and followed by Chamber Officers and members returns to Parliament House.
- (8) At a convenient time and by direction of the Speaker, the House re-assembles at the ringing of one long bell.

²⁸ The Serjeant-at-Arms assist the Speaker if necessary with the names of members and their electorates.

Chapter 5 Speaker, other Office Holders and Officers

5.1 The Speaker

The office of Speaker is an essential element in the parliamentary system. The “Speaker” of the House of Commons was originally so called because his function was to speak for the Commons in all the proceedings of the Parliament in which they were allowed or required to take part and to communicate the resolutions of the Commons to the Monarch.¹ In New South Wales, the position of Speaker was first appointed under the Act of 1842 (Imperial Act – 5 & 6 Vic. C. 76) for the Government of New South Wales and Van Diemen’s Land.²

Today, the Speaker presides over the sittings of the House and as the Presiding Officer of the Legislative Assembly the position holder must act with both authority and impartiality. The Speaker’s authority is respected and rulings and decisions are rarely challenged. The Speaker maintains order in the House, calls members to speak, proposes questions for debate and puts the question for decision at the conclusion of debate. The Speaker also conducts divisions and rules on points of order. When presiding in the Chair the Speaker cannot vote in divisions. However, in the event of votes being equal, the Speaker exercises a casting vote and any reasons given may be entered in the *Votes and Proceedings*. The Speaker can speak in debates and vote in divisions when not presiding in the Chair.³ *In all, the function of the Speaker is to regulate debate and enforce the observance of the rules which govern the conduct in the House. To assist with the interpretation of the procedures and practices of the House, the Speaker is able to issue guidelines in relation to matters not provided for in the standing orders (S.O. 9).*⁴

The Speaker’s decisions are subject to the will of the House exercisable through a motion of dissent (S.O. 95). As such, any inference that the Chair has acted inadequately or improperly, however indirect or ambiguous, is disorderly. For example, any presumption that the members on the Opposition side of the House are being treated less fairly than members supporting the Government is a reflection on the Chair because it implies that fair treatment will not automatically be forthcoming.⁵ Furthermore, any accusation that a member (or Minister) has defied a request from the Speaker is improper because it implies that the Speaker lacks control.⁶

The office of the Speaker is recognised in s. 31 of the *Constitution Act 1902* where the office is described as the Legislative Assembly’s “independent and impartial representative”. This independence is reflected by the fact that the Speaker is not bound by any order of the Cabinet or Executive Council unless it is made in pursuance of an Act.⁷

¹ Laundy, Philip, *The Office of the Speaker in the Parliaments of the Commonwealth*, 1984, p. 11.

² Extract from an address delivered to members of the Royal Australian Historical Society by H. Robbins, Clerk of the Legislative Assembly, 23 June 1951, p. 13.

³ In June 2007 an amendment was made to the *Constitution Act 1902* to provide for the Speaker to participate in debate and vote in divisions when not presiding in the Chair. Prior to this amendment the Speaker could not participate in debates in the House and could only exercise a casting vote. Prior to the adoption of the current standing orders in November 2006 the Speaker was able to participate in debate during committee of the whole when the Chairman of Committees was presiding.

⁴ (To date no such guidelines have been issued.)

⁵ See ruling of Speaker Ellis, PD 16/09/1970, p. 5934.

⁶ See ruling of Speaker Ellis, PD 22/11/1972, p. 2971.

⁷ This advice was first provided in a legal opinion obtained by the Legislative Assembly regarding the Office of the Speaker and a Parliamentary Privileges Bill, dated 1912, but remains current in relation to this aspect.

Speakers have in the past and present been criticised for being subject to the will of the political party to which they belong. However, the principle of the Speakership is well summed up in the statement by Speaker Maher in 1959:

...nothing that happens elsewhere is likely to affect my impartiality in the control of this House. I have a job to do and it would be most improper if, in my control of the House, I have to be subject to party discipline and in that way be more sympathetic to members on one side of the Chamber than the other.

*As far as my political loyalty and principles are concerned, I am subject fully to the control of the party to which I belong: as far as my administration of this House is concerned, and my control of the proceedings of this House, I am subject only to this honourable House, whose servant I am.*⁸

5.1.1 Election of the Speaker

The first act of a newly elected Legislative Assembly after new members have all taken the pledge of loyalty or oath of allegiance is the election of a Speaker (S.O. 2(7)).⁹ Section 31B of the Constitution Act outlines the mechanism of election. It provides:

(1) The election of the Speaker shall be conducted by secret ballot. A ballot is not required if only one candidate is validly nominated, and that candidate shall be declared elected.¹⁰

(2) Nominations shall be made in writing, and the identity of the nominators and seconders shall not be disclosed by the Clerk of the Legislative Assembly or other person presiding at the election. A nomination is not validly made unless the person nominated accepts nomination, by endorsement on the instrument of nomination.

(3) Nominations shall not be closed until a reasonable opportunity has been given for the Members of the Legislative Assembly desiring to do so to make nominations. Further nominations may not be made between ballots.¹¹

(4) The candidates with the smallest number of votes shall be successively withdrawn one by one, and a fresh ballot shall take place after each withdrawal, until one candidate receives the votes of at least two-thirds of the number of Members of the Legislative Assembly for the time being or (if there are only two candidates validly nominated or there are only two candidates left) a majority of the number of Members voting at that ballot. That candidate shall be declared elected.

(5) If there is an equality of votes among the candidates with the smallest number of votes, the ballot shall be taken again, and if again there is such an equality of votes, the Clerk of the Legislative Assembly or other person presiding at the election shall determine, by lot, which of the candidates with

⁸ PD 26/11/1959, p. 2370.

⁹ For recent examples see VP 02/05/1995, pp. 7-8; VP 11/05/1999, p. 6; VP 29/04/2003, p. 6.

¹⁰ VP 29/04/2003, p. 6; VP 08/05/2007, p. 6.

¹¹ It has been the practice in the Commons since the early 18th Century that proposals for Speakership are not made from the front benches. There is, however, no convention in the House of Representatives nor the Legislative Assembly of New South Wales that proposals should not be made from the front bench. (Extract from *Balancing Tradition and Progress, Procedures for the opening of a new Parliament*, House of Representatives Standing Committee on Procedure, August 2001, p. 12).

the same number of votes shall be withdrawn, as if that candidate had received the smallest number of votes.

(6) If there are only two candidates validly nominated or there are only two candidates left, and if there is an equality of votes among the two candidates, the ballot shall be taken again, and if again there is an equality of votes, the Clerk of the Legislative Assembly or other person presiding at the election shall determine, by lot, which of the candidates is taken to have received the smaller number of votes. The other candidate shall be declared elected.

(7) The Standing Rules and Orders of the Legislative Assembly may make provision, not inconsistent with this section, for or with respect to the manner of election of the Speaker and associated matters.

(8) In the absence of relevant standing rules and orders at the time of such an election, the election is to be conducted (subject to this section and to any necessary adaptations) in accordance with the provisions of the standing orders of the Senate of the Parliament of the Commonwealth that relate to the election of the President of the Senate.

These provisions are complimented by the provisions of standing order 10(2)¹² which provides:

(a) At least one week before the scheduled sitting all Members are notified by the Clerk that nominations will be called for the office of Speaker at the prescribed time, i.e., immediately after Members have taken the pledge of loyalty. A sample copy of the nomination form will be attached to the notification.

(b) At the prescribed time on the first day of sitting the Clerk will:

- (i) call for nominations to be delivered to the Clerk at the Table in a sealed envelope by the person nominated or by any other Member;
- (ii) ask the House if it is satisfied that reasonable opportunity has been given for the receipt of nominations;
- (iii) declare nominations to be closed;
- (iv) if there is one valid nomination, declare that Member to be elected;
- (v) if there is more than one valid nomination, announce the fact that a ballot will be required;
- (vi) have ballot papers prepared and initialled;
- (vii) order that the bells be rung as prescribed for the taking of a ballot;¹³
- (viii) call each Member by order of electorate, with Members proceeding to the Table to collect a ballot paper. The names of Members issued with ballot papers will be crossed off a list.

(c) Having received a ballot paper Members will:

- (i) proceed to the voting booths located at the western end of the Chamber

¹² This standing order was adopted in 2006 but prior to this the Clerk, as Returning Officer, published guidelines for the election of Speaker to fill in the gaps in the statutory provisions.

¹³ S.O. 351 provides that "Before the House proceeds to any ballot, the bells shall be rung as in a division. No other business shall be conducted during the balloting period."

- to cast their vote in secret; and
- (ii) place their ballot paper in the locked ballot box on the Table and return to their seat.

(d) When all Members present have been called, received a ballot paper, voted and placed a ballot paper in the ballot box, the Clerk will ask if any Member has not voted and desires to do so. The Clerk will then ask the House if there is any objection to declaring the ballot closed.

(e) The locked ballot box will then be brought to the Table by the Serjeant-at-Arms and unlocked by the Clerk. The votes will be counted by the Clerk and checked by the Deputy Clerk and Clerk-Assistant. When the counting is completed the Clerk will report the result of the ballot and the House shall either proceed to further ballots or the Clerk will declare a Member to be elected.

NB: At no time during the proceedings is the Chamber locked or the sitting suspended.

- The very first election of a Speaker by secret ballot took place on 2 May 1995, the first sitting day of the 51st Parliament.¹⁴

After election in accordance with standing order 11:

- (1) The elected Member shall be conducted to the Speaker's rostrum by two Members.
- (2) Having been so conducted the Member elected makes acknowledgment to the House for the honour conferred and takes the Chair as Speaker. The Mace having lain under the Table shall be laid upon the Table.
- (3) After the House congratulates the Speaker, a Minister shall inform the House, where and at what time the Governor will receive the House for the purpose of presenting the Speaker.
- (4) At the stated time the sitting may be adjourned or suspended and the House shall proceed, with any Members then present, to be received by the Governor.¹⁵
- (5) At such presentation the Speaker shall, in the name and on behalf of the House, lay claim to its undoubted rights and privileges.
- (6) On return the Speaker shall report the making of the claim.
- (7) A new Speaker filling a vacancy occurring during the currency of a Parliament does not lay claim to the privileges of the House. (See also section 4.1 of Part One on the meeting of a new Parliament.)

A Speaker may also be elected during the currency of a Parliament in the event that the Speaker vacates the position during a session of Parliament.¹⁶

¹⁴ VP 02/05/1995, pp. 7-8.

¹⁵ From the 16th Century, the Speaker of the House of Commons was a royal nominee, which reflected the Speaker's role as the conduit between the Commons and the Sovereign and the importance of his being accepted by the latter. However, over centuries the roles of the Speaker as presiding officer of the Commons during its deliberations and the defender of its powers and privileges took on increasing significance. The loyalty of the office to the House rather than the Crown became more important. Nevertheless, in the British Parliament, the choice of the Speaker cannot take place until the Crown has given its leave or consent. (Extract from *Balancing Tradition and Progress, Procedures for the opening of a new Parliament*, House of Representatives Standing Committee on Procedure, August 2001, p. 12).

¹⁶ For example, during the twenty-fifth Parliament (27 April 1920 to 17 February 1922) the Speakership changed hands a number of times due to the numbers in the House following the 1920 general election. (See VP 13/12/1921, p. 169 and VP 20/12/1921, p. 177 where Speaker Levy (Nationalists) resigned from the Chair and Speaker Hickey (Labor) held the Speakership for only a week until resigning and Speaker Levy again took the Chair). The Labor Party were able to govern,

The role of the Clerk in the election of the Speaker is that of returning officer and is purely an administrative one.¹⁷ However, the Clerk can remind members of their obligations in relation to the Speaker's election. For instance, during the first secret ballot for the Speaker in 1995, a point of order was taken that members were milling around the polling booths and the Clerk, as returning officer, reminded members that the Constitution Act required that the ballot be secret and asked that members conduct themselves in such a way that no member be able to see what vote another member had cast.¹⁸

Once the election is determined the House proceeds to Government House to present the Speaker to the Governor. (See section 4.1 of Part One for further information).

5.1.2 Other provisions

There are important provisions in the *Constitution Act 1902* which relate to the office of Speaker: what happens when the Speaker is absent from the State¹⁹; the fact that the Speaker, or other member presiding, is not counted in a quorum; the casting vote of the Speaker or other member presiding²⁰; the right of the Speaker to participate in debate and vote in divisions when not presiding in the Chair; and the fact that members resign to the Speaker.²¹

When the Speaker takes part in debates on legislation and general motions on the floor of the House, it is done in their capacity as a private member and not as the Presiding Officer. However, as the Speaker comments may be made from the Chair on condolence motions for former members²² and sitting members²³ and also in relation to seasonal felicitations.²⁴

despite not having an absolute majority, due to the support of two minor party members and by putting a member of the Nationalists, Daniel Levy, in the Chair. However, in October 1921 Levy was persuaded to step down by Sir George Fuller, Leader of the Nationalists with a firmer promise of support from Progressive leader Wearne. This move brought down the Labor Government and Fuller became the Premier for several hours on 20 December 1921. Wearne was, however, unable to control the numbers in the Progressive party and Levy returned to the Chair. (See *The People's Choice: Electoral Politics in 20th Century New South Wales*, Volume One, edited by Michael Hogan and David Clune, 2001, pp. 231-42). Mr Levy agreed to be reappointed to the Speakership "...on the distinct assurance that, if I am elected, when I present myself to his Excellency the Governor for his approval, I am clearly to communicate to him the condition of deadlock at which, unfortunately, we have arrived." (PD 20/12/1921, p. 2619). When Mr Levy was presented to the Governor following his second election to the Chair, he informed the Governor of the difficulties associated with the election of a Speaker, and that he had accepted the office to prevent an impasse and suggested that the only solution was for the Governor to dissolve the Parliament (PD 20/12/1921, p. 2621). The Parliament was not dissolved by the Governor which resulted in the resignation of the Fuller Ministry with Mr Fuller arguing that he had declined to remain in office "...under conditions that not only would humiliate me but would tend to lower the repute of parliamentary government." The Labor party subsequently formed the new Administration (PD 20/12/1921, pp. 2621-2).

¹⁷ It is interesting to note that on 28 July 1909 the House of Representatives met to elect a new Speaker following the death of the incumbent and the role of the Clerk in the election process was questioned. In this instance, a motion was moved to adjourn the debate on the election with the result of the division being 31 for both the ayes and the noes and the Clerk then stated that he would give his casting vote with the noes and allow debate to continue under the provisions of the standing orders of the House that stated the Clerk shall act as Chairman of the House until a Speaker is elected. This action was, however, questioned by members of the House particularly given the fact that no-one is able to vote in the House if they have not taken an oath. Debate continued and Speaker Salmon was eventually elected by 37 votes to 29. See *House of Representatives Practice*, 5th edition, p. 168.

¹⁸ PD 02/05/1995, pp. 7-8.

¹⁹ See section 5.2.1 of Part One for further information.

²⁰ See section 5.7 of Part One for further information.

²¹ See section 6.3 of Part One for further information.

²² PD 16/04/1996, p. 51; PD 08/06/2005, p. 16705; PD 19/09/2006, pp 1852-3.

²³ PD 30/04/2003, p. 159; PD 20/10/2004, p. 11759.

²⁴ PD 05/12/2003, p. 6131; PD 22/11/2002, p. 7547; PD 06/12/2001, p. 19845.

In the event of a vacancy in the office of Speaker during a Parliament, the Clerk reports the vacancy to the House at its next meeting and a new Speaker is elected as the first item of business (S.O. 16).²⁵ If the vacancy occurs during a recess (between sessions) the election will take place after the Governor's opening speech or the reading of the Commission to open the Parliament.²⁶

Under s. 70 of the *Parliamentary Electorates and Elections Act 1912*, the Speaker issues writs to fill vacancies caused otherwise than by a general election.

The Speaker is the mouthpiece for the House, and thus Addresses from the House to the Governor (S.O. 354) and messages to the Legislative Council are conveyed under the Speaker's hand (S.O. 337).

The Speaker also has extensive administrative functions, being responsible, with the President of the Legislative Council, for the overall direction of Parliament House and its staff.²⁷ In this, the Presiding Officers are advised by the Clerks of both Houses and the Executive Manager of the Department of Parliamentary Services. The Speaker is solely responsible for the operation of the Department of the Legislative Assembly.

5.1.3 Convention followed for the office of the Speaker between dissolution or expiration of the Parliament and opening of a new Parliament

By convention, the Speaker remains in office and exercises the powers vested in the office up until the election of the Speaker on the opening day of the first session of the new Parliament. This applies even if the occupant of the office of Speaker does not seek re-election or is not returned at the general election. During this period the Speaker receives the full salary and expense allowance prescribed for the Speaker, but does not receive the salary and electoral allowance of a private member.²⁸

5.1.4 The role of the Speaker in the administration of the Parliament

Under the current arrangements there is no statutory provision which prescribes how the New South Wales Parliament is to be managed. The *Constitution Act 1902* makes no provision for the administration of the Parliament. Despite this lack of statutory provision, the Presiding Officers have in practice been jointly responsible for the operations of the Parliament.²⁹ Each House of Parliament is administered by its Presiding Officer with the Department of Parliamentary Services, which includes Facilities, Financial Services, People and Engagement, Information Services and Catering, being administered jointly by the Speaker and the President.³⁰ There is provision in the standing orders of both Houses for the appointment of a Library and a House Committee, which may make recommendations concerning their respective

²⁵ VP 13/12/1921, p. 169 and VP 20/12/1921, p. 177.

²⁶ VP 04/08/1937, p. 2.

²⁷ The Speaker made a statement in the House concerning the death of a member of the parliamentary staff and offered the sincere sympathy of the Parliament. VP 11/12/2002, p. 665

²⁸ In 1885 by colonial minute it was decided that the Speaker should hold office for the period between dissolution and the election of his successor, notwithstanding that the occupant of the position has not been returned at the general election. This situation occurred in 2003 when Speaker Murray did not stand for re-election at the general election but maintained the Speakership until the first sitting day of the new Parliament where a new Speaker was elected by the House.

²⁹ See for example, PD 17/04/1996, pp. 135 and 147 where Speaker Murray stated that "by a long-established convention, matters pertaining to the administration of Parliament and the provision of members' services are brought to the attention of the Presiding Officers."

³⁰ A legal opinion in relation to this matter was obtained by the Legislative Assembly as part of the opinion regarding the Office of the Speaker and a proposed Parliamentary Privileges Bill in. The Opinion was ordered to be printed by the Legislative Assembly 10 September 1912.

areas. However, the Presiding Officers are not subject to any direction, except possibly by the House collectively, as to the management of the Parliament.

5.1.4.1 The Parliamentary Precincts Act 1997

Legislation was enacted in 1997 which provides for a statutory definition of the precincts of the New South Wales Parliament and vests its control in the Presiding Officers.³¹ Section 13 of the *Parliamentary Precincts Act 1997* provides for the constitution of the Corporation of the Presiding Officers as a statutory body representing the Crown with Part 2 of the Act defining the Parliamentary precincts, conferring control, and management thereof in the Presiding Officers and vesting title to the Parliamentary precincts in the corporation. Section 7 provides:

Control and management of Parliamentary precincts

- (1) Subject to this Act:
 - (a) the Parliamentary precincts are under the control and management of the Presiding Officers, and
 - (b) the Presiding Officers may take any action they consider necessary for the control and management of the Parliamentary precincts.
- (2) Subsection (1) does not affect:
 - (a) the powers of each House to control or manage its own affairs and proceedings, and
 - (b) the orders of each House in relation to its own affairs and proceedings, and
 - (c) the powers of each House in relation to the control and management of so much of the Parliamentary precincts as constitute the chamber of the House concerned or as are used exclusively or principally for the purposes of the House.

The Crown Solicitor has advised that the legislation does not confer control and management of the Parliamentary precincts on the Corporation nor does it make acts of the Presiding Officers, as such, acts of the Corporation. Therefore, the Corporation and the Presiding Officers have distinct roles and functions with respect to the Parliamentary precincts – the Corporation as owner, with (limited) power to deal with land and the Presiding Officers with control and management, but not so as to affect the powers etc. of the Houses.³²

Prior to the enactment of the *Parliamentary Precincts Act 1997* the Presiding Officers did exercise a general control over the building and precincts but it was not statutorily defined. For instance, on 25 March 1976, in response to a question as to whether the Speaker would permit nurses demonstrating at the front of Parliament House to be allowed to shelter under the verandah of Parliament House due to the rain, the Speaker stated:

*...I believe that if I were to accede to the humane request by the Deputy Leader of the Opposition...the House thereafter would be faced with a situation in which the front of this Parliament House would take on a character similar to the front of the federal Parliament House at one time, with the equivalent of aboriginal tents, as it were, on its front lawn. Every time there was a hostile demonstration the House would be in the position of having to accommodate protesters within the precincts of the House, on its verandah. I find the matter embarrassing to me, as I am sure it is embarrassing to the whole House in some respects, but it would be an unworkable proposition to do what the Deputy Leader of the Opposition has suggested.*³³

There were, however, times when the issue was brought into question and even a proposal to give the control of the building/precincts to a parliamentary committee. In

³¹ See the second reading on the *Parliamentary Precincts Bill*, PD 17/04/1997, pp. 7724-30.

³² Advice received from the Crown Solicitor re: Security Licences for Parliament House, dated 14 August 1998.

³³ PD 25/03/1976, pp. 4802-3.

1928 a sub-committee of the House Committee recommended that the whole of the parliamentary premises, with the exception of the two Chambers during sittings, be under the control of the Committee. This was of grave concern to both the Speaker and the President at the time who, in response to the report, argued that such a move would deprive them of their authority over the buildings and that under such conditions the Presiding Officers could be beholden to the Committee even in the use of their own suites. In fact, the Presiding Officers went so far as to argue that to place the precincts under the control of the House Committee could be construed as being so far-reaching as to even prevent the removal of a disorderly member from the precincts and would divest the power of the Presiding Officers to deal with “strangers” (now referred to as visitors) in and about the premises.³⁴

In 1992 a Joint Select Committee reported on the management of the Parliament, following the introduction of legislation to establish a Parliamentary Management Board.³⁵ It recommended that a board be established for the management of the Parliament, either by legislation or preferably by a resolution of both Houses. The objective of the board would be “to improve the management and the administration of the Parliament and to increase the involvement of Members.” The board was to be comprised of equal members from each House including the Presiding Officers who would act as joint Chairs, occupying the Chair on a rotational basis and with a deliberative vote only. It was also proposed that members of each House would be able to meet separately on matters affecting their own House.³⁶

It was envisioned that the functions of the board would be:

- general oversight of the administration of the Parliament;
- exercising the powers of a standing committee, under the standing orders of both Houses;
- assuming the responsibilities of certain existing committees, namely the House Committee and the Library Committee, and appoint sub-committees to carry out the continuing functions of such committees;
- establishing other sub-committees to deal with any matters and invite persons who are not members of Parliament to offer advice or give evidence (thus ensuring access to external expertise if needed);
- examining and making recommendations concerning any functions which might be contracted out (e.g. library reference services, printing, contract reporting, stores, building services);
- compiling the estimates of expenditure for the Parliament; and
- reporting to Parliament annually and as required on its operations, and with the joint chairmen to answer any questions which may be asked about the board in their respective Houses.³⁷

The Legislative Assembly passed a resolution on 2 December 1994 establishing a Joint Standing Committee to be known as “The Parliamentary Management

³⁴ See letter from the Presiding Officers re: proposals by a sub-committee of the House Committee to place control of the precincts in the hands of the House Committee, dated 6 February 1928.

³⁵ The introduction of such legislation was part of an agreement between the Greiner Coalition Government and the three non-aligned independents who held the balance of power in the Legislative Assembly. The *Parliament Management Bill 1992* was never passed by the Parliament.

³⁶ See the Report of the Joint Select Committee upon the Management of the Parliament, November 1992.

³⁷ *Ibid*, p. 2.

Board”.³⁸ The resolution was subsequently passed by the Legislative Council on 5 December 1994, which was also the final sitting day of the 50th Parliament. Members were not appointed to the Joint Standing Committee and due to the expiration of the 50th Parliament, prior to the general election, the committee ceased to exist. The election brought about a change of Government and the Parliament has not taken any further action to re-establish such a committee.

5.1.4.2 Role of the Speaker in relation to staff of the Legislative Assembly

The Speaker employs the staff of the Legislative Assembly and together with the President is responsible for employing the staff of the joint services. All “minor servants” of the Parliament are appointed by delegation of the Governor to the Presiding Officers under section 47 of the *Constitution Act 1902* and are therefore Crown employees³⁹. The Clerks, the Serjeant-at-Arms and the Usher of the Black Rod are appointed by the Governor with a Commission under Letters Patent.

Since 1988, the Parliament has received a global salaries vote, allowing the Presiding Officers to use the funds allocated to salaries according to their discretion. The delegation from the Governor includes an implied power to set terms and conditions of employment and to dismiss. There is no abrogation of the general law within the Parliamentary precincts and the Parliament is subject to employment and occupational health and safety laws of general application.

5.2 The Deputy Speaker and Assistant Speaker

The standing orders provide for both a Deputy Speaker and an Assistant Speaker⁴⁰ (previously referred to as the Chairman of Committees).⁴¹ Both the Deputy Speaker and the Assistant Speaker are elected on the first sitting day of each Parliament, or whenever either office becomes vacant and hold office for the duration of the Parliament unless the House otherwise directs. Advice from the Crown Solicitor suggests that section 31A of the *Constitution Act 1902*, which provides for the Deputy Speaker to act in place of the Speaker when they are absent from New South Wales, couple with the absence of a legislative position stating when the position of Deputy Speaker ceases, implies the Deputy Speaker continues until a new Deputy Speaker is elected.⁴² The procedure for election of the two positions is the same and set out in standing orders 13 and 14. The motions which are moved do not require notice.

The Assistant Speaker’s principal responsibility is presiding over the proceedings when a bill or other matter is considered in detail (previously known as committee of the whole).⁴³ The Assistant Speaker ensures that the proceedings are orderly and conducted in accordance with the standing orders. The Assistant Speaker also certifies under standing order 239 that a bill originating in the Assembly which is to be presented to the Governor for assent is the same as that which was passed by both Houses (by indicating so on the vellum copy).

³⁸ VP 02/12/1994, pp. 628-9.

³⁹ Parliamentary Staff are covered by the Crown Employees (Parliament House Conditions of Employment) Award.

⁴⁰ A sessional order has been adopted for the current Parliament to provide for two Assistant Speakers. VP 08/05/2007, pp. 7-8.

⁴¹ VP 11/05/1999, p. 7; VP 29/04/2003, p. 6.

⁴² Advice received from the Crown Solicitor re: Remuneration of Deputy Speaker of the Legislative Assembly, dated 16 March 2007.

⁴³ See Chapter 21 of Part One for information on the consideration in detail procedure.

The Assistant Speaker has the same authority as the Speaker when in the Chair. In contrast, under the previous standing orders certain restrictions were placed on the Chairman's authority in committee. For instance, the Chairman could remove a member repeatedly called to order but if a member was named, the Chairman would have to suspend the proceedings and report the matter to the House, which then considered the matter. Similarly, if a ruling from the Chairman was objected to, the objection was reported to the Speaker who then made a ruling on the matter.⁴⁴

5.2.1 Absence of Speaker, Deputy Speaker or Assistant Speaker

During the unavoidable absence of the Speaker, the Deputy Speaker takes the Chair in the House.⁴⁵ Section 31A of the *Constitution Act 1902* provides for the Deputy Speaker to act as the Speaker whilst the Speaker is absent from the State. It provides:

- (1) During the absence from New South Wales of the Speaker the Deputy Speaker of the Legislative Assembly shall act in his place, and for all purposes, whether of this Act or otherwise, shall have and may exercise and perform all the powers, authorities, duties and functions of the Speaker.
- (2) Without prejudice to the generality of subsection (1) the Deputy Speaker of the Legislative Assembly, while acting in the place of the Speaker under that subsection, shall be deemed to be the Speaker for the purposes of section 71 of the *Parliamentary Electorates and Elections Act 1912*.⁴⁶

In instances where the Speaker is absent from the House but not necessarily absent from the State, the standing orders provide for the Deputy Speaker to perform the duties of the Speaker on any day when the Speaker is absent and the House is sitting (S.O.15). *If the Speaker and Deputy Speaker are both absent of a day when the House is sitting the Assistant Speaker will perform the duties of the Speaker, and if the Assistant Speaker is also absent a temporary Speaker will act as the Speaker (S.O. 15).*⁴⁷

*Whilst it is highly unlikely that all occupants of the Chair would be absent from the House at any one time, the current standing orders provide for the situation where the Speaker, Deputy Speaker, Assistant Speaker and temporary Speakers are all absent from the House. Standing Order 18 authorises the House in the absence of all occupants of the Chair, to elect an Acting Speaker so long as a quorum is present.*⁴⁸

⁴⁴ VP 21/11/1994, p. 520. However, it was argued by a Chairman on one occasion that he was not bound to accept a motion that he report a ruling to the Speaker for the latter's determination if the rulings were given in accordance with the standing orders and long established practices of the committee. On this occasion the Chairman refused to leave the Chair to accept the motion as it was in his opinion that it was likely to cause obstruction to the debate. See PD 03/05/1994, pp. 1817-8 where the Chairman ruled that proposed amendments were out of order for being subversive to the principles of the bill and a member raised an objection to the ruling and moved that the Chairman leave the Chair so that the House could consider his point of order that the Chairman was in error in ruling that the proposed amendments were not relevant.

⁴⁵ VP 13/11/1992, p. 647; VP 15/05/1997, p. 887 (Acting Chairman of Committees took the Chair); VP 15/11/2001, p. 1629.

⁴⁶ Section 71 provides for the Speaker to issue writs for by-elections when a vacancy occurs in the House.

⁴⁷ See for example when an temporary Speaker took the Chair at the commencement of the sitting VP 29/10/2010, p. 2421

⁴⁸ See for example, VP 07/05/1997, p. 838. Under the previous standing orders provision was made for the House to elect an Acting Speaker if the Speaker was to be absent from the House for more than three consecutive sitting days. When the standing orders were reviewed in 2006 the standing order was deemed unnecessary given that there is both a Deputy Speaker and an Assistant Speaker which can act in the Speaker's place if he is to absent from the House for any length of time.

The need to include such provision within the standing orders first arose in 1899. At the time there was no provision for the House to appoint a member to act in the absence of the Speaker and Chairman and on 5 December 1899 when both office holders were absent, the Clerk announced the fact and, pursuant to the standing orders, adjourned the House.⁴⁹ On 7 December 1899 the House agreed to amend the standing orders to provide that in the absence of both the Speaker and Chairman the House could elect one of their number to act as Deputy Speaker so long as a quorum was present.⁵⁰ The following week the Speaker informed the House that the Governor had approved the standing order as passed by the House.⁵¹

The indulgence of the House has also been asked for the Speaker to absent himself to attend an overseas parliamentary seminar during a named period. This having been readily given, it was not necessary for the Clerk to inform the House later of the Speaker's absence.⁵²

5.2.2 Procedure for election of Deputy Speaker and Assistant Speaker

A member is elected Deputy Speaker or Assistant Speaker by motion (notice is not required) and holds office for the duration of the Parliament unless the House otherwise directs.

The elections for each office are conducted separately and more than one nomination for each office may be proposed. No member may speak to the motion for nomination for more than five minutes. The closure may be moved. Nevertheless, before putting the question "That the question be now put" the Speaker must accept any additional nominations without debate. After the closure has been carried the candidates are proposed in the order in which they have been nominated⁵³ until one receives a majority of the votes recorded (S.O. 13).

Upon election, the Deputy Speaker or Assistant Speaker is not required to return his acknowledgments to the House but it has become customary for them to do so.⁵⁴ On one occasion an unsuccessful candidate also thanked the House.⁵⁵

5.2.3 The Deputy Speaker's and Assistant Speaker's vote

When not occupying the Chair, the Deputy Speaker and Assistant Speaker exercise independence of voice and vote.⁵⁶ However, when presiding as Deputy Speaker or Assistant Speaker, a casting vote only may be exercised and any reason given may be recorded. (S.O. 184).⁵⁷

5.3 Temporary Speakers

At the beginning of each Parliament, the Speaker nominates not more than five members to act as Temporary Speakers (S.O. 19).⁵⁸ These members take the Chair for the Speaker, Deputy Speaker and the Assistant Speaker whenever requested and any advice or ruling given by them is independent and outside the responsibility

⁴⁹ VP 05/12/1899, p. 251.

⁵⁰ VP 07/12/1899, p. 265.

⁵¹ VP 12/12/1899, p. 271.

⁵² VP 19/02/1975, p. 301.

⁵³ VP 02/09/1919, pp. 34-5.

⁵⁴ VP 26/03/1858, p. 18; On the occasion of the election of the first member to the office of Deputy Speaker, Mr Price made his acknowledgments to the House VP 11/05/1999, p. 8.

⁵⁵ VP 23/12/1868, p. 77.

⁵⁶ On one occasion a Chairman voted when a Temporary Chairman occupied the Chair. See VP 20/02/1963, p. 660.

⁵⁷ See section 5.7 for information on the exercise of the casting vote of the Chair.

⁵⁸ For example, see VP 29/04/2003, p. 37 where three Government members and two opposition members were nominated by the Speaker to serve as Temporary Chairmen of Committees for the 53rd Parliament. When the Speaker is a member of the governing party only the Government members act in the Chair.

of the Speaker, Deputy Speaker or Assistant Speaker.⁵⁹ Temporary Speakers are referred to as Acting Speakers when in the Chair (S.O. 19).

The Speaker at any time may revoke the nomination of a member as a Temporary Speaker and nominate another member (S.O. 20).⁶⁰

5.4 The Leader of the House and the Manager of Opposition Business

The Leader of the House is a member appointed by the Government to manage government business in the Legislative Assembly. The Leader sets and arranges the Government's legislative program (the days on which the House will sit and the bills Cabinet has decided will be dealt with) and is the Government's main spokesperson on procedural matters. The Leader and the Manager of Opposition Business consult together in an effort to facilitate the orderly conduct of business.

Traditionally, the Leader of the House has been a Minister. However, on occasions the Leader of the House is not a Minister, which requires sessional orders to enable the Member to operate in that role and to move certain motions such as the adjournment of the House.⁶¹

5.5 The party whips

The duties of the whips are in the main to liaise with Ministers in regard to the business of the House, secure the attendance of members in the House, arrange speakers for debates, arrange "pairs" and generally act as intermediaries between the party leaders in the House and backbench members.

Whips hold office during the continuance of that Parliament only, and the office is automatically relinquished on the dissolution of the Parliament.

5.6 Parliamentary Secretaries

Part 4A of the *Constitution Act 1902* provides for the appointment by the Premier of Parliamentary Secretaries to perform such functions as the Premier, from time to time, determines. The Act does not authorise Parliamentary Secretaries to perform any function that by any law may only be performed by some other person.

Standing order 366 permits Parliamentary Secretaries to act on behalf of Ministers and for references to Ministers in the standing and sessional orders to be taken to include references to Parliamentary Secretaries except in respect of certain standing orders.⁶² Parliamentary Secretaries, acting on behalf of Ministers, are able to:

- give notice of, introduce and have carriage of the Government's business⁶³;
- be seated at the Table in order to undertake the functions undertaken by Ministers in this role. The Speaker has ruled that the requirement for a

⁵⁹ See ruling given by Chairman of Committees – George Booth, PD 28/10/1954, p. 1323.

⁶⁰ VP 17/09/1996, p. 365. First used after Temporary Chairman became a Parliamentary Secretary.

⁶¹ VP 27/11/2001, p. 1647 and VP 08/05/2007, pp. 7-8.

⁶² Prior to the adoption of the current standing orders in 2006 a sessional order first adopted in 1999 has provided for the same provisions VP 11/05/1999, pp. 40-1. See also VP 26/02/2002, pp. 17-18; VP 29/04/2003, p. 31.

⁶³ On one occasion standing and sessional orders were suspended to enable the Premier to make a further contribution to a debate for which the second reading had been moved by a Parliamentary Secretary on his behalf. VP 03/05/2000, p. 438.

Minister to be seated at the Table during debate is a convention rather than a rule;⁶⁴

- have the same time limits apply to their contributions as apply to Ministers (S.O. 85);
- table papers and, if desired, move motions to restrict inspection (S.O.s 264, 266 and 267);
- reply to a private member's statement (S.O. 108);
- give consecutive notices of motion (S.O. 138); and
- move a motion, without leave, to suspend standing and sessional orders to deal with any item or items of business before the House (S.O. 365).

Parliamentary Secretaries are not able to:

- inform the House when the Governor will give reasons for opening of Parliament (S.O. 2(9));
- inform the House when the Governor will receive the House with its new Speaker (S.O. 11(3));
- sit on the front bench during Question Time (S.O. 26);
- move a motion for the days and times of meeting and adjournment (S.O. 34);
- adjourn the House (S.O. 46);
- issue a notification for the allocation of time (guillotine) (S.O. 90);
- arrange government business (S.O. 101);
- receive notices of matters of public importance (S.O. 110(3));
- be the subject of a no confidence motion in a Minister or speak for the Minister (S.O. 112);
- receive copies of petitions sent to Ministers (S.O. 125);
- answer questions either on notice or without notice (S.O. 126, S.O. 131(5) and S.O. 132);
- declare a bill urgent (S.O. 189);
- introduce a money or taxing bill (see also s. 46(2) of the Constitution Act) (S.O. 190 and S.O. 243);
- appoint estimates committees (S.O. 246(1));
- be the subject of an order for papers (S.O. 269);
- be required to provide resources to a legislation committee (S.O. 323(10)); or
- speak in response to a motion for the suspension of standing orders (S.O. 365(4)).

5.7 Exercise of the casting vote of the Chair

Section 32(2) of the Constitution Act provides the authority for the exercise of a casting vote by the member presiding. Standing order 184 states that in the case of an equality of votes, the member presiding *shall* give a casting vote and that any reasons given *may* be entered in the Votes and Proceedings.

In practice this means that the member presiding is not obliged to give reasons for casting a vote one way or the other and even if they do the reasons do not have to be recorded in the Votes and Proceedings. Traditionally, the Chair will use their

⁶⁴ PD 26/06/2001, p. 15332. See also PD 06/06/2000, p. 6643 when a point of order was taken that the sessional order precluded a Parliamentary Secretary from sitting at the Table during a motion of no confidence in a Minister. The Speaker ruled that the sessional order did not provide that the Parliamentary Secretary could not sit at the Table.

casting vote to avoid making the decision before the House final – thus giving the House another opportunity of considering the matter.⁶⁵

5.7.1 New South Wales Legislative Assembly practice in exercise of a casting vote

The first casting vote in the Legislative Assembly was given on 12 August 1856 by the first Speaker, Sir Daniel Cooper, who before voting said “As I can find no precedent to guide me, I must use my own judgement.” He voted against the government members on a motion for the adjournment of the debate upon a private member’s motion.⁶⁶

Since that date, there have been many cases of casting votes, though not one, as far as can be gathered from the official records, was cast to the embarrassment of the Government, i.e. no Premier has resigned as a result of a casting vote.

Under the former standing orders the Chairman of Committees was restricted to exercising a casting vote only when the House was in committee. The first casting vote in committee was required on 11 December 1856. The Chairman gave his voice with the “noes” against an amendment to reduce an item in the Estimates. He did not give any reasons.⁶⁷

During the remainder of the 1856-57 session of Parliament, the Chairman was called upon on two further occasions to give his casting vote – and each time did so without comment. However, it would appear that the Chairman followed the Speaker’s lead and exercised “his own judgement.” Over the years, with a negligible number of exceptions, the Chairman has not offered comment upon the casting vote.

The following precedents in respect of the casting vote have been recorded:

- Speaker gave his casting vote with the “ayes” on the question that a motion for urgent consideration (now motion accorded priority) be proceeded with;⁶⁸
- Speaker gave his casting vote with the “ayes” on the motion that the debate be now adjourned;⁶⁹
- On the question, “That the [committee] report be adopted”, the Acting Speaker, gave his casting vote with the “ayes”;⁷⁰
- On the question, “That standing orders be suspended to allow the resumption of the adjourned second reading debate on certain bills”, the Speaker gave his casting vote with the “ayes”;⁷¹
- On the question, “That standing orders be suspended to allow government business to have precedence of all other business at this sitting”, the Speaker gave his casting vote with the “ayes”;⁷²
- On the question, “That Mr Armstrong, member for Lachlan be not further heard” (having been asked a question about his private member’s bill under

⁶⁵ See *May*, p. 413. See also ruling of Speaker Cameron, PD 09/09/1975, p. 869 where he commented that “consistent with the long standing principle that where there is an equality of votes the Speaker should cast his vote in order to permit further discussion to take place.”

⁶⁶ VP 12/08/1856, p. 61.

⁶⁷ VP 11/12/1856, p. 627.

⁶⁸ VP 01/06/1995, pp. 111-2; VP 14/11/1995, pp. 326-7.

⁶⁹ VP 16/09/1997, p. 33.

⁷⁰ VP 13/12/1995, p. 550-1.

⁷¹ VP 12/12/1995, p. 537-8.

⁷² VP 12/12/1995, p. 536.

a previous standing order), the Speaker gave his casting vote with the "ayes";⁷³

- Speaker gave his casting vote with the "noes" on motion of dissent against Speaker's ruling;⁷⁴
- On the question, "That General Business Notice of Motion (General Notice) No. 19 be re-ordered to take precedence", the Speaker gave his casting vote with the "ayes";⁷⁵
- On the question, "That the amendment [to a vote of censure of the Minister for Transport and for Tourism] be agreed to", the Speaker gave his casting vote with the "ayes";⁷⁶
- Speaker gave his casting vote with the "noes" on the second reading of a private member's bill;⁷⁷
- On a vote of no confidence in the Premier, the Speaker gave his casting vote with the "noes";⁷⁸
- Additional sessional orders relating to suspension of standing orders for consideration of government business and for the extension of the sitting carried on casting vote of Speaker;⁷⁹
- Motion for urgent consideration to consider forthwith three notices given this day for tomorrow proposing a new sessional order and amendments to two others. Agreed to on Speaker's casting vote;⁸⁰
- Speaker gave his casting vote with the "ayes" on the question "That a motion for urgent consideration be proceeded with";⁸¹
- Motion moved that member be not further heard on motion of dissent against Speaker's ruling. Speaker gave his casting vote with the "noes" – "to ensure that freedom of speech in this House is not infringed";⁸²
- Speaker voted against an amendment in order to preserve the original motion;⁸³
- Speaker voted against a motion to suspend standing orders to bring on a debate in order to leave control of the business in the hands of the Government;⁸⁴
- Speaker voted to adopt the report of the committee of the whole;⁸⁵
- Speaker voted to adopt the report of the committee of the whole and for the bill to be read a third time;⁸⁶
- Speaker voted against a motion to adjourn debate on a bill;⁸⁷
- Speaker voted with the "noes" on the question of whether a motion be noted as a matter of public importance;⁸⁸

⁷³ VP 23/11/1995, pp. 441-2, PD 23/11/1995, pp. 3931-2. This formed a ground for a motion of no confidence in the Speaker, VP 05/12/1995, pp. 469-70, VP 07/12/1995, pp. 508-9.

⁷⁴ VP 22/11/1995, p. 421.

⁷⁵ VP 25/10/1995, p. 334.

⁷⁶ VP 25/10/1995, p. 346-7.

⁷⁷ VP 19/10/1995, pp. 318-9; VP 26/10/1995, pp. 352-3; VP 23/11/1995, pp. 434-5.

⁷⁸ VP 19/10/1995, pp. 208-10.

⁷⁹ VP 01/06/1995, pp. 113-7.

⁸⁰ VP 01/06/1995, p. 113.

⁸¹ VP 18/11/1997, pp. 265-6; VP 14/11/1995, pp. 371-2; "for the reasons advanced by the Deputy Premier", PD 14/11/1995, p. 3097.

⁸² VP 01/06/1995, pp. 109-10; PD 01/06/1995, p. 596.

⁸³ PD 22/08/1991, p. 466.

⁸⁴ VP 29/08/1991, p. 115.

⁸⁵ PD 10/03/1992, p. 930.

⁸⁶ VP 25/03/1992, p. 172.

⁸⁷ VP 10/04/1991, p. 234.

⁸⁸ PD 01/09/1992, p. 5302.

- Speaker voted with the “ayes” for a bill to be read a second time;⁸⁹
- Speaker voted with the “noes” to an amendment to a motion for papers to be printed;⁹⁰
- Speaker voted with the “noes” for a bill to be read a second time;⁹¹
- Speaker voted with the “noes” to a motion to censure a Minister;⁹²
- Speaker voted with the “noes” to a motion referring a matter to the Public Accounts Committee for investigation and report;⁹³
- On the question, “That the motion as amended be further amended” the Speaker gave his casting vote with the “noes”;⁹⁴
- Speaker voted against a motion to refer a bill to a legislation committee;⁹⁵
- In committee – Question “That the words proposed to be left out stand”. Carried on casting vote;⁹⁶
- In committee – Question “That the clause as read stand a part of the bill”. Carried on casting vote;⁹⁷
- In committee – Question “That the remaining amendments as printed and circulated by the Minister be agreed to”. Carried on casting vote;⁹⁸
- In committee – Question “That words proposed to be inserted be so inserted”. Carried on casting vote;⁹⁹
- In committee – closure carried on casting vote of Chairman;¹⁰⁰
- Special Adjournment. Carried on casting vote of Speaker;¹⁰¹
- Question “That the question be now put”. Carried on casting vote;¹⁰²
- Urgency – consideration of certain notices of motions of general business or other motions. Negatived on casting vote;¹⁰³
- Amendment to motion for second reading of Anti-Discrimination Bill to provide for second reading “this day three months”. Question that the word proposed to be left out (now) stand part of the question, carried on casting vote of the Speaker. Bill was read a second time;¹⁰⁴
- On the closure, the Chairman gave his casting vote with the “ayes”. On objection being taken, the Chairman explained that the Chairs give their casting vote “by their best judgements of the merits of the question”;¹⁰⁵
- Rescission of resolution disallowing by-laws under *Government Railways Act*. Carried on casting vote. The Speaker stated that he was guided by the principles in *May* and that it was his duty to give his casting vote in such a manner as would not preclude the House at some future date from resolving the matter. The Leader of the Opposition could give a fresh notice of motion to disallow;¹⁰⁶

⁸⁹ VP 24/09/1992, p. 515.

⁹⁰ PD 15/10/1992, p. 7169.

⁹¹ VP 04/03/1993, p. 71.

⁹² VP 10/03/1993, p. 89.

⁹³ VP 11/03/1993, p. 98.

⁹⁴ VP 13/10/1993, p. 426.

⁹⁵ VP 16/11/1993, p. 555.

⁹⁶ Report of Divisions, 23 August 1977, p. 904; 24 November 1977, p. 936.

⁹⁷ Report of Divisions, 7 June 1977, p. 895.

⁹⁸ Report of Divisions, 30 March 1977, p. 893.

⁹⁹ Report of Divisions, 30 March 1977, p. 892.

¹⁰⁰ Report of Divisions, 30 March 1977, p. 891.

¹⁰¹ VP 16/03/1978, p. 732.

¹⁰² VP 17/08/1977, p. 408; 08/11/1977, p. 529; 09/11/1977, p. 538; 25/01/1978, p. 619

¹⁰³ VP 25/11/1976, p. 210; 23/03/1977, p. 315; 02/06/1977, p. 370; 09/11/1977, p. 537

¹⁰⁴ VP 24/11/1976, p. 205.

¹⁰⁵ PD 09/11/1976, pp. 2585-7.

¹⁰⁶ VP 09/11/1950, p. 105.

- Disallowance of regulations under *Transport Act*. Negatived on casting vote of the Speaker – no reasons given ;¹⁰⁷
- Motion for the adoption of a Report from the Select Committee on the Employment of Youth in Industry. Negatived on casting vote. The Deputy Speaker said that he would follow the usual practice and leave the position as it was;¹⁰⁸
- Motion to suspend standing and sessional orders to allow consideration of a motion that the prayer of a petition on the Public Service (Salaries Reduction) Bill be granted and that the President of the Public Service Association be heard at the Bar of the House. Carried on casting vote. The Speaker stated that as the House had already agreed to the urgency motion he would vote for the motion in order not to prevent a discussion of the substantive resolution;¹⁰⁹
- Substantive motion (above). Negatived on casting vote. The Speaker stated that it was his duty not to cast his vote in such a way as to take the business of the House out of the hands of the Government;¹¹⁰
- Consideration of an urgency motion was agreed to on the casting vote of the Speaker to allow further discussion on the issue.¹¹¹
- On a closure motion, the Speaker cast his vote with the “noes” in order that the debate on the second reading of a bill could be continued.¹¹²
- Following an attempt to adjourn the second reading debate on a bill, which was negatived on division, the closure was moved. The Speaker gave his casting vote against the motion to enable the debate to continue.¹¹³
- When the previous question was put, the Speaker gave his casting vote with the “ayes” so that the substantive motion before the House could be put rather than shelved.¹¹⁴

5.7.2 Imperial practice – Speaker’s casting vote

As standing order 184 does not elaborate on the exercise of the casting vote by the Speaker, reference may be made to the principles set out in *May* at pages 413-17.

May distils various principles from the way Speakers have exercised their casting votes in the House of Commons.

In summary, the principles are:

- (1) The Chair should always vote for further discussion where this is possible (Speaker Addington 1796);
- (2) Where no further discussion is possible, decisions should not be taken except by a majority (Speaker Denison 1861 and 1867); and
- (3) A casting vote on an amendment to a bill should leave the bill in its existing form (Speaker Denison 1860). Note: in the House of Commons bills as amended in committee may then be considered in the House.

¹⁰⁷ VP 09/11/1950, p. 102.

¹⁰⁸ VP 04/12/1940, p. 178.

¹⁰⁹ VP 20/05/1930, p. 386.

¹¹⁰ VP 20/05/1930, p. 387.

¹¹¹ VP 04/11/1925, p. 125.

¹¹² VP 23/09/1925, p. 64.

¹¹³ VP 10/10/1922, pp. 150-1.

¹¹⁴ VP 11/10/1859, p. 168.

Bearing in mind that the above-mentioned principles were first conceived in the House of Commons between 1796 and 1867 and that, because of the size of the House, the Speaker has rarely had to exercise a casting vote, the relevance of these principles to the New South Wales Legislative Assembly today could be questioned.¹¹⁵

It should also be noted that *May* at page 413 predicates his remarks with "In the performance of this duty to give a casting vote, the Speaker is at liberty to vote like any other member, according to his conscience, without assigning a reason; but in order to avoid any imputation upon his impartiality, it is usual for him, when practicable, to vote in such a manner as not to make the decision of the House final". This is the proviso which governs the principles involved.

Precedents from the House of Commons related in *May* (pages 414-17) include:

- the Chair should always give its casting vote in favour of leave to bring in a bill (on the basis that the House should deal with the bill), its first and second readings and in favour of motions that the bill be considered in committee (or re-committed) on the basis that he or she should always vote for further discussion;
- on the question of an amendment proposed to the question that a bill be read a second time a ruling in 1828 was made that to best discharge the Speaker's duty, a bill should be left open to further consideration – the Speaker would vote against the amendment.
- on the question of the third reading of a bill, Speaker Addington in 1796 said – "...when the question turned upon the measure itself – for instance, that a bill do or so not pass – he should then vote for or against it, according to his best judgement of its merits...". In 1861 Speaker Denison voted against the third reading of a bill on the basis that "...he should best discharge his duty by leaving to the future judgement of the House to decide what change in the law should be made, rather than take the responsibility for the change on his single vote."
- the previous question "That that question be now put" was the subject of a casting vote in favour of the ayes on the basis that in the Speaker's opinion, the original question was now fit to be submitted to the judgement of the House.

5.7.3 House of Representatives – Speaker's casting vote

*House of Representative Practice*¹¹⁶ also provides some examples on pages 182-185:

¹¹⁵ Prior to the adoption of the current standing orders a standing order was in place which allowed recourse to Imperial practice in cases not provided for by standing orders, sessional or other orders or practice of the House. The Standing Order stated that the current practice of the House of Commons shall be followed only *as far as it can be applied*. This standing order was removed as it was considered that the 150 years of the New South Wales Legislative Assembly provided ample precedent. However, the principles are still worthy of note.

¹¹⁶ 5th edition, 2005.

- An amendment to the second reading of a bill was negatived in order to enable a further decision of the House.
- A motion for the closure of a debate has been negatived to enable debate to continue.
- Several examples are recorded where the Speaker has had to finally decide a matter before the House – a few examples will suffice – in favour of a member being suspended from the service of the House; against an amendment to add words to the Address in Reply; against a report being printed; against a motion for expulsion of a member from the press gallery on the basis that it was a matter for the House to decide; against an amendment to the standing orders in view of an undertaking that the matter would be referred to the Standing Orders Committee.
- In respect of motions at the various stages in the passage of a bill, Speaker Johnson in 1914, in regard to the Government Preference Prohibition Bill, exercised his casting vote against an amendment to the motion for the first reading, and for the first, second and third readings.

5.7.4 New Zealand – Speaker's casting vote

With the move to the MMP (Mixed Member Proportional) voting system, which was enacted in the *Electoral Act 1993* (NZ) following a referendum and subsequent changes to the standing orders, the Speaker in the New Zealand House of Representatives no longer has a casting vote. The Speaker has an ordinary vote, which is included in the collective vote of the party they were elected to represent. This ensures that the party proportionality determined at the general election is maintained.¹¹⁷

However, past practice provides some examples of how the casting vote has been used:

- On questions of confidence the Speaker should use the casting vote with the Government, as it should not be the Speaker's vote which precipitates the fall of a Government or the dissolution of Parliament.
- The Speaker would vote in favour of motions for the first and second readings of a bill and for referral to a committee but would vote against the third reading unless this has been made a question of confidence by the Government or the bill was a conscience issue. On appropriation bills, the Speaker would vote to sustain the Government.¹¹⁸

5.7.5 Summary

The New South Wales Legislative Assembly has developed its own practice to a large extent in regard to the exercise of the casting vote. However, recourse may be had to House of Commons practice and particularly to the principles which evolved in the period between the late 1700's and late 1800's in that House, in the end, the Speaker is entitled to exercise a vote according to conscience. In modern times the Speaker is usually from the governing party and invariably gives a casting vote to enable the Government to govern effectively.¹¹⁹

¹¹⁷ See New Zealand Office of the Clerk of the House of Representatives, *Parliament Brief: Officers of the House*, June 2004, available at www.clerk.parliament.govt.nz

¹¹⁸ McGee, David, *Parliamentary Practice in New Zealand*, 2nd edition, 1994, p. 181.

¹¹⁹ For example, see VP 19/10/1995, pp. 208-10 where the Speaker gave his casting vote with the "noes" on a motion of no confidence in the Premier.

5.8 Rulings from the Chair

The primary responsibility of the Speaker or other occupant in the Chair, when required to give rulings, is to interpret the standing orders, other orders and practice of the House. As far as is practicable, the Chair is not expected to interpret the *Constitution Act 1902* or other Acts, adjudicate upon points of law, decide technical questions or interpretation in any bill, or to judge the correctness or otherwise of statements made by a member.

5.8.1 Dissent from ruling or decision of the Chair

If a ruling is given from the Chair and no objection is taken, that ruling is equivalent to a resolution and must be complied with. However, as the House itself is the final arbiter on all questions of order, if any objection is taken to a ruling of the Speaker, the point is considered by the House upon substantive motion, of which notice must be given at the time for notices for business with precedence within three clear sitting days after the ruling. Debate on the motion is accorded precedence of all other business (S.O. 95).¹²⁰ Any motion of dissent which is given notice of outside of these three sitting days is out of order.¹²¹

The procedure for dissent motions set out in standing order 95 must be read in conjunction with the other standing orders which lay down the general procedure concerning notices of motion, as these also apply to dissent motions.¹²² Standing order 95 only provides for dissent from “a ruling or decision of the Chair” although this is taken to mean any interpretation of standing orders by the Speaker.¹²³

There are however two important exceptions to this ruling:

- (1) It has been ruled that a dissent motion cannot be moved in relation to a privilege matter which was not established as a *prima facie* case “to the satisfaction of the Speaker”, because the Speaker’s state of mind cannot be changed by a motion of the House;¹²⁴ and
- (2) There has been a ruling that a statement made for the guidance of the House is not necessarily subject to dissent. Speaker Ellis commented:

“It is not to be taken as a precedent that, because the Speaker replies to a question and makes a statement for the guidance of the House, it necessarily follows that it is capable of dissent.”¹²⁵

A number of Speakers have also deplored members of the House attacking or criticising the Chair through media reports rather than by a motion of dissent, given that such behaviour was “unchivalrous”, a violation of the traditions of Parliamentary procedure,¹²⁶ and “despicable and cowardly”.¹²⁷

¹²⁰ Notice not accepted as it was not in the correct form. PD 25/10/01, pp. 18033 and 18036.

¹²¹ See ruling of Speaker McCourt, VP 1902, p. 71 and ruling of Speaker Willis, VP 06/09/1911, p. 17; PD 06/09/1911, p. 359.

¹²² See ruling of Speaker Cameron, PD 25/02/1975, p. 3810.

¹²³ See comments made by Speaker Ellis in relation to motions of dissent from the Speaker’s rulings, PD 12/10/1971, pp. 1758-64.

¹²⁴ 16/03/1967, p. 4387.

¹²⁵ PD 18/09/1973, p. 934 where a motion of dissent was moved in relation to a statement made by the Speaker about the application of the sub judice rule to Royal Commissions.

¹²⁶ See ruling of Speaker Clyne, PD 13/04/1943, p. 2364-5.

¹²⁷ See ruling of Speaker Weaver, PD 03/04/1940, p. 7719.

It is interesting to note that the attitudes of former Speakers of the House towards the debate on dissent stand in marked contrast. Speaker Ellis expressed the view that the occasion was not one for airing general grievance and discussion should be strictly restricted to the ruling being dissented to.¹²⁸ Speaker Cameron on the other hand, in supporting the opposite principle, that limits should be minimal so that justice should manifestly and undoubtedly be seen to be done, commented on one occasion that the Chair will always be extremely reluctant to fetter a member moving a motion of dissent.¹²⁹

Generally, motions of dissent in relation to decisions made by the Speaker are negated on party lines.¹³⁰

5.8.2 Objection to decision of Chair in former committee of the whole

Under the current standing orders adopted in 2006 there is no provision for the House to constitute itself as a committee of the whole. Rather, the House considers matters such as amendments to bills in the consideration in detail stage.¹³¹

Accordingly, any decisions made by the occupant of the Chair when the House is considering a matter in detail must be dissented to in the same way as any ruling in the House (i.e. by notice). A member may also seek the leave of the House to suspend standing and sessional orders to provide for a motion of dissent to be moved forthwith.

In contrast, under the former committee of the whole procedure an objection to a decision of the Chairman was required to be taken immediately, be in writing and handed to the Chairman. An example was as follows:

- I object to the Chairman's decision that the proposed amendment to clause of the ABC Bill is not in order on the ground that it is not relevant to the subject matter of the bill.

A motion was then required to be moved by the member, such as:

- That you do now leave the Chair to report an objection and ask leave to sit again as soon as the objection is ruled upon by the Speaker. The objection is that the Chairman was in error in deciding that the proposed amendment to clause ... of the ABC Bill was not in order on the ground that it was not relevant to the subject matter of the bill.

No debate was allowed on a motion for referring a point to the Speaker. The mover was however permitted to make a statement of their objections to the ruling, limited to five minutes. If this question was agreed to, the Chairman left the Chair and the House resumed.

When the Speaker took the Chair of the House, the Chairman reported the dissent, in writing.

¹²⁸ PD 30/08/1972, p. 465.

¹²⁹ PD 17/10/1974, p. 1971.

¹³⁰ For examples see VP 23/08/1977, p. 424; VP 21/08/1979, pp. 28 and 29; VP 05/11/1981, p. 26; VP 11/11/1982, p. 144; VP 23/11/1982, p. 151; VP 22/09/1983, p. 84; and VP 23/10/1984, pp. 138-40.

¹³¹ See Chapter 21 of Part One for further information on the consideration in detail procedure.

For example:

- Mr/Madam Speaker, I have to report that in the committee of the whole on clause of the ABC Bill, the member for moved the following amendment: I made a decision that the amendment was not in order on the ground that it was not relevant to the subject matter of the bill. The member for objected to my decision and submitted a dissent in writing.

The matter was then dealt with in the House as a point of order, that is, members were able to speak as many times as they desired until the Speaker heard sufficient to make a ruling. Of course, it was still open for the House to dissent from the ruling given by the Speaker, but notice of such a motion was required.

There were certain situations in which the Chairman was not bound to accept a motion for a ruling to be given by the Speaker. For example, those rulings which were given in accordance with the standing orders¹³² or the long-established practice of the Committee and those objections not taken at once, i.e. before another member speaks.

5.9 Permanent officers of the House

The permanent officers of the House are the Clerk of the Legislative Assembly, the Deputy Clerk, Clerk-Assistant Committees and Corporate, and Clerk-Assistant Table and Serjeant-at-Arms. Since 1860, when the House agreed to a resolution regarding the permanent officers of the House, these officers have been appointed by the Executive Council, on the recommendation of the Speaker.¹³³ The Clerks are only accountable to the Speaker and the House and are totally independent of the Government and the Opposition. As such, it is the duty of the Clerk of the House to always objectively interpret the position arising from any set of circumstances without any influence of political considerations.

A commission under the Public Seal is issued in the case of the Clerk and the Serjeant-at-Arms. On assuming office the Clerk takes an oath of allegiance¹³⁴ and a second oath, taken from the practice of the House of Commons¹³⁵ before the Governor. The Serjeant-at-Arms also takes an oath of allegiance before the Governor.

In the absence of the Clerk the duties of Clerk are performed by the officer next in seniority (S.O. 22). If it is known, or if there is a distinct possibility, that the Clerk will be absent for some time when the House is sitting, it is customary for the Deputy Clerk to be issued with a Commission as Acting Clerk. In this event the Deputy Clerk takes the same oath as taken by the Clerk before the Governor.¹³⁶

¹³² PD 11/12/1925, p. 3317; PD 30/05/1928, p. 1105.

¹³³ See VP 24/01/1860, pp. 367-8, where clause (2) of the resolution agreed to by the House stated "That it is the opinion of this House, That in order to maintain the dignity and usefulness of the office of Speaker, all the Clerks and other Officers of the House ought to be appointed by the Executive upon the recommendation of the Speaker of the Legislative Assembly." This resolution was reinforced by a legal opinion obtained by the House in 1912 which specified that under the provisions of the *Constitution Act 1902* it appeared that the officers of the House are appointed by the Governor in Council on the recommendation of the Speaker.

¹³⁴ The Clerk takes an oath of allegiance in accordance with section 7 of the *Oaths Act 1900*.

¹³⁵ May, p. 229. "to make true entries, remembrances and journals of things done and passed during my continuance in Office as Clerk of the Legislative Assembly"

¹³⁶ VP 27/01/1886, p. 73; VP 22/10/1968, p. 147; Acting Clerk appointed following resignation of the Clerk, VP 05/09/1990, p. 367 and VP 11/09/1990, p. 402.

5.9.1 Role of the Permanent Officers of the House

The position of Clerk is referred to in the earliest records of the House of Commons (UK) written around 1327. However, it was not until 1363 that the Clerk was first appointed by letters patent and 1388 before the Clerk was recorded as a permanent official of the House as the “Communes Clerk”.¹³⁷ The first Clerks were officers of the Crown but, by the seventeenth century, their loyalties had become solely to the House.

The Clerk of the House of Commons began keeping a record of proceedings during the sixteenth century and developed the role of advising on precedents and procedure during the seventeenth century. Since that time Clerks have continued to have a crucial role as impartial (non-political) advisors on the procedures of the House.

The Clerk of the Legislative Assembly has overall responsibility for the procedural advice given, the administration of the House and the management of the Department of the Legislative Assembly. In particular, the Clerk:

- Records what happens in the House (i.e. the *Votes and Proceedings*) and keeps a record of all papers tabled;
- Assists in the running of the House;
- Advises and assists the Speaker on procedural matters;
- Chairs the election of the Speaker;
- Certifies that Assembly bills have passed both Houses and sends them to the Governor for Royal Assent;
- Maintains custody of papers and documents presented to the House;¹³⁸ and
- [Manages the Department of the Legislative Assembly.](#)

In the Chamber, the Clerk sits in front of the Speaker at the Speaker’s right. From there the Clerk is able to converse with the Speaker, the Premier, Leader of the House and other members who require advice and guidance.

The Clerk reads the order of the day or next item of business to make members aware of the next matter to come before the House.¹³⁹ The practice of the Clerk reading the order of the day dates from centuries ago in England when few members could read and the Clerk read the whole text of a bill. In fact, the term “Clerk” historically meant a person who could read and write.¹⁴⁰ This was still the case in the early days of the Colony in that a Board which was assembled pursuant to an Order of the Governor of New South Wales in June 1837 had considered that any person appointed to the position of Clerk must have the following qualifications:

- The person appointed must have hand writing that is clear and legible in every aspect;
- The person appointed must be perfect in the common Rules of Arithmetic, viz. addition, subtraction, multiplication and division;

¹³⁷ Address delivered to Members of the Royal Australian Historical Society by H. Robbins, Clerk of the Legislative Assembly, 23 June 1951, pp. 17-19.

¹³⁸ Since the early years of the Parliament in the UK, the Clerk of each House has had absolute custody of all documents and papers belonging thereto, or presented to the Parliament, and this is the practice in the New South Wales Legislative Assembly.

¹³⁹ Under the previous standing orders of the House when a bill was considered the Clerk read its title at the end of each of the three stages in the passage of legislation in addition to reading the order of the day.

¹⁴⁰ *House of Representatives Practice*, 5th edition, p. 205.

- The person appointed is required to write grammatically in the English language, and to be correct in his or her orthography.¹⁴¹

The other Table Officers, namely, the Deputy Clerk and Clerks-Assistant sit at the Table at the left-hand of the Clerk. Not all Table Officers are in the House at the same time but are rostered according to the workload of the House and the officers' responsibilities outside the Chamber, although the Deputy Clerk is principally responsible for proceedings where bills or other matters are considered in detail.

The Serjeant-at-Arms has traditionally been responsible for a number of ceremonial duties and the preservation of order. Under the standing orders the Serjeant-at-Arms under the Speaker's direction is authorised to:

- Remove members from the Chamber for disorderly behaviour (S.O. 249);
- Admit visitors to the public galleries (S.O. 257);
- Remove visitors who are causing disturbance from the precincts of the House (S.O. 260); and
- Introduce witnesses before the House.

The name Serjeant-at-Arms derives from the Latin for servant – *serviens*. In the United Kingdom the office of the Serjeant-at-Arms dates back to 1415 and the reign of Henry V when the Serjeant was responsible for carrying out the orders of the House of Commons including making arrests. The ceremonial duties of the position holder such as being custodian of the Mace dates back to those early days.¹⁴²

From March 2003, the Clerk-Assistant (Table) assumed the additional role of Serjeant-at-Arms. The Deputy Serjeant-at-Arms carries out a number of the Serjeant's duties under the Serjeant's delegated authority.

¹⁴¹ *Proceedings of a Board assembled pursuant to the Order of His Excellency Sir Richard Bourke, KCB Governor of New South Wales*, dated 26 June 1837, p. 5.

¹⁴² Information from the House of Representatives website at <http://www.aph.gov.au/house/dept/saa.htm>

Chapter 6 Members' Pledge of Loyalty or Oath of Allegiance, Roll, Leave of Absence

6.1 Members' Pledge of Loyalty

The procedure for members to make the pledge of loyalty or take the oath of allegiance at the commencement of a Parliament is outlined in Chapter 4 of Part One.

New members are advised to make an appointment with the Clerk to discuss the legal and procedural requirements of taking a seat in the House.

Early in the days of a new Parliament separate commissions are issued by the Governor to occupants of the positions of the Speaker, Deputy Speaker and the Assistant Speaker, enabling them to administer the pledge of loyalty or oath of allegiance to any members who may be elected during that Parliament. A member cannot sit or vote until he or she has taken the pledge of loyalty or oath of allegiance in accordance with section 12 of the *Constitution Act 1902*.¹

After a by-election, the procedure on the day the member takes the pledge of loyalty or oath of allegiance (usually the first day the House sits after the return of the writ) is that:

- (1) The Speaker informs the House that the writ for election of a member for the electoral district has been returned and names the member elected.
- (2) The Clerk announces the member's name and the member is conducted into the Chamber (through the northern side door) escorted by members (usually the party leader and one other) to the foot of the Table) where they nod obeisance to the Speaker prior to walking up to the Speaker's Chair. The Speaker hands the member the form of the pledge of loyalty or oath of allegiance.
- (3) The member must take the pledge of loyalty or an oath of allegiance prior to signing the form, which is then witnessed by the Speaker.
- (4) The member then signs the Roll with their full name (no initials). The member's address is transcribed from the writs.
- (5) The member is escorted back to their "allocated" place on the respective side of the House.²

On occasion this procedure has been slightly altered. For example, on 11 October 2005 three members, who had been elected at recent by-elections, were escorted into the Chamber as a group by the Premier and the Government Whip. This departed from the usual practice where the Clerk introduces new members to the House and they are escorted and introduced individually.³

¹ In 2006 an amendment was made to the Constitution Act removing the requirement for members to swear allegiance to the reigning Sovereign, their heirs and successors and requiring members instead to take a pledge of loyalty to Australia and the people of New South Wales. This was subsequently amended in 2012, to provide members with the option of taking either the pledge of loyalty or the oath of allegiance to the reigning Sovereign.

² See for example, VP 12/03/2002, p. 57.

³ PD 11/10/2005, p. 18310.

Standing order 23(2) states that a member returned at other than a general election may be escorted into the Chamber by other members (i.e. introduced to the House).⁴ It is not mandatory for a newly elected member to be escorted into the Chamber by another member.

Originally such an introduction was mandatory and this created a difficult situation in 1943 when Mr J. T. Lang, a former Premier of the State, was elected at a by-election as an independent member for the electorate of Auburn and no member was prepared to introduce him.⁵ The situation was overcome by Mr Lang introducing himself as the newly elected member for Auburn and the Speaker made a statement explaining that as the newly elected member was well known to members and the Speaker, he would allow Mr Lang to be sworn without first having been formally introduced.⁶

The pledge of loyalty taken before the Speaker by a member is as follows:

- 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.

The oath of allegiance is 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.⁷

A member may, instead of taking an oath of allegiance, make an affirmation to the same effect.

6.2 Leave of absence

Every member is bound to attend the service of the House⁸ unless leave of absence is granted, on motion without notice, usually moved by the member's party whip.⁹ Leave may be granted for any sufficient cause, but such leave cannot exceed the remainder of the session. A member is excused from attendance so long as the member has leave, but forfeits it upon attending the House (S.O. 27-29).¹⁰ Leave has been granted to a member who was yet to take a seat.¹¹

⁴ On one occasion, a member who had been elected following the death of a candidate on the day of the general election was introduced to the House in the same way as a member returned at a by-election as the writ for the election was issued after the general election, VP 17/06/2003, p. 167.

⁵ Mr Lang was Premier in 1932, when the Governor had cause to inform him that his commission as Premier had been withdrawn and in the ensuing years Mr Lang remained a controversial political figure.

⁶ VP 05/10/1943, p. 20.

⁷ Section 12 (4B) provides that it is not necessary for any member who has taken an oath or affirmation of allegiance to take the oath or affirmation again after any demise of the Crown. Prior to the introduction of the Pledge of Loyalty in 2006, members were required to again take the oath or affirmation of allegiance upon the demise of the Crown see for example, VP 27/02/1952, pp. 377-9.

⁸ The duty of a member to attend the sittings of the House includes also the obligation to serve on committees of the House to which the member may be appointed.

⁹ VP 23/06/2004, p. 898.

¹⁰ VP 23/12/1913, p. 14; VP 25/05/1976, p. 9.

¹¹ See VP 02/05/1995, p. 29, where a leave of absence was granted to the Member for East Hills on the first day of the 51st Parliament on account of being absent from the State. The member was subsequently sworn in the following day VP 23/05/1995, p. 34.

A member's seat becomes vacant if they remain absent for one whole session without leave being granted.¹² Members unable to attend Parliament on any particular sitting day inform their party whip or in the case of an Independent member, the Speaker, who may make a statement to the House informing it of the member's absence¹³ or the member may explain any absence to the House themselves.¹⁴

6.3 Resignation

Section 33 of the *Constitution Act 1902* provides that "Any Member of the Legislative Assembly may, by writing under his hand, addressed to the Speaker, resign his seat therein, and upon receipt of such resignation by the Speaker, the seat of such Member shall become vacant."

On receipt of a resignation, the Speaker informs the House. It is usual for the House to declare the seat vacant when a member has resigned.¹⁵ After the House has declared the seat vacant the Speaker then issues a writ for a by-election.¹⁶ If the House is not in session or adjourned for more than seven days, the Speaker issues the writ without a declaration by the House (s. 70 *Parliamentary Electorates and Elections Act 1912*).¹⁷

Members cannot send a letter of resignation to the Speaker which requests that the resignation take effect from a later date. The House has affirmed that the resignation takes place from the time of receipt of the letter by the Speaker. On 27 October 1998, the Speaker informed the House that he had received a resignation from a member the previous day and the House declared the seat vacant. Concerns arose as to whether this declaration was valid as the member had requested that his resignation take effect from 31 October 1998 rather than the date of receipt. The Speaker received advice from the Crown Solicitor that, under section 33 of the *Constitution Act 1902* "the scheme for resignation of a seat is for such resignation to take effect immediately upon its receipt by the Speaker to whom it must be addressed and it is not possible for a Member to exclude the operation of section 33 by nominating some other time at which resignation is to take effect." The Crown Solicitor also noted that section 33 did not confer a discretion on the Speaker to take into account a request for a resignation to take effect at some future time. Despite this, the Crown Solicitor was of the view that the letter did not constitute a resignation within the meaning of section 33 as it did not constitute an unequivocal statement of

¹² Constitution Act, s. 13A.

¹³ The Leader of the House may also propose a motion to grant a member leave of absence PD 30/03/2004, p. 7687.

¹⁴ PD 04/09/2003, p. 3189.

¹⁵ This process is particularly important in those cases where a member has not resigned but the seat has become vacant for some other reason such as a member has died in office or the election of a member has been declared void by the Court of Disputed Returns.

¹⁶ If the Speaker is absent, the Deputy Speaker, as Acting Speaker, can assume his duties in relation to the resignation of a member and the issue of a writ for filling the vacancy in accordance with section 31A of the *Constitution Act 1902*.

¹⁷ There have been occasions when a seat has become vacant, either through resignation or the death of a member, and no writ has been issued even though the House has declared the seat vacant. For example, in 1913 Speaker Morton advised the House that he considered it unnecessary to issue a writ for the election of a member for the electoral district of Lachlan following the death of the member as the Parliament would be in recess when the writ would be returned and would not sit again during the session due to the expiration of the Parliament. VP 10/09/1913, p. 87. See also PD 06/03/1947, pp. 1184-5 where Speaker Clyne advised the House that a writ for the vacant seat of Redfern would not be issued as the dissolution of the House for a general election was imminent and there would be no opportunity for any new member elected to be sworn in before the end of the session. More recent advice from the Solicitor General indicates that if the House declares a seat vacant the Speaker must issue a writ for a by-election in accordance with the provisions of s. 70 of the *Parliamentary Electorates and Elections Act 1912*. Advice received from the Solicitor General re: Phillip Smiles MP: Constitution Act s.13A, dated 25 June 1993.

intention to resign the seat on the receipt of the resignation. As such the Crown Solicitor advised that the seat did not become vacant on the letter's receipt by the Speaker. The House, whilst recognising the advice of the Crown Solicitor, did not agree that the intention to resign was unclear and on 29 October 1998 reaffirmed its resolution declaring the seat vacant from the date of the receipt of the resignation letter.¹⁸

Any member of the Legislative Assembly wishing to stand as a candidate for a federal election must resign from the Legislative Assembly before the "hour of nomination" as a candidate for that election.¹⁹ Whilst any such resignation is irrevocable, the by-election for the casual vacancy created by any such resignation may be delayed to allow the former member to contest the by-election if unsuccessful at the Federal poll.

To delay the issue of the writ for the by-election created by a member's resignation, the member must tender their resignation to the Speaker with notification of their intention to contest a federal election and to contest the by-election for their former seat if unsuccessful at the federal poll. The member must do so "prior to the date of the issue of the writ" for the federal election.²⁰ This means that the member must resign the day before the issue of the writ. The writ for a federal election must be issued within 10 days of the dissolution of the House of Representatives and may be issued almost immediately. Consequently, there may be little or no time after the announcement of an election during which a member may take advantage of the provisions of the *Parliamentary Electorates and Elections Act 1912*.

A member's salary ceases from the day of resignation and, if re-elected to the Legislative Assembly, recommences from the day of election.²¹

6.4 Places of members

Members do not have reserved seats, however the front bench on the right hand of the Chair is reserved for Ministers during Question Time (S.O. 26). Likewise the front bench on the left is reserved for Opposition Shadow Ministers.²² The whips are seated on opposite sides in the first place nearest the Speaker on the second row. Independent members have sat on the back rows of the Opposition side and, during periods when there are large Government majorities, two back rows on the Opposition side have been deemed to be "Government" for the purposes of divisions.

¹⁸ VP 27/10/1998, p. 987; VP 29/10/1998, pp. 1017 and 1018. See also PD 29/10/1998, pp. 9373-5 and 9398.

¹⁹ See section 164 of the *Commonwealth Electoral Act 1918*.

²⁰ See section 79(8) *Parliamentary Electorates and Elections Act 1912*.

²¹ See section 16 of the *Parliamentary Remuneration Act 1989*.

²² PD 15/10/1997, p. 849.

Under review

Chapter 7 Members' Ethics and Code of Conduct

7.1 The Independent Commission Against Corruption

In 1988, the Independent Commission Against Corruption (ICAC) was established with jurisdiction over all "public officials". Public official was defined to include officers in the Parliament, government departments, statutory authorities and local councils, as well as parliamentarians and local councillors, judges and magistrates. Those working in the private sector and general community who are not public officials may be covered if their conduct adversely affects or could adversely affect the honest or impartial exercise of a public official's official functions.

The principal functions of the ICAC are to:

- investigate, expose and prevent corruption involving or affecting public authorities or public officials; and
- educate public authorities, public officials and members of the public about corruption and its detrimental effects on public administration and on the community.¹

The ICAC does not punish offences nor does it have any prosecutorial role. Its role is to protect the public interest and to prevent breaches of public trust by exposing and minimising corruption. The legislation establishing the Commission has incorporated many amendments since its assent as a result of court challenges and anomalies that have been recognised in the legislation. Of note is the New South Wales Court of Appeal decision in *Greiner and Moore v Independent Commission Against Corruption*.²

This court case concerned an ICAC inquiry into the appointment of a former member of the Liberal Party and Minister of that Government, Dr Metherell, to a senior public service position as an alleged inducement to resign his parliamentary seat. The former Premier (Mr Greiner) and former Minister (Mr Moore) appealed the decision in the Supreme Court of New South Wales and a judgment was brought down that the ICAC's finding was made without, or in excess of jurisdiction, was a nullity, and was wrong in law.

In 1994 the Parliament passed an amendment to the *Independent Commission Against Corruption Act 1988* in response to continued debate following this decision. The ensuing amendment to correct this anomaly expanded the jurisdiction of the Commission in relation to Ministers of the Crown and members of Parliament. This expanded jurisdiction enables the ICAC to investigate an allegation that a Minister or member of Parliament has breached a code of conduct applicable to that Minister or member, if the alleged breach was substantially of a corrupt nature.³

¹ See information on "What is the ICAC?" <http://www.icac.nsw.gov.au/go/the-icac>

² *Greiner v ICAC* (1992) 28 NSWLR 125.

³ Section 122 of the *Independent Commission Against Corruption Act 1988* precludes any action contrary to Article 9 of the Bill of Rights and thus parliamentary privilege. See also section 5.1.2 of Part Two on the application of section 122 to members of Parliament in relation to search warrants executed by the ICAC.

7.2 The Code of Conduct adopted by the Legislative Assembly

The New South Wales Legislative Assembly adopted a Code of Conduct for its members for the first time on 5 May 1998.⁴ The resolution adopting the code of conduct for the current Parliament was passed by the Legislative Assembly on 8 May 2007 with an amendment being made to the Code in June 2007. The Code of Conduct that has been agreed to by both Houses is as follows:

Preamble to the Code of Conduct

The Members of the Legislative Assembly and the Legislative Council have reached agreement on a Code of Conduct which is to apply to all Members of Parliament.

Members of Parliament recognise that they are in a unique position of being responsible to the electorate. The electorate has the right to dismiss them from office at regular elections.

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 of Parliament, and using their influence to advance the common good of the people of New South Wales.

Members of Parliament acknowledge that their principal responsibility in serving as Member is to the people of New South Wales.

THE CODE

1 Disclosure of conflict of interest

- (a) *Members of Parliament must take all reasonable steps to declare any conflict of interest between their private financial interests and decisions in which they participate in the execution of their office.*
- (b) *This may be done through declaring their interests on the Register of Disclosures of the relevant House or through declaring their interest when speaking on the matter in the House or a Committee, or in any other public and appropriate manner.*
- (c) *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.*

2 Bribery

- (a) *A Member must not knowingly or 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 the Member has received, is receiving or expects to receive.*
- (b) *A Member must not knowingly or improperly promote any matter, vote*

⁴ The same code applies to members of the New South Wales Legislative Council.

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:

- (i) A member of the Member's family;*
 - (ii) A business associate of the Member; or*
 - (iii) Any other person or entity from whom the Member expects to receive a financial benefit.*
- (c) A breach of the prohibition on bribery constitutes a substantial breach of this Code of Conduct.*

3 Gifts

- (a) Members must declare 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 accept gifts that may pose a conflict of interest or which might give the appearance of an attempt to improperly influence the Member in the exercise of his or her duties.*
- (c) Members may accept political contributions in accordance with part 6 of the Election Funding Act 1981.*

4 Use of public resources

Members must apply the public resources to which they are granted access according to any guidelines or rules about the use of those resources.

5 Use of confidential information

Members must not knowingly and improperly use official information which is not in the public domain, or information obtained in confidence in the course of their parliamentary duties, for the private benefit of themselves or others.

6 Duties as a Member of Parliament

It is recognised that some members are non-aligned and others belong to political parties. Organised parties are a fundamental part of the democratic process and participation in their activities is within the legitimate activities of Members of Parliament.

7 Secondary employment or engagements

Members must take all reasonable steps to disclose at the start of a parliamentary debate:

- (a) *the identity of any person by whom they are employed or engaged or by whom they were employed or engaged in the last two years (but not if it was before the Member was sworn in as a Member);*
- (b) *the identity of any client of any such person or any former client who benefited from a Member's services within the previous two years (but not if it was before the Member was sworn in as a Member); and*
- (c) *the nature of the interest held by the person, client or former client in the parliamentary debate.*

This obligation only applies if the Member is aware, or ought to be aware, that the person, client or former client may have an interest in the parliamentary debate which goes beyond the general interest of the public.

This disclosure obligation does not apply if a Member simply votes on a matter; it will only apply when he or she participates in a debate. If the Member has already disclosed the information in the Member's entry in the pecuniary interest register, he or she is not required to make a further disclosure during the parliamentary debate.

This resolution has continuing effect unless and until amended or rescinded by resolution of the House.

This code forms part of the web of definitional terms of corrupt conduct in sections 8 and 9 of the *Independent Commission Against Corruption Act 1988*.

Section 8 of the Act is an inclusive provision which specifies the kind of acts that might constitute corrupt conduct. This section defines corrupt conduct as the dishonest or partial exercise of official functions, or breach of public trust or the misuse of information or material which was acquired in the exercise of official functions.

Section 9 is an exclusionary provision, establishing the boundaries of corrupt conduct. An act mentioned in section 8 will not constitute corrupt conduct unless it would amount to either:

- (a) a criminal offence;
- (b) a disciplinary offence; or
- (c) reasonable grounds for dismissing, dispensing with the services of or otherwise terminating the services of a public official.
- (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.

As noted, subsection (d) above was introduced through the 1994 amendments to the ICAC legislation so that an act by a Minister or member could also amount to corrupt conduct if it amounts to a substantial breach of an applicable code of conduct.

An applicable code of conduct is defined in the *Independent Commission Against Corruption Act 1988* as, firstly, in the case of a Minister, a ministerial code of conduct prescribed or adopted for the purposes of section 9 by the regulations, and, secondly, in the case of a member of Parliament (including a Minister of the Crown), a code of conduct adopted for the purposes of the section by resolution of the House concerned.

Under the provisions of the Act, the Legislative Assembly is required to appoint a committee to carry out functions in relation to the Code of Conduct, including reviewing the code at least once every four years.⁵ The code was last reviewed in 2010 by the Legislative Assembly Standing Committee on Parliamentary Privilege and Ethics.

7.2.1. The link between the Code of Conduct and the Members' Handbook

Under the Code of Conduct "Members must apply the public resources to which they are granted access according to any guidelines or rules about the use of those resources." Guidelines and rules regarding the use of entitlements by Members are set out in determinations of the Parliamentary Remuneration Tribunal, the Members' Entitlements Handbook, parliamentary policies and procedures, and relevant statutes such as the *Parliamentary Remuneration Act 1989*.

Failure to use public resources in accordance with guidelines or rules may amount to a breach of the Members' Code of Conduct and may amount to corrupt conduct under the Independent Commission Against Corruption Act 1988, even if the conduct is not otherwise illegal.

7.3 Parliamentary Ethics Adviser

On 23 September 1998, on the motion of the Premier, the House agreed to the appointment of a Parliamentary Ethics Adviser for the first time.⁶ The Parliamentary Ethics Adviser has been appointed to assist and advise members of Parliament in resolving ethical issues and problems. The position holder advises members, upon their request, on the use of entitlements and on the interpretation of rules for use of entitlements. The adviser is also an independent point of contact for advice on more difficult questions arising in relation to exercising the role of a member of Parliament, such as whether there is a potential conflict of interest in particular circumstances.

The Adviser bases the advice given on the determinations of the Parliamentary Remuneration Tribunal and the provisions of the Code of Conduct adopted by the Houses. The Adviser does not provide legal advice and gives an opinion rather than a ruling. It is up to members how and whether or not they adopt the advice given.

In June 2006 the functions of the Parliamentary Ethics Adviser were extended to include the provision of advice to Ministers or former members (who held ministerial positions) in relation to post-separation employment.⁷

In establishing the position, the resolution of the House requires the Adviser to keep a record of any advice given in response to a member's request and also the factual

⁵ Section 72E of the *Independent Commission Against Corruption Act 1988*. The designated committee for purposes of the Act is the Legislative Assembly Standing Committee on Parliamentary Privilege and Ethics see VP 04/12/2003, pp. 536-7.

⁶ VP 23/09/1998, pp. 883-4 – Mr Ken Robson (a former Auditor-General for NSW) was appointed.

⁷ VP 07/6/2006, pp. 97-8.

information on which the advice was based. These records are to remain confidential unless:

- (1) The member who requested the advice gives permission for the Parliamentary Ethics Adviser to make the advice public; or
- (2) The House calls for the production of the records of the Parliamentary Ethics Adviser if the member to which the records relate has sought to rely on the advice of the adviser or has given permission for the records to be produced to the House.

The current resolution sets out the functions and provisions related to the role of the Ethics Adviser:

The Parliamentary Ethics Adviser shall have the following functions.

Advice to Members of Parliament

- (1)(a) The Parliamentary Ethics Adviser is to advise any member of Parliament, when asked to do so by that member, on ethical issues concerning the exercise of his or her role as a member of Parliament (including the use of entitlements and potential conflicts of interest).
- (b) The Parliamentary Ethics Adviser is to be guided in giving this advice by any Code of Conduct or other guidelines adopted by the House (whether pursuant to the Independent Commission Against Corruption Act or otherwise).
- (c) The Parliamentary Ethics Adviser's role does not include the giving of legal advice.

Advice to Ministers on post-separation employment

- (2) The Parliamentary Ethics Adviser must on request by a Minister provide written advice to the Minister as to whether or not the Adviser is of the opinion that the Minister's:
 - (a) acceptance of an offer of post-separation employment or engagement which relates to the Minister's portfolio responsibilities (including portfolio responsibilities held during the previous two years of ministerial office); or
 - (b) decision to proceed, after the Minister leaves office, with a proposal to provide services to third parties (including a proposal to establish a business to provide such services) which relates to the Minister's portfolio responsibilities (including portfolio responsibilities held during the previous two years of ministerial office),

would give rise to a reasonable concern that:

- (c) the Minister's conduct while in office was influenced by the prospect of the employment or engagement or the proposal to provide services; or

- (d) the Minister might make improper use of confidential information to which he or she has access while in office.
- (3) The Adviser must on request by a person who has ceased to hold ministerial office within the previous 12 months ("the former Minister") provide written advice to the former Minister as to whether or not the Adviser is of the opinion that the former Minister's:
- (a) acceptance of an offer of employment or engagement which relates to the former Minister's former portfolio responsibilities during the last two years in which the Minister held ministerial office; or
 - (b) decision to proceed with a proposal to provide services to third parties (including a proposal to establish a business to provide such services) which relate to the former Minister's former portfolio responsibilities during the last two years in which the Minister held ministerial office,
- would give rise to a reasonable concern that:
- (c) the former Minister's conduct while in office was influenced by the prospect of the employment or engagement or the proposal to provide services; or
 - (d) the former Minister might make improper use of confidential information to which he or she had access while in office.
- (4) If the Adviser is of the opinion that accepting the proposed employment or engagement or proceeding with the proposal to provide services might give rise to such a reasonable concern, but the concern would not arise if the employment or engagement or the provision of services were subject to certain conditions, then he or she must so advise and specify the necessary conditions.
- (5) The Adviser's advice must include:
- (a) a general description of the position offered, including a description of the duties to be undertaken, or the services to be provided, based on material provided by the Minister or former Minister but excluding any information that the Minister or former Minister indicates is confidential; and
 - (b) the Adviser's opinion as to whether or not the position may be accepted, or the services may be provided, either with or without conditions.
- (6) Where the Adviser becomes aware that a Minister or former Minister has accepted a position, or has commenced to provide services, in respect of which the Adviser has provided advice, 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.

Keeping of records

- (7) The Parliamentary Ethics Adviser shall be required to keep records of advice given and the factual information upon which it is based.
- (8) Subject to clause 6, the Parliamentary Ethics Adviser shall be under a duty to maintain the confidentiality of information provided to him in exercising his function and any advice given, but the Parliamentary Ethics Adviser may make advice public if the person who requested the advice gives permission for it to be made public.
- (9) This House shall only call for the production of records of the Parliamentary Ethics Adviser if the person to which the records relate has: in the case of advice given under clause 1(a), sought to rely on the advice of the Parliamentary Ethics Adviser; or given permission for the records to be produced to the House.

Annual meeting with committees

- (10) The Parliamentary Ethics Adviser is to meet annually with the Standing Committee of each House designated for the purposes of Part 7A of the Independent Commission Against Corruption Act.

Report to Parliament

- (11)(a) The Parliamentary Ethics Adviser shall be required to report to the Parliament prior to the end of his annual term on the number of ethical matters raised with him, the number of members who sought his advice, the amount of time spent in the course of his duties and the number of times advice was given.
- (b) The Parliamentary Ethics Adviser may 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.⁸

⁸ VP 27/06/2007, pp. 196-8.

Chapter 8 Records of the House

The following is a short description of some of the documents compiled by the Department of the Legislative Assembly which relate to proceedings in the House.

8.1 *Votes and Proceedings*

The *Votes and Proceedings* (the *Votes*) comprise the official record of the proceedings in the House. In accordance with standing orders 30 and 31 they are compiled by the Clerk of the Legislative Assembly for each sitting day. A proof issue of the *Votes* is published on the evening of each sitting day. A final or "struck-off" copy is produced some days later. The struck off copy is signed by the Speaker and by the Clerk, printed by authority of the Parliament and eventually bound. A cumulative index is prepared of the *Votes*.

The *Votes* include a record of proceedings of all proceedings in the House, including proceedings when a bill or other matter is considered in detail.

A member may wish to object to the Speaker signing the *Votes* but must do so within three sitting days (S.O. 30). Other than by this method, the *Votes* may only be altered by motion, or by the Speaker directing the correction of an error. Proceedings have in the past been expunged on motion.¹ An alleged inaccuracy was once raised as a matter of privilege,² and motions have been passed altering the way divisions were recorded.³

At the conclusion of each session of Parliament the indexed *Votes and Proceedings* and certain other records and documents of the House are bound and published as the *Votes and Sessional Papers of the Legislative Assembly*. The other documents included are registers showing the history of bills; a report of members' attendance in divisions; a register of addresses and orders of the House for papers; sessional and select committees; business undisposed; proclamations; and statistics on business of the session.

The current standing orders adopted in 2006 provide for the recording of Members' attendance in the House. The practice has been adopted due to a number of reasons:

- The attendance of members is provided for in section 13A of the *Constitution Act 1902* which states that if a member of the Legislative Assembly "...fails for one whole session...to give his attendance in the House of which he is a member, unless excused in that behalf by the permission of that House entered upon its journals...his seat as a member of that House shall thereby become vacant." This provision requires attendance in the House – not merely in a committee room, in a party room or otherwise in the precincts of the Parliament. Recording the attendance of members in the *Votes and Proceedings* provides a systematic and public way to determine whether or not a member is absent from the House.
- A survey was conducted of the other Houses of Parliament in Australia, and

¹ VP 14/05/1879, p. 511; VP 25/10/1887, p. 90; VP 17/12/1889, p. 37; VP 28/5/1997, p. 968.

² VP 26/09/1900, p. 347.

³ VP 04/06/1998, pp. 715 and 717.

all record the attendance of members. Every House, except the Victorian Legislative Assembly and Legislative Council publish the attendance or otherwise of members in the House in the published record of their proceedings and in all cases members must actually enter the Chamber to be counted. In both Federal Houses, this has been the practice since 1901. In Victoria both Houses record members attendance but do not publish it, as this information is required for the payment of attendance fees.⁴

- In the recent past there have been several occasions when the Legislative Assembly has been asked to provide information for the purposes of a court case or for other reasons as to whether a member attended the House on a particular sitting day or days. On days such as Fridays, when members are not required in the House for Question Time and there are no divisions or quorums, unless a member participated in debate, it is impossible to state as a matter of fact that the member was in attendance. This would also be the case on any sitting day on which there were no divisions (or even if there were divisions and a member was not granted a pair) or a member did not contribute to debate. In such cases, it is for the protection of members that their attendance in the Chamber was recorded.
- It is established practice in any formal meeting to have the attendance of those attending recorded. As the *Votes and Proceedings* is the official record of the meeting of the Legislative Assembly, it was thought right and proper for the attendance of members to be recorded.

8.2 Business paper

The business paper, which sets out all the notices of motions and orders of the day, is published by the Clerk under the authority of standing order 31 after each sitting for the next sitting day.

A notice of motion is a statement of intention to move a motion on a particular day whilst an order of the day is a bill or other matter which the House or Speaker has ordered to be taken into consideration on a particular day. Thus the contents of the business paper are the notices of motions given and all items not concluded at the end of a sitting which have been ordered to be taken into consideration or to be resumed at a later time.

The "notices" and "orders" are predominantly categorised into "Government Business". Other categories may include "Business with Precedence" (S.O. 118), which includes motions of no confidence and censure motions, and "Business of the House – Petitions", which lists those petitions signed by 10,000 or more persons that have been set down for discussion in the House.

Under standing order 99 notices of motions take precedence of orders of the day and this is reflected in the traditional way "notices" are printed before "orders" on the business paper. In turn, under standing order 136, notices of motions are set down on the business paper in the order in which they are given. Similarly under standing order 168 orders of the day are dealt with in the order in which they appear on the

⁴ In 2001, a member raised as a matter of privilege, the fact that the attendance of members in the House, at some time during the sitting, had been recorded in the *Votes and Proceedings*, VP 01/06/2001, p. 1245. After considering the matter the Speaker agreed that the Victorian practice of the Clerks taking a note of the members present in the Chamber during the sitting as an administrative record only would be adopted. This was the practice until the adoption of the new standing orders in 2006.

business paper, although government business is taken in the order determined by the Leader of the House (S.O. 102). (See also Chapters 15 and 18 of Part One).

Other standing orders also determine the internal arrangement of individual items within each category of business.

In 1967, Speaker Ellis, in response to an inquiry about the duties and functions of the Speaker in relation to the business paper noted that it is “the bounden duty of the Speaker to exercise supervision over the business paper....It is therefore essential that the Speaker exercise the greatest care to see that no scandalous or improper matter appears on the printed paper unless there are compelling reasons for allowing it...[and] that all matters that are printed comply with the standing orders and the forms and practices of the House.”⁵

The role of the Speaker in relation to the business paper has been formalised under standing order 137. The standing order provides that any notice containing argument, unbecoming expressions or otherwise not conforming with the practice of the House may, under the authority of the Speaker, be amended by the Clerk or divided if it contains matters that are not relevant to each other. The Speaker can also order such notice to be not printed or removed from the business paper.

8.2.1 Business with precedence

"Business with Precedence" is a category of business that may appear on the Business Paper from time to time. It is provided for in the routine of business on Tuesdays, Wednesdays and Thursdays after Motions Accorded Priority. A sessional order varying the routine of business has been adopted for the current Parliament, which provides for business with precedence to be conducted each sitting day.⁶

Business with precedence is defined and arranged for consideration in the order set out in standing order 118. It includes such items as dissents from a ruling of the Speaker, no confidence and censure motions, motions regarding privilege and contempt, expulsion of a member, and disallowance of statutory rules.

Standing orders 111A, 112 and 113, which relate to motions of no confidence in the Government, a Minister, and in the Speaker respectively, provide that a notice of motion must be given. Such notices appear on the Business Paper under the category "Business with Precedence" and are called on at the time for business with precedence on the next sitting day that business with precedence is considered.⁷ This business can be postponed or considered forthwith through a suspension of standing orders.⁸

⁵ PD 02/03/1967, pp. 3717-8.

⁶ VP 3 May 2011, p. 37.

⁷ Motion of no confidence in the Speaker moved, pursuant to notice, that the Speaker no longer has the confidence of the House based on the House not sitting at the scheduled time of 2.15 p.m. the preceding day. The Speaker had taken the Chair after 2.15 p.m. and announced that, having received advice that some members were having difficulty attending the Parliament, left the Chair at 2.23 p.m. until the ringing of one long bell at 5.16 p.m. The no confidence motion was negatived on division. PD 20/6/2001, pp. 14901-8; On one occasion, when the Speaker was involved in a matter being determined by the ICAC, no notice to move a motion of no confidence was given. Instead a member sought the leave of the House to suspend standing and sessional orders to permit the moving of a motion forthwith that the Speaker vacate the Chair until the House otherwise determines. Leave was not granted. VP 31/10/2000, p. 805. That same day a member spoke to a motion for urgent consideration, "That, in view of the serious allegations made against him, the Speaker do now vacate the Chair and the Deputy Speaker act in his stead until the House otherwise determines." This question was also negatived. VP 31/10/2000, p. 810.

⁸ VP 27/06/2001, p. 1356; VP 28/06/2001, p. 1362.

If there are multiple no confidence motions then standing order 136 applies and they are set down in the order they are given. The order of the day for the resumption of an adjourned debate on a motion of no confidence in the Government, a Minister or Speaker must appear on the Business Paper before a notice for a no confidence motion.⁹ This reflects the desirability of the House concluding a debate on such a serious motion.

A similar practice on the Business Paper applies to motions of censure under standing orders 114 and 115, although censure motions are called on the same sitting day at which the notice was given.

8.2.2 Other business that may be accorded precedence

Standing order 118(1)(i) provides that business with precedence may include any "Business accorded precedence by the House". Such items will be included on the Business Paper under "Business with Precedence" and can include any item of business that might be set down for consideration at a certain time on a particular day such as when a joint sitting with the Legislative Council is ordered.

Another example is in relation to the Address in Reply debate that occurs after an official opening of a session of Parliament by the Governor. Standing order 5 states that debate on the Address in Reply to the Governor's Opening Speech shall take precedence of general business. Under the former standing orders of the House the Address in Reply had precedence of government and general business and standing and sessional orders were frequently suspended to enable government business to take precedence of the Address in Reply debate.¹⁰ The adoption of the new provisions has removed the need for standing and sessional orders to be suspended for the government to conduct its business.¹¹ Standing and sessional orders will however still need to be suspended to allow general business to take precedence of the Address in Reply. This has occurred from time to time.¹²

8.2.3 Government business

"Government Business" is the next category on the business paper. Under standing order 99 notices are listed before orders. In accordance with standing order 136 notices of motions for government business are listed in the order given which is usually by ministerial seniority.

Standing order 102 provides that Ministers (in effect the Leader of the House) may arrange government business in any order.¹³ On occasion standing and sessional orders have been suspended to allow non-government business to be dealt with in government business time.¹⁴

⁹ VP 30/10/1996, p. 543; PD 30/10/1996, pp. 5549-50, contrast SO 111.

¹⁰ VP 17/03/1994, p. 125; VP 12/04/1994, p. 136; VP 24/09/1997, p. 81; VP 15/10/1997, p. 125; VP 11/11/1997, p. 216; VP 09/09/1999, p. 47; VP 14/09/1999, p. 64; VP 15/09/1999, p. 69.

¹¹ Provision was made in the former standing orders for certain business to be considered during the currency of the Address in Reply debate including dissent from a Speaker's ruling, days and hours of sitting, adoption of sessional orders, and disallowance of statutory rules. Such items are considered to be government business and a separate standing order permitting their consideration before the Address in Reply is adopted is no longer required.

¹² VP 24/09/1997, p. 97; VP 16/09/1999, p. 79.

¹³ See also PD 03/09/1992, p. 5494 where Speaker Rozzoli noted that the "programme" is an unofficial business paper, traditionally issued for the information of members. However, the Government can order its business in whatever sequence it sees fit.

¹⁴ PD 19/11/1993, p. 5823.

8.2.4 General Business (non-government business)

Standing order 97 provides for general business to be conducted at certain times on Thursday and Friday as follows:

Thursday 11.45 am until 1.30 pm –	Orders of the Day (not being for bills) then Notices of Motions (not being for bills);
Thursday 4.30 pm until 5.30 pm –	Orders of the Day for Bills; and
Friday 10.00 am until 10.30 am –	Notices of Motions for Bills.

A sessional order has been adopted for the current (55th) Parliament varying the routine of business to provide for general business to be conducted on Thursdays at the following times:

- Notices of motions for bills (i.e. introduction of private members' bills) – after the giving of General Business notices of motions until 10.30 am.
- Orders of the Day for bills (i.e. debate on private members' bills already introduced – from 10.30 am until 11.30 am.
- General Business (Community Recognition Notices) dealt with formally by the House at 11.30 am followed by Orders of the Day and notices (not being for bills) until 1.00 pm.

Standing order 101 sets out the procedure for establishing the program for general business. Under this procedure members are able to postpone items of business standing in their name by advising the Clerk in writing on Wednesdays¹⁵ (see 12.3 of Part One).

Postponed items remain on the paper in their relative order and are marked as postponed with a "P". This does not abrogate the rights of members to postpone, withdraw or discharge any items of business in their name when called on. Withdrawn items are removed from the Business Paper and all items remaining on the Business Paper retain the number they were originally given until considered or otherwise dealt with.

Under standing order 106 certain items of general business may be granted precedence of other general business on motion of the House. Such items are denoted by an asterisk on the Business Paper.

Any general business notices of motions and orders of the day not commenced or completed 12 months from the date given lapses in accordance with standing order 105 and will be removed from the Business Paper. The 12 month period commences on the day the notice is given and expires at midnight 12 months hence. For example, if a notice was given on 1 May in one year it would lapse at midnight on 30 April the following year.

All divisions called before 10.30 am are deferred and conducted at 10.30 am and any business then before the House is interrupted and recommenced after the division(s) (S.O. 187). If a division or divisions are deferred on general business days and for some reason are not conducted at the same sitting, the question or questions

¹⁵ Party Whips may also advise the Clerk in writing of which items of general business standing in the name of Members of their party are to be postponed.

will not be put until the next general business day.¹⁶ The deferment of the question will be noted in the Business Paper.

8.2.5 Miscellaneous Matters

Guillotine Notice

Whenever a guillotine notice is given standing order 90 requires that "the notice shall be published in the business paper". The notice is printed as a table under the heading of "Government Business". In addition each item subject to such a notice is denoted by an asterisk referable to a footnote that states "Orders marked * are subject of notice under standing order 90".

Bills originating in the Legislative Council

Legislative Council bills on the business paper are denoted by a dagger and footnoted "Orders marked † are bills forwarded from the Legislative Council".

Interrupted mover's second reading speech

On Friday (or on Thursday in accordance with sessional orders adopted for the current Parliament), private members can only introduce legislation until 10.30 am. This means that a member's second reading speech is often interrupted at 10.30 am. The interrupted speech is listed on the Business Paper in general business under the heading "Resumption of Mover's Interrupted Speech". This category of business takes precedence over general business notices for bills not already moved.

Notice of motion to appoint a committee

As with any business the House considers a notice of motion must be given in relation to the appointment of a committee. However, standing and sessional orders may be suspended to enable a motion to be moved to establish a committee to be moved without a notice of motion being first given.¹⁷ When a motion appointing a committee is moved it can be debated and amended.

Notices of Motions

Standing Order 133 provides for members to give notices of motions for bills, government business, no confidence and censure motions, and other business with precedence prior to Question Time. All other notices must be given at the time provided in the routine of business for Notices of Motions (General Business).¹⁸

Standing order 134 provides that at the time of giving notices in the House the member must hand up an original signed notice to a Clerk at the Table. This notice is used to compile the manuscript business paper. A notice containing argument, unbecoming expressions or otherwise not conforming with the practice of the House may be amended or divided if it contains matters that are not relevant to each other (S.O. 137). The original notice is kept with the primary sources used to compile the *Votes and Proceedings*. For further information on notices of motions see Chapter 15 of Part One.

Placing or Disposal of Business

¹⁶ PD 20/9/2001, pp. 16975 and 16980 and PD 18/10/2001, pp. 17596-8.

¹⁷ For example see VP 04/12/2003, p. 536 where standing and sessional orders were suspended to permit the consideration forthwith of a motion to appoint a standing committee on parliamentary privilege and ethics.

¹⁸ This procedure was first adopted by sessional order in November 2005, VP 15/11/2005, pp. 1742-3. Prior to this all notices were given at the same time.

This proceeding provides an opportunity within the daily routine of business for notices or orders to be postponed, discharged or withdrawn. Standing order 100 provides an opportunity for government business notices to be postponed or withdrawn and orders to be postponed or, by motion, discharged within the daily routine of business. General business notices of motion can be withdrawn or postponed on general business days when called on and orders of the day may be postponed or, on motion, discharged on general business days when the matter is called on (S.O. 101).

The procedure for establishing the program for general business days is also set out in standing order 101. Members or their party whips advise the Clerk in writing prior to 12.00 noon on Wednesdays which general business notices of motions for bills, orders of the day for bills, or notices of motions (not for bills) standing in their name on the Business Paper are to be postponed. The first ten notices not advised to be postponed will be deemed to be proceeding.¹⁹

Orders of the Day

An order of the day is a matter set down for consideration, or further consideration, by the House. The following are examples of the types of business that are listed as orders of the day on the business paper: the consideration of notices which are not concluded; adjourned debates on bills or motions; and the consideration of a bill or matter in detail.

Bills

The procedure for the passing of legislation is considered in detail in Chapter 20 of Part One. An important step in the process is when a bill is read a third time. When the question "That this bill be now read a third time" is agreed to the bill has finished its passage through the House and is forwarded to the Council and thus removed from the Business Paper. Messages from the Council forwarding bills or returning bills with any amendments are listed as orders of the day on the Business Paper.

Committee Reports

Committee reports tabled or the receipt of reports tabled out of session and announced by the Clerk in the House are listed on the business paper in the order in which they were tabled. Committee reports listed for debate but not commenced or not completed within 12 months of being tabled lapse in accordance with standing order 306(7).

8.3 The Daily Programme

A daily programme which lists business intended to be dealt with on a particular day, is prepared by the Leader of the House for each sitting day. It is posted on the Parliament's website and is made available to members before the House meets. The programme is issued for the guidance of members only and may be varied without notice.

8.4 Questions and Answers Paper

Questions which members wish to propose to Ministers in writing (as opposed to oral questions asked in Question Time) are recorded in the official publication called

¹⁹ This procedure was first adopted as a sessional order in November 2005, VP 29/11/2005, pp. 1795-6.

Questions and Answers. Members' questions are published in full when the question is first asked and again when the answer is published. The publication is authorised by standing order 31, which provides for a Questions and Answers paper to be produced after each sitting day and also from time to time during any adjournment of the House for two weeks or more in relation to answers received. The Questions and Answers Paper is regularly published during an adjournment when answers are received.

As with the Business Paper, the Speaker has overall authority for the production of the Questions and Answers paper which requires the Clerk and their officers to ensure that no improper matter appears on it and that all questions comply with the standing orders and practices of the House.²⁰ Standing Order 132(2) provides that a question containing argument, unbecoming expressions or otherwise not conforming with the practice of the House may be amended, divided if it contains matters that are not relevant to each other, or ordered not to be printed or removed from the Questions and Answers paper under the authority of the Speaker.

The rules for questions are set out in Chapter 14 of Part One.

8.5 Statutory Rules and Instruments Paper

The provisions of the *Interpretation Act 1987* require that a written notice of the making of a statutory rule be tabled in each House within 14 sitting days after it has been published on the NSW Legislation website or in the Government Gazette. In the House, the Clerk tables the notices of the making of statutory rules and instruments forwarded from the Office of the Parliamentary Counsel (S.O. 32).

Under section 41(1) of the *Interpretation Act 1987*, notice of disallowance may be given:

- (a) at any time before written notice of a statutory rule is tabled; or
- (b) within 15 sitting days after a written notice of a statutory rule is tabled.

The *Statutory Rules and Instruments* paper lists the date of publication in the Government Gazette or on the NSW Legislation website of the rule or instrument, when and if tabled, and the last sitting day for the notice of disallowance to be given in the House. This document is published for the information of members on Tuesday of each week when the Assembly is sitting and the first Tuesday of each month when not sitting. A copy of each statutory rule and instrument is available for inspection in the Table Office (see section 12.12 of Part One).

8.6 List of members, list of electorates and committees

Lists of members, electorates and committees appointed by the Legislative Assembly including joint committees are prepared and distributed when changes occur. The members' list contains members' full names and titles, party affiliation and the party representation in the House.

²⁰ See ruling of Speaker Ellis, PD 02/03/1967, pp. 3717-8.

8.7 Subpoena of records of the House

From time to time the Clerk is summoned to produce documents related to the proceedings of the House before a court or bodies such as the Independent Commission Against Corruption.

On occasions this includes papers that have been laid on the Table of the House.²¹ Leave to produce documents related to proceedings in the House or a committee should be given by the House.²² This process enables the House to consider parliamentary privilege issues, if any. If the House is not sitting, the documents may be produced with the authority of the Speaker, who subsequently informs the House of the action.²³

The Clerk may also be summoned to produce administrative documents such as records of employment. Such subpoenae are complied with in accordance with normal legal practice following consideration of privilege issues. The House is not involved in any action taken in relation to the subpoena of documents of an administrative nature, rather the documents are produced under the authority of the Clerk.²⁴ (See section 5.1.1 of Part Two in relation to the subpoena of documents held by members of Parliament).

8.8 Hansard

8.8.1 The development of Hansard in the United Kingdom and in New South Wales

Hansard is the printed record of the parliamentary debates and proceedings. The name derives from the name of the first printer of the parliamentary debates, Thomas Curzon Hansard, who later became the publisher of the official series of parliamentary debates, covering both Houses of the Parliament of the United Kingdom from 1803.²⁵

Hansard is an edited record of what was said in the House. A proof copy is available online within 3 hours of the last House rising. A hard copy is available the day following sitting and minor corrections can be made prior to a final version being published.²⁶ During the sitting, members can ask the *Hansard* office at any time before publication to provide them with an advance printed proof copy of their own speech.

Parliamentary debates in New South Wales were not reported by *Hansard* staff until the session of 1879-80.²⁷ Prior to this, parliamentary proceedings appeared in newspaper reports and members, particularly those representing regional electorates, were of the opinion that these reports were often biased or incomplete.²⁸

²¹ See PD 04/02/1954, p. 6 where the Speaker informed the House that he had authorised the Clerk to produce certain documents that had been laid upon the Table of the House to the Court of Petty Sessions.

²² See *May*, p. 937 where it is noted that the House alone can take action upon petitions requiring an officer of the House to produce documents relating to the proceedings in the House or a committee.

²³ PD 04/02/1954, p. 6.

²⁴ These documents are not afforded protection under article 9 of the *Bill of Rights* as they do not relate to "proceedings in Parliament."

²⁵ *May*, pp. 258-9.

²⁶ This was not always the case see Ruling given by Speaker Barton, PD 15/07/1886, p. 3397.

²⁷ VP 03/05/1878, p. 288 – resolution passed to provide for the establishment of parliamentary reporting staff.

²⁸ See Hawker, Geoffrey, *The Parliament of New South Wales, 1856 – 1965*, 1971, p. 114.

When *Hansard* was first established in New South Wales members were not provided with “proofs” of their speeches as it was considered that the revision would result in long delays in the publication of the parliamentary debates. The financial statement of the Treasurer was however, open to revision but only in-so-far as the verification of the figures was concerned. Today members receive a “proof” copy of *Hansard* the day following the sitting. Members are advised that corrections to *Hansard* should only relate to inaccuracies and that new matters cannot be introduced. *Members are also advised that any suggestions for corrections to speeches made on Tuesday and Wednesday must be submitted by 4.00 pm on Thursday and for speeches delivered on Thursday by 12.00 noon on the following Monday to ensure the timely publication of the corrected version of Hansard.* Members have not always had the liberty of correcting what was said by them in the House. In 1886, Speaker Barton noted in response to concerns about the accuracy of the *Hansard* reports that it was not the practice of the House to allow members of this House to correct the reports of their speeches. However, he noted that in future he would allow those matters which were of a technical or specialist nature and concepts with which the *Hansard* staff were unfamiliar to be revised and corrected.²⁹

The editing of *Hansard* is something that has continued to enjoy the support of Speakers of the House. For instance, in 1974, Speaker Cameron noted that he supported the editing of *Hansard* arguing that “...if we get to the stage where speeches are recorded precisely as they are delivered, without the help of those benevolent corrections in matters of minor detail made by the staff, it may well be the source of embarrassment to many honourable members.”³⁰

Of course, *Hansard* reflects the differences between spoken and written English and has obvious mistakes corrected and redundancies removed. In the early days of *Hansard* there was a tendency towards sterilisation of the report and there were occasions when members questioned the way that *Hansard* recorded what they said in the House. For instance, on 10 June 1886 a member brought the attention of the House to the omission of his speech in the committee of the whole stage of a bill arguing that he did not think it was within the province of the *Hansard* reporters to judge what they would report and what they would not. He went on to note that the *Hansard* reporters had taken it upon themselves to omit mentioning that he had even spoken on the subject and that all members should be treated in the same fashion by the reporting staff. In response the Speaker advised the member that both in New South Wales and elsewhere matters debated in committee are not reported so fully as are debates in the House, unless in cases of exceptional importance. The Speaker also considered that any omission by *Hansard* had been inadvertent.³¹

Today such omissions would not be tolerated, and reports accord with the definition of the *Hansard* report published by the House of Commons Select Committee on Parliamentary Debates in 1907:

...though not strictly verbatim, [Hansard] is substantially the verbatim report, with repetitions and redundancies omitted, and with obvious mistakes

²⁹ See PD 15/07/1886, p. 3397.

³⁰ PD 09/10/1974, p. 1749.

³¹ PD 10/06/1886, p. 2599. See also PD 14/09/2003, pp. 4789-91.

*corrected, but which...leaves out nothing that adds to the meaning of the speech or illustrates the argument.*³²

Apart from these simple principles *Hansard* has no editorial policy apart from the pursuit of accuracy and consistency. *Hansard* is not hampered by conceptions of news value, and no bias towards either persons or parties enters into its pages. The reporters are not without strong personal opinions but their work is absolutely uninfluenced by them. When a member rises to speak, *Hansard* staff work for that member. Above all, the editorship is not a political appointment.

Members often ask the Chair to order that the *Hansard* record be corrected when comments are made which imply that a member was lying to the House or when members have a difference of opinion as to what the truth entails.³³ However, the Speaker has no authority under the standing orders of the House to do so.³⁴ Despite this, Speakers of the Legislative Assembly have commented that they do exercise a degree of control over the way *Hansard* records the proceedings of Parliament³⁵ and they can order that factual corrections be made to the *Hansard* record.³⁶ Members seeking to have the *Hansard* record corrected should wait until the *Hansard* is available in corrected form, before raising a matter of privilege relating to matters included in or omitted from *Hansard*.³⁷ Whilst, the Speaker has no authority to order that the *Hansard* record be corrected, members are able to make a personal explanation in relation to matters which they deem to be incorrect and that becomes part of the public record.³⁸ It is important to note that whilst members may make personal explanations about matters that are incorrect in the *Hansard* they cannot rise to make a personal explanation on the basis that in the course of debate remarks are made from the opposite side of the House which do not conform to the member's ideas.³⁹

The copyright which is attached to the Parliamentary Debates is vested in and remains with the Attorney-General in right of the Crown. The Attorney-General has given the Parliament the power to waive Crown copyright in relation to *Hansard* in cases where it is considered appropriate. In such cases, permission is given to reprint material on the basis that:

- the source of the material is clearly acknowledged as "New South Wales Parliamentary Debates";
- the material reprinted is not varied in any particular from the original, and any text omitted must be shown by the use of a series of dots – "..."; and
- care must be taken in the republication of *Hansard* material in order to avoid a breach of parliamentary privilege should a quotation of *Hansard* be taken out of its context and published in such a way as to reflect on the character of a member who is quoted in *Hansard*, or to reflect on the proceedings of Parliament itself, or to destroy its meaning.

³² See *May*, p. 260.

³³ PD 30/10/1991, p. 3811; PD 03/07/2003, p. 2865.

³⁴ See comments by Acting Speaker Brown, PD 13/03/1975, pp. 4649-50; and PD 18/03/1975, p. 4769.

³⁵ See comments by Speaker Rozzoli PD 01/05/1992, p. 3364.

³⁶ PD 15/10/1992, p. 7232.

³⁷ See ruling of Speaker Kelly, PD 02/11/1983, p. 2261.

³⁸ PD 03/07/2003, p. 2865.

³⁹ See ruling of Speaker Burke, PD 18/06/1931, p. 3406.

The publication of *Hansard* is authorised by the House under standing order 367. It appears as a proof daily, a weekly pamphlet copy and, after prorogation of the Parliament, bound copies for each session. *Hansard* is also available on computer disk and copies of *Hansard* are also available in a number of public libraries across the State, including the State Library of NSW and university libraries. It is also available for sale. [The full text of the Parliamentary Debates for the New South Wales Parliament from 1974 is available on the Parliament's website.](#)⁴⁰

8.8.2 Expunging the record

There is no provision for the Chair to order a reference to be struck from the Parliamentary record or to alter the *Hansard* record. Should a member wish to expunge the Parliamentary record a resolution of the House needs to be passed and the matter referred to generally needs to be one of an offensive nature.⁴¹

On one occasion a motion was moved by a member to expunge from the record the name of an individual mentioned in a speech in the House who was currently the subject of criminal charges. Following a number of reservations being expressed by other members about the ability of the governing party to amend the *Hansard* record of what has taken place in the House merely by passing a resolution, the motion was withdrawn by leave.⁴² In contrast, in 1997 a motion was moved by an Opposition member to expunge certain accusatory words that had been withdrawn by a Minister which was agreed to by the House.⁴³ Members must seek the leave of the House to move a motion to expunge the *Hansard* record and only once leave is granted may the motion be moved.⁴⁴ With this agreement of the House a member does not have to give notice of a motion to expunge the *Hansard* record.⁴⁵

8.8.3 Incorporation of material in Hansard

Standing order 271 provides that "The incorporation of material in *Hansard* shall be by leave of the Speaker." However in many circumstances the Speaker will only permit the member to read a document verbatim rather than formally incorporating it in *Hansard*. By doing this, the contents of the document are included as part of the official Parliamentary record.⁴⁶

[Material which has been incorporated in Hansard includes second reading speeches⁴⁷, letters⁴⁸, lists⁴⁹, schedules⁵⁰, sketch diagrams⁵¹, statutory declarations⁵², explanations of a bill⁵³, tables⁵⁴, agreements between members⁵⁵ and additional or](#)

⁴⁰ The parliamentary debates from 1843 until 1880 were not recorded by *Hansard* but appeared in the *Sydney Morning Herald*. These debates are also available on the Parliament's website.

⁴¹ PD 18/05/1993, p. 2178.

⁴² PD 12/09/1991, pp. 1145-6.

⁴³ PD 28/05/1997, pp. 9449-50.

⁴⁴ See PD 14/11/2002, p. 6845 where leave was sought for a member to move a motion to expunge the *Hansard* record but was not granted.

⁴⁵ See comments by Speaker Cooper, PD 15/03/1859, p. 209; Speaker Hay, PD 30/12/1863, p. 836; and Speaker Meagher, PD 01/09/1915, p. 1476.

⁴⁶ See for example, PD 27/11/1992, pp. 10472-3 where a member sought leave to incorporate a letter into *Hansard* for deliberation by a legislation committee. The Acting Speaker ruled that the member may read the letter on record or choose to make a submission to the legislation committee and tender the letter.

⁴⁷ PD 15/11/2002, p. 6891; VP 29/05/1997, p. 289.

⁴⁸ VP 23/09/1997, p. 78; VP 17/11/1998, p. 1084.

⁴⁹ PD 20/06/2003, p. 1799; VP 02/04/1998, p. 466; VP 22/10/1998, p. 983; VP 24/09/1996, p. 432.

⁵⁰ VP 18/11/1999, p. 269; VP 26/11/1996, p. 662.

⁵¹ PD 07/05/1992, p. 4000.

⁵² VP 16/11/1995, p. 402.

⁵³ PD 03/05/1994, p. 1760.

background information to a bill.⁵⁶ On one occasion, a member sought leave to incorporate a letter into *Hansard* for deliberation by a legislation committee. The Acting Speaker ruled that there was no provision for so doing, but provided the member with a couple of avenues, i.e. either to read the letter so that it could be incorporated into the *Hansard* record or to make a submission to the legislation committee and tender the letter.⁵⁷ On another occasion, the Speaker upheld a point of order that visual material, which could not be incorporated into *Hansard*, should not be used excessively in the House. The Speaker did, however, note that it was in order for a member to quote from printed material on a poster.⁵⁸

Speakers' rulings have indicated that the following types of material cannot be incorporated into *Hansard*:

- Photographs;⁵⁹
- Graphs;⁶⁰ and
- Petitions.⁶¹

In 1969, Speaker Ellis, made a definitive ruling on the incorporation of statistical material in the *Hansard* record, emphasising that any such material must be brief, relevant and will only be incorporated with the approval of the Speaker if no other member objects. Speaker Ellis also advised all members that before tendering the material in the House for incorporation in *Hansard* that it should be produced to him in his room for examination.⁶² This ruling and practice has been upheld by subsequent Speakers.⁶³

8.8.4 Parliamentary privilege attaching to *Hansard*

The official publication of *Hansard* is absolutely privileged against any liability.⁶⁴ However, any subsequent republication of a proceeding in Parliament does not necessarily enjoy the same level of protection and liability can arise from the distribution of extracts of *Hansard*. For further information on the privilege attaching to the republication of *Hansard* see section 3.10.1 of Part Two.

Whilst the official versions of *Hansard* are absolutely privileged, parliamentary debates can be referred to in court proceedings in order to determine matters of fact or in order to determine the intent of legislation. The admissibility of *Hansard* in court proceedings is also given more detailed consideration in the section 3.4 of Part Two.

⁵⁴ VP 21/05/1996, p. 151. On one occasion a member submitted a table for incorporation into *Hansard* to which the Speaker ruled that the member could read the contents of the table but could not have it incorporated, PD 10/03/1993, p. 616.

⁵⁵ PD 31/10/1991, p. 4004 when the Premier tabled the Memorandum of Understanding signed between the Government and Independent Members of the House for incorporation into *Hansard*.

⁵⁶ PD 11/03/1993, p. 725; VP 14/10/1998, p. 930; VP 21/10/1998, p. 973

⁵⁷ PD 27/11/1992, pp. 10472-3.

⁵⁸ PD 09/03/1993, p. 456.

⁵⁹ PD 16/08/1966, p. 193 (Speaker Ellis); PD 02/11/1976, p. 2182 (Speaker Kelly).

⁶⁰ PD 22/02/1989, p. 5066 and PD 27/07/1989, p. 8623 where Speaker Rozzoli advised that graphs are not usually incorporated into the *Hansard* record but that they could be tabled for the edification of all members. In a previous ruling, Speaker Rozzoli indicated that if graphs were capable of simple typesetting they may be incorporated in *Hansard* if leave is given, PD 20/10/1988, p. 2747.

⁶¹ PD 04/04/1990, p. 1739.

⁶² PD 18/03/1969, p. 4669.

⁶³ See for example, ruling of Speaker Kelly, PD 01/03/1978, p. 12214 and ruling of Speaker Rozzoli, PD 03/06/1988, p. 1551.

⁶⁴ See section 27 of the *Defamation Act 2005* (NSW).

Under review

Chapter 9 The Parliamentary Calendar and Elections

9.1 “Parliaments”

The period of a Parliament is prescribed by the *Constitution Act 1902* as four years. Section 24 states that, unless sooner dissolved, an Assembly shall expire on the Friday before the first Saturday in March in the fourth calendar year in which the return of the writs for choosing that Assembly occurred. Under the provisions of section 24A polling day will usually be the fourth Saturday in March following the expiry of the Legislative Assembly.

Provision is also made for situations where the Legislative Assembly is dissolved prior to its expiration. Under section 24B the Assembly *may* be dissolved by the Governor by proclamation if:

- (1) a no confidence motion in the Government is passed by the Legislative Assembly (after three days notice is given); and
- (2) within eight clear days after passage of such a no confidence motion a motion of confidence in the then Government has not been passed. The House cannot be prorogued before the end of the eight-day period and may not be adjourned for a period beyond that eight-day period, unless the confidence motion has been passed.

The Assembly may also be dissolved by the Governor if it rejects an appropriation bill for the ordinary annual services of the Government (this does not apply to the Parliamentary Appropriation Bill) or fails to pass such a bill before the time the Governor considers that the appropriation is required.

Subsection 24B(4) states that the Assembly may be dissolved within two months before it is due to expire if the general election would otherwise be required to be held during the same period as a Commonwealth election, during a holiday period or at any other inconvenient time.

Subsection 24B(5) retains the Governor's discretion to dissolve the Assembly "in accordance with established constitutional conventions" (despite any advice of the Premier or Executive Council).

Subsection 24B(6) requires the Governor, in deciding whether the Assembly should be dissolved, "to consider whether a viable alternative Government can be formed without a dissolution".

In cases where the Assembly is dissolved prior to its expiration section 24A provides that the polling day for the general election is to be a day not later than the fortieth day from the date of the issue of the writs.

An amendment to the *Constitution Act 1902* in 2011 provides that the Premier or Executive Council cannot advise the Governor to prorogue the Parliament prior to 26 January in the calendar year in which the Legislative Assembly is due to expire (subsection 10A). This amendment was introduced to prevent a Government from proroguing Parliament in the lead up to a General election.

9.2 What happens after the Parliament expires or is dissolved?

Section 68 of the *Parliamentary Electorates and Elections Act 1912* states that:

All writs for Assembly general elections shall be issued within four clear days after the publication in the Gazette of the proclamation dissolving the Assembly, or after the Assembly has been allowed to expire by effluxion of time, and every such writ shall be made returnable on a day not later than the sixtieth clear day after the date of the issue thereof or on such later day as the Governor may by proclamation in the Gazette direct.

A writ is a document which is in the form of a command in the name of the Sovereign, State, court etc. issued to an official or other person directing that person to act or abstain from acting in some way. In the case of general elections, the writs are prepared by The Cabinet Office, signed by the Governor and the Premier and addressed to the Returning Officer in each Electorate District. One writ is issued for the 21 vacancies to be filled in the Legislative Council. The Speaker issues writs for casual vacancies in the Assembly.

Under the *Parliamentary Electorates and Elections Act 1912* the Electoral Commissioner is responsible for the conduct and administration of Assembly general elections and by-elections and is appointed to conduct periodic Council elections as Council returning officer. The Electoral Commissioner may appoint returning officers for each electoral district to assist in the administration of elections (s. 21AE). The Returning Officer:

- is responsible to the Electoral Commissioner for the administration of all elections within the district to which appointed (s. 75 and 76).
- may, with the Electoral Commissioner's delegated authority, appoint polling place managers or election assistants (s. 21AM).
- must be enrolled as an elector (s. 21AE).

The writ itself contains all the information necessary for the Electoral Commissioner and Returning Officer to arrange the poll to be conducted in the Electoral District. It contains:

- the last day for nomination (by candidates).
- the polling day.
- the date the writs are to be returned.

Section 74D of the *Parliamentary Electorates and Elections Act 1912* outlines the duties of the Electoral Commissioner when a writ for an election is received. They include such actions as advertising the purpose of the writ; the relevant dates; and information about receiving the nomination papers. Section 81 specifies that the Electoral Commissioner must publicly advertise in the electoral district as soon as practicable after the close of nominations the names and addresses (i.e. the suburb, town or locality) of the candidates, the date of the poll, and a list of polling places for each district. Under s. 87 the Returning Officer must appoint a polling place manager to preside at each polling place. A Returning Officer may, if authorised by the Electoral Commissioner, preside over and take the poll at one polling place.

The Returning Officer and polling place managers, after the close of the poll, count the votes (pre-poll, postal, absent, those cast at polling places). Once the votes have been counted and the result ascertained the Returning Officer is to notify the Electoral Commissioner who then announces the result. The Electoral

Commissioner endorses the name of the person so elected on the writ which is returned to the Governor or Speaker (if a by-election) within the time specified.

The ballot papers for the Assembly (enclosed in separate packets containing used ballot papers; unused ballot papers; electoral rolls, books, other papers) are then forwarded to the Electoral Commissioner who keeps them secure until the period has expired during which the election can be disputed in the Supreme Court (acting as the Court of Disputed Returns) i.e. within 40 days of the return of the writ or, if a petition has been filed, the Court of Disputed Returns has made a determination or, the period of 6 months after the day of polling has expired.¹ Prior to 2006 all ballot papers for Legislative Assembly general elections were forwarded to the Clerk of the Legislative Assembly and petitions were received against the election of certain members requiring the House to authorise the Clerk to provide the court with all envelopes containing ballot papers to enable the Court of Disputed Returns to investigate before coming to a decision as to whether the election of a member was void.²

9.3 When does the new Parliament meet?

Under s. 69 of the Parliamentary Electorates and Elections Act, the Governor must issue a proclamation calling the Parliament together to meet on a day not later than the 7th clear day after the return of the writs for the Assembly general election or the date for the return of the writ for the periodic Council election, whichever is the later. If the counting of votes is delayed the Governor may issue a proclamation extending the date for the return of the writs for either the Legislative Assembly or the Legislative Council.

9.4 Key events/dates for general elections

<u>Expiry of Parliament</u>	- Friday before the first Saturday in March four years after the previous Assembly elected.
<u>Issue of the Writs</u>	- within four clear days after above date.
<u>Polling Day</u>	- Assembly expired – fourth Saturday in March next following the expiry. Assembly dissolved – not later than the 40th day from the date of the issue of the writs.
<u>Declaration of the Poll</u>	- Announcement made by the Electoral Commissioner after the votes are counted.
<u>Return of the Writs</u>	- within 60 days of issue or as the Governor directs.
<u>Meeting of new Parliament</u>	- within seven clear days of the date the writs are returnable, unless the date for the return of the writs is extended by the Governor.

9.5 Administrative arrangements

Although the Parliament has been dissolved and members are therefore unable to meet collectively, they still undertake their duties and responsibilities as members in their electorates until midnight the day prior to polling day.

¹ Section 127 and 129H of the *Parliamentary Electorates and Elections Act 1912*.

² For example, in 1991, following investigation, the Court of Disputed Returns ordered that the election of R.L. Graham to the electorate of The Entrance be declared void and the House agreed to a motion declaring the seat vacant VP 27/08/1991, pp. 93-4; VP 10/09/1991, p. 122 and VP 11/12/1991, pp. 471-2.

This is reflected in the fact that members continue to receive a salary and most of their entitlements/allowances up to the day preceding polling day. Under the *Parliamentary Remuneration Act 1989*, for the purposes of that Act, a person elected as a member of the Legislative Assembly is deemed to become a member on the date of election (that is, polling day) and ceases to be a member if not elected, from polling day. An unopposed member is deemed to be a member from the date of election (i.e. day of nomination).

In the case of the Premier and Ministers, after a general election, they act in a caretaker capacity and continue to exercise the duties and responsibilities of their offices until the Ministry is reconstructed or until the Premier resigns (an action which automatically involves the resignation of all other Ministers). There is no written law compelling the Premier to resign if the government is defeated. However, the convention that a government defeated at the polls must resign is clear cut and well observed. A defeated Ministry continues to function until the new majority party is in a position to take over government. The Premier then submits his resignation to the Governor and the Leader of the majority party is invited to form a government. If a government is returned at the elections the Ministry is usually “reconstructed” before Parliament meets in a manner recommended by the Premier to the Governor (a reconstruction may involve changes in portfolios, changes in the seniority of Ministers, the replacement of Ministers and the appointment of new Ministers).

9.6 Sessions

The duration of a Parliament may be divided into sitting periods called sessions. A session begins when the Parliament meets in accordance with a proclamation issued by the Governor and ends when the Parliament is prorogued by the Governor by proclamation (Const. Act s. 10A) or when the Assembly is dissolved.

It is mandatory for a session to be held once at least in every year so that a period of 12 months does not intervene between sittings (Const. Act s. 11). During a session the Assembly of its own motion may adjourn from one sitting day to the next.

There is no requirement for a four-year term of a Parliament to be divided into sessions. For example, the 54th Parliament from 2007 to 2011 comprised only one session.

9.7 Sittings

There are usually two distinct sitting periods during the course of a year. The Autumn sittings are usually held between late February and June and the Spring sittings from August to December. The House does not normally sit during school holiday periods.

Standing order 34 provides that the House may appoint, on the motion of a Minister at any time, without notice, the days and the times of meeting and adjournment.

Towards the end of a calendar year, recent practice has been for the House to consider and agree to a motion setting the days of meeting for the next calendar year.

Under the current standing orders the routine of business (S.O. 97) sets the following meeting times:

Tuesdays	1.00 pm – 7.30 pm
Wednesday	10.00 am – 7.30 pm
Thursday	10.00 am – 6.30 pm

The conduct of Friday sittings is set out in standing order 98, which provides:

On any Friday upon which the House sits, whether as a continuation of the sitting of the previous day or as a separate sitting day the following routine of business will apply:

- (1) Notices of Motions for Government Business
- (2) Notices of Motions (General Notices)
- (3) Petitions
- (4) General Business Notices of Motions for Bills (concluding not later than 10.30 am)
- (5) From 10.30 am Government Business shall have precedence of all other business in the routine of business.
- (6) No quorums shall be called and any divisions called shall be deferred, set down as orders of the day for the next sitting day and determined after Question Time.
- (7) At 1.00 pm Business before the House is interrupted for consideration of committee reports presented or the next item of business shall be called. Any interrupted item of Government Business shall stand as an order of the day for tomorrow.
- (8) At 1.30 pm Private Members' Statements, after which the House shall adjourn without motion moved until the next sitting day.

Friday sitting days provide a time when non-contentious issues can be considered such as the Address in Reply debate and the Budget debate. This enables the House to make more effective use of its time. It also means that members who are not listed to speak on Fridays do not have to be present in the House.

The sitting times of the Legislative Assembly have been varied by sessional order for the current (55th) Parliament. The routine of business, as amended by sessional order, now sets a sitting scheduled based on a three day sitting week: Tuesday, Wednesday and Thursday. Accordingly, the standing order regarding Friday sittings has been suspended for the current Parliament and sessional orders set the following meeting times:

Tuesday	12.00 pm – 7.45 pm (or at the conclusion of the matter of public importance if earlier)
Wednesday	10.00 am – 10.00 pm (or at the conclusion of the matter of public importance if earlier)
Thursday	10.00 am – until the conclusion of private members' statements (approx. 6.30 pm).

9.8 Prorogation

A House of Parliament is prorogued by the Governor issuing a proclamation terminating a session. Section 10A of the *Constitution Act 1902* provides for the proroguing of the Parliament. It states:

(1) The Governor may, by proclamation, prorogue the Legislative Council and Assembly whenever the Governor considers it expedient to do so (subject to this section and section 24B).

(2) 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 September³

While the Governor generally acts on the advice of the Premier or Executive Council, there are times when the Governor may exercise discretion by proroguing the Parliament without advice or by refusing to prorogue the Parliament. For instance, in 1911, the McGowen Labor Government lost the support of the House when a number of Government members refused to support the legislation before the House and resigned from Parliament. Acting Premier Holman requested that the Lieutenant-Governor prorogue the Parliament. This was however, refused and the Government resigned. The Opposition, after being asked to form a Government by the Lieutenant-Governor, agreed to do so on the condition that if they did not have control of the business of the House that they would be granted a dissolution. This was also refused which resulted in the resignations of the McGowen Government being withdrawn and the prorogation of the House as originally sought.⁴

From 1856 to 1893 it was the usual practice for the Governor to attend the Legislative Council in person and, after summoning the members of the Legislative Assembly, to read a speech proroguing the Parliament. Since 1893 the Parliament of New South Wales has been prorogued by proclamation. In 1904⁵ and again in 1908,⁶ a proclamation proroguing the Parliament was issued whilst the Legislative Assembly was still sitting. In these instances, the proclamation was handed to the Speaker in the Chair who then announced that he had received a document proroguing the Parliament and left the Chair.

The House is said to be “in recess” after it is prorogued. It is generally accepted (no specific provision exists) that all parliamentary business is brought to an end by prorogation. Exceptions to this are provided by a Parliamentary Committees Enabling Act that is usually passed at the end of each session (to allow committees to continue operating)⁷ and standing order 315 which purports to authorise standing committees to sit during the currency of the Parliament in which they are appointed.

³ Available authority suggests that it is not possible to prorogue only one House of Parliament – hence the reference to proroguing both the Legislative Council and the Legislative Assembly rather than either/or.

⁴ *The People's Choice, Electoral Politics in 20th Century New South Wales*, Volume 1 1901 to 1927, edited by Michael Hogan and David Clune, 2001, pp. 119-21.

⁵ VP 21/01/1904, p. 15.

⁶ VP 10/04/1908, p. 72.

⁷ Committees enabling legislation will be passed if there is to be a significant length of time between the prorogation and when the House resumes. For example, in May 2006 the Parliament was prorogued on Friday 19 May and the House resumed on Monday 22 May and it was considered that there was no need for enabling legislation to be passed.

(For more information on the effect of prorogation on parliamentary committees see section 26.13 of Part One).

Whilst prorogation brings all business before the House to an end, it does not have any effect on legislation that has passed through the Parliament but is awaiting assent when the Parliament is prorogued. This was recently considered in *Attorney-General (WA) v Marquet* where it was held that proroguing the Houses of Parliament would have no effect on bills already passed by the Parliament in that they could be lawfully presented for and receive assent. In coming to this decision the majority of the High Court argued that:

When it is said that prorogation wipes the parliamentary slate clean, what is meant is that proceedings then pending in the House that has been prorogued must be begun again unless there is some contrary provision made by statute or standing order. (Here, the standing orders of each House provided for proceedings to be taken up after prorogation at the point they had reached when the House was prorogued.) But here, if the Bills had been passed by both Houses, there was no proceeding then pending in either House. Each House would have completed its consideration of the Bills.⁸

⁸ (2003) HCA 67 at paragraph 85.

Chapter 10 Sitting and Adjournment of the House

10.1 Meeting and adjournment

10.1.1 In the House

Standing order 97, which sets out the routine of business on sitting days, is predicated on the fact that the sittings will commence in the afternoon on Tuesdays at 1.00 pm and in the morning on other days at 10.00 am.

A sessional order has been adopted for the current (55th) Parliament which has varied the routine of business to provide for the House to sit on Tuesdays, Wednesdays and Thursdays. Under this sessional order the House will commence sitting at 12.00 noon on Tuesday and at 10.00 on Wednesday and Thursday.

The Speaker leaves the Chair at 1.30 pm each day to allow for a lunch break. The Speaker may also leave the Chair at other times to allow members to attend particular events such as the presentation of the Address in Reply to the Governor or to attend a joint sitting or because of disorder.¹

The House automatically adjourns without a motion being proposed at certain times, or at the completion of certain business, each sitting day in accordance with standing order 46 as follows:

Tuesdays:	7.30 pm, or at the conclusion of the matter of public importance if earlier.
Wednesdays:	7.30 pm, or at the conclusion of the matter of public importance if earlier.
Thursdays:	6.30 pm, or at the conclusion of private members' statements if earlier.
Fridays:	At the conclusion of private members' statements.

The adjournment times have been varied by sessional order for the current (55th) Parliament as follows:

Tuesdays:	7.45 pm, or at the conclusion of the matter of public importance if earlier.
Wednesdays:	10.00 pm, or at the conclusion of the matter of public importance if earlier.
Thursdays:	at the conclusion of private members' statements.

Sittings may be extended by motion suspending the standing and sessional orders to vary the routine of business. When a sitting has been extended by a motion of the House and no alternative time for adjournment has been set, a question for the adjournment will be proposed by the Chair as follows:

The question is "That this House do now adjourn".

¹ Renaming ANZAC Bridge ceremony, VP 11/11/1998, p. 1049; respect for Port Arthur shooting victims, VP 01/05/1996, p. 84; visit of the President of USA, VP 21/11/1996, p. 648.

Under the standing orders, the question on the adjournment cannot be debated nor amended (SO 80(2)).

When agreed to, or if an automatic adjournment is provided for under the standing orders or by suspension of standing and sessional orders,² the Speaker states:

"The House now stands adjourned until"

If sitting days and hours have not been set by a Minister, it is necessary for a Minister to move a motion on every sitting day for a special adjournment which specifies a particular day and hour for the House to next meet.³ The question proposed by the Speaker would be, for example:

The question is "That the House at its rising this day, do adjourn until Tuesday 21 May 1995 at 2.15 p.m.".

The House has been adjourned at irregular times for a variety of reasons. The House adjourns on the death of a sitting member as a mark of respect⁴ and on two occasions the House adjourned at 5.00 p.m. due to industrial action.⁵ In addition, motions to suspend standing and sessional orders have also provided for the adjournment of the House after the completion of a specified item of business.⁶

Under standing order 47, the Government may request (in writing to the Speaker) that the House meet at an earlier time than set down on adjournment.⁷ Similarly, a majority of Members may, in writing to the Speaker, request the House meet at an earlier time than that set down at adjournment (S.O. 48).

10.1.2 Suspending a sitting until the ringing of one long bell

The procedural device of suspending a sitting of the House until the ringing of one long bell in lieu of a formal adjournment often suits the convenience of the House and individual members by allowing the suspension of a sitting for special events⁸ or unusual meal breaks (such as breakfast). The business of the House is resumed later at the point where it was suspended. The practice of suspending proceedings to extend a sitting over more than one day allows the business of the House to be resumed without the requirement to observe a new routine of business. This practice also therefore makes more time available for pressing business before the House.

It is within the discretion of the Speaker to suspend a sitting over more than one day. A specific resolution authorising the Speaker to leave the Chair "until the ringing of

² VP 18/10/2005, pp. 1655-6; VP 22/06/2005, p. 1499; VP 23/03/2005, pp. 1305-6; 22/06/2004, pp. 884-5; VP 18/02/2004, p. 591; VP 10/11/1999, p. 222.

³ During 2000 and 2001 the House, having not set on the motion of the Minister the days and times of meeting and adjournment, agreed to special adjournments for all sitting days.

⁴ VP 15/09/2004, p. 973.

⁵ VP 16/06/1998, p. 728; VP 29/08/2006, p. 133.

⁶ VP 10/11/1999, p. 222.

⁷ See VP 15/12/2005, p. 1833 when the House was recalled prior to the date set at the last adjournment. Standing and sessional orders have also been suspended to provide that the House adjourn to a particular date and that should the Speaker be requested by the Leader of the House to call the House to meet for a stated specific purpose at other times the Speaker shall act on such advice and advise members accordingly, VP 17/08/2000, p. 755.

⁸ The Speaker, having received advice from the Leader of the House that some members were having difficulty attending the Parliament, left the Chair at 2.23 p.m. until the ringing of one long bell. The Speaker resumed the Chair at 5.16 p.m., VP 19/06/2001, p. 1277.

one long bell" is not required although on occasions a resolution of the House has provided for this to occur.⁹

Such extended sittings are sometimes resorted to towards the end of a Parliamentary sitting period to suit the convenience of the House when it awaits business to be returned from the Legislative Council. In more recent times the Legislative Assembly has availed itself of long suspensions, for example: November/December 1999¹⁰; June/July 1999¹¹; November/December 1998¹²; June/July 1998¹³; November/December 1997¹⁴; and November and December 1993.¹⁵

On most of these occasions some programmed sitting days were lost in conjunction with the events associated with extended suspensions of a sitting.

Perhaps in recognition of the argument that overuse of the long suspension may be prejudicial to the rights of members, the Leader of the House moved motions in the following years to allow certain items of regular business, such as Question Time, to take place notwithstanding that the House was resuming a suspended sitting: 1997¹⁶; 1998¹⁷; and 1999.¹⁸

10.2 Absence of quorum

A quorum of the Legislative Assembly is 20 members, exclusive of the member presiding (Const. Act, s 32).

If a quorum is not present at the commencement of a sitting the bells are rung for four minutes and if there is no quorum then, the Speaker adjourns the House to the next sitting day (S.O. 38). A quorum is not required to be formed to recommence business after the Speaker has left the Chair until an appointed time or the ringing of one long bell (S.O. 40), or after the usual suspension of a sitting for a meal time.¹⁹

A member generally may call the attention of the Speaker to the "state of the House" (that is, to the member's belief that a quorum is not present) at any time, even by

⁹ VP 26/11/1997; p. 344 where the sitting was suspended from 26 until 27 November 1997 without a specific resolution although a suspension of standing orders on 27 November 1997 provided, among other things, for the Speaker to leave the chair until the ringing of one long bell, see also VP 25/06/1998, p. 784.

¹⁰ Sitting suspended on 18 November until 23 November, again until 24 November and again until 2 December without a specific resolution. Three programmed sitting days, 23-25 November 1999 were not held, VP 18/11/1999, pp. 268, 291 and 302.

¹¹ Sitting suspended on 29 June until 1 July and again until 2 July without a specific resolution. Three programmed sitting days, 30 June and 1-2 July, were not held, VP 29/06/1999, pp. 192, 204.

¹² Sitting suspended on 25 November until 4 December without a specific resolution. Four programmed sitting days, 26 November and 1-3 December, were not held, VP 25/11/1998, p. 1147.

¹³ Sitting suspended on 25 June until 3 July 1998 in accordance with a resolution. There were no programmed sitting days during this period. VP 25/06/1998, p. 784.

¹⁴ Sitting suspended from 26 November until 27 November without a specific resolution and suspended again until 8 December in accordance with a resolution. Four programmed sitting days, 28 November and 2-4 December, were not held.

¹⁵ Sitting suspended twice overnight on 19 November before adjourning, VP 19/11/1993, pp. 608-9. Three programmed sitting days were not held. The House was summoned in accordance with the standing orders to meet on 14 December. The 14 December sitting was suspended three times and adjourned after midnight on 15 December, VP 14/12/1993, pp. 612, 626. On 15 December the sitting was suspended three times, the last at 12.05 a.m., to be resumed at 7.30 p.m. on 16 December, VP 15/12/1993, pp. 629, 634. There were no resolutions providing for these suspensions.

¹⁶ Private members' statements, questions without notice, consideration of urgent motions and the matter of public importance, VP 26/11/1997, p. 344.

¹⁷ Private members' statements, VP 25/11/1998, p. 1145; tabling of papers, committee reports, announcement of reports received out of session, statutory instruments, presentation of petitions and a ministerial statement, VP 25/11/1997, p. 1147.

¹⁸ Questions without notice (two occasions 24 & 25 November), VP 18/11/1999, pp. 271, 291. Provision was also made to allow members to lodge additional questions on notice, VP 18/11/1999, p. 296.

¹⁹ PD 10/03/1966, pp. 4109-10.

interrupting when another member is speaking. The Speaker then counts the House and if a quorum is not present the bells are ordered to be rung. The bells are rung for four minutes (or up until a quorum is formed). If there is still no quorum after the four minutes, the Speaker sets down the interrupted business as an order of the day for the next sitting day and adjourns the House until the next sitting. On any second or subsequent quorum call in any one sitting the Speaker has discretion to either proceed with business or to order the bells to be rung (S.O. 42). For example, on one occasion after a quorum call the Chair used his discretion and directed that the House continue to sit in its present state as a quorum had been called earlier, and the hour was late.²⁰

Standing order 45 provides that a member may not call attention to the want of a quorum before 10.30 am on days when the House meets at 10.00 am.²¹ The standing order also provides that quorums may not be called on Friday sittings or during private members' statements. A sessional order has been adopted that varies this standing order to remove the reference to Friday sittings and to provide that a quorum cannot be called during the discussion on matters of public importance or the discussion on a petition signed by 10,000 or more persons or during the establishment of and debate on any motion accorded priority in addition to during private members' statements and before 10.30 am.²²

Standing and sessional orders have also been suspended to prevent quorums being called on specified days²³, for a specified time²⁴, and while the House dealt with specific items of business.²⁵

It is disorderly to call attention to the want of a quorum when one is present and it is also disorderly to leave the Chamber after a quorum has been called for and the Speaker has ordered the bells to be rung.²⁶

If tellers in a division report that there is not a quorum present, the Speaker must adjourn the House until the next sitting day (S.O. 43).

10.3 Joint sittings

On occasion members of the Legislative Assembly hold joint sittings with members of the Legislative Council.

In the event of casual vacancies in the Legislative Council and in the Senate the two Houses sit together to elect persons to fill such vacancies. A casual vacancy occurs before the expiration of the member or Senator's term through resignation, death or otherwise. It does not include those vacancies that simply arise due to the expiration of a member's term of service. On one occasion a joint sitting was held for the purposes of electing both a member of the Legislative Council and a Senator.²⁷

²⁰ PD 08/04/1992, p. 2462. See also PD 06/06/1996, p. 2690.

²¹ Prior to the adoption of the current standing orders a sessional order first passed in September 1997 provided for this restriction on quorums VP, 17/09/1997, p. 38-9; VP 11/05/1999, pp. 37-42; VP 07/09/1999, pp. 22-7; VP 29/04/2003, p. 30.

²² VP 3/05/2011, p. 40 & VP 14/02/2012, p. 517

²³ VP 24/06/1999, p. 168

²⁴ VP 11/11/1999, p. 230

²⁵ VP 15/09/1999, p. 77; VP 10/11/1999, p. 222; VP 25/05/2000, pp. 504-5.

²⁶ The Acting Speaker drew the attention of the House to the standing orders and that when the last quorum was formed a member came into the Chamber and left. The Acting Speaker reminded that member that such conduct was disorderly. PD 30/12/2000, p. 11413.

²⁷ VP 17/09/1997, p. 48,

The two Houses may also meet together to resolve deadlocks over bills. Resolutions have also been passed by both Houses enabling them to sit together to hear addresses given by overseas dignitaries,²⁸ for condolence motions²⁹ and for public forums such as the seminar on the reform of the law of negligence.³⁰

10.3.1 Filling of casual vacancies in the Legislative Council

When a vacancy occurs in the Legislative Council the Governor convenes a joint sitting of both Houses under section 22D of the *Constitution Act 1902* to elect a new member.³¹ The legislation provides that a person may only be nominated for election if they belong to the political party of the outgoing member.

Any member elected to the Legislative Council at a joint sitting must wait at least two days after the joint sitting before they can make the pledge of loyalty and any member elect who ceases to be a member of his or her party before pledging loyalty will be deemed not to be elected.³² In addition, the legislation provides that more than one vacancy can be filled at the same joint sitting.³³

The conduct of any joint sitting to fill a casual vacancy in the Legislative Council is governed by provisions contained in the *Constitution and Parliamentary Electorates and Elections (Amendment) Act 1978*. It provides:

- The President of the Legislative Council presides at the joint sitting. If he or she is unable to do so, the Speaker of the Legislative Assembly shall preside;
- Where a joint sitting is convened for the purpose of filling more than 1 vacant seat, each vacant seat shall be filled separately, by the votes of the members present in accordance with these provisions;
- A member proposes some eligible person³⁴ to fill the vacant seat and moves "That (*the person proposed*) be elected as a member of the Legislative Council to fill the seat in the Legislative Council vacated by (*the person whose seat has become vacant*)". This motion must be seconded;
- The member proposing the new member may speak on his or her proposal for up to 10 minutes and no other member may speak at that time. Other members may speak to any motion for 10 minutes and no longer;
- If only 1 person is proposed and seconded that person is, without a question being put, elected as a member of the Legislative Council to fill the vacant seat;
- If 2 or more persons are proposed and seconded to fill the vacancy:

²⁸ VP 02/06/2000, p. 546 and VP 08/09/1998, p. 826.

²⁹ VP 22/10/2002, p. 500 where a joint sitting was convened to consider a motion of condolence to the families and friends of the victims of the Bali bombings.

³⁰ VP 17/09/2002, pp. 426-7 and VP 18/09/2002, pp. 433-4.

³¹ Joint sittings are convened to elect new members of the Legislative Council on the death of a sitting member or when seats become vacant for reasons other than the expiry of the member's term of service. For examples, see VP 30/08/2000, pp. 764-5; VP 01/11/2000, pp. 829-30; VP 06/09/2001, p. 1439; VP 03/09/2002, p. 391; VP 25/06/1998, p. 779; VP 30/04/1998, pp. 527-8; VP 17/04/1996, p. 36; VP 17/09/1997, p. 48; VP 19/10/1995, pp. 328-9; VP 19/09/1995, pp. 204-5; VP 12/09/1991, p. 148; VP 21/08/1991, p. 75.

³² Section 22E of the *Constitution Act 1902*.

³³ See section 22E of the *Constitution Act 1902*.

³⁴ An eligible person is a reference to a person who is eligible to be nominated for election under section 22D of the *Constitution Act 1902*.

- (a) the motion shall be put in respect of each of those persons in the order in which they have been proposed and seconded and any member may speak to any such motion; and
- (b) when a motion is resolved in the affirmative the person to whom the motion relates is elected as a member of the Legislative Council to fill the vacant seat and the remaining motions lapse;
- A motion at a joint sitting shall be decided by the majority of the votes of the members present other than the person presiding and when the votes on any motion are equal the person presiding shall have a casting vote;
- Any motion at a joint sitting shall be decided by open voting;
- The Standing Rules and Orders of the Legislative Council apply to and in respect of proceedings at a joint sitting;
- The person presiding will not declare the joint sitting closed until all vacancies for which the joint sitting was convened have been filled;
- Following the joint sitting the person presiding shall in writing inform the Governor of the name of the new person elected to fill the vacancy in the Legislative Council; and
- The records of the proceedings of a joint sitting shall be made and retained by the Clerk of the Legislative Council.³⁵

The legislation also provides that its provisions for joint sittings will only have effect until standing rules and orders governing the proceedings at joint sittings held under section 22D of the *Constitution Act 1902* have been adopted by both Houses of Parliament and approved by the Governor.³⁶ By convention joint sittings to elect a member to the Legislative Council to fill a casual vacancy are held in the Legislative Council Chamber.

A message convening a joint sitting of both Houses for the purposes of filling a casual vacancy in the Legislative Council can only be received from the Governor if both Houses are sitting. This is because there is no provision for a message to be given solely to either the Speaker or the President and in order to be effective a message needs to be received when the House is sitting so that it can be dealt with as appropriate.³⁷

10.3.2 Senate casual vacancy

Section 15 of the *Commonwealth of Australia Constitution* provides for the filling of casual vacancies in the Australian Senate. It provides:

If the place of a senator becomes vacant before the expiration of his term of service, the Houses of Parliament of the State for which he was chosen, sitting and voting together, or, if there is only one House of that Parliament, that House, shall choose a person to hold the place until the expiration of the term. But if the Parliament is not in session when the vacancy is notified, the Governor of the State, with the advice of the Executive Council thereof, may appoint a person to hold the place until the expiration of fourteen days from the beginning of the next session of the Parliament of the State or the expiration of the term, whichever first happens.

³⁵ See Schedule 4, clause 12 (1)-(16) of the *Constitution and Parliamentary Electorates and Elections (Amendment) Act 1978*.

³⁶ See Schedule 4, clause 12(17) of the *Constitution and Parliamentary Electorates and Elections (Amendment) Act 1978*. To date, the Legislative Assembly has not adopted standing orders in relation to joint sitting to fill vacancies in the Legislative Council.

³⁷ Advice received from the Crown Solicitor's Office re: Message to both Houses under s.22D, Constitution Act, dated 5 January 1996.

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 chosen, he was publicly recognised 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 consequent vacancy or vacancies, shall, unless there is no member of that party available to be chosen or appointed, be a member of that party.

Where –

- (a) in accordance with the last preceding paragraph, a member of a particular political party is chosen or appointed to hold the place of a senator whose place had become vacant; and
- (b) before taking his seat he ceases to be a member of that party (otherwise than by reason of the party having ceased to exist), he shall be deemed not to have been so chosen or appointed and the vacancy shall be again notified in accordance with section twenty-one of this Constitution.

The name of any senator chosen or appointed under this section shall be certified by the Governor of the State to the Governor-General.

As with the filling of casual vacancies in the Legislative Council, any person proposed to fill a casual vacancy in the Senate must, if possible, belong to the same political party as that of which the Senator retiring or vacating the seat was a member.³⁸ If only one person is proposed and seconded the President shall declare that person to hold the vacant seat. However, if more than one person is nominated and seconded the person to fill the casual vacancy will be chosen by open voting.

The Governor can only appoint a person to hold the casual vacancy in the Senate when the House is “not in session”. This effectively means that the Governor can only make an appointment to the Senate during periods when the Parliament is prorogued.³⁹

There is little guidance provided by the Australian Constitution and the standing orders of both the Houses regarding the conduct of joint sittings to fill casual vacancies in the Senate. The first joint sitting convened to fill a vacancy in the Senate occurred on 8 October 1903⁴⁰ and established a basic pattern for the conduct of proceedings which has generally been followed.⁴¹ This pattern is somewhat similar to the conduct of a joint sitting to fill a casual vacancy in the Legislative Council and consists of the following steps:

1. On receipt of the Governor’s message to fill a casual vacancy in the Senate, the Legislative Assembly sends a message to the Legislative Council requesting a time and place to hold a joint sitting;
2. The joint sitting would then elect a Chair, the nomination being received and the question put by the Clerk of the Parliaments. Usually the President

³⁸ See section 15 of the Australian Constitution. The provision was introduced in 1977 following an incident when a Coalition member was elected to the Senate in the place of a Labor Senator as part of a political strategy by the NSW Coalition Government to attack the Federal Whitlam Labor Government. See PD 27/02/1975, pp. 3994-4011. See also Clune D and Griffith G, *Decision and Deliberation: The Parliament of New South Wales 1856-2003*, 2006, p. 442.

³⁹ Advice received from the Crown Solicitor’s Office re: Appointment to casual Senate vacancy pursuant to s.15, Constitution Act, dated 15 December 1986.

⁴⁰ The first NSW Senate vacancy was due to the resignation in 1903 of Senator Richard Edward O’Connor QC who became one of the initial appointees to the bench of the High Court of Australia.

⁴¹ See for example VP 04/05/2000, p. 458; VP 14/10/1998, p. 928; VP 17/09/1997, p. 48; VP 29/08/1991, pp. 116-7; VP 08/03/1994, p. 71; VP 10/05/1994, p. 240; VP 27/02/1976, p. 333; VP 16/03/1971, p. 17; VP 02/09/1965, p. 32.

- of the Legislative Council is nominated with the proviso that in the President's absence the Speaker would take the Chair;
3. The Premier proposes draft rules for the joint sitting and provision is made to conduct the joint sitting in accordance with parliamentary usage and the standing orders of either the Legislative Council or the Legislative Assembly. After the adoption of the rules the Chair calls for nominations.
 4. If only one person is proposed and seconded, the President declares that person to be elected to hold the vacant place in the Senate. If more than one person is proposed and seconded, the person to hold the vacant place shall be chosen by open voting;
 5. Before proposing the question, the President asks if any member desires to propose any other person to fill the vacancy, and, no other person being proposed, the first division is proceeded with;
 6. If on the first division the person proposed has an absolute majority of the whole number of the members voting, the President declares that the proposed person has been chosen to hold the vacant seat in the Senate. However, if the person proposed does not receive an absolute majority of the members voting, the name of such person is excluded from any subsequent division.
 7. Successive divisions are taken until one of the proposed persons obtains an absolute majority of the members voting. The President, in the case of an equality of votes in any division, gives a casting vote and any reasons may be entered in the records;
 8. When a person obtains an absolute majority of the members voting the President declares that person to be the new senator and the President will inform the Governor in writing of that; and
 9. The records of the proceedings and division lists are retained by the Clerk of the Legislative Council.

In 1975 a joint sitting brought on by the resignation of Senator Murphy who had been Attorney-General in the Whitlam Labor Government was quite contentious. Prior to the joint sitting the Premier announced that the vacancy would be filled by a non-Labor candidate flouting the convention that a casual vacancy in the Senate should be filled by a person from the same party as the Senator vacating the seat.⁴² When the Legislative Assembly resumed following the Christmas adjournment an endeavour was made by the Labor Opposition to have a joint committee appointed to draw up rules for the expected joint sitting. The motion was defeated on division.⁴³ The following day the Labor Opposition in the Legislative Council proposed a similar motion which was ruled out of order because the House had not yet been advised by message from the Governor that there was a vacancy. Furthermore, the motion contained an instruction which constituted a direction to Assembly members, who may be appointed to any joint committee established to draw up rules for a joint sitting, which was regarded as an infringement of the rights and privileges of the Legislative Assembly.⁴⁴

⁴² After this incident an amendment was made to section 15 of the Australian Constitution in 1977 to provide that any casual vacancy in the Senate must be replaced by a member of the same party to which the member who has left the vacancy belonged "unless there is no member of that party available to be chosen or appointed."

⁴³ PD 19/02/1975, p. 3611.

⁴⁴ PD 20/02/1975, p. 3697.

The rules to govern the conduct of the joint sitting were agreed upon by prior resolution of both Houses, rather than by the members present at the joint sitting.⁴⁵ In doing so, there was a departure from the practice established at the first such sitting in 1903 and followed on every occasion afterwards. As such, when the President of the Legislative Council took the Chair, declared the joint sitting open and sought nominations for the vacant senatorial position, Opposition members raised points of order that there were no rules governing the sitting unless they were adopted by the members themselves at the sitting. An unsuccessful endeavour was made to substitute rules for the sitting prior to the President putting the question for the appointment of the first candidate. When the question was put the result was 86 to 70 resulting in the selection of the government candidate, Cleaver Bunton, and the President declared him elected and closed the proceedings.⁴⁶

As an aftermath of the disorderly meeting, the Legislative Assembly Standing Orders Committee proposed a new standing order to provide for rules at future joint sittings to elect a senator. A copy of the proposed standing order was referred to an ad hoc Legislative Council committee which was at the time reviewing certain Council standing orders. This committee sought the opinion of the Clerk of the Parliaments, who advised against its adoption in view of section 15(1) of the *Constitution Act 1902*, which restricted the preparation and adoption of standing rules and orders concerning communication between the Houses to:

...the mode in which such Council and Assembly shall confer, correspond, and communicate with each other relative to Votes or Bills passed by or pending in such Council and Assembly respectively.

Following similar advice received from the Clerk of the Assembly the proposal was then abandoned.

10.3.3 Conferences between the Legislative Assembly and Legislative Council

The standing orders of both Houses provide for the holding of conferences between the two Houses. Conferences can be designated as either “ordinary” or “free” conferences with different rules and procedures applying to each. When motions are moved requesting a conference with the Legislative Council the motion must note the names of the members proposed to be the managers for the Assembly and a statement of the general objects of the conference (S.O. 344). The message which is delivered to the Legislative Council must also state the general objects of the conference and the number of members the Assembly will appoint (S.O. 345).

10.3.3.1 Ordinary conference

Standing order 342 specifies the procedure for an ordinary conference. It provides that when an ordinary conference is held between the two Houses that there shall be at least five Assembly managers, that all communication between the managers shall be in writing and that the duty of the Assembly managers is confined to reading and delivering the reasons or resolutions to the Council managers or hearing and receiving reasons or resolutions from the Council managers. In other words the parameters of the debate are determined by the House. The Legislative Assembly has never held an ordinary conference with the Legislative Council.

⁴⁵ PD 25/02/1975, pp. 3765-809.

⁴⁶ PD 27/02/1975, pp. 3994-4011.

10.3.3.2 Free conferences and joint sittings under section 5B of the *Constitution Act 1902*

Section 5B of the *Constitution Act 1902* sets out the process that may be undertaken when the two Houses disagree on bills, other than those bills which appropriate monies for the ordinary annual services of the Government which are dealt with under section 5A. A disagreement occurs when a bill is introduced and passed by the Legislative Assembly, but rejected by the Council, not passed by the Council or passed with amendments to which the Assembly does not agree.

A bill is deemed to have not passed for the purposes of section 5B 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.⁴⁷ Advice received from the Crown Solicitor indicates that the “transmission” of a bill to the Legislative Council for the purposes of the *Constitution Act 1902* is best considered to have occurred when the bill is delivered to a member or one of the Clerks-at-the-Table while the House is sitting or to the Clerk of the Legislative Council if it is not sitting.⁴⁸

The first step in resolving disagreements between the Houses is to hold a free conference between managers appointed by each House. If no agreement is reached at this free conference the Governor may convene a joint sitting of both Houses to 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.⁴⁹ No vote is taken at the joint sitting.

The *Constitution Act 1902* provides that if there is no agreement between the two Houses following the joint sitting or after further communication to bring about agreement, the Legislative Assembly may by resolution direct that the bill as last proposed by the House, with or without amendments made by the Legislative Council, be submitted to the electors of the State by way of a referendum at any time during the life of the Parliament or at the next general election of members of the Legislative Assembly. If the bill is approved by the majority of the electors voting it shall be presented to the Governor for assent even though the Legislative Council has not agreed to the bill.⁵⁰

Such a referendum occurred when a bill was before the Parliament which proposed to abolish the Legislative Council. In this instance, the Legislative Council refused to participate in a free conference and joint sitting as provided for in section 5B of the *Constitution Act 1902*. An injunction was sought to prevent the bill going to referendum.⁵¹ However, the High Court unanimously concluded that section 5B of the *Constitution Act 1902* was valid, due to the fact that the power to legislate for the peace, welfare and good government includes the power to change the *Constitution Act 1902*, and that the Council’s refusal to consider the bill for reasons of alleged privilege constituted a rejection of the bill under section 5B. The majority of the court considered that the requirement of a free conference was directory rather than imperative. Justice Kitto implied that the Council had an inability to prevent the process through non-cooperation and Justice Menzies made a similar

⁴⁷ See section 5B(4) of the *Constitution Act 1902*.

⁴⁸ Advice received from the Crown Solicitor re: s.5B(4), *Constitution Act 1902*, dated 3 May 1990.

⁴⁹ The Governor is provided with Ministerial advice that a joint sitting should be convened and the Governor is bound to act on this advice.

⁵⁰ See section 5B of the *Constitution Act 1902*.

⁵¹ *Clayton v Heffron* (1960) 105 CLR 214.

interpretation.⁵² The referendum which was held in April 1961 was rejected by a majority of over 250,000.

The Legislative Assembly standing orders specify that when a free conference is held there must be at least ten Assembly managers present and that the managers may confer verbally and without restriction with the Council managers (S.O. 343). The managers may be appointed by ballot if any member so requests although this is not a requirement under the standing orders.⁵³ In the case of an equality of votes the Speaker will determine which members are to be appointed as managers. If a ballot occurs the bells are rung as in a division and each member is required to hand in a list of ten members nominated by them to be appointed as managers. The practice of the House has been that a member's vote is considered to be informal if they do not mark ten members. In the Legislative Assembly there has been a precedent of appointing Government members as managers and in cases where significant legislation is to be considered Ministers are usually appointed as the managers. However, there are cases where the Government of the day has professed to have a desire to allow equal representation of both sides of the House although this has at times been thwarted by the Opposition's refusal to co-operate.⁵⁴

When there is disagreement between the Houses in relation to a bill one of the Houses (the House where the legislation originated) requests a free conference with the other House to discuss the subject of such disagreements. It does this by sending a message to the other House requesting a free conference and notifying it of the members who have been appointed as managers. A message is then received back from the other House agreeing to a time and place for the free conference. When the time arrives for the free conference the Clerk, by direction of the Speaker, calls the name of the managers⁵⁵ and they then proceed to the conference, attended by the Serjeant-at-Arms. The business of the House is suspended during their absence. On their return to their Chamber the managers hand up the report of the free conference and the Clerk, by direction of the Speaker, reads out the resolutions agreed to by the free conference. These resolutions are placed on the business paper as an order of the day forthwith, for a later hour, or for the next sitting day to be considered in detail.

A ruling of Speaker Meagher in 1916 indicates that only the matters referred to the free conference are to be considered by the managers and that no new matter can be dealt with at the free conference. Referring to *May* Speaker Meagher stated:

*May sets forth the usages of the Imperial Parliament in regard to the position of a joint conference which has taken upon itself to deal with a matter not specifically referred to it. The conference meets in order to find a solution of certain disagreements between the two Chambers respecting a bill, and the particular items of conflict form the basis of the deliberations of the conference. The reason why either House has agreed to the amendments made by the other House is not in issue. The only matter in issue is that in respect of which there is antagonism between the two Houses.*⁵⁶

⁵² See *Clayton v Heffron* (1960) 105 CLR 214.

⁵³ See ruling of Speaker Maher, PD 07/04/1960, p. 3845 where it was ruled that a request that managers for a free conference be elected by ballot must be made when a motion for a free conference is first proposed from the Chair.

⁵⁴ See for example, PD 07/04/1960, pp. 3838-9.

⁵⁵ For precedent when one of the members appointed as a manager does not answer to their name when called see *Public Roads Bill*, VP 09/06/1897, p. 118. See also VP 20/10/1879, p. 364, where two members did not answer when called and on motion of a Minister new members were appointed to serve.

⁵⁶ PD 29/11/1916, p. 3105-6.

Speaker Meagher went on to add that “clearly construing the procedure as laid down by *May*...there is no method by which a free conference could bring in new matter.”⁵⁷

Free conferences held by the two Houses are informal meetings and no official record of proceedings are kept – apart from what is reported to the House. In a free conference the managers may come to agreement among themselves but cannot bind their Houses to agree to any particular course of action.

On one occasion the Legislative Assembly sent a message to the Legislative Council following a free conference requesting advice as to what steps had been taken by the Council on the report of its managers of the free conference. The Legislative Council referred this message to a select committee to report on the practice of Parliament in sending messages from one House to the other requesting information as to their proceedings. The Legislative Council complied with the Assembly’s request but also re-iterated its select committee’s view that the message of the Legislative Assembly did 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 and noted that its response should not set a precedent.⁵⁸

In response the Legislative Assembly passed a motion to remove the Council’s message from the records due to the fact that the “...said message not only manifests a disregard of the rights and privileges contended for by the representatives of the people, but surrenders the privileges with which the Council is separately invested, by accounting to this House how the members of the Council in their individual capacity have recorded their votes, a course not sanctioned by any precedent, and never desired by this branch of the Legislature, and one which, if acknowledged, would form a precedent dangerous to the independence of the Council itself.”⁵⁹ This action by the Assembly was arguably the proper course to adopt in that later legal advice received indicated that the Legislative Assembly was not out of order in requesting advice from the Council as to what it was intending to do with resolutions agreed to at a free conference and that the Assembly could even request the Council to respond to their request within a specified time period.⁶⁰ Given this advice, in future, if the Council’s position is not clear following a free conference between members of both Houses it could be wise for the Assembly to express its views by message to the Council and request an indication of the Council’s views within a time to be stated in the message.

There have been twenty four requests for free conferences in New South Wales since 1867. The purpose of these requests has been to resolve disagreements on legislation between the Houses. Twenty one free conferences have resolved the disagreements and the legislation (unamended or amended) has subsequently been enacted. The disagreements in the following bills were unresolved:

⁵⁷ *Ibid.* On this occasion the free conference had agreed to amend a section of the bill that had already been agreed upon by both Houses. The Speaker, whilst allowing the amendment, noted that it was a departure from accepted practice and that it was not to be regarded as a precedent.

⁵⁸ See the Minutes of Proceedings of the Legislative Council, 14/05/1879, pp. 220-1.

⁵⁹ VP 14/05/1879, p. 511 – Entry 12.

⁶⁰ Advice received from the Crown Solicitor in the matter of the Constitution and Parliamentary Electorates and Elections (Amendment) Bill 1977: Question to be followed in Free Conference and Joint Sitting, dated 12 January 1978.

- Parliamentary Powers and Privileges (1878-79): The Legislative Council did not consider the report of its own managers and the Assembly consequently discharged the order of the day for the bill;
- Crown Lands (1898): The Legislative Council refused the request for a free conference due to the lateness of the session. The bill lapsed on prorogation; and
- Constitution Amendment Legislative Council Abolition (1960): The Legislative Council refused to take part in the proposed joint sitting. This bill, as a result, was put to a referendum in April 1961 and rejected by a majority of over 250,000 votes.

Conferences or meetings can also be held between the committees of both Houses following the passing of resolutions by each House authorising the committees to do so. For instance, each House has a committee that deals with members' conduct and ethics and on a number of occasions both Houses have passed resolutions enabling them to confer with each other.⁶¹

10.3.4 Other joint sittings/meetings

The Legislative Assembly has, in recent times, held joint sittings with the Legislative Council for particular purposes in addition to filling vacancies in either the Legislative Council or the Senate and free conferences.

On 18 September 2002 a joint sitting was held in the Legislative Assembly Chamber for the purpose of a seminar on reform of the law of negligence. The seminar was convened in order to set the context for proposed legislation by hearing about developments in the law of negligence, current legal developments and the financial and actuarial issues underpinning the need for reform.

The resolution, passed by the Legislative Assembly and agreed to by the Legislative Council, provided that the joint sitting would commence at 10.05 a.m. at the ringing of one long bell and that it would conclude at 1.00 p.m. without question being put. The resolution also provided that during the joint sitting the standing orders of the Legislative Assembly would apply.⁶²

A number of experts were admitted on to the floor of the House to address the members at the joint sitting including a Professor of Law, insurance specialists and the President of the NSW Bar Association. The resolution passed establishing the joint sitting therefore included a clause authorising these "strangers" to address members from the floor of the House.⁶³

On 22 October 2002, a joint sitting was convened by both Houses to consider a motion of condolence to the families and friends of the victims of the Bali bombings which occurred on 12 October 2002. Standing orders were suspended to give the joint sitting precedence over all other business and for the Houses to adjourn, as a mark of respect, without motion, after the joint sitting was concluded.⁶⁴ The joint

⁶¹ VP 20/09/1995, p. 221 and VP 03/04/2001, p. 1134.

⁶² VP 17/09/2002, pp. 426-7 and Minutes of Proceedings of the Legislative Council 17/09/2002, pp. 353-4.

⁶³ *Ibid.*

⁶⁴ VP 22/10/2002, p. 500.

sitting was held in the Legislative Assembly Chamber and, as with the joint sitting convened to consider the law of negligence, the rules of the Assembly applied.

Members of the Legislative Council have also been admitted into the Legislative Assembly Chamber to hear speeches from distinguished visitors. These joint meetings are somewhat different to other joint sittings where a vote on a particular decision is taken. However, resolutions are still required to be passed by each House authorising the attendance of Upper House members in the Legislative Assembly.⁶⁵ Resolutions have been passed to enable joint meetings to be convened to hear addresses from the First Secretary of the National Assembly of Wales⁶⁶ and the President of Ireland.⁶⁷

10.3.5 Meeting of the two Houses at the beginning of a new Parliament or a new session

As noted in Chapter 4 of Part One, members of the Legislative Assembly are requested to attend in the Legislative Council Chamber for the purposes of hearing the Governor's commission for the opening of Parliament.

On the first day of a new Parliament the House meets pursuant to the proclamation of the Governor. When the members are assembled the Clerk reads the proclamation summoning Parliament and the Usher of the Black Rod delivers a message from the Commissioners requesting the immediate attendance of the members of the Legislative Assembly in the Legislative Council Chamber to hear the Commission for the opening of Parliament read.

One of the Commissioners appointed by the Governor then reads out the following address on behalf of all the Commissioners appointed:

*Her Excellency the Governor has been pleased to cause a Commission to be issued under the Public Seal of the State constituting us Commissioners with full power, in the name of her Excellency, to open this session of the Legislative Council and the Legislative Assembly and to deliver messages to the Legislative Council and the Legislative Assembly, and to do all such things as may be necessary to enable Parliament or the Legislative Council or Legislative Assembly to proceed to the despatch of business.*⁶⁸

This in effect is a declaration opening Parliament. The Commissioner then informs the members of the Legislative Assembly that they must proceed to elect one of their number as the Speaker and that the Governor informs members that they are to take whatever measures deemed to be expedient to provide for the peace, welfare and good government of the State.⁶⁹ The members of the Assembly then proceed back to their Chamber and, once all members have taken the pledge of loyalty, proceed to elect a Speaker.

The Governor does not usually give an address at the beginning of a new Parliament although the Legislative Assembly standing orders provide that the Governor may set out the reasons for calling a new Parliament together.⁷⁰ This occurred for the commencement of the 55th Parliament in 2011, when the Governor made an address

⁶⁵ For example, see VP 02/06/2000, p. 546.

⁶⁶ VP 02/06/2000, p. 546.

⁶⁷ VP 08/09/1998, p. 826.

⁶⁸ For example, see PD 29/04/2003, p. 1.

⁶⁹ See PD 29/04/2003, pp. 1-2.

⁷⁰ S.O. 2(9) of the Legislative Assembly.

to a Joint Sitting of both Houses on the first sitting day after the usual commission opening.⁷¹

A similar procedure takes place at the beginning of each session where the two Houses meet to hear the Governor's speech⁷² or the commission read.⁷³ In accordance with the standing orders of the House, members assemble at the time and place specified in the Governor's proclamation and a message is received summoning the House to hear the Governor's speech opening the session with members of the Legislative Council in the Council Chamber. The members of the Legislative Assembly then proceed to the Legislative Council to hear the speech and after hearing it return to the House.⁷⁴

⁷¹ PD 3 May 2011, pp. 6-13.

⁷² For example, see PD 26/02/2002, pp. 1-9; PD 07/09/1999, pp. 1-6; PD 16/09/1997, pp. 1-5; PD 01/03/1994, pp. 1-7; and PD 24/02/1993, pp. 1-6.

⁷³ PD 16/04/1996, p. 1.

⁷⁴ Legislative Assembly S.O. 3.

Chapter 11 Rules of Debate

11.1 Rules of debate

The topic of "debate" entails consideration of the right of members to speak, the rules which must be observed and the power of the Chair to enforce these rules.

The standing orders which pertain to debate are S.O. 49-96. The following Chapter highlights those which are considered the more important.

11.1.1 Right of speech

A member's right to speak is guaranteed by the *Bill of Rights 1688*¹ and the publication of a speech in *Hansard* is protected from action in defamation by s. 27(2)(a)(iii) of the *Defamation Act 2005* which offers a defence of absolute privilege for the publication of the debates and proceedings of a parliamentary body.²

Members desiring to speak must rise and seek the call by calling the Speaker's attention with the words, "Mr/Madam Speaker" (S.O. 55). On one occasion, a member was deemed by the Chair to have forfeited the call due to engaging in conversation.³

A member may only speak once to a question in the House except: the member in charge of the order of the day may seek preaudience when the order is read; in explanation;⁴ in reply; or during consideration in detail of any matter (S.O. 64).⁵

Standing order 61 states that a member may only speak in the following instances:

- (1) To a question before the Chair which is open to debate;
- (2) When moving a motion;
- (3) When moving an amendment;
- (4) When rising to a point of order or privilege;
- (5) To make a personal explanation; and
- (6) In explanation.

Standing order 79 sets out the only circumstances in which a member is able to interrupt another member speaking.⁶ They are to:

- (1) Raise a matter of privilege or contempt suddenly arising;
- (2) Call attention to a point of order;
- (3) Call attention to the want of a quorum;
- (4) Call attention to the presence of visitors;
- (5) Move a closure motion;
- (6) Move "That the member for be now heard"; and
- (7) Move "That the member for be not further heard".

¹ For further information on the freedom of speech see section 2.1 of Part Two.

² Under the Act a parliamentary body is defined as: (a) a parliament or legislature of any country; (b) a house of a parliament or legislature of any country; (c) a committee of a parliament or legislature of any country; or (d) a committee of a house or houses of a parliament or legislature of any country. For further information on the privilege attached to Hansard see section 8.9.4 of Part One and section 3.10.1 of Part Two.

³ PD 20/11/1996, 6310.

⁴ See standing order 61 (6) which provides for members to speak in explanation.

⁵ PD 02/05/1996, p. 728; member spoke again by leave, PD 22/05/1997, p. 937, or by suspension of standing orders, VP 21/06/1996, p. 329.

⁶ Standing orders suspended to allow interruption of a member so that another member could make a first speech, VP 18/06/1996, p. 287.

Certain matters, mainly procedural motions, are not open to debate. These are listed in standing order 80.

Whilst members are granted the right to speak, the House can restrict debate. For example, standing and sessional orders have been suspended to allow the consideration of a bill by Government Members only.⁷

11.1.1.1 Reply

A member has a right of reply only when the member is the mover of a substantive motion (one which is self-contained and which normally requires notice, e.g. a general business motion) or the mover of a motion for the second reading of a bill. Such reply closes the debate.⁸ Ministers are able to reply to private members' statements in accordance with standing order 108.

11.1.1.2 "That member be now heard"

A member may interrupt another member⁹ to move without notice that a member who sought but was not given the call should now be given the call. The question is put without debate or amendment (S.O. 57). If the motion is passed, the member named is given the call. As the object of the motion is to prefer a certain member in the allocation of the call rather than to silence the member speaking, the member interrupted may again seek the call. If the motion is defeated, the member interrupted may resume his or her speech. If the time for the interrupted member's speech has commenced, the clock is not stopped and consideration of the question occurs during the interrupted member's speaking time.

The motion has been used to allow a member to add supplementary observations to a personal explanation after objection had been taken to the member trying to qualify an explanation,¹⁰ to permit a member to speak again to a question,¹¹ and to enable a member to speak in explanation (an objection having been voiced).¹²

When the motion "That the question be now put" has been moved, the motion for a member to be "now heard" may not be accepted by the Chair.¹³ Furthermore, the motion "that the member be now heard" was not allowed during a debate on a motion to suspend standing orders as the standing orders only allow one member other than the mover to speak.¹⁴ The motion has been allowed (although negated) during a mover's reply.¹⁵

⁷ See VP 02/11/2000, p. 849 where the Leader of the House noted that the Government had circulated 160 amendments to the Water Management Bill and that the Opposition had asked for time to consult with stakeholders and as such would not participate in the debate that day.

⁸ Member in reply sought to adjourn the debate and was advised by the Acting Speaker that as mover of the motion he had replied to the substantive motion and could not adjourn the debate. Standing and sessional orders were suspended to allow the putting of the question to be deferred to a later hour, PD 02/05/1996, p. 741; See also warning by Speaker Rozzoli that he has discretion to close debate by calling the Minister in reply, PD 15/10/1992, pp. 7166-7.

⁹ See S.O. 79.

¹⁰ VP 23/09/1890, p. 327.

¹¹ VP 10/02/1886, p. 100.

¹² VP 28/02/1888, p. 302.

¹³ PD 16/12/1924, p. 4674.

¹⁴ PD 27/05/1998, p. 5292.

¹⁵ PD 17/09/1997, pp. 100-1.

11.1.1.3 "That member be not further heard"

A member may interrupt another member¹⁶ to move without notice that the member speaking "be not further heard" (S.O. 58). The motion is not restricted to a specific business type and can be moved at any time. For example, the motion can be moved when a Minister is answering a question without notice¹⁷ or when a Minister is making a ministerial statement.¹⁸ The question is decided without debate or amendment. If the motion is passed the member interrupted loses the call and may not speak again in the debate¹⁹ unless the standing orders or the House provide otherwise. If the motion is negatived, the member interrupted may resume his or her speech if time remains. The clock is not stopped and consideration of the question occurs during the interrupted member's speaking time.²⁰

The motion may not be moved on a member who is speaking on a point of order. If the motion is negatived the Chair will not accept a second motion during the same speech.²¹

The question "That the member be not further heard" is often put during debates on motions to suspend standing and sessional orders as a closure motion cannot be moved. Paragraph 6 of standing order 365 (suspension) provides that closure shall not apply to a motion for the suspension of standing and sessional orders. For example, debate proceeded on a motion to suspend standing and sessional orders when a member moved, "That the question be now put". The Speaker advised the House that such a motion was not in order whereupon the member subsequently moved "That the Member speaking be not further heard", which was agreed to on division.²²

11.1.1.4 "That member be further heard"

If the Speaker has directed a member to cease speaking, any member may move that that member "be further heard" (S.O. 60). The question is decided without debate or amendment.

On one occasion, the Speaker ruled that the motion was out of order when the member had not commenced speaking.²³

11.1.2 Manner of speech

The content of speeches is also to some extent regulated by the standing orders. Standing order 76 states that a member shall be relevant to the subject matter of the debate. Using offensive words against any member of either House²⁴ or imputations of improper motives or personal reflections on members²⁵ are also contrary to standing orders.

¹⁶ See S.O. 79.

¹⁷ PD 23/11/1995, pp 3933-4.

¹⁸ VP 22/06/2000, p. 636.

¹⁹ PD 14/11/1929, p. 1349 and PD 27/02/1918, p. 3043.

²⁰ Negatived on division, VP 16/11/2000, p. 887; negatived on division VP 22/06/2000, p. 636; VP 25/05/2000, p. 502; VP 25/05/2000, p. 504; 16/08/2000, p. 732; VP 16/08/2000, p. 742; VP 06/05/1997, p. 828; VP 24/09/1997, p. 8; 15/10/1997, p. 134; VP 20/11/1996, pp. 628-9; negatived on casting vote of Speaker PD 01/06/1995, pp. 109-10; carried on casting vote of Speaker, VP 23/11/1995, pp. 441-2.

²¹ PD 12/12/1901, p. 4338; PD 09/11/1921, p. 1596 and PD 01/12/1915, p. 4146.

²² PD 25/05/2000, p. 5860 – 61. Other examples include, VP 25/05/2000, p. 502; VP 25/05/2000, p. 504; VP 16/08/2000, p. 732; and VP 16/08/2000, p. 742.

²³ PD 20/11/1996, p. 6310.

²⁴ See S.O. 72.

²⁵ See S.O. 73.

Members in their speeches are not permitted to:

- quarrel with other members (S.O. 74(2));
- anticipate discussion of a matter on the business paper (S.O. 77);²⁶
- reflect on a previous decision of the House unless debating its rescission (S.O. 71);²⁷
- use offensive words against the Sovereign or Governor (S.O. 72). This does not preclude the moving of a substantive motion regarding the conduct of the Governor;²⁸
- use offensive words against a member of the judiciary²⁹ or a statute (unless moving for its repeal) (S.O. 72); or
- make imputations of improper motives and personal reflections on members of either House other than by substantive motion. (S.O. 73).

In relation to the anticipation of discussion of matters on the business paper, it should be noted that there are a number of exceptions. Speakers have ruled that matters may be raised during Question Time for the purpose of eliciting facts that may be used in subsequent debate,³⁰ and that on motions “That government business take precedence” brief reference can be made to motions on the business paper.³¹ In 1966 Speaker Ellis ruled that the anticipation of debate rule did not apply to ministerial statements commenting that “a ministerial statement is a form of proceeding by which a Minister informs all honourable members so that they may better equip themselves to take part in the subsequent debate”.³² Speaker Ellis was also of the view that the rule did not apply to matters on the Questions and Answers Paper noting that “...there can be no debate in answering a [written] question.”³³

In addition, Speaker Ellis has also ruled that the anticipation rule did not apply if there was no likelihood that the matter would come before the House in a reasonable time.³⁴ What is considered to be “reasonable time” is dependent on the circumstances of the particular case. The real test appears to be whether the matter on the business paper will be brought before the House before a certain event takes place. For example, on matters of great urgency the anticipation of debate rule may not be applied.³⁵ However, if a Minister can assure the Speaker that a decision on a particular matter would not be made before the House had an opportunity to debate it, the matter would be deferred.³⁶

²⁶ Speaker did not accept notice of a matter of public importance because it anticipated debate on the *Appropriation Bill*, VP 23/6/99, p. 159.

²⁷ Following a motion to suspend standing and sessional orders the Manager of Opposition Business reflected on a previous decision of the House. The Speaker reminded the member that the House had already made a decision on the matter. PD 28/11/01, p. 19056.

²⁸ PD 16/09/1919, p. 807; PD 27/06/1918, pp. 391-2; PD 04/07/1918, p. 544.

²⁹ Speakers' rulings have indicated that reflections can be made on the conduct of a judge from another State who is acting in New South Wales as a Royal Commissioner PD 10/08/1920, p. 129. However, other rulings have indicated that attacks on any judge, including those acting as a Royal Commissioner could only be made on specific motion. PD 09/10/1932, pp. 1875-6.

³⁰ Minister allowed to give information regarding a bill on the business paper, PD 07/04/1998, p. 3729, PD 15/04/1997, p. 7508; Speaker ruled that members could elicit facts for future debate, PD 15/11/1994, p. 5010.

³¹ PD 02/11/1967, p. 2776.

³² PD 03/11/1965, pp. 1694-5.

³³ PD 28/10/1971, p. 2470.

³⁴ PD 16/11/1966, pp. 2512-3.

³⁵ See comments of Speaker Ellis, PD 30/09/1971, pp. 1727-8.

³⁶ See comments of Speaker Ellis, PD 17/10/1968, p. 1862 when a Minister assured the Speaker that a decision on the Lane Cove Expressway would not be made before the Loan Estimates were debated and the matter was deferred until then.

The place of speaking, under normal circumstances, is at the Table of the House. Members may speak from their place on the bench if a short speech is to be delivered, if a point of order or privilege suddenly arising is taken or when asking a question during Question Time. A member unable to stand by reason of illness or disability is allowed to address the House seated with the leave of the Speaker (S.O. 56).

The Speaker and other occupants of the Chair are entrusted, as the servants of the House, with power to ensure that the business of the House is conducted in an orderly fashion and in accordance with the standing orders and the principles of parliamentary practice. The Chair exercises a discretion in intervening in debate and will usually only do so if a member's right to speak or be heard is being infringed, a breach of order has been committed, or is called on to decide a point of order.

11.1.3 Reading speeches and quoting from documents during debate

The convention has developed in New South Wales that members are not allowed to read speeches. This is due to the fact that a speech may have been prepared by someone other than the member and as such would provide a voice to someone outside the Parliament. In 1972 Speaker Ellis explained the rule against reading speeches as follows:

*In this House and most other Parliaments it has been a long-standing rule, which has been applied with considerable flexibility and tolerance, that honourable members must address the House in their own words, and not in speeches that could have been prepared for them by someone else. If that were permitted, it would mean that persons who are not members of this House would have a voice on the floor of this Chamber. That is the reason why written speeches are, to put it at its lowest, discouraged.*³⁷

There are however, times when the Chair has permitted members to read from prepared speeches such as when members are referring to complex matters such as economic figures, statistics or other complicated conceptual matters so as to ensure accuracy,³⁸ or when time limits for speeches are heavily restricted.³⁹ It is also accepted practice that Ministers and the Leader of the Opposition (or other member leading in a debate for the Opposition) read prepared speeches at the second reading stage of a bill and that inaugural speeches may be read.⁴⁰

The Chair has also allowed members not actually reading the whole speech but using copious notes to continue.⁴¹ In addition, the Chair has commented that there is a difference between a member reading notes that are his or her own composition and reading something prepared by someone else with Acting Speaker Brown in 1975 commenting:

*Not all honourable members are equipped with the oratorical ability to deliver speeches without referring to notes. Some members are so intent on a particular subject that they prepare their material and do not want to deviate from it so that whatever they say here will be correct and in accord with their thinking.*⁴²

³⁷ PD 31/08/1972, p. 564; See also ruling of Speaker Rozzoli, PD 25/11/1992, p. 9921.

³⁸ See ruling of Acting Speaker Tink, PD 30/06/1992, pp. 4787-8.

³⁹ See ruling of Speaker Rozzoli, PD 10/11/1988, p. 3133 and PD 01/12/1988, p. 4303.

⁴⁰ See ruling of Speaker Cameron, PD 19/08/1975, p. 489.

⁴¹ PD 21/09/1994, p. 3463.

⁴² PD 11/03/1975, p. 4422.

In debate, members are usually discouraged from reading lengthy quotes. Members may read extracts from debates of the current session or newspaper reports of such debate or proceeding provided the reference or quotation is brief and relevant to the matter under discussion or the subject of a personal explanation (S.O. 70). This applies equally to proceedings of the Legislative Council. The rule against quoting from a current *Hansard* does not apply to debates on different stages of the same bill or debate which has already taken place on the Address in Reply during the same session.⁴³

Members may also read extracts from documents other than newspapers or *Hansard* during a speech provided that the quote is brief and the source of the document is properly identified before the member quotes from it.⁴⁴ For instance, members are able to read from letters so long as they identify the person who wrote the letter.⁴⁵

There is no requirement for a Minister to table quoted documents, but he or she may do so on their own initiative, by leave.⁴⁶

Members, other than Ministers and chairs of committees, are not able to table documents (S.O. 264). If, however, a member quotes at length from a document, that document should be made available for the information of all members, if so requested by another member, or else the member speaking must refrain from further quoting it.⁴⁷ There have been, however, a number of exceptions to this rule. In one instance, when the Leader of the Opposition quoted from a letter he had received from a brothel manager the Speaker did not require him to make the letter available to all members provided the Leader of the Opposition handed the letter in question to the Attorney-General or the Premier.⁴⁸ On another occasion, a Minister quoted from a letter not realising that by doing so he would have to make the document available to all members. When a member requested that the author be identified the Speaker noted that the Minister had made a mistake and that the author of the letter was entitled to have their confidentiality protected.⁴⁹

In addition, confidential reports to a Minister which are quoted from do not have to be tabled. Rather, the Minister must judge if it is in the public interest to make the document available.⁵⁰ Furthermore, in situations where a member quotes from a document such as a report that is already publicly available the Speaker does not always insist that it be laid upon the table and made available to all members of the House.⁵¹

⁴³ See Ruling of Speaker Lamb, PD 03/09/1957, p. 290 and ruling of Speaker Maher, PD 15/09/1964, p. 620.

⁴⁴ Acting Speaker ruled that it was not for the Chair to tell members how they should quote from reports. However it was incumbent upon members to use material they quote from reports in an appropriate and balanced context. PD 30/06/1992, p. 4789; PD 17/11/1998, p. 10080.

⁴⁵ See for example, PD 03/03/1994, p. 166; See also PD 11/04/2001, pp. 13694 – 5 where a point of order was taken that a member was reading from letters from a person outside the House in order to give privilege to something recorded in *Hansard* that was not of his making. The Acting Speaker ruled that, if the member gave the name of the writer and vouched for that, and if the letter was not too lengthy, he may continue to read it, otherwise he should paraphrase the letter and to desist from reading it. PD 11/04/2001, pp. 13694-5.

⁴⁶ PD 22/04/1993, p. 1493; PD 28/10/1998, p. 9201; PD 15/11/2001, pp. 18730 and 18746.

⁴⁷ PD 05/12/1967, pp. 4086 and 4089; PD 10/04/1968, p. 788; PD 25/11/1969, p. 3042. Speakers have noted that it is common practice for Ministers to refer to, or quote from, reports from their officers and these papers are not made available to members, PD 28/09/1971, p. 1496.

⁴⁸ PD 11/09/1968, p. 790.

⁴⁹ PD 29/09/1971, p. 1619.

⁵⁰ See ruling of Speaker Ellis, PD 28/09/1971, p. 1499.

⁵¹ For examples see PD 28/10/1971, p. 2466 and PD 29/02/1972, p. 4624.

This obligation to identify documents quoted from can be avoided by the member relating the matter in the third person without actually reading from it⁵² or by summarising the contents of the letters rather than directly quoting from it.⁵³

When quoting from documents, members must not wave newspapers or other documents around and it is not proper for a member to quote as fact statements contained in newspapers, unless that member can verify the accuracy of the report. As Speaker Ellis ruled in 1967 and again in 1968 the rationale behind this rule is that it would be very foolish of the House to debate something that was factually incorrect or did not exist.⁵⁴ In 1993, Speaker Rozzoli ruled that the only obligation upon a member quoting from a newspaper was to provide the date and name of the newspaper and not to vouch for the accuracy of the statement read.⁵⁵ This has become the accepted practice of the House.⁵⁶

11.1.4 General provisions

A number of basic rules and principles governing the conduct of debate are laid down in the standing orders and supplemented by the practice of the House. They exist for the sake of regularity, uniformity, and orderly and acceptable standards for the conduct of the business of the House. In the words of John Hatsell, Clerk of the House of Commons 1768-1820, "It is more material that there should be a rule to go by than what that rule is: in order that there may be a uniformity of proceeding in the business of the House, not subject to the momentary caprice of the Speaker or to the captious disputes of any of the Members".⁵⁷

It is an essential rule that in the House a member may speak only once to a question unless a bill or other matter is being considered in detail. This rule, however, does not preclude the member in charge of the order of the day having the right to pre-audience,⁵⁸ an explanation being given,⁵⁹ or the mover of a motion speaking in reply⁶⁰ (S.O. 64). It is the practice of the Legislative Assembly that when an amendment is moved to a motion in the House, the mover of the motion and those who spoke prior to the moving of the amendment may speak again, but to the amendment only.⁶¹ Those members who speak after an amendment has been moved are deemed to be speaking to both the original motion and the amendment.⁶²

It is a recognised rule that a question, the same as one upon which the judgement of the House has been obtained, cannot be brought forward again in the same session (S.O. 154). This rule is to avoid contradictory decisions and prevent surprises. Otherwise the same question might be brought forward again and again and affirmed and negated according to chance majorities.⁶³

⁵² See rulings of Speaker Ellis, 05/12/1967, pp. 4086-92 and ruling of Acting Speaker Darby, PD 12/03/1969, p. 4477.

⁵³ See ruling of Speaker Cameron, PD 22/08/1974, p. 579.

⁵⁴ See rulings of Speaker Ellis, PD 24/08/1967, p. 788 and PD 10/09/1968, p. 734. For more recent examples see PD 23/02/1989, p. 5199; PD 21/11/1994, p. 5428; PD 22/05/1996, p. 1371.

⁵⁵ PD 04/03/1993, pp. 358-9.

⁵⁶ See for example comment of Deputy Speaker Price, PD 28/09/2006, p. 2568.

⁵⁷ Hatsell, John, *Precedents of proceedings in the House of Commons: with observations*, 1818, Vol. 2, pp. 207-8.

⁵⁸ See Chapter 18 of Part One.

⁵⁹ See section 11.5 of Part One.

⁶⁰ See section 11.1.1.1 of Part One.

⁶¹ PD 02/09/1992, pp. 5408-10.

⁶² PD 10/08/1905, p. 1405.

⁶³ This rule only applies to questions voted on by the House and not procedures to which no vote is taken such as discussion on matters of public importance. See PD 13/11/2002, p. 6678.

11.2 Adjournment of debate

When there is no member speaking, any member who has not spoken to the question before the Chair may move that the debate be adjourned (S.O. 82). This question is put without amendment or debate (S.O. 80). If agreed to, the Speaker will, on request of the member having carriage of the matter, set down the resumption of the debate for a later hour of the same day, tomorrow or a future day. In the absence of the Member having carriage of the matter, the Speaker must set down the resumption of the debate as an order of the day for a later time (S.O. 83).⁶⁴ It is out of order for a member to move that the debate be adjourned to a specific date.⁶⁵ A member whose motion for the adjournment of a debate is negatived cannot speak later in that debate (S.O. 84).⁶⁶

A member may not conclude his speech with a motion, "That the debate be now adjourned", nor may a member who has spoken move the closure.⁶⁷ To meet the convenience of the House a member who has not finished his speech may, with the leave of the House, move that the debate be adjourned.⁶⁸

11.3 Inaugural and Valedictory Speeches

A member's inaugural speech (formerly first speech or maiden speech) is the first speech a member makes in the Legislative Assembly regardless of prior parliamentary experience in another House of Parliament.⁶⁹ It is the general custom that other members extend a greater measure of courtesy to a member making an inaugural speech and refrain from making interjections and other interruptions regardless of whether matters of a controversial nature are raised in that speech.⁷⁰ Standing order 63 provides for the business before the House to be interrupted at a specified time⁷¹ (but not so as to interrupt a member speaking) to permit members to make their inaugural speeches without a question being before the House.⁷² The interrupted business is resumed on completion of the speech or speeches. The standing order also provides for the time limit on inaugural speeches to be 15 minutes with a 5 minute extension.

Retiring members often make valedictory speeches in their final days of Parliament. Such speeches provide the member with an opportunity to reflect on their time as a member of Parliament. As with inaugural speeches it is customary that members

⁶⁴ Previous standing order amended to allow the member in charge or member speaking at interruption to ask that the resumption of the debate be set down, VP 25/09/1996, p. 431.

⁶⁵ The Speaker ruled the motion "That this debate be now adjourned until 26 June 2001" out of order as it was contrary to the standing orders (resumption of debate set down by member having carriage). The Speaker reminded the House that Acting Speaker Bruxner had ruled that a member may move only that the debate be adjourned, not that it be adjourned to a certain date. See PD 04/03/1970, p. 3851 PD 19/06/2001, p. 14777.

⁶⁶ See PD 28/10/1993, p. 4736 where the Speaker ruled that a member was precluded from speaking again after his motion to adjourn the debate was negatived.

⁶⁷ VP 31/05/1887, p. 223; PD 26/08/1969, p. 533.

⁶⁸ A member speaking to an amendment to a motion that a bill be now read a second time, by leave, moved that debate be now adjourned, VP 29/06/2000, p. 679; member speaking to the question that a bill be now read a second time, by leave, moved that debate be now adjourned in order to facilitate the address by the First Secretary of the National Assembly of Wales, VP 07/06/2000, p. 559; member in reply sought to adjourn the debate, but instead the putting of the question was deferred to a later hour, PD 02/05/1996, p. 741; member speaking adjourned the debate by leave, VP 16/04/1997, p. 783, VP 06/12/1995, p. 481.

⁶⁹ PD 10/09/1991, p. 931.

⁷⁰ See comments made by Speaker Murray in relation to an inaugural speech that was made during a motion in relation to a breach of privilege and a number of points of order were taken throughout the speech. PD 01/06/1995, p. 562.

⁷¹ See, for example, VP 23/06/1999, p. 159.

⁷² Prior to the adoption of the current standing orders in 2006 a sessional order in the same terms had been in place since 1999. See VP 12/05/1999, p. 48; VP 07/09/1999, p. 22; VP 26/02/2002, p. 16; VP 29/04/2003, p. 30.

listen to valedictory speeches in silence. However, in practice, other members often heckle retiring members in the spirit of fun, particularly long serving members. On occasion, the House has passed resolutions to enable members to make valedictory speeches when no other business is before the House,⁷³ and at times such speeches are made as part of a contribution to a debate on Christmas felicitations.⁷⁴

11.4 Personal explanation

Standing order 62 states that, with the leave of the Speaker, a member may make a personal explanation to the House. A member is not entitled to seek the call to make an explanation if there is a question before the Chair.

Rulings of the Speaker provide that a personal explanation allows a member to briefly⁷⁵ explain any matter which reflects upon the honour, character or integrity of that member, or reflects upon the member in a personal way⁷⁶ including the refuting of accusations made against them by other members in the House.⁷⁷ Personal explanations can also be made by members if, on reflection of a speech they have made in the House, the member concludes that it was not correct in its details. Speaker Murray stated in 2001 that the standing orders allow for members to make a personal explanation to draw the attention of the House to their interpretation of events.⁷⁸ Ministers are also entitled to make a personal explanation on ministerial statements they have made.⁷⁹

However, a personal explanation does not extend to allowing members to make explanations about remarks made by other members during debate which do not conform with their ideas, in the course of continuing the debate.⁸⁰ Furthermore, Speakers have ruled that no new matter may be introduced under the guise of a “personal explanation”, which must be confined to explaining the precise misrepresentation.⁸¹ In practice, a member should confine remarks to “This is what was said; these are the facts.”

They should not be used to explain matters on behalf of another person,⁸² nor to make a personal attack on another member.⁸³ Personal explanations do not extend to simply refuting an inaccurate statement made about them⁸⁴ or to refute a Minister’s answer to a question during Question Time.⁸⁵ In addition, debating the

⁷³ For example, at the end of the 52nd Parliament there were a number of retiring members who wished to make valedictory speeches in the House. The House suspended standing and sessional orders to allow members to make valedictory speeches of up to 15 minutes with a 5 minute extension available when no other business was before the House. VP 20/11/2002, p. 631.

⁷⁴ PD 22/11/2002, p. 7543.

⁷⁵ PD 07/11/2001, p. 18207; Point of order upheld that a member’s personal explanation was too long, PD 06/03/2001, p. 12237.

⁷⁶ PD 28/05/1997, p. 9427; PD 22/10/1996, p. 5142; PD 29/10/1996, p. 5433.

⁷⁷ See PD 02/12/1994, p. 6236, where leave was granted for a member to make a personal explanation concerning an accusation made in a statutory declaration that was tabled the previous day.

⁷⁸ PD 28/02/2001, pp. 12126-7.

⁷⁹ PD 29/05/2001, p. 13821.

⁸⁰ See ruling of Speaker Burke, PD 18/06/1931, p. 3406.

⁸¹ PD 09/09/1952, p. 489; and PD 20/11/1952, p. 2513.

⁸² A member during a personal explanation stated that a breach of practice of the House had occurred in that the Premier had made misleading comments against a person who was not a member of the House. The Speaker ruled that members could not make a personal explanation on behalf of a stranger. PD 27/03/2001, p. 12609.

⁸³ PD 28/02/2001, pp. 12126-7.

⁸⁴ PD 16/11/1994, p. 5144.

⁸⁵ PD 13/05/1993, pp. 2071 and 2079 where Speaker Rozzoli noted that the House’s time would be consumed with members seeking to make personal explanations if members sought to refute everything said by a Minister in reply to a question because the response was considered to be inaccurate or not in accordance with another member’s truth.

matter the subject of the explanation, and alluding to any debate of the same session (unless the bill or question is then under discussion) is prohibited.

Normally, personal explanations are made following Question Time. However, a member is not confined to that time, as long as there is no question before the Chair. The Speaker has not allowed a personal explanation on a matter of privilege under consideration by the Chair.⁸⁶ *The Speaker may withdraw leave at any time if the member strays too far from the rules regarding a personal explanation.*⁸⁷

11.5 Speech in explanation

An explanation under standing order 65 is different to a personal explanation. Under this procedure a member who has already spoken to a question may explain some material part of their speech which has been misunderstood or misinterpreted.⁸⁸

In making an explanation, the member cannot interrupt another member already speaking,⁸⁹ introduce new material into the debate, debate the matter or invoke this right after the question before the Chair has been determined. Leave is not required to make a speech in explanation unless a different question is before the Chair, in which case the leave of the House is required.

11.6 Closure

The closure is the name given to the motion moved during debate "That the question be now put" and it is referred to, colloquially, as "the gag". Originally, there were no means by which debate upon any question could be terminated while any member was seeking the call. The motion, without notice, "That...(the member speaking)...be not further heard" was available, and the Chair had the authority to direct a member to discontinue his speech for continued irrelevance and for tedious repetition.⁹⁰ However, flagrant "stonewalling" was, for the most part, suffered in comparative silence.

In 1887, Sir Henry Parkes, seeking means to combat any obstruction of discussion, was instrumental in the introduction of the "closure" which since 1894 has appeared in the standing orders.⁹¹ In 1922⁹² and again in 1923,⁹³ the Standing Orders and Procedure Committee was given a reference by the House to report on, amongst other things, a new standing order which provided that the application of the closure should be subject to the consent of the Speaker or other occupants of the Chair. The Clerk provided the Speaker, who was the chair of the committee, with advice noting that to adopt such a rule would be contrary to a previous decision of the House where it had refused to give the Speaker the power to decide the "urgency" of a

⁸⁶ PD 18/06/1998, p. 5428.

⁸⁷ See for example, PD 21/06/2011, p. 2998 when the Speaker withdrew leave when a Minister used the procedure to continue debate.

⁸⁸ PD 07/12/1995, p. 4413.

⁸⁹ An unusual occurrence happened when a member took a point of order, claiming to have been misunderstood during another member's speech on a bill. The member was told he could not interrupt another member speaking but that he would be given the call at the conclusion of the member's statement. PD 05/06/2001, p. 14366.

⁹⁰ A member has the right to require the Chair to put the question that the member "be further heard" after they have been called to cease speaking. Standing order 60.

⁹¹ See VP 12/05/1887, p. 187 where the House referred the matter to the Standing Orders and Procedure Committee for consideration and report; VP 17/05/1887, p. 192 where the report of the Committee was tabled; VP 20/05/1887, pp. 209-12 where the House agreed to and adopted the new standing order; VP 31/05/1887, p. 217 where the Governor's approval was reported.

⁹² See VP 24/08/1922, p. 87.

⁹³ VP 20/09/1923, p. 70.

matter regarding motions for adjournment. Consequently, the committee did not recommend that the proposed standing order be adopted by the House.⁹⁴

The closure of debate is dealt with by standing orders 86 to 89. The object of moving the closure is to bring debate on a question to an end by directing the putting of the substantive motion under consideration by the House. It forces the House to reach a decision on a question.

Briefly the rules governing the moving of the closure are:

- It cannot be moved before 10.30 a.m. on days where the House sits earlier.
- It may be moved without notice, whether another member is speaking or not.
- It may not be moved on a motion to suspend the standing orders.⁹⁵
- There are restrictions on when it can be moved in certain debates.⁹⁶
- The mover of the original motion,⁹⁷ or a member who has already spoken may not move the closure (this is akin to seeking the call to speak a second time to a question).⁹⁸
- No debate nor amendment is allowed on the question.⁹⁹
- If there is a division on the closure question it must be carried by at least 30 members.
- If the motion for the closure is agreed to, the mover of the original motion is permitted a reply of up to 30 minutes (or a lesser time if specified for the debate). The closure cannot be moved during the reply.
- The carrying of the closure only affects the last question submitted to the House. For example if the question before the House is "that the words proposed to be omitted stand", the carrying of the closure would not affect debate on the next questions which could be "that the words proposed to be added be so added" and "that the clause as amended stand part of the bill". Closure could be moved on each of these separate questions. In the House if the closure is agreed to for debate on an amendment, debate on the original motion may be continued and the closure would need to be moved again to end debate.
- The Chair may not accept the motion when the business under consideration is covered by a "guillotine" notice.¹⁰⁰ This is considered below.
- A member may not conclude their speech by moving the closure.¹⁰¹
- A member having moved the closure which is negated is not able to speak later in the debate.¹⁰²

⁹⁴ See PD 07/11/1923, p. 2158 where the Committee reported on proposed new standing orders and amendments to existing ones.

⁹⁵ Standing order 365(6) provides that the closure does not apply to any motion to suspend standing and sessional orders. On one occasion a member moved the closure on a motion to suspend standing and sessional orders and after being advised that it was out of order the member moved that the Member speaking be not further heard, which was agreed to. PD 25/05/2000, pp. 5680-1. For another example see PD 20/11/1996, p. 6312.

⁹⁶ S.O. 111 provides that the closure cannot be moved on a motion of no confidence in the government until at least 8 Members have spoken to the original question before the House. S.O. 112, S.O. 113, S.O. 114, and S.O. 115 in relation to motions of no confidence in a Minister or the Speaker and motion of censure of a member or the Speaker provide that the closure cannot be moved until at least 4 members have spoken on the original question before the House.

⁹⁷ See ruling of Speaker Ellis, PD 26/08/1969, p. 533.

⁹⁸ VP 31/05/1887, p. 223 and PD 26/08/1969, p. 533.

⁹⁹ See ruling of Speaker Ellis, PD 01/09/1970, p. 5418.

¹⁰⁰ PD 04/11/1959, p. 1718.

¹⁰¹ See for example, PD 27/10/1977, p. 9212

¹⁰² The House would consider the moving of the closure motion to be similar to moving that the debate be adjourned and that standing order 84 specifically provides that a member whose motion for the adjournment of debate is negated cannot speak later in that debate.

11.7 Closure—allocation of time for debate (guillotine)

A closure may also be applied by application of a guillotine notice (S.O. 90). This standing order, which was first adopted in 1925,¹⁰³ does not require the Government to allocate time for discussion despite its title. When a notice is given indicating the item (or items) of business, the stages to be completed and the times before which the closure may not be applied, the requirements of the standing orders have been fulfilled. There is no compulsion for the item specified to be “called on” before the time stated in the notice.

The intention of the guillotine is to ensure that proceedings are completed in a timely fashion. On one occasion it was argued by the then Leader of the House that a guillotine notice was “merely a contingent matter, should discussions develop, for the tidy and expeditious disposal of this bill and other matters.” It was also put that the nature of a guillotine notice is non-threatening.¹⁰⁴

A guillotine notice is characterised as follows:

- Notice of intention to apply a guillotine may only be given by the Premier or a Minister acting on the Premier’s behalf.
- Notice of the intention to apply a guillotine to certain stages or clauses of a bill must be given verbally to the House at a previous sitting and written notice must be given to the Speaker and party leaders, and the notice is published in the business paper.
- At the time specified in the notice or at some later time at the same sitting, any member may move the closure which, if carried, is deemed to be an instruction to the Chair to put to the vote every question necessary to give effect to the terms of the notice up to the time specified in the notice.
- The effect of the closure being moved is to permit only those amendments proposed by a Minister not yet put, to be put by the Chair, provided printed copies have been circulated at least two hours before the specified time in the notice.¹⁰⁵ The amendments are put as one question. *If there have been no Minister's amendments circulated and the closure is agreed to during the second reading stage, the Speaker will put the vote on the third reading of the bill forthwith.*¹⁰⁶
- If not moved on the sitting day, the notice lapses.

11.8 Speakers’ statements

On occasion, the Speaker will inform the House of a variety of matters, both procedural and administrative, by way of a statement to the House. Such matters have included:

- advising the House that the proceedings are to be filmed;¹⁰⁷

¹⁰³ See VP 01/09/1925, pp. 29-31 where the House agreed to and adopted the new standing order and VP 03/09/1925, p. 35 where the Governor’s approval was reported to the House.

¹⁰⁴ PD 11/12/1991, p. 6545.

¹⁰⁵ On one occasion a motion was agreed to that for purposes of a guillotine notice on a bill that amendments circulated by a private member be deemed to be the amendments proposed by a Minister. VP 12/12/1991, p. 489.

¹⁰⁶ See VP 25/9/96, p. 429 – where an amendment was made to the guillotine procedure to permit the conclusion of a bill if no amendments were circulated.

¹⁰⁷ VP 07/05/1992, p. 321; VP 09/11/1993, p. 493.

- advising the House that a notice in relation to the Legislative Assembly programme would appear in a Sydney metropolitan newspaper;¹⁰⁸
- allowing the use of notebook/laptop computers in the Chamber;¹⁰⁹
- retirement or death of members¹¹⁰ and members of staff of the House;¹¹¹
- noting the anniversaries of members who had served for a number of years;¹¹²
- advising the House of the launch of the Parliament's Internet site;¹¹³
- advising the House of arrangements to hear addresses from overseas dignitaries;¹¹⁴
- reminding the House of the rules in relation to the framing of questions without notice;¹¹⁵
- reminding the House as to the purpose of private members' statements;¹¹⁶
- advising the House of the new paging system and the issue of new pagers to members;¹¹⁷
- advising members that a condolence book had been placed in the foyer of Parliament House for Her Majesty Queen Elizabeth the Queen Mother;¹¹⁸
- informing the House that an East Timor flag, provided by the Australian East Timor Association, had been placed in the Speaker's Square to commemorate the independence of East Timor and invited all members to sign it and advising that the signed flag would be donated to the library of the University of East Timor;¹¹⁹ and
- inviting members to add their signatures to a letter addressed to the President of Nigeria concerning women's human rights.¹²⁰

11.9 Time limit for speeches

There are different time limits for speeches in various debates. These are all set out in standing order 85. [The time limit for many debates has been changed for the current Parliament by way of sessional order.](#)

In some debates, provision is made for a member to request an extension of time. The procedure is that a member makes the request (after the three minute warning bell sounds) and the Speaker puts the question:

"That the member's time be extended".

No amendment or debate is allowed on this question. There is no provision for extensions of speaking time when a bill or matter is being considered in detail (former committee of the whole). However the House has moved a motion in

¹⁰⁸ VP 30/05/1995, p. 75.

¹⁰⁹ VP 12/10/1995, p. 282.

¹¹⁰ VP 29/10/1998, p. 1017; VP 19/02/1985, p. 209.

¹¹¹ VP 17/04/1996, p. 39; VP 11/12/2002, p. 665.

¹¹² PD 01/05/1996, p. 659; PD 18/11/1997, pp. 1945-6; VP 07/04/1998, p. 473.

¹¹³ VP 29/10/1996, p. 520.

¹¹⁴ VP 20/11/1996, p. 625.

¹¹⁵ VP 02/06/1998, p. 668.

¹¹⁶ PD 04/09/2001, pp. 161297 and 16330.

¹¹⁷ VP 16/10/2001, p. 1493.

¹¹⁸ VP 09/04/2002, p. 133.

¹¹⁹ VP 28/05/2002, p. 215.

¹²⁰ VP 26/09/2002, p. 488.

committee, by leave, to extend a member's speaking time¹²¹ and for a member to conclude their speech.¹²²

There is no provision for restoring to a member time lost due to interruptions such as points of order,¹²³ procedural motions or quorum calls,¹²⁴ although the Speaker has restored time lost to a member on occasion or by agreement.¹²⁵ The Speaker has also on occasion directed the Clerk to reset the clock used to time members' contribution to debate.¹²⁶

11.10 Granting of leave

Leave is a means by which the House gives permission for something to occur which would not otherwise be allowable. Leave can only be granted if no member dissents. A request for leave cannot be debated (S.O. 96). Members must be given the opportunity to refuse to grant leave if leave is sought for a particular proceeding, e.g. to table documents outside the time specified in the routine of business.

The Chair must intervene to ask:

"Is leave granted?"

Leave is refused by any member calling "no" in response to this question. The Chair may also be required to intervene when a member attempts to do something which cannot proceed without leave being granted.

Under the standing orders the leave of the House is required for a member, other than a Minister, to be able to move for the suspension of standing orders (S.O. 365).

Under the standing orders, the leave of the Speaker must be sought for members to be able to incorporate material into *Hansard* (S.O. 271), make a personal explanation (S.O. 62), and to speak from their seat in the Chamber (S.O. 56).

11.11 Questions of order

Specific matters on which the Chair may need to intervene are as follows:

11.11.1 Points of order

Under standing order 93, a member has the right at any time to raise a point of order relating to a breach of the standing orders or the practice of the House. The point of order must be clearly stated to the Chair who may make a decision immediately or hear argument on the point of order and then make a ruling. Until the point is determined all other proceedings are suspended. It has been ruled that the question "That a member be not further heard" cannot be moved on a point of order.¹²⁷ However, the closure has been moved and no objection taken.¹²⁸ Furthermore, the

¹²¹ PD 31/05/1995, p. 466.

¹²² PD 09/06/2000, p. 7026.

¹²³ On one occasion standing and sessional orders were suspended to permit the mover of a motion to speak for a full 10 minutes irrespective of points of order taken during his contribution. VP 20/06/2000, pp. 601-2.

¹²⁴ On one occasion a member's speaking time was reset at five minutes due to a quorum being called just after the member had started to speak. PD 30/11/2000, p. 11411.

¹²⁵ PD 08/04/1997, p. 7215; PD 17/04/1996, p. 165; PD 26/10/1999, p. 1950

¹²⁶ PD 15/11/2001, p. 18742.

¹²⁷ PD 14/11/1929, p. 1349.

¹²⁸ PD 23/05/2000, p. 5526.

practice of the House has been for members to remain in the Chamber when a point of order against them is being considered.¹²⁹

It is unclear whether it is competent to take a point of order upon a point of order. In 1975 Speaker Cameron ruled that it was not in order to raise a point of order on a point of order.¹³⁰ However, in the early 1900s the Chair permitted a point of order to be taken on a point of order.¹³¹ Accordingly, points of order raised about a point of order need to be considered on a case by case basis. Such cases are rare because the circumstances for such are very limited.

Only one point of order may be raised and considered at one time, and unless taken immediately on an alleged breach, will not be considered later by the Chair. Any member is entitled to interrupt another member speaking to call attention to a point. However, this does not apply when the Chair is speaking or “on his feet” as it is grossly disorderly to interrupt the Chair.¹³²

A common error into which members are apt to fall is to take a point of order upon the substance of a speech, claiming that because of inaccuracies or misleading statements the member speaking is out of order.¹³³ These alleged offences do not necessarily constitute breaches of the standing orders. The contents of a speech are matters of opinion¹³⁴ which any member is entitled to put to the House, and it is not the function of the Chair to decide the accuracy of any statements made. Should another member disagree with the views expressed, the member may subsequently refute the argument with other argument. That is the essence of debate.

It is an abuse of the forms of the House to take spurious points of order.¹³⁵ In fact the Speaker has on occasions refused to take points of order due to members’ behaviour¹³⁶ and has warned members that they will not be given the call if they continue to take points of order which do not comply with the standing orders.¹³⁷

Furthermore, Speakers’ rulings have indicated that if an attack is made on another member either in answering a question or during debate it is up to the member who was attacked to raise a point of order that the attack on him or her should be by substantive motion.¹³⁸

11.11.2 Interjections

Technically, interjections are regarded as disorderly (standing order 61 sets out the only circumstances in which a member may speak) but, since relevant questions or interjections frequently elucidate the speaker’s remarks, discretion is generally exercised by the Chair. If, however, a member who is speaking objects to interjections, the Chair must protect that member. Interjections are not recorded in *Hansard* unless responded to by the member who has the call.

¹²⁹ PD 17/02/1992, p. 1094 where the Deputy Leader of the Opposition was ordered to return to the Chamber after a point of order was taken against him.

¹³⁰ PD 17/09/1975, p. 1168.

¹³¹ See for example, VP 22/10/1903, p. 312.

¹³² See standing orders 50 and 51.

¹³³ PD 27/02/1929, p. 3244.

¹³⁴ PD 18/11/1943, p. 875; PD 29/10/2003, p. 4432.

¹³⁵ PD 14/10/1998, p. 8308; PD 16/11/1995, p. 3407.

¹³⁶ PD 15/10/1998, p. 8453; PD 11/11/1998, p. 9714.

¹³⁷ PD 08/03/2001, p. 12481; PD 29/05/2001, p. 13826.

¹³⁸ PD 29/04/1992, pp. 3011 and 3014.

11.11.3 Offensive words, reflections on members and unparliamentary language

According to *May*, “good temper and moderation are the characteristics of Parliamentary language.”¹³⁹ As long ago as 1887, a Speaker ruled that it was out of order to use language which could be held to be offensive to the feelings of another member. A standing order adopted in 1964 stated that “No member shall use offensive or unbecoming words in reference to any member of either House.” This standing order had, on occasions, been responsible for objections either frivolous or as a result of mishearing, and yet others engendered by the heat of the moment – most of them time-wasting and unnecessary. From the 1960s, this has resulted in a modification of the ruling. Nowadays the Chair “must be satisfied, surely, that the words complained of must be fairly and reasonably capable of giving offence,”¹⁴⁰ and will not, in any event, tolerate endless requests for withdrawals of allegedly offensive remarks to the stage of absurdity.¹⁴¹

“Unparliamentary language” may be regarded as encompassing “offensive words” under the standing orders and also include words which, while not strictly excluded by the standing orders, are inappropriate for a Parliament.

Unparliamentary language must be considered in context; words which may be regarded as objectionable under some circumstances may be unexceptionable under other conditions.

Objections that any particular words or language used are offensive must be taken immediately.¹⁴² It has been ruled that an objection will be entertained only from a member who was the butt of the remarks.¹⁴³ However, this is not always the case.¹⁴⁴

The expressions “offensive words” and “unparliamentary language” generally refer to the same thing. A useful distinction is that “offensive words” offend against standing orders 72 and 74.

Standing order 72 prohibits members from using offensive words against the sovereign or the Governor or against either House or its members, a member of the judiciary or a statute unless moving for its repeal. In relation to reflections on judges it is important to note that members are able to criticise members of the judiciary but may only do so by way of a specific and distinct substantive motion naming the judge and stating the charge or complaint against him or her. Speaker Ellis, in a considered ruling in relation to criticisms of the judiciary under the standing orders argued that the member moving the motion must produce evidence to support the charges, and that the motion “must be confined to the charge or complaint and must not relate to other matters as well.” Speaker Ellis went on to argue that “...It is not sufficient merely to impute improper motives or to make reflections, insinuations, or innuendos in a general way. The motion must be specific.”¹⁴⁵

¹³⁹ *May*, p. 440.

¹⁴⁰ See comments of Speaker Ellis, PD 16/02/1966, pp. 3321-2.

¹⁴¹ See comments of Deputy Speaker Fowles, PD 19/11/1963, p. 6373.

¹⁴² PD 14/03/1963, p. 3410.

¹⁴³ PD 17/11/1965, p. 2084.

¹⁴⁴ See PD 10/03/2004, p. 7080 where a parliamentary secretary objected to remarks made about another member in the Chamber.

¹⁴⁵ See ruling of Speaker Ellis, PD 29/03/1966, p. 4707.

This rule is based upon the philosophy of the separation of powers in that “it is essential that judges should be permitted to administer the law not only independently and freely and without favour, but also without fear of attack upon them or upon their decisions.”¹⁴⁶

In a further ruling Speaker Ellis advised the House “...it is only for actual misconduct in their judicial office that judges are responsible to Parliament. In respect of their functions outside their judicial office they are not answerable to Parliament, nor may they be criticised in Parliament, unless of course the criticism is coupled with a motion for their removal from office.”¹⁴⁷

When a question of order relates to offensive words or unparliamentary language, the Chair may intervene under standing order 74. The rule to be followed was succinctly stated in a ruling of Speaker Ellis in 1966 and still applies. Speaker Ellis stated:

*If language is used which is capable of giving offence to a member and he takes objection to it, the Chair will order that it be withdrawn and, if it is a serious case, the Chair will direct an apology. But, of course, the rule also is that the member using the language may explain it away and make it clear that he did not intend to offend.*¹⁴⁸

The essential element in such cases is that the words personally offend an individual member. As such the test is not whether the words are offensive per se but whether they related directly to an individual member who immediately objected to them. As such, practice of the House has been that, if a member takes exception to a remark on the ground that it is personally offensive, the Chair will insist on its withdrawal, unless the complaint is clearly unjustified. Members may be requested to apologise if the words are extremely distasteful,¹⁴⁹ and if a member is ordered by the Chair to withdraw certain words and refuses to do so, the member may, under standing order 250(3), be named (see section 23.2 of Part One).

Furthermore, standing order 73 forbids “imputations of improper motives and personal reflections on members” unless they are made by substantive motions framed for the purpose.

11.11.4 Relevance and tedious repetition

The question of relevance arises in respect of:

- (a) relevance of debate, including answers to questions (S.O. 59, 67, 70, 76, 129, 214, 245(1)), and
- (b) relevance of a proposed amendment (S.O. 160).

Each question of relevance must be decided on its own merits.

In relation to the relevancy of answers given by Ministers to questions, it is accepted practice that when Ministers answer questions in the House they may reply in any manner they deem appropriate¹⁵⁰ including replying to any interjections.¹⁵¹

¹⁴⁶ *Ibid.*

¹⁴⁷ PD 31/03/1966, pp. 4936-8.

¹⁴⁸ PD 15/11/1966, p. 2438.

¹⁴⁹ PD 22/11/1995, p. 3793.

¹⁵⁰ Speakers' rulings have indicated that they cannot direct Ministers in how they answer a question. See for example PD 29/10/2003, p. 4365; PD 20/10/1988, pp. 2472-3.

When a bill is being considered in detail, discussion must be confined to the clause or clauses being considered. However, reference is usually permitted to other clauses or the explanatory notes attached to the bill when this is necessary to elucidate meaning.¹⁵²

The Chair is able to direct a member who is transgressing the rules regarding relevance to cease speaking. When this occurs, it is open to that member, or any other member, to ask the Chair to put the question "That the member be further heard". However, if a member has been ordered to discontinue a speech under standing order 59 due to persistent irrelevance or tedious repetition the member may not be heard upon the same question.¹⁵³

With regard to the relevance of amendments to questions before the House, the Speaker has ruled that proposed amendments that are not relevant to the question before the House are out of order. For example, the Speaker ruled out of order a proposed amendment to a motion to suspend standing orders to enable the introduction and debate on the appropriation bill and cognate bills. The amendment proposed that the motion be amended to permit the House to immediately debate the Government's handling of an alleged incident at Cecil Hills High School and to allow for the taking of members' questions on each day when the House sits on a Friday.¹⁵⁴ Similarly, the Speaker ruled out of order a proposed amendment to a motion to suspend standing orders to allow the introduction and progress up to and including the Minister's second reading speech of a bill to amend the Crimes Act as the amendment proposed to add the words "and the Premier be required to advise the House why he is not taking any action to ensure the courts actually impose the heavier sentences he talks about and why he has failed to honour his promise to increase police numbers in New South Wales."¹⁵⁵

In relation to tedious repetition, it should be noted that whilst tedious repetition has not been precisely defined, Speakers' rulings indicate it means repeating something within the same debate rather than repeating comments that had previously been made in other debates.¹⁵⁶

11.11.5 Respect for the Chair

Standing order 50 provides that, whenever the Speaker rises, members must be seated and be silent. This allows the Speaker to be heard and for all members to be aware that the Chair is intervening to restore order.

It is also provided in the standing orders that when the Speaker is putting a question members shall be silent and not leave or cross the Chamber (S.O. 51).¹⁵⁷

¹⁵¹ PD 03/03/1993, p. 248.

¹⁵² For example, see PD 21/04/1994, p. 1662.

¹⁵³ PD 17/07/1902, p. 1280; and PD 25/10/1917, p. 2128.

¹⁵⁴ PD 29/05/2001, p. 13835. See also PD 29/03/2006, p. 21709 where an amendment moved to a motion of censure was ruled out of order for being outside the scope of the motion as it was not an amendment but proposed a different motion of censure.

¹⁵⁵ PD 04/09/2001, p. 16318.

¹⁵⁶ See ruling of Speaker Ellis, PD 10/09/1968, p. 748 and ruling of Speaker Cameron, PD 27/11/1975, p. 3342.

¹⁵⁷ Former standing orders provided for members to make obeisance (bow slightly) to the Chair when passing in front of the Chair on entering or leaving the Chamber as an indication of respect. This is no longer required under the standing orders adopted in 2006.

The Chair has ordered a member cease speaking and resume his seat for canvassing his ruling.¹⁵⁸ The Chair has also asked the Serjeant-at-Arms to remove members from the Chamber when they continue to flout the Chair's ruling.¹⁵⁹

11.11.6 Reflections upon private citizens

Invariably occasions arise when, for some reason or another, a member feels compelled to criticise or perhaps castigate private citizens. It is contrary to the unwritten law of Parliament to make charges reflecting upon persons who have no right of reply to those charges, unless the member has strong proof of the assertions or the member feels it is within the public interest to do so.¹⁶⁰ The Chair has ruled that in what might appear to be a bad case of a member using the privilege of freedom of speech, it will seek to restrain any such attack, but it is not within the province of the Speaker to prevent free speech in the House.¹⁶¹ In fact, on one occasion a request by a member for the withdrawal of remarks about a visitor has been refused.¹⁶²

The Chair has warned members against using their freedom of speech in Parliament to reflect adversely on private citizens or public officials who do not enjoy the same privilege.¹⁶³ A member, although not amenable to civil or criminal courts for his or her utterances in a proceeding in the House is answerable to the House itself, which may adjudge the member "guilty of conduct unworthy of a member of Parliament" and in extreme cases, expel the member from the service of the House under standing order 254. On one occasion the House has censured the Leader of the Opposition for permitting the abuse of parliamentary privilege by opposition members in raising unsubstantiated allegations against an individual.¹⁶⁴ For further information on the House's control over what a member says under parliamentary privilege see section 3.7 of Part Two.

During the 51st Parliament, a procedure called "a citizen's right of reply" was adopted which enables, at the discretion of the House, a person or corporation adversely named in the House to seek to have a reply incorporated into *Hansard* (see Chapter 29 of Part One).

11.11.7 Decorum

Standing orders and tradition contain a number of rules for behaviour in the Chamber, including that members:

- Must sit and be silent when the Speaker rises (S.O. 50).¹⁶⁵
- Shall be silent and not leave or cross the Chamber while the Speaker is putting a question (S.O. 51).
- Shall not converse while other members are speaking (S.O. 52). Members should also not hold conversations with people seated in the public

¹⁵⁸ PD 19/05/1998, p. 4778.

¹⁵⁹ PD 08/11/2001, pp. 18294-7.

¹⁶⁰ PD 02/12/1964, p. 2481.

¹⁶¹ PD 16/10/1969, p. 1706.

¹⁶² PD 13/10/1965, p. 1295.

¹⁶³ PD 02/05/1989, p. 7148; PD 06/05/1997, p. 8076; PD 09/11/1999, p. 2433.

¹⁶⁴ VP 09/09/1999, pp. 51-3; PD 09/09/1999, pp. 256-74.

¹⁶⁵ Members failing to abide by this standing order may be given a more serious admonition than that which usually accompanies the usual call to order. For instance, the Speaker placed a member on three calls to order when the member flouted the authority of the Chair. That same day the Speaker placed a Minister on three calls to order for the same reason and warned the House that the Chair would not tolerate the habit developing in the House of members interjecting when the Chair was standing. PD 21/04/1994, pp. 1629-30.

gallery.¹⁶⁶

- Shall not pass between the Chair and the Table or between the Chair and the member speaking (S.O. 53).
- Shall normally be seated (S.O. 54).
- Wishing to speak will rise and seek the call from the Speaker (S.O. 55).
- Shall speak standing except by leave of the Speaker (S.O. 56).
- Should not use props or things that cannot be recorded in *Hansard* when speaking.¹⁶⁷ Although visual material such as maps may be placed on the Table for perusal by other members.¹⁶⁸ In fact, the Speaker has ruled that maps or similar graphic material should be displayed in the Speaker's Square at least 1 day prior to the debate and should thereafter be displayed on each sitting day on which the bill or other matter is listed for debate.¹⁶⁹
- Should not leave the Chamber immediately upon finishing a speech.
- Should be appropriately attired.¹⁷⁰
- Should not read newspapers or material not related to the business of the House.¹⁷¹
- Members have also been warned against raising spurious points of order, moving around the Chamber, conversing loudly, using unparliamentary language and displaying poor conduct.¹⁷²
- Should not bring into the Chamber for use mobile phones¹⁷³ or laptop computers.¹⁷⁴ The latter prohibition was however relaxed under Speaker Murray, who in 1995 commented that it had been demonstrated to him that using a laptop computer in the Chamber did not interfere with the orderly conduct of proceedings and, on that basis, allowed members to use notebook/laptop computers in the Chamber¹⁷⁵ and in 1998 Speaker Murray suspended the sitting to allow a technician from the Parliamentary Technology Services section to assist a member with his laptop computer.¹⁷⁶

In addition, a Minister, or parliamentary secretary in accordance with standing order 366, should always be at the Table,¹⁷⁷ and the front benches are reserved for Ministers and Shadow Ministers during Question Time.¹⁷⁸

11.12 Sub judice convention

The term "sub judice" simply means under judicial consideration.

¹⁶⁶ For example, a member was called to order for holding a conversation with people in the public gallery. The Speaker stated that it was a longstanding tradition that there be no communication between members of the House and persons in the gallery, and warned people in the gallery that they should desist from further communication. PD 21/05/1993, p. 2625.

¹⁶⁷ See the ruling given by Speaker Rozzoli that a member who wishes to table material in *Hansard* must first approach the Speaker to ascertain whether the material is capable of being reproduced in *Hansard*. PD 21/05/1993, p. 2609. See also PD 30/05/2000, p. 6074.

¹⁶⁸ PD 20/05/2003, p. 708.

¹⁶⁹ VP 01/05/1992, p. 290.

¹⁷⁰ On objection being taken, the Speaker noted that Speakers have generally ignored the wearing of badges, PD 28/04/1998, p. 3979.

¹⁷¹ PD 30/08/1967, p. 919; PD 10/03/1970, p. 3983; PD 19/03/1970, p. 4655; PD 13/05/2004, p. 9049; and PD 08/06/2005, p. 16676.

¹⁷² VP 16/11/1995, p. 394.

¹⁷³ PD 18/06/2002, p. 3278.

¹⁷⁴ PD 10/12/1991, p. 6226.

¹⁷⁵ PD 12/10/1995, pp. 1709-10.

¹⁷⁶ PD 01/04/1998, p. 3600.

¹⁷⁷ PD 27/05/1998, p. 5305, although see also PD 24/06/1998, p. 6498.

¹⁷⁸ PD 15/10/1997, p. 849.

The general rule is that matters still under adjudication by the courts should not be brought forward in debate in such a way as to prejudice court proceedings, but the public interest may be held to prevail over the sub judice doctrine. The rule only applies to debate and as such notices of motions cannot be ruled out of order on the basis of the sub judice convention until they are moved.¹⁷⁹

The application of what has been termed "the sub judice rule" in the New South Wales Legislative Assembly is not subject to a statute, standing order or set rule. Accordingly, reference must be made to New South Wales' precedents.

Whether discussion on a matter purportedly sub judice is allowed is at the discretion of the Chair. The Chair's decision is, of course, subject to the will of the House exercised through a motion of dissent.

It is often difficult for the Chair to decide whether to invoke the sub judice convention because the facts are not always well enough known or may be in dispute. Under these circumstances, the reasonable course is to make a request of members not to refer to matters which, in their knowledge, might prejudice any judicial proceedings. For instance, a member was allowed to continue canvassing a number of matters related to a case listed in a local court after the Speaker warned him about traversing evidentiary matters.¹⁸⁰

In situations where it is unclear whether a member intends to speak to a matter that is considered to be sub judice in a generalised way or by delving into the evidentiary matters before the court the Speaker has permitted the debate to commence with the proviso that he would ask the member to desist if it appeared that the sub judice rule was being breached.¹⁸¹ It is also usual to permit debate when a writ for defamation has been issued (colloquially referred to as a 'stop writ'), or before a civil case has been set down for trial or otherwise brought before a court.

A stricter interpretation of the convention is applied in respect of criminal cases before the courts.

The origin of the sub judice rule (or convention) is detailed in a report of the House of Commons Select Committee on Procedure entitled "Matters Sub Judice", as: "the desire of Parliament to prevent comment and debate from exerting an influence on juries and prejudicing the positions of parties and witnesses in court proceedings." The Select Committee recognised a difference between the sub judice convention and contempt of court: "sub judice is imposed voluntarily by Parliament itself and is exercised subject to the discretion of the Chair with the object of forestalling prejudice of proceedings in the courts. Courts protect themselves from prejudicial comment outside Parliament by the exercise post hoc of the powers to punish contempts".¹⁸²

In summary, the important matters the Chair has to take into consideration in applying the rule are that:

¹⁷⁹ See PD 17/09/1992, pp. 6006-8 where the Speaker noted that as he understood the application of the rule he had no power to rule a notice of motion out of order as the rule applies to the debate that ensues after a motion is moved.

¹⁸⁰ PD 10/04/1992, p. 2662; See also PD 13/10/1994, p. 3996.

¹⁸¹ PD 06/05/1992, pp. 3658-60 and p. 3666.

¹⁸² 4th Report HC 298 (1971-2) pp. vii-viii; see also *May*, pp. 436-7.

- the Parliament has a right to legislate on any matter within its jurisdiction – therefore the restriction of debate on matters on the basis that they are sub judice is based on the House voluntarily restricting itself in debate in order not to influence the outcome of a court's deliberation and to protect the interests of litigants or other parties before the courts.¹⁸³
- the convention is much stricter in relation to criminal matters (taking effect the moment a charge is made) than in civil cases (where the filing of the relevant documents is the trigger).
- the onus falls upon the Chair and the Chair alone to adjudge whether a matter is sub judice. In order to make this assessment the Chair must be apprised of the specific matter before the Court and the Chair must be able to hear enough of the member's contribution to decide whether the member should be allowed to proceed.

The Chair must also take a realistic attitude in such matters by not automatically excluding discussion in the House on matters of public interest which are already being freely ventilated in the media. Speaker Ellis referred to the following quotation from the judgment of Sir Frederick Jordan, Chief Justice of the NSW Supreme Court in *Ex parte Bread Manufacturers Ltd; re Truth and Sportsman Ltd and another* (1937) SR (NSW) 249-50 which relates to the public interest question:

*...the administration of justice, important though it undoubtedly is, is not the only matter in which the public is vitally interested...The case may be one in which as between competing matters of public interest the possibility of prejudice to a litigant may be required to yield to other and superior considerations. The discussion of public affairs and the denunciation of public abuses, actual or supposed, cannot be required to be suspended merely because the discussion or the denunciation may, as an incidental but not intended by-product, cause some likelihood of prejudice to a person who happens at the time to be a litigant.*¹⁸⁴

Mr R.P. Meagher QC makes the following comment on the modern sub judice rule:

*It is of critical importance to appreciate that the rule is limited in its operation. It does not apply unless the necessity of its operation has become quite clear ... It has to be applied prudently, and is not applied strictly. It applies, when it does, only to prevent discussion of the precise issue before the House, not to prevent general discussion of collateral or related matters.*¹⁸⁵

Rulings that have been given by Speakers of the Legislative Assembly include:

- (1) On 25 August 1965, Speaker Ellis gave a considered ruling on the application of the sub judice rule following a request for advice on the matter from the Leader of the Opposition. He stated that it didn't necessarily follow that because a matter was before a court that every aspect of it must be sub judice arguing that the press are able to deal with some aspects of court cases without in any way offending the court or embarrassing it or transgressing any rule of law or propriety and that the Parliament must be able to do the same. Speaker Ellis went on to note that the great difficulty was to determine what is, in fact, before the court and that a flexible approach should be taken to the sub judice issue so

¹⁸³ See comments by Speaker Ellis in relation to what principles should guide the Chair in determining whether a matter is sub judice. PD 07/11/1972, p. 2286.

¹⁸⁴ See comments by Speaker Ellis, PD 05/11/1970, pp. 7404-5.

¹⁸⁵ Meagher, QC, "The Parliamentary sub-judice rule in New South Wales", in *Justice: Journal of the International Commission of Jurists – Australian Section*, No. 7, November 1978, pp. 33-9.

as to allow maximum debate, stopping only at the point where there appears to be a real possibility of prejudicing the interests of the parties involved before the court or in any way embarrassing or influencing the court itself.

As such, Speaker Ellis ruled that he would allow debate in a general way and on broad issues of policy up to the point when it becomes clear to the Chair, either upon its own information or upon submission of a point of order taken by a member, that another member is seeking to discuss the specific matter before the court or an aspect of it which the court must necessarily examine in coming to a decision on the issue before it. Speaker Ellis did note that this was a liberal interpretation of the rule and warned members that should they display a tendency to take unwarranted liberty that it may be necessary for the Chair to revert to a strict application of the sub judice rule.¹⁸⁶

- (2) On 13 September 1973, Speaker Ellis stated in relation to Royal Commissions that the *Royal Commissions Act 1923* (NSW) was substantially the equivalent to the English *Tribunals of Enquiry (Evidence) Act 1921* to which the sub judice rule has been said to apply in that country – therefore the rule applied to proceedings of Royal Commissions.¹⁸⁷
- (3) On 31 May 1988, Speaker Rozzoli said in such matters "the Chair always receives and gives maximum weight to the advice of the Attorney General on whether a matter is sub judice", and when the subject matter relates to matters of criminality the rule is applied more strictly than it might otherwise be.¹⁸⁸
- (4) On 25 August 1988, Speaker Rozzoli reinforced past rulings that it is the action of lodging an appeal that brings about the initial ground upon which the sub judice rule can apply.¹⁸⁹
- (5) On 19 April 1989, Speaker Rozzoli ruled, during debate on motion on the legal system, that a member should be allowed latitude in addressing the question of whether a matter involved sufficient public interest to weigh the scales in favour of not invoking the rule. He said that the rule is closely aligned but not identical to the question of what constitutes contempt of court. "...the Parliament should not embark upon any course which is likely to prevent a litigant in a court of law from having his case tried free from all manner of prejudice, balanced by the competing freedom of the Parliament to debate matters which are deemed to be of extreme public interest."

The Speaker went on to quote a former Commonwealth Attorney General, Dr H.V. Evatt who said on 17 April 1947 that:

What is said in Parliament is absolutely privileged by law. What is said in the courts of justice is absolutely privileged by law. We have those two great instruments of government, the legislative power exerted by one, and the judicial power exerted by another. As the years have gone by, the Parliament, having an absolute privilege and not being bound to the rules of contempt of court, or even the laws of defamation, both of which are applicable to comment outside the Parliament, has taken the view which I believe has been carried out in

¹⁸⁶ PD 25/08/1965, pp. 75-6.

¹⁸⁷ PD 13/09/1973, pp. 858-9.

¹⁸⁸ PD 31/05/1988, p. 828.

¹⁸⁹ PD 25/08/1988, pp. 619-20.

cases like the Jerger case.

That is to say the Parliament does not ask – “Is there a proceeding pending at the moment?”, but rather “In all the circumstances, should a debate on a particular matter be permitted at this particular moment?”

Speaker Rozzoli further said that:

- The Chair must weigh the matters presented in terms of the rights of litigants against the public interest.
- A member should not deal with the merits of matters currently before the courts in relation to which, to any specific degree, the courts must be the proper tribunal.
- The debate should address matters of broad public interest, to draw attention to wrongs and to determine matters of policy which may address those wrongs.
- The House should not try matters which should properly come before the courts.
- The subject of the debate must not be substantially associated with the proceedings before the court.¹⁹⁰

- (6) On 3 April 1990, Speaker Rozzoli invoked the sub judice rule after a point of order was taken by the then Attorney General that a matter sought to be debated, was before the courts. Mr Speaker said that, in determining whether public interest outweighed all other interests, public interest was not necessarily to be equated with widespread interest. The interests of litigants must also be taken into account and in this regard he said – “A longstanding arm of the sub judice rule provides that if a matter of a criminal nature proceeds before a jury ... under almost every circumstance the sub judice rule should be invoked.”

He said that in this particular case, the matter was a criminal one and was before the courts in the sense that a proceeding had been commenced and under those circumstances the rule should be invoked. He also said that he felt that it would be difficult to divorce from any debate the matters that may go to, and be brought into, evidence in a hearing of the matter.¹⁹¹

- (7) On 10 April 1992, Speaker Rozzoli directed a member who had raised a matter during the Grievance Debate which was listed in a local court to not raise matters that would prejudice the outcome of such proceedings. The member replied that he wished to canvass a number of matters which showed a deficiency in the current legislation as it affected the Building Disputes Tribunal. The Speaker allowed the member to continue but warned him about traversing evidentiary matters.¹⁹²

- (8) On 6 May 1992, Speaker Rozzoli noted that the application of the sub judice rule is not restricted to matters of a criminal nature being heard before a jury but can apply to civil matters, depending upon the circumstances that arise such as whether there is any likelihood of prejudice occurring to the litigants in the matters when a point of order was raised about a proposed matter of public importance

¹⁹⁰ PD 19/04/1989, pp. 6849-51.

¹⁹¹ PD 03/04/1990, pp. 1489-90.

¹⁹² PD 10/04/1992, p. 2662.

concerning an action in the Land and Environment Court. The Speaker stated that before the debate commenced it was very difficult to know whether the member intends to speak to the matter in a generalised way or to delve into the evidentiary matters before the court and he ruled that it was best to allow the debate to commence.¹⁹³

- (9) On 17 September 1992, Speaker Rozzoli noted that under the sub judice rule he had no power to rule a notice of motion out of order as the rule applied to the debate that ensued after a motion had been moved. As such any applications of the sub judice rule must occur when debate on the motion takes place.¹⁹⁴
- (10) On 11 October 1995, Speaker Murray explained that the sub judice rule is only applied if it is determined by the Chair that reference to specific matters may influence the judgment of a court. He therefore did not apply the rule in that case where the coroner had already taken all evidence.¹⁹⁵
- (11) On 16 May 1996, Speaker Murray did not apply the sub judice rule as he considered that as the matter was before a judge rather than a jury, it was unlikely that the House's debate would influence the judge's determination.¹⁹⁶
- (12) On 8 April 1997, Speaker Murray confined debate to one paragraph of a motion as he had received advice from the Attorney General that the matter was currently before the courts.¹⁹⁷
- (13) On 16 April 1997, Speaker Murray read a letter from the Attorney General advising that civil proceedings had been commenced on a subject and that to debate that matter would infringe the sub judice rule. The Speaker advised that he was obliged to read the advice but it was for the House to make its own decisions. No ruling of sub judice was made.¹⁹⁸
- (14) On 19 November 1997, the Acting Speaker directed a member to not continue a line of debate relating to a murder case.¹⁹⁹
- (15) On 14 October 1998, the Deputy Speaker ruled that there was no point of order in mentioning the fact that people had been arrested.²⁰⁰
- (16) On 22 October 1998, Speaker Murray allowed a question after being advised that charges had been laid related to the matter as the question was general rather than specific in nature but advised the Minister to be brief and avoid particular cases.²⁰¹
- (17) On 22 October 1998, Speaker Murray noted that it is traditional for the Chair to accept the advice of a Minister on whether the subject matter of a question is

¹⁹³ PD 06/05/1992, pp. 305-6.

¹⁹⁴ PD 17/09/1992, pp. 6006-8.

¹⁹⁵ PD 11/10/1995, p. 1589.

¹⁹⁶ PD 16/05/1996, p. 1153.

¹⁹⁷ VP 08/04/1997, p. 737.

¹⁹⁸ PD 16/04/1997, p. 7631.

¹⁹⁹ PD 19/11/1997, p. 2139.

²⁰⁰ PD 14/10/1998, p. 8372.

²⁰¹ PD 22/10/1998, p. 8902.

sub judice.²⁰²

(18) On 29 June 1999, Speaker Murray ruled out of order a general business notice of motion (general notice) submitted by a member because it infringed the sub judice convention.²⁰³

(19) On 22 September 1999, Speaker Murray allowed a question without notice on the understanding that the answer was not likely to influence any decision to be made by a judge or a jury but the Speaker asked the Minister to take care about the way in which he answered the question.²⁰⁴

On all occasions before the sub judice rule is invoked the individual circumstance of the matter must be considered by the Chair.

11.12.1 Matters before the Independent Commission Against Corruption (ICAC)

Matters before the Independent Commission Against Corruption do not fall within the sub judice rule. However, the House has at times observed the practice of refraining from asking questions about matters before the ICAC. In 1996, when the ICAC was conducting an inquiry involving three members of the New South Wales Parliament, the Speaker noted that the precedent was that matters before the ICAC were not the subject of questions in the House. However, the Speaker found it difficult to rule a question out of order on the basis that the matter is before a court. He stated:

*the difficulty facing the Chair was that ICAC is not a properly constituted court of law in the sense that it does not fall into the category of court proceedings on which Speakers in the past have ruled. The matter in question was not before a jury. At the moment the ICAC has under consideration matters relating to three members of this Parliament and public proceedings are being conducted. Often a short-term initiative has no long-term value to the House and to that extent I am at this stage not attempting to give a ruling on the matter but merely to express a point of view. The difficulty that the Chair faces is that we have gone down a certain path in relation to the current public proceedings and it is very difficult to withdraw from that path. However, at an appropriate time I will rule on the admissibility of such questions and it will be up to the House at that stage to determine whether to abide by that ruling.*²⁰⁵

The matter was also considered by Speaker Aquilina in 2005 following the asking of questions in the House, which touched on evidence given at the ICAC. He noted:

The rule that motions, debates and questions should not make reference to matters awaiting or under adjudication is intended to ensure that there is fairness, that there is no prejudice, and that Parliament does not prejudge findings or influence a jury or witnesses. The Independent Commission Against Corruption is not a court of law, and questions have been asked and answered in this House in relation to then current ICAC investigations.

However, if the Chair perceives that questions, debates or motions give rise to a real and substantial danger of prejudice to proceedings, those questions, debates or motions should not be allowed. In some instances the greater public interest may lie in restricting debate or questions if they clearly canvass evidence, prejudge proceedings or seek to influence the finding of the commission. Members enjoy freedom of speech in this House. Parliamentary privilege is expressly recognised in section 122 of the Independent Commission Against Corruption Act. However, members need to be aware that this privilege should be exercised with care so that, in the interests of justice, a witness does not feel inhibited or that his or her

²⁰² PD 22/10/98, pp. 8898-9.

²⁰³ VP 29/06/1999, p. 179.

²⁰⁴ PD 22/09/1999, pp. 1066 and 1068.

²⁰⁵ PD 21/05/1996, p. 1227.

*legal rights have been denied.*²⁰⁶

Under review

²⁰⁶ PD 22/03/2005, p. 14704.

Chapter 12 Business

12.1 Routine of business

Standing Orders 97 and 98 set out the order and type of business for different sitting days.

(97) The House shall conduct its business in the following routine:

TUESDAYS

1. At 1.00 p.m. (Speaker takes Chair)
2. General Business Notices of Motions and Private Members' Statements
3. At 2.15 p.m. (Speaker resumes Chair)
4. Ministerial Statements
5. Notices of Motions (Government Business, Bills, Business with Precedence)
6. Notices of Motions to be Accorded Priority
7. Question Time
8. Ministerial Statements
9. Papers
10. Committee Reports – Tabling of reports and notification of inquiries
11. Petitions
12. Announcement of Matter of Public Importance
13. Placing or Disposal of Business
14. Motion Accorded Priority
15. Business with Precedence
16. At 4.30 p.m. Business before the House is interrupted for Government Business. Any interrupted business lapses except when the House is considering Business with Precedence which will stand as an order of the day for tomorrow.
17. At 7.00 p.m. Business before the House is interrupted for the Matter of Public Importance. Any interrupted item of Government Business shall stand as an order of the day for tomorrow. If at the time of interruption a division is in progress, that division shall be completed.
18. Adjournment at 7.30 p.m. or at the conclusion of the Matter of Public Importance, if concluded before 7.30 p.m.

WEDNESDAYS

1. At 10.00 a.m. (Speaker takes the Chair)
2. General Business Notices of Motions
3. Government Business concluding at 1.30 p.m. Any interrupted item of Government Business shall stand as an order of the day for a later hour of the day. If at the time of interruption a division is in progress, that division shall be completed.
4. At 2.15 p.m. (Speaker resumes Chair)
5. Ministerial Statements
6. Notices of Motions (Government Business, Bills, Business with Precedence and notices to be the subject of a motion to re-order later in the sitting)
7. Notices of Motions to be Accorded Priority
8. Question Time
9. Ministerial Statements
10. Papers
11. Committee Reports – Tabling of reports and notification of inquiries
12. Petitions
13. Announcement of Matter of Public Importance
14. Re-ordering of General Business Orders of the Day (for Bills) and General Business (Notices of Motions)
15. Placing or Disposal of Business
16. Motion Accorded Priority
17. Business with Precedence

18. At 4.30 p.m. Business before the House is interrupted for Government Business. Any interrupted business lapses except when the House is considering Business with Precedence which will stand as an order of the days for tomorrow.
19. At 5.45 p.m. Business before the House is interrupted for Private Members' Statements. Any interrupted item of Government Business shall stand as an order of the day for tomorrow. If at the time of interruption a division is in progress, that division shall be completed.
20. At 7.00 p.m. Business before the House is interrupted for the Matter of Public Importance
21. Adjournment at 7.30 p.m. or at the conclusion of the Matter of Public Importance, if concluded before 7.30 p.m.

THURSDAYS

1. At 10.00 a.m. (Speaker takes Chair)
2. General Business Notices of Motions
3. Government Business until 11.45 a.m. Any interrupted item of Government Business shall stand as an order of the day for tomorrow. If at the time of interruption a division is in progress, that division shall be completed.
4. General Business Notices of Motions or Orders of the Day (not being Bills) concluding at 1.30 p.m. Any interrupted business shall stand as an order of the day for tomorrow with precedence of other General Business (not for Bills). If at the time of interruption a division is in progress that division and any other division(s) to determine the matter shall be completed.
5. At 2.15 p.m. (Speaker resumes the Chair)
6. Ministerial Statements
7. Notices of Motions (Government Business, Bills, Business with Precedence)
8. Notices of Motions to be Accorded Priority
9. Question Time
10. Ministerial Statements
11. Papers
12. Committee Reports – Tabling of reports and notification of inquiries
13. Petitions
14. Placing or Disposal of Business
15. Motion Accorded Priority
16. Business with Precedence
17. At 4.30 p.m. Business before the House is interrupted for General Business Orders of the Day for Bills. Any interrupted business lapses except when the House is considering Business with Precedence which will stand as an order of the day for tomorrow.
18. At 5.30 p.m. Private Members' Statements. Any interrupted business shall stand as an order of the day for tomorrow with precedence of other General Business Orders of the Day for Bills.
19. Adjournment at 6.30 p.m. or at the conclusion of Private Members' Statements, if before 6.30 p.m.

(98) On any Friday upon which the House sits, whether as a continuation of the sitting of the previous day or as a separate sitting day the following routine of business will apply:

1. Notices of Motions for Government Business
2. Notices of Motions (General Notices)
3. Petitions
4. General Business Notices of Motions for Bills (concluding not later than 10.30 a.m.)
5. From 10.30 a.m. Government Business shall have precedence of all other business in the routine of business.
6. No quorums shall be called and any divisions called shall be deferred, set down as orders of the day for the next sitting days and determined after Question Time.

7. At 1.00 p.m. Business before the House is interrupted for consideration of committee reports presented or the next item of business shall be called. Any interrupted item of Government Business shall stand as an order of the day for tomorrow.
8. At 1.30 p.m. Private Members' Statements, after which the House shall adjourn without motion moved until the next sitting day.

The routine of business may be altered for a particular instance or for a sitting day, usually by a motion to suspend standing orders (S.O. 365). The adoption of a sessional order is the usual method of changing the routine of business for a longer period. For example, on a sessional order has been adopted for the current session that varies the routine of business. This sessional order provides:

That, during the current session, unless otherwise ordered, standing order 97 shall read as follows:

Tuesdays

1. At 12.00 pm the Speaker takes the Chair
2. Giving of General Business Notices of Motions (General Notices)
3. Private Members' Statements
4. At 1.30 pm the Speaker leaves the Chair
5. At 2.15 pm the Speaker resumes the Chair
6. Ministerial Statements
7. Giving of Notices of Motions (Government Business, Bills, Business with Precedence)
8. Giving of Notices of Motions to be Accorded Priority
9. Question Time
10. Ministerial Statements
11. Papers
12. Committees – Tabling of reports and notification of inquiries
13. Petitions
14. Announcement of Matter of Public Importance
15. Placing or Disposal of Business
16. Motion Accorded Priority
17. Business with Precedence
18. At 4.00 pm Business before the House is interrupted for Government Business. Any interrupted business lapses except when the House is considering Business with Precedence which will stand as an order of the day for tomorrow.
19. At 7.00 pm Business before the House is interrupted for private members' statements. Any interrupted item of Government Business shall stand as an order of the day for tomorrow. If at the time of interruption a division is in progress, that division shall be completed.
20. Matter of Public Importance.
21. Adjournment at 7.45 pm or at the conclusion of the Matter of Public Importance, if concluded before 7.45 pm.

Wednesdays:

1. At 10.00 am the Speaker takes the Chair
2. Giving of General Business Notices of Motions (General Notices)
3. Government Business concluding at 1.15 pm. Any interrupted item of Government Business shall stand as an order of the day for a later hour of the day. If at the time of interruption a division is in progress, that division shall be completed.
4. Community Recognition Statements
5. At 2.15 pm the Speaker resumes the Chair
6. Ministerial Statements

7. Giving of Notices of Motions (Government Business, Bills, Business with Precedence, and notices to be the subject of a motion to re-order later in the sitting)
8. Giving of Notices of Motions to be Accorded Priority
9. Question Time
10. Ministerial Statements
11. Papers
12. Committees – Tabling of reports and notification of inquiries
13. Petitions
14. Announcement of Matter of Public Importance
15. Re-ordering of General Business Orders of the Day (for Bills) and General Business Notices of Motions (General Notices)
16. Placing or Disposal of Business
17. Motion Accorded Priority
18. Business with Precedence
19. At 4.00 pm Business before the House is interrupted for Government Business. Any interrupted business lapses except when the House is considering Business with Precedence which will stand as an order of the day for tomorrow.
20. At 6.30 pm the Speaker leaves the Chair. Any interrupted item of Government Business shall stand as an order of the day for a later time. If at the time of interruption a division is in progress, that division shall be completed.
21. At 7.00 pm the Speaker resumes the Chair
22. Private Members' Statements
23. Government Business concluding at 9.45 pm. Any interrupted item of Government Business shall stand as an order of the day for tomorrow. If at the time of interruption a division is in progress, that division shall be completed.
24. Matter of Public Importance.
25. Private Members' Statements
26. Adjournment at 10.00 pm or at the conclusion of Private Members' Statements, if concluded before 10.00 pm.

Thursdays:

1. At 10.00 am the Speaker takes the Chair
2. Giving of General Business Notices of Motions (General Notices)
3. General Business Notices of Motions for Bills (concluding not later than 10.30 am). Any interrupted item of business shall be set down as an order of the day for tomorrow with precedence of other General Business Notices of Motions for Bills.
4. General Business Orders of the Day for Bills (concluding not later than 11.30 am or after the expiry of 60 minutes from the commencement of General Business Orders of the Day for Bills if commenced earlier than 10.30 am). Any interrupted item of business shall stand as an order of the day for tomorrow. If at the time of interruption, a division is in progress, that division shall be completed.
5. General Business Notices of Motions or Orders of the Day (not being Bills) concluding at 1.00 pm. Any interrupted business shall stand as an order of the day for tomorrow with precedence of other General Business (not being Bills). If at the time of interruption a division is in progress that division and any other division(s) to determine the matter shall be completed.
6. At 1.00 pm consideration of committee reports presented concluding at 1.30 pm. Any interrupted item of business shall stand as an Order of the Day for tomorrow.
7. At 2.15 pm the Speaker resumes the Chair
8. Ministerial Statements
9. Giving of Notices of Motions (Government Business, Bills, Business with Precedence)
10. Question Time
11. Ministerial Statements
12. Papers
13. Committees – Tabling of reports and notification of inquiries
14. Petitions
15. Placing or Disposal of Business
16. Business with Precedence

17. Government Business
18. At 4.30 pm business before the House is interrupted for Business of the House – Petitions. Any interrupted item of Business with Precedence or Government Business shall stand as an order of the day for tomorrow. If at the time of interruption a division is in progress, that division shall be completed.
19. Community Recognition Statements
20. Private Members' Statements after which the House shall adjourn without motion until the next sitting day.¹

?

In addition, standing order 98, regarding Friday Sittings, has been suspended for the current session.

Standing and sessional orders may be suspended to change the routine of business to enable the House to give precedence to a particular debate over other proceedings or to postpone an event in the routine such as private members' statements or debate on a motion for urgent consideration. For example, in October 1999, the House suspended standing and sessional orders to permit the normal routine of business to be interrupted to allow members of the public to address the House to introduce a debate on the Republic Referendum. The suspension in that instance provided for the Premier to move a motion, time limits to apply to the debate, for part of the normal routine of business (Question Time) to apply at 2.15 p.m., and for the Leader of the House to interrupt the debate at any time and ask the Chair to set down the motion as an order of the day for a later time in which case the normal routine of business would apply.²

When the Government has a majority, the routine of business may also be changed to bring forward the Government's legislative program. For example, to deal with the *Civil Liability Amendment (Personal Responsibility) Bill 2002* where the House resolved that: the only business to be dealt with would be that bill; no divisions or quorums were to be called; the House could sit beyond 10.30 p.m. and at the conclusion of the debate on the bill or at midnight the House would adjourn without a motion until the next day.³

The House has also suspended standing and sessional orders to allow the routine of business to be changed to accommodate particular special events. For example, the House has suspended standing orders to enable Question Time, which normally occurs at 2.15 p.m. in the routine of business, to commence earlier on particular days.⁴ Similarly, standing and sessional orders have been suspended to change the routine of business to enable members to attend a State Funeral,⁵ and to enable the House to adjourn without a motion following a debate.⁶

12.2 Types of business

The Business Paper, which lists notices and orders, divides business into the following categories:

¹ VP 14/02/2012, p. 514

² VP 26/10/1999, p. 160.

³ VP 30/10/2002, pp. 546-7.

⁴ For instance, Question Time was held at 10.00 a.m. on Tuesday 6 November 2001 in order that it would not clash with the running of the Melbourne Cup in the afternoon, PD 25/10/2001, p. 18006; and at 11.00 a.m. on Wednesday 22 September 2004 due to the fact that the Premier would not be available in the afternoon, PD 21/09/2004, p. 11195.

⁵ VP 27/02/2002, p. 47.

⁶ VP 13/03/2002, p. 94; VP 29/11/2001, p. 1684; VP 03/05/2000, p. 432; VP 08/09/1998, pp. 829-30; and VP 02/11/1997, p. 226.

- Government business – notices of motion and orders of the day in the charge of Ministers.
- General business – notices of motions and orders of the day in the charge of private members.
- Orders of the Day (Committee Reports) – reports of committees that have been tabled awaiting debate.
- Petitions requiring Ministerial response – petitions presented by members which have been signed by 500 or more persons.
- Committee recommendations requiring government response.

The Business Paper may also include other business such as Business of the House – Petitions which lists any petitions that have been received by the House that have been signed by 10,000 or more persons and has been set down for discussion in accordance with Standing Order 125A (adopted as a sessional order for the current Parliament).

Business with Precedence is another category of business that appears on the Business Paper from time to time. This is business that has been granted precedence of other business under standing order 118 (see section 12.5).

12.3 Placing or disposal of business (“call over”)

Each sitting day, after the conclusion of Question Time, the Speaker asks whether any member wishes to postpone, withdraw or discharge any business standing in their name on the Business Paper. Any member seeking to postpone or dispose of any items seeks the call and, when acknowledged by the Speaker, advises the Chair or moves a motion accordingly.

The placing or disposal of business or "call over" procedure gives members an opportunity to withdraw or postpone any notice of motion standing in their name on the paper or to postpone or move a motion to withdraw or discharge any order of business in their name (S.O. 100). Any item of government business can be postponed, withdrawn or discharged during the placing or disposal of business. However, in relation to general business, members can only withdraw or discharge items on the Business Paper standing in their name during the call over and must postpone items in accordance with standing order 101 (see section 12.3.1).

12.3.1 General Business

The program for general business each week is established on Wednesday to ensure Members are aware of the General Business that will be considered the following day. In accordance with standing order 101, members advise the Clerk in writing prior to 12.00 noon on Wednesday which general business⁷ standing in their name on the Business Paper is to be postponed. A party whip may also advise the Clerk of which items of general business standing in the name of members of their party are to be postponed. The first ten notices on the Business Paper not advised to be postponed are deemed to be proceeding. If a member has been granted leave of absence it is accepted practice that the business standing in the member's name is postponed.

⁷ i.e. general business notices of motion (general notices), general business notices of motion for bills, general business orders of the day (general orders), general business orders of the day for bills.

Members are still able to withdraw or postpone any notice of motion or an order of the day when it is called on.⁸ No motion is required for a member to postpone business standing in their name when it is called on and the leave of the House is not required. However, if a member wishes to withdraw an order of the day when it is called on the member is required to move a motion. The motion is considered without debate.

When the House proceeds to consider items of general business members must be present and take some action when the item of general business standing in their name is called on, or else the item lapses.⁹ However, on one occasion an unusual occurrence happened when a member who had carriage of a private member's bill was not present in the House and with the concurrence of the House his item was not called on and the House proceeded to the next order of the day. This meant that the item did not lapse.¹⁰ A sessional order adopted in February 2013 provides for the Speaker to have discretion to postpone any general business notice of motion if the Member is absent from the Chamber when it is called on. This provision has been adopted to prevent a domino effect on general business items listed for debate if a member unexpectedly postpones a General Business Motion, resulting in subsequent items lapsing as the members who have carriage of those items are not in the Chamber to either move the motion or postpone the item.¹¹

General business notices of motions and orders of the day not commenced or completed 6 months from the date given lapse in accordance with standing order 105 (as amended by sessional order). In addition when Parliament prorogues, all business before the House comes to an end. General business can however be restored to the business paper by resolution of the House. For example, when the House resumed after prorogation on 27 February 2002 standing and sessional orders were suspended to enable members, or the Leader and Shadow Leader of the House on their behalf, to give written notification of any general business notices of motions and orders of the day which had lapsed due to prorogation to be restored to the business paper. The resolution also provided that the restored notices of motion would be printed as a supplement to the business paper and that notices of general business given after 27 February 2002 would have precedence over the business restored.¹² In fact, none of the restored notices were ever given precedence for debate.¹³

The House has also suspended standing and sessional orders to allow a number of general business notices of motions (for bills), an interrupted mover's second reading speech and orders of the day (for bills) from the previous session of the

⁸ This procedure was first adopted in November 2005 VP 29/11/2005, p. 1795. Prior to this the program for general business day was established in the House with the Speaker calling over each item of business and members indicating whether business was to proceed at the next sitting, be postponed, withdrawn or discharged (by motion).

⁹ VP 16/09/1999, pp. 79-80. Three general business notices of motion called on and lapsed because members were not present to move them.

¹⁰ See the Legislative Assembly Notices (i.e. the business paper) 06/05/2004 where the *Quarantine Station Preservation Trust Bill* was listed as the first general business order of the day for bills followed by the *Roads Amendment (Transfer of Crown Roads) Bill* and PD 06/05/2004, p. 8571 where the *Roads Amendment (Transfer of Crown Roads) Bill* was called after the previous item of business despite the fact that the *Quarantine Station Preservation Trust Bill* had not been postponed.

¹¹ The Leader of the House has on occasion suspended standing orders to restore business that has lapsed in such circumstances. See for example, VP 31 May, 2012 p. 1040.

¹² VP 27/02/2002, p. 45.

¹³ It is unusual for general business (general notices) to be restored to the business paper following prorogation. Standing orders do however provide specifically for bills, including private members' bills, to be restored (S.O. 237). See section 20.6.6.5 of Part One for more information on the restoration of bills after prorogation.

same parliament to be reintroduced at the stage they had reached before the close of the session. This business was to have precedence of all general business notices of motions (for bills) given in the new session.¹⁴ Messages were sent to the Legislative Council requesting that bills, which were in the Council at the time of prorogation, be resumed in the new session at the same stage they had reached prior to prorogation.

12.3.2 Re-ordering General Business

Under the standing orders provision is made for any two private members to re-order each week:

- A general business order of the day for the resumption of debate on that member's bill; and
- A notice of motion (general notice), listed on the Business Paper or given that day.¹⁵

Notices of motions for bills and resumption of general notices cannot be re-ordered under this procedure (S.O. 106).

Members seeking to re-order their item of business may make a statement of up to five minutes in support of the re-ordering of an order of the day (for bills) or in support of the notice of motion (general notice). Only one item of business can be re-ordered under each category. If the first motion is agreed to, the second motion is not put. The same process is then repeated whereby any two private members may move to reorder their notice of motion for an item of general business. (S.O. 106).

12.3.2.1 Bills

Where the House accords precedence to an order of the day (for bills), the resumption of debate on that bill takes precedence when general business orders of the day (for bills) are considered and accordingly has precedence over all other general business orders of the day (for bills) on the Business Paper.

12.3.2.2 General notices and orders

Where the House accords precedence to a general business notice of motion Where the House accords precedence to a general business notice of motion (general notice), such notice takes precedence at the time when general business (general orders of the day and general notices of motions) are considered and accordingly has precedence over all other notices of motions (general notices) and orders of the day (general orders) on the Business Paper.¹⁶

In addition to the re-ordering procedure, the House is able to accord precedence to any general business notice of motion, or any other item of business, through the

¹⁴ VP 12/03/2002, pp. 60-1.

¹⁵ Under the sessional orders general business notices of motions are given at the commencement of the sitting each day. However, a member wishing to re-order a notice of motion in accordance with SO 106 may also give notice of their motion prior to Question Time each Wednesday in order to be considered for re-ordering later that day.

¹⁶ Two motions for precedence agreed to - one an order of the day (for bills), the other for a general business notice of motion. Another member then sought to move that his motion also be accorded precedence. The Speaker ruled that as the House had already agreed to give precedence to one general business notice of motion, there was no opportunity available for the other motion to be given precedence: VP 07/03/2001, p. 1082; VP 28/03/2001, pp. 1116-7.

mechanism of suspending standing and sessional orders to provide that a particular motion or bill take precedence or be brought on forthwith.¹⁷

12.4 Formal Business

Prior to November 2005 provision was made for the Speaker to give the House the opportunity to deal with any notice or order as formal business.¹⁸ Under this procedure the Speaker inquired whether there was any objection to each notice and each order of the day for the third reading of a bill on the business paper to be dealt with formally. Usually the Speaker grouped items, and the whips of each party would object. If no objection was taken by any member, the notice or order was deemed to be formal and the member having carriage of the matter could move the motion (in the case of a notice) immediately, or the Speaker would propose the question on an order and the question would then be decided without amendment or debate. It was usual for the order of the day for third readings of amended bills to be dealt with formally. However, this did not preclude the House from proceeding to a division on the question if a member called a vote. Certain business such as motions establishing a select or standing committee (except on a private bill) or for the adoption of a report of a committee could not be dealt with formally. The standing orders adopted in November 2006 have removed the procedure as it was considered that it was rarely used, unnecessary and sometimes delayed the bringing on of Question Time.

12.5 Business with Precedence

In accordance with standing order 118, certain matters are deemed to be 'Business with Precedence'. Such matters are considered during the time set aside in the routine of business (SO 97) for 'Business with Precedence'. Business with precedence may be interrupted in accordance with the routine of business.¹⁹ However, it is not unusual for standing and sessional orders to be suspended to alter the routine of business to allow the conclusion of any business with precedence.²⁰

The following types of business is considered 'Business with Precedence':

- ???
 - ???
 - ???
 - ???
 - ???
 - ???
 - ???
 - ???
 - ???
 - ???
- Dissent from the Speaker's ruling;
No confidence in the Government²¹, Minister or Speaker;
Censure of member or Speaker;
Privilege/contempt;
Expulsion of a member;
Arrangement of business of the House;
Days and hours of sitting;
Disallowance of statutory rules;

¹⁷ See for example, VP 19/09/2002, p. 452 where standing and sessional orders were suspended to provide for the consideration forthwith of a general business notice of motion regarding the retirement of the Acting Manager, Parliamentary Printing.

¹⁸ See comments made by the Leader of the House PD 15/11/2005, p. 19677.

¹⁹ For example, on Tuesday and Wednesday, the routine of business, as amended by sessional order, provides that business with precedence is interrupted at 4.00 pm for the consideration of Government Business.

²⁰ See for example: VP 3/4/2012, pp. 706-7

²¹ The standing orders provide for two different types of no confidence motions in the Government. SO 111 provides for a no confidence motion in the Government pursuant to section 24B(2) of the Constitution Act 1902. Such a motion is considered to be of great importance and is not dealt with as other 'Business with Precedence' as debate on the motion takes the place of all other business and cannot be adjourned. SO 111A does however provide for motions of no confidence in the Government not in accordance with the Constitution Act 1902 and such motions are considered as 'Business with Precedence' and will be interrupted in accordance with the routine of business.

- ?? Business accorded precedence by the House;
- ???? Vote of thanks or condolence;
- ???? Printing of papers.

Standing order 118 ranks business with precedence in order from 1 to 11 to provide for the situation where one or more of these matters are to be considered on any one day.

12.5.1 Votes of Condolence

On 9 April 1966, the then Premier issued a memorandum containing guidelines as to how the government would prefer to deal with motions following the death of a member or former member as follows:

Death of a sitting member including Premier, Minister or Speaker	- Motion of sympathy to be moved, and House to adjourn as a mark of respect.
Death of former Premier, Minister or Speaker (no longer in Parliament)	- Motion of sympathy to be moved. No adjournment of the House. ²²
Death of former member who ceased to be a member not more than 15 years ago	- Motion of sympathy to be moved. No adjournment of the House. ²³
Death of former member who ceased to be a member more than 15 years ago	- Message of condolence to be adopted, without debate. Members to stand in silence as a mark of respect. Speaker to inform House that a message had been sent to the family on behalf of House and House stands as mark of respect. ²⁴

There is no provision in the standing orders for specific time limits to apply where members are speaking on condolence motions. Under S.O. 85 a time limit of 20 minutes applies for debates not otherwise provided for. By custom, however, members are not restricted in time when speaking on a condolence motion. The time in the day's business for a condolence motion is arranged between the party whip and the Leader of the House to facilitate attendance of the deceased member's family and friends.

The House may also adjourn as a mark of respect or extend condolences for people other than members or former members. For example, following the death of Diana, Princess of Wales the House adjourned as a mark of respect²⁵ and on occasions condolences are extended to the families of significant Australians, by way of ministerial statement, with the leaders of all parties speaking.²⁶ The Speaker has also left the Chair for a period of time as a mark of respect.²⁷ Copies of the *Hansard* of the debate on a condolence motion are forwarded to the bereaved by the Clerk.

²² VP 15/09/1998, p. 841; VP 08/04/1997, p. 712. However, the House has suspended standing orders to enable the House to adjourn as a mark of respect at the conclusion of a condolence motion for a former Deputy Premier. VP 26/09/2002, p. 492.

²³ VP 16/04/1996, p. 17.

²⁴ VP 31/03/1998, p. 419; VP 31/03/1998, p. 420. See also PD 13/12/1995, p. 4883 where member paid tribute to a former backbench member in a private member's statement as the customary practice precluded a motion of sympathy.

²⁵ VP 16/09/1997, p. 33.

²⁶ See for example PD 13/12/1995, p. 4887, on the death of Andrew Olle, ABC journalist; PD 05/09/2006, pp. 1379-80, on the death of Steve Irwin; and PD 19/09/2006, p. 1791, on the death of Peter Brock.

²⁷ VP 01/05/1996, p. 84 where the Speaker left the Chair for 35 minutes as a mark of respect for the 35 victims of the Port Arthur shootings.

12.6 Matters of Public Importance

A matter of public importance (MPI) is a vehicle for discussion of a matter, without the House having to make a final judgement by way of resolution. Consequently the matter for debate is usually framed as a very brief, general statement.

Under standing order 110, the Speaker is to determine, at least 30 minutes prior to Question Time on days on which a matter of public importance will be discussed, whether an issue a member wishes to raise through this avenue is a matter of sufficient public importance to take up the time of the House. The criteria the Speaker uses is whether the MPI procedure is the most appropriate vehicle to raise the issue, the timeliness of the issue, and, in choosing between matters, the make-up of the House. If more than one matter is submitted, the Speaker is required to make a determination as to which matter is of the greatest public importance. Under the standing order, the Speaker's decision in these matters cannot be challenged. Speaker's rulings provide that a member may raise their doubts as to whether a matter is one of public importance when the matter is announced in the House, but not once discussion on the matter has commenced.²⁸

Written notice of the matters submitted and the matter selected for discussion, is given to the Premier, the Leader of the Government, the Leader of the Opposition, the responsible Minister in the House, Independent members and members submitting matters. In addition, notices to all members are placed on notice boards at least 30 minutes prior to question time (S.O. 110(3)). It is interesting to note that a subject which has been raised as a matter of public importance can be debated more than once in the same session as no vote is taken, and thus the "previous question" rule does not apply.²⁹

The discussion can take a maximum of 16 minutes³⁰, with 3 members being provided with an opportunity to speak. The member who submitted the matter may speak for up to 5 minutes, the member next speaking may also speak for up to 5 minutes and one other member may speak for 3 minutes. The member who submitted the matter is also entitled to a reply of up to 3 minutes. The House may agree to motions to enable additional members to speak in such discussions. The practice has been for the Speaker to alternate between Government and non-Government members in determining which matter will be discussed.

12.7 Motions of no confidence in a Minister or the Speaker and motions of censure

As noted in section 12.5 motions of no confidence in a Minister or the Speaker and censure are considered business with precedence and time is set aside in the routine of business for business with precedence each sitting day. Under the routine of business adopted as a sessional order, business with precedence is interrupted at 4.00 p.m. for Government Business on Tuesday and Wednesday and at 4.30 p.m. on Thursday for discussion on petitions signed by 10,000 or more persons. The

²⁸ PD 22/09/1992, p. 6137, and pp. 6153-4.

²⁹ A point of order was raised during the announcement of matters of public importance that the matter had already been previously debated and that it was prohibited under the standing orders. The Speaker advised that it is correct that the House cannot debate a motion which is the same in substance as any question already determined by the House but that a matter of public importance is not a motion and as no vote is taken and standing order 164 (now S.O. 154 "same question not to be put") did not apply. PD 13/11/2002, p. 6678.

³⁰ Current times set by sessional order adopted 14 February 2012.

interrupted debate is set down as an order of the day for the next time business with precedence is considered. However, it is not unusual for standing orders to be suspended to enable debate on motions of no confidence or censure motions to have precedence of all other business until the matter is concluded, or at a specified time at the sitting.

Notices of motions of no confidence are called on the day after the notice is given in order for more time for preparation to be available, in view of the gravity of the motion, and notices for censure motions are called on the same day.³¹ These items appear on the Business Paper under the category of "Business with Precedence".

No confidence motions may not be postponed nor amended³² but they may be withdrawn.³³ A motion of no confidence in a Minister or the Speaker may also incorporate other issues. For instance, on one occasion when a motion of no confidence was moved in a Minister for Transport the motion also called for the Auditor-General to review the terms and conditions of the M5 motorway contracts and report to the House by a specified time.³⁴

The standing orders permit the closure to be moved on no confidence or censure motions after at least four members (including certain specified members)³⁵ have spoken in debate. The debate on a no confidence motion may be adjourned, the order of the day for the adjourned debate taking its place in the routine as business with precedence. It is interesting to note that on 10 July 1888, a motion of no confidence was moved against the then Speaker, Mr Young, who saw fit to leave the Chair because the motion was personal to himself. On a point of order being taken that the standing orders did not permit his absence, he resumed the Chair and continued to occupy it during debate. The standing orders were subsequently amended to allow the Speaker to leave the Chair whenever he wished and to have the Chair occupied by the Deputy Speaker.³⁶

Motions of no confidence and censure against members supporting the Government are inevitably negatived on party lines.³⁷ This includes motions of no confidence moved in relation to the Speaker.³⁸ However, on a number of occasions during the 50th Parliament, where a number of non-aligned Independent members in the Legislative Assembly held the balance of power, motions censuring the Premier were resolved in the affirmative.³⁹ During this period the Independent members had an agreement with the Liberal/Coalition Government whereby they agreed to vote with the Government on motions of no confidence except where matters of corruption or maladministration were involved, which reflected upon the conduct of

³¹ In 1992, a member moved that the Member for The Hills, Anthony Packard, attend in his place to respond to a notice of motion already given regarding his conduct. VP 30/04/1992, p. 275.

³² Prior to the adoption of the standing order relating to no confidence motions when such a motion was moved in the House it was permissible to make amendments to the motion. See for example, PD 22/11/1994 p. 5542 and pp. 5598-600.

³³ Notice of motion of no confidence in Minister withdrawn on behalf of Leader of the Opposition, VP 08/04/1997, p. 732.

³⁴ PD 22/11/1994, p. 5542 and pp. 5598-5600.

³⁵ i.e. the mover and Party Leader(s)

³⁶ See VP 06/12/1892, p. 219, where a new standing order allowing the Speaker to leave the Chair and for the Deputy to act in his place without formal communication to the House was adopted by the Legislative Assembly.

³⁷ See for example, VP 08/09/1999, pp. 41-3 and 45-6; VP 06/06/2000, pp. 552-3; VP 28/06/2001, p. 1363; VP 16/10/01, p. 1505; and VP 27/06/2002, p. 359.

³⁸ See VP 04/11/1953, pp. 123 – 125, where a vote of no confidence in Speaker Lamb for amongst other things displaying partiality in favour of Government members was negatived on division. See for further examples, VP 26/02/1912, p. 216; VP 25/11/1912, p. 237; VP 05/09/1957, p. 33; VP 26/09/1962, p. 57.

³⁹ See PD 28/04/1992, pp. 2905-9 and PD 22/09/1994, pp. 3588 and 3627 where votes of censure in the Premier were supported by the Independent members.

the Government as a whole, in which case the Independent members retained the right to move a motion of no confidence.⁴⁰ Independents elected to Parliament in subsequent Parliaments seem to have continued this practice despite them not holding the balance of power.⁴¹

The Speaker has ruled that a censure motion must use the word “censure” at the commencement of the motion otherwise it will not be considered to bring standing orders 114 and 115 into play. In 2001, a member sought leave to amend a notice of motion given that day to reorder paragraphs. In the original motion, the word “censure” did not appear at the commencement of the motion and the Speaker ruled that it was therefore not one of censure for the purposes of standing order 114. The Speaker also ruled that the proposed amendment to reorder the paragraphs would change the scope of the motion, in that it would not constitute a formal censure motion and therefore it was ruled out of order.⁴²

In relation to the censure of the Speaker, precedents of the House indicate that any such motion of censure is required to be framed absolutely and specifically and restricted to matters concerning the Speaker and not concern matters of which the Speaker had no official cognisance,⁴³ or another matter such as a censure of the Government.⁴⁴ The actions of the Speaker cannot be criticised in debate or upon any form of proceeding except a substantive motion, such as a motion of censure or no confidence and, as noted by *May*, any reflection upon the character or action of the Speaker that is not part of a contribution to debate on a substantive motion may be punished as a breach of privilege.⁴⁵

12.8 No confidence in the Government

As confidence of the elected members of the Legislative Assembly in the Executive is the basis of the Executive’s mandate to govern, a vote of no confidence in the Government is a most serious matter. Section 24B *Constitution Act 1902* provides that the Governor may dissolve the Assembly if:

- (a) a motion of no confidence in the Government is passed by the Legislative Assembly (being a motion of which not less than 3 clear days’ notice has been given in the Legislative Assembly);⁴⁶ and
- (b) during the period commencing on the passage of the motion of no confidence and ending 8 clear days thereafter, the Legislative Assembly has not passed a motion of confidence in the then Government.

Section 24B also requires that, after a motion of no confidence is passed, the Legislative Assembly may not be prorogued before the end of that 8-day period and

⁴⁰ See the Memorandum of Understanding Between the Hon. N. F. Greiner MP, Premier for and on behalf of the Liberal/National Party Government (The Government) and Mr John Hatton MP, Ms Clover Moore MP and Dr Peter Macdonald MP (The Independent members), Item A.

⁴¹ See for example, VP 27/06/2002, p. 359; where the Independent members voted with the Government on the motion of no confidence in the Minister for Transport and Minister for Roads which did not involve corruption or maladministration.

⁴² PD 28/02/2001, p. 12067 and VP 28/02/2001, 1057.

⁴³ See ruling of Speaker Meagher, PD 06/10/1915, p. 2372.

⁴⁴ See ruling of Speaker Willis, VP 20/02/1912, p. 200; PD 20/02/1912, pp. 2957-8.

⁴⁵ See *May*, pp. 386-7 and 438-9.

⁴⁶ During the 51st Parliament, a motion of no confidence was brought on before three days had passed through a suspension of standing orders, VP 98/99/1998, pp. 827-30. If this motion had passed, it would not have fulfilled the conditions under s.24B by which the Governor could dissolve the Assembly, although the Governor may have had a discretion to dissolve the House under s.24B(5) *Constitution Act 1902* or to dismiss the Government under ss.35C(2) & 35E(2).

may not be adjourned for a period extending beyond that 8-day period, unless the motion of confidence has been passed.

In accordance with the provisions of the Constitution Act and the gravity of a motion of no confidence in the Government, standing order 111 provides that:

- If a motion is given under section 24B(2) of the Constitution Act, the motion takes precedence of all other business on the sitting day that is three clear days after notice is given (i.e., there must be at least three whole calendar days between the giving of notice and moving the motion);⁴⁷
- The motion may not be postponed nor amended, although it can be withdrawn with the leave of the House;
- The debate cannot be adjourned and certain motions closing debate (the previous question) or controlling the debate (That the member be now heard, or That the member be not further heard) cannot be moved;
- The closure ("That the question be now put") cannot be moved until at least 8 members have spoken; and
- The Speaker will leave the Chair at the time for adjournment each day and the sitting will resume at 10.00 a.m. on each successive business day until the question is determined.

In 2009, an additional standing order (S.O. 111A) was adopted by the House to provide for a motion of no confidence in the Government to be moved that is not pursuant to the provisions of the *Constitution Act 1902*. Such motions are dealt with in the same way that motions of no confidence in a Minister or the Speaker are considered and accordingly are called on the next sitting day at the time for business with precedence.

Rulings of previous Speakers have set the boundaries of debate for no confidence motions in the Government. For instance, Speaker Rozzoli ruled that such a debate included the possibility of attack on any member, who in the performance of the member's duties, contributed to the functions of government but that it did not extend to addressing matters which concerned actions allegedly taken by another member prior to them becoming a member of Parliament nor to attacking another member personally.⁴⁸

12.9 Motions Accorded Priority

A procedure for consideration of motions to be accorded priority (formerly called urgent motions) was first adopted in 1994 and provides that the Speaker call for notices of motions to be accorded priority prior to Question Time at each sitting (S.O. 109). However, in accordance with the routine of business adopted by way of sessional order for the current (55th) Parliament motions accorded priority are only considered on Tuesday and Wednesday. When called upon, the member reads the notice aloud and then hands three written⁴⁹ copies to the Clerk. The Speaker has

⁴⁷ The current standing orders provide for motions of no confidence to be moved that do not conform with the conditions set out in s. 24B of the Constitution Act. The need for this provision was identified when in 1998 the Leader of the Opposition gave notice of a motion of no confidence in the Government and the House then suspended standing orders to allow the motion to be moved on the same day. The issue arose as to whether a motion of no confidence moved within 3 days of the giving of notice is one which could give rise to the Governor's discretion under section 24B of the Act. VP 08/09/98, pp. 827-30.

⁴⁸ PD 01/07/1992, pp. 5206-8.

⁴⁹ The notice of motion for a motion accorded priority must be typed and signed by the member in accordance with the standing orders relating to notices of motion (S.O. 134-5).

ruled that the oral version of the notice for a motion to be accorded priority must be the same as the written version.⁵⁰ In one instance the Speaker ruled that a motion not in accordance with the facts, was out of order and that a paragraph would need to be amended.⁵¹ Debate on the motion takes place at the conclusion of Question Time, so members have some time to prepare for the debate.

If two notices are received (the maximum allowable), members have three minutes each to argue why their motion should be accorded priority.⁵² Sessional orders provide that no points of order regarding the scope or substance of the notice will be entertained during the three minute statement. This restriction was introduced to prevent spurious and time-wasting points of order which allege that a member is debating the substance of their motion rather than establishing priority. It also reflects the evolving practice of the House which is for the Speaker to allow members to refer to the substance of their motion when establishing priority.⁵³

After both members have argued why their motion should be accorded priority, the Speaker puts the question "That the motion of the Member for ... be accorded priority" in the order in which the notices were given. The total time allocated for the debate under the sessional orders is 19 minutes. The sessional orders also provide that no quorum calls are permitted during the time set aside for a motion accorded priority.

Standing orders have been suspended to allow both motions proposed to be debated at the same sitting and for additional speakers to participate in the debate.⁵⁴ Standing and sessional orders have also been suspended to allow debate to be adjourned until a later hour, or the next day⁵⁵ and for a motion to be considered as a matter of public importance.⁵⁶ On one occasion a notice of motion was given which proposed that in view of the serious allegations made against him the Speaker vacate the Chair. The House voted on division for the notice to not proceed.⁵⁷

As with most motions, a motion accorded priority may be amended before it is voted upon by the House (see Chapter 16).⁵⁸ On one occasion, the closure was moved and agreed to in order to allow the consideration of a second separate amendment to the motion.⁵⁹

If the debate on the motion accorded priority is interrupted pursuant to standing orders or sessional orders the motion lapses. However, standing order 109(6) provides that if at the time of interruption a division is in progress that division and any other division(s) to determine the matter is completed.

⁵⁰ In the House, a Minister gave notice of a motion for urgent consideration which differed from the written version that had been lodged with the Clerk. The Speaker ruled it out of order as it was not in the proper form. VP 23/05/2000, 481.

⁵¹ VP 20/06/2000, 601.

⁵² Sessional order adopted VP 14/02/2012, p. 520 has reduced the time given to members to argue why their motion should be accorded priority down from the five minutes provided in standing order 109.

⁵³ See Statement of Speaker Hancock, PD 15/02/2012, p. 8295.

⁵⁴ Both motions debated, VP 21/9/1999, p. 96; VP 26/10/1999, p. 160; VP 31/5/2000, p. 526; VP 04/04/2000, p. 344; VP 23/10/2002, p. 513; Both motions debated with additional speakers, one allowing unlimited speakers, VP 19/10/1999, p. 129; motion for urgent consideration on the collapse of Ansett allowed for an unlimited number of speakers VP 18/09/2001, 1456.

⁵⁵ VP 03/05/2000, p. 440.

⁵⁶ PD 01/03/2005, p. 14322.

⁵⁷ VP 31/10/2000, p. 810.

⁵⁸ PD 04/06/1998, p. 5824.

⁵⁹ PD 25/09/2002, p. 5395.

12.10 Private members' statements

The standing orders (S.O. 108) make provision for private members' statements.

In summary:

- Time is provided each sitting day for the giving of private members' statements.
- Up to 16 private members are permitted to speak for up to five minutes each; Ministers, or parliamentary secretaries in accordance with standing order 366, may reply to each statement for up to two minutes. This has been varied by sessional order to provide for up to 47 private members' statements to be made each sitting week and for replies from Ministers or parliamentary secretaries if they desire to make one to be limited to one minute.
- Divisions in progress when private members' statements are due to be called on are to be completed as are any proceedings under a "guillotine" that are in progress.
- A division on any question or call for a quorum cannot be made during private members' statements.
- Private members' statements may be taken between items of business, by leave, or until certain business is to be conducted as specified by the Minister then in charge of the House.

There are Speakers' rulings to the effect that:

- Matters of general concern may be raised, mostly pertaining to a member's electorate or local matters or matters of concern to a constituent.⁶⁰ However, members generally are permitted to cover wider issues of public policy where a connection with the member's constituency is established.⁶¹
- Attacks on other members are not permissible except by way of substantive motion.⁶²
- Statements reflecting on the character or conduct of persons outside the Parliament are inappropriate.⁶³
- Reflections on the judiciary are not permitted.⁶⁴
- Ministers should not use private members' statements to raise policy issues that fall within their portfolio responsibilities except when relevant in replying to matters raised by private members.⁶⁵
- Similarly, shadow ministers should not raise portfolio policy issues by way of an attack on the Minister under the guise of a private member's statement.⁶⁶
- Private members' statements should not be used to anticipate or continue debate on a matter in the Assembly or the Council, nor should they be used to debate legislation or comment on policy matters.⁶⁷

⁶⁰ PD 20/05/1998, p. 4946; PD 27/05/1998, p. 5320; the member intimated he was about to release a report and the Speaker ruled that such action would be outside the leave of private members' statements, PD 15/10/1998, p. 8475.

⁶¹ PD 09/11/1999, p. 2433; and see PD 14/09/1999, p. 410 where a Minister suggested a member should have notified a Minister to give him an opportunity to be present to respond when an item of general policy was raised; PD 04/09/2001, p. 16297. See also Speaker Murray's statement PD 04/09/2001, pp. 161297 and 161330.

⁶² PD 04/09/2001, p. 16297.

⁶³ PD 02/05/1989, p. 7148; PD 06/05/1997, p. 833; PD 09/11/1999, p. 2433; PD 29/03/2001, p. 12939; PD 04/09/2001, p. 16297.

⁶⁴ PD 04/09/2001, p. 16297.

⁶⁵ PD 04/09/2001, p. 16297.

⁶⁶ PD 17/10/1996, p. 5000; PD 04/09/2001, p. 16297; PD 31/05/2000, p. 6288.

⁶⁷ PD 04/09/2001, p. 16297.

- Members should make a statement rather than develop an argument.⁶⁸
- During the currency of the Address in Reply debate, the matter raised in a private member's statement must be a strictly local one or an urgent matter that cannot be expected to wait until the member has an opportunity to speak to the Address in Reply. The matter should also be one which it is highly unlikely that another member would raise during the Address in Reply.⁶⁹

12.10.1 Community Recognition Statements

In 2013, a sessional order was adopted to provide for members to make 60 second statements of a congratulatory nature or acknowledging the achievements of individuals, groups or organisations in the community. The sessional order provides that the ambit of such statements must:

- Be congratulatory in nature and predominantly of a local or private nature and uncontroversial (e.g. congratulating a particular person or group or people for an achievement);
 - Recognise charity work, retirements or honour awards (e.g. sporting achievements, school awards etc); or
 - Be words of thanks or condolence.
- The sessional orders specify that Community Recognition Statements should not contain:
- Matters of policy;
 - Requests for the Government or the House, or another body to take some form of action or inaction; or
 - Criticisms or negative reflections on any person, including Members, Office Holders, the Government, the Opposition or a third party.

The sessional order provides for Community Recognition Statements to be given on Wednesdays at 1.15 pm and on Thursdays after the conclusion on the discussion on any petition signed by 10,000 or more persons for a total of 15 minutes. Members are not permitted to make consecutive statements. However, a member may make a second community recognition statement if the Chair is satisfied that no other member is seeking the call to give their first community recognition statement.⁷⁰

12.11 Ministerial statements

Standing orders first adopted in 1994 make provision for Ministers to make statements both before and after Question Time and at other times by leave of the House (S.O. 103 and 104). The statements are not time limited and the Leader of the Opposition (or any member deputed) may respond for an equivalent length of time. On occasion, leave has been granted for an additional speaker to address the House (e.g. a third party leader).⁷¹ Prior to this there were no clear rules governing

⁶⁸ PD 24/04/1996, p. 449.

⁶⁹ PD 23/08/1988, pp. 339-40.

⁷⁰ See ruling of Speaker Hancock PD 26/03/2013, galley p. 31

⁷¹ See for example, VP 04/04/2000, p. 322. This practice usually applies when a ministerial statement is used to express condolences.

the giving of ministerial statements in the House and such statements were “vague, imprecise and contain[ed] many anomalies”.⁷²

Speakers’ rulings on ministerial statements provide that they must relate to Government policy and that a Minister in making a ministerial statement may deal with matters of administration so long as they are related to the matter of policy being enunciated⁷³; and no debate is permitted in that the response must traverse only those matters raised by the Minister.⁷⁴ On one occasion a Minister gave a personal explanation concerning a ministerial statement given by him and subsequent events.⁷⁵

12.12 Statutory rules and instruments

Part 6 of the *Interpretation Act 1987* provides for the making, tabling and disallowance of statutory rules and certain other instruments by either House of Parliament. The Act defines “statutory rule” as “(a) a regulation, by-law 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 (b) a rule of court”.

In addition to statutory rules, the tabling and disallowance procedures of Part 6 of the Act also apply to other statutory instruments by virtue of provisions of other Acts.⁷⁶ A full list of disallowable statutory rules and instruments is published by the Parliamentary Counsel’s Office.⁷⁷

Notices of motion for disallowance of an instrument that does not fall within the ambit of an Act providing for the disallowance of that instrument have been ruled out of order.⁷⁸

Section 40(1) of the *Interpretation Act 1987* provides that written notice of the making of a statutory rule shall be laid before each House of Parliament within 14 days after the day on which it is published on the NSW Legislation website.

The House has adopted the practice of the Clerk announcing in the House the receipt from Parliamentary Counsel of notices of the making of statutory instruments, as published in the Government Gazette. This satisfies the tabling provision in the *Interpretation Act 1987*. The tabling of other instruments that might be disallowable but are not published on the NSW Legislation website remain the responsibility of Ministers and their agencies.⁷⁹

⁷² See comments of Speaker Ellis, PD 20/09/1972, p. 834.

⁷³ See ruling of Speaker Ellis, PD 08/11/1966, p. 2204.

⁷⁴ See rulings of Speaker Weaver, PD 11/04/1940, p. 7910; Speaker Maher, PD 15/02/1961, p. 2405; and Speaker Ellis, PD 03/11/1965, p. 1711.

⁷⁵ PD 29/05/2001, p. 13821.

⁷⁶ See for example, *Crown Lands Act 1989* – notifications under section 84 (made by the Minister) of proposed revocations of dedication of land and *Ombudsman Act 1974* – proclamations under section 14 (made by the Governor) amending Schedule 1 in relation to any class or conduct of a public authority.

⁷⁷ See the *Automatic Parliamentary Tabling Scheme* available under the legislation guides section of the Parliamentary Counsel’s website at <http://www.pco.nsw.gov.au/publications.htm>

⁷⁸ See for example, PD 30/06/1992, p. 4862 where a notice of motion for disallowance of a notification given under section 18 of the *Fisheries and Oyster Farms Act 1935* ruled out of order on the grounds that it was not made by the Governor or required to be approved or confirmed by the Governor; and PD 18/11/1993, p. 5702 where the Speaker ruled a motion to disallow a Supreme Court Practice Note out of order as it was not subject to the scrutiny of Parliament.

⁷⁹ See for examples, VP 29/06/1999, p. 202 where the Leader of the House tabled variations to the Shareholders’ Agreement pursuant to the *National Rail Corporation (Agreement) Act 1991*; VP 19/10/1999, p. 124 where the Minister tabled a notice of proposed amended terms and conditions of Sydney Water’s Operating Licence pursuant to the *Sydney Water Act 1994*; and

Section 41 provides that either House may pass a resolution to disallow a statutory rule at any time before the written notice is laid before the House or at any time after its tabling as long as notice to disallow the rule is given within 15 sitting days after the tabling. Day 1 of the 15 days is the first sitting day after the tabling of the statutory rule.⁸⁰ Furthermore, these 15 sitting days apply regardless of whether the Parliament is dissolved or has expired. For instance, if a statutory rule is tabled and there are a further two sitting days before the Parliament is dissolved or expires then a member will have 13 sitting days in the next Parliament in which to give notice of a motion to disallow the rule.

Standing order 116 sets out the procedure for disallowance and standing order 118 constitutes disallowance motions as business with precedence and accordingly such motions are considered at the time for business with precedence in the routine of business. Prior to 1994 any motion to disallow regulations lapsed if it was not moved on the day it had been accorded precedence. However, despite this, on one occasion it was ruled that if there had been no opportunity to move a disallowance motion it does not lapse and is accorded precedence until moved.⁸¹ This is the practice currently followed by the Legislative Assembly today.

Under the current standing orders, the Speaker may put the question when debate has exceeded 30 minutes (S.O. 85). Members, and the mover in reply, may speak for up to 10 minutes each. However, the Speaker can use discretion to alter the speaking time of members.⁸²

Section 41(6) of the Interpretation Act, provides that the House may disallow part of a statutory rule. However, there is no provision or power for the House to amend a statutory rule by adding words or provisions. Under s. 41(4) the effect of a successful disallowance motion is to restore or revive the pre-existing scheme. Furthermore, under s. 8 of the *Subordinate Legislation Act 1989*, a statutory rule the same in substance as one disallowed cannot be published in the Gazette within four months after the date of disallowance, unless the disallowance resolution has been rescinded.

In sitting periods the Legislative Assembly Procedure Office produces a weekly Statutory Rules and Instruments Paper which shows all the regulations which are subject to disallowance, their Government Gazette reference and the time period within which a motion for disallowance may be moved. Out of sitting periods, this paper is published monthly (S.O. 32).

12.12.1 The effect of sittings extending over more than one day on disallowance motions

Section 18 of the *Interpretation Act 1987* defines a reference to a sitting day, in relation to a House of Parliament, as "a day on which the House actually sits" and a

VP 26/10/1999, p. 158 where the Minister tabled proposed revocations of dedications of Crown land pursuant to the *Crown Lands Act 1989*.

⁸⁰ House agreed to postpone consideration of a disallowance motion. VP 20/10/98, pp. 958 and 959

⁸¹ See ruling of Speaker Cameron, PD 01/10/1975, p. 1318.

⁸² During debate on a motion to disallow a regulation (for which 1 hour was normally allocated – now 30 minutes), a member sought the call when debate had been under way for 45 minutes. The Deputy Speaker reminded the member that the mover of the motion may wish to speak in reply before the conclusion of debate. Another member sought the call and the Deputy Speaker warned the member that, if he spoke, there would be no opportunity for the mover to speak in reply, unless the Chair exercised his discretion. The Deputy Speaker limited the member's speaking time to five minutes. PD 24/10/2001, p. 17934

reference to a number of sitting days as "a reference to that number of sitting days, regardless of whether those days occur within the same or within different sessions of Parliament". This includes sitting days within different Parliaments.

Notwithstanding the definition in the *Interpretation Act 1987* it is the practice of the House to consider a sitting as the period between the opening of the House by the Speaker and its adjournment pursuant to a motion or order of the House. A sitting that continues after midnight is therefore only one sitting day. Similarly a sitting that is suspended by the Speaker leaving the Chair and resumed on a later day or days is considered to be one sitting day.

It would be an abrogation of the rights of the House and its members to consider each calendar day that the House meets following the suspension and resumption of a single sitting, a separate sitting day for the purposes of, for example, notices of motions for the disallowance of statutory instruments which are required to be given within 15 sitting days of the tabling of the instrument. Members are required by standing order 97 to give notices of motions in accordance with the routine of business. Notices of motions for disallowance, which is business accorded precedence, are to be given prior to Question Time at 2.15 p.m. each sitting day. On the resumption of a suspended sitting the business of the House is resumed at the point where the sitting was suspended and members do not get a further opportunity to give notices of motions.

12.12.2 Other documents that may be laid upon the Table pursuant to legislation

Provision is made in various pieces of legislation for certain documents to be tabled in the House. For example, section 19 of the *Forestry Act 1916* provides that the Governor may lay upon the Table of each House proposed revocations or alterations of dedications under the Act and, if both Houses resolve that the proposals should be carried out, the Governor may Gazette the proposals. When the House has wished to amend such a proposal, it has sent a message to the Governor requesting that he or she submit an amended proposal for approval.⁸³

In some instances statutory provisions specifically require documents to be tabled. For example, variations to the Shareholders' Agreement must be tabled pursuant to section 8(2) and 8(4) of the *National Rail Corporation (Agreement) Act 1991*. The Act provides that amendments to the agreement must be tabled in each State Parliament party to the agreement and the Commonwealth Parliament within 15 sittings days. Amendments to the agreement are subject to disallowance in any Parliament within 15 sitting days of being tabled.⁸⁴

⁸³ VP 18/06/1996, p. 280; VP 20/06/1996, p. 314-5; VP 27/06/1996, p. 333.

⁸⁴ VP 29/06/1999, p. 202.

Chapter 13 Petitions

13.1 History of petitions

A petition is an ancient right by which citizens can have their grievances brought to the notice of the Parliament by a member on their behalf. The petition is a direct means by which any citizen or group of citizens can place concerns before the Parliament. According to *May* public petitions in the House of Commons “may pray for an alteration of the general law or the reconsideration of a general administrative decision, and they may also pray for redress of local or personal grievances.”¹

The petition dates back to the reign of King Edward I in the thirteenth century. Some of the earliest forms of legislation were merely petitions which had been agreed to by the King. Thus, the practice of petitioning the Crown predates early parliament. In fact the origins of Parliament can be traced back to those meetings of the King’s Council which considered petitions.

In modern times the importance of the petition has been diminished by other parliamentary forms such as questions, and by bodies such as the New South Wales Ombudsman, the Administrative Decisions Tribunal and the Independent Commission Against Corruption, which can often deal with individual grievances by more direct non-public action. Public grievances are often effectively publicised in the media. However, petitions are still seen by many as an important and direct means of placing their concerns before the Parliament.

In the early years of the New South Wales Parliament, petitions were seen as an important means for the public to air their concerns and desire for social change and to request construction of major infrastructure such as main roads, bridges and schools. For example, in 1896 a petition was received by the House which requested a bridge to be built from Sydney to North Sydney.

The number of petitions presented to the Legislative Assembly continued to increase after 1970. From the 1930s up until the start of the 1970s the average number of petitions presented annually to the House ranged between 3 and 9. During the 1990s the yearly average of petitions presented was 1,055. In the early 2000s this rose to over 2,000 petitions being presented each year, often with only a few signatures each. Changes to the standing orders requiring a ministerial response to petitions signed by 500 or more persons and the adoption of a sessional order which enables discussion on any petition signed by 10,000 or more persons has reduced the average number of petitions tabled in recent years to less than 500 per year.

13.2 Rules and practice

Each sitting day in the House, the Clerk announces the receipt of petitions from members. Petitions presented to the Legislative Assembly are required by standing orders 119-125, and the practice of the House, to conform with the following principles:

¹ *May*, p. 932.

- Be addressed to the Speaker and members of the Legislative Assembly in Parliament assembled.
- Be clearly written, typed or printed, not have anything attached to it, and not contain any alterations (unless for a private bill). (S.O. 121(1), 122(1)).²
- State the facts which the petitioners wish to bring to the notice of the House (S.O. 121(3)).
- Conclude with a request that the House do, or do not do, something or take some course of action.
- Contain at least one signature (S.O. 121(5)).
- Contain the name, address and original signature of each petitioner (S.O. 121(4)).
- Not make reference to debate in the House (S.O. 122(2)).
- Members must sign the front sheet (S.O. 123(3)).
- It is the responsibility of the member to ensure that the petition is in order (S.O. 123(2)).
- A copy of every petition received is referred to the Minister responsible for the subject contained in the petition and a copy of that letter is sent to the member presenting the petition (S.O. 125).
- Petitions must be lodged with the Clerk by 12 noon on the day it is to be reported (S.O. 119). Petitions received after this time will be presented the following sitting day.
- The member presenting the petition cannot be a signatory. (S.O. 122(3)).
- Must be in the English language or be accompanied by an English translation, certified to be correct by the member who lodges it. (S.O. 121(2)).
- Petitions are only accepted if they have the prayer at the top of all its sheets.
- Ministers are required to lodge a response with the Clerk within 35 calendar days of a petition being received by the House if that petition has been signed by 500 or more persons. The receipt of the response is reported to the House, published on the Legislative Assembly page of the Parliament's website and a copy of the response is sent to the member who lodged the petition.
- A petition that has been signed by 10,000 or more persons is set down for discussion by the House in accordance with sessional orders.

In the past a petition could not directly or indirectly request a grant of public money. However, this prohibition was removed from the standing orders in September 1996.³

Standing order 123 sets out the procedure for presenting a petition.⁴ Under the standing order the Clerk announces to the House that petitions have been received and that the terms of petitions presented will be printed in *Hansard* and in the *Votes and Proceedings*.

² Petition ruled out of order for containing an alteration, PD 12/06/1996, p. 2907. This ruling was given following attempts to censure the member who had altered the petition, see PD 05/06/1996, pp. 2577-87.

³ PD 25/09/1996, p. 4586.

⁴ The procedure was first adopted as a sessional order in November 2005 VP 15/11/2005, p. 1742. Prior to the adoption of this sessional order the Clerk announced the petitions received, indicating in the case of each petition the member who lodged it and the subject matter of the petition.

Standing Order 123(7) provides that no discussion is allowed upon the subject matter of petitions. However, a sessional order has been adopted for the current session that provides for a discussion on the subject matter of any petition that has been signed by 10,000 or more persons. Under the sessional order any petition that has been signed by 10,000 or more persons is automatically set down as an order of the day for discussion on a future day.

The discussion takes place the following Thursday at 4.30 pm and any further petition received before the first order of the day is disposed of is set down on succeeding Thursdays in the order in which they are presented. The time limit for the discussion is 16 minutes with the first two members speaking allocated 5 minutes each and two other members 3 minutes each. The member who spoke first is not entitled to a reply under the procedure as there is no question before the House. If a member does not seek the call when the order of the day is called on the discussion lapses. The order of the day cannot be amended and at the conclusion of the discussion no question is put.

Every petition presented is deemed to be received by the House unless a motion, moved on the next sitting day, is agreed to, without debate or amendment, that a particular petition be not received (S.O. 124).

Only on very rare occasions has the House refused to receive a petition.⁵ There is however, no requirement for a member to present a petition to the House when requested to do so. This was established in *Chaffers v Goldsmid*⁶ where it was held that no action at common law lay against a Member of the House of Commons who refused to present a petition forwarded to him by a constituent.⁷

Members are able to petition the Parliament. For example, in 1998 two members of the Legislative Assembly petitioned the Legislative Council praying that, in view of the absence of any clear procedure or protocol for the removal of a judicial officer under the Constitution Act, the Legislative Council agree to a conference of representatives of all parties and Independents of both Houses being held on Thursday, 25 June 1998, to decide on the process by which the Houses will consider the report of the Conduct Division of the Supreme Court concerning complaints against Justice Vince Bruce, and that the Legislative Council refrain from debating or voting on any motion regarding the report until after the conference has reported to both Houses.⁸ No motion was moved in the Legislative Council to appoint a conference of representatives from both Houses. However, Justice Bruce was ordered to appear before the Legislative Council to show cause why he should not be removed from office.⁹ A motion was subsequently moved in the Legislative Council to remove the judge. However, the motion was negatived.¹⁰ For further information on the removal of judicial officers see Chapter 33 of Part One.

13.2.1 Electronic petitions

Given the existing requirements for “signatures” as provided for in the standing

⁵ Disrespectful, VP 08/07/1863, p. 75; unjustifiable interference (calling for prohibition of alcohol on precincts, VP 27/11/1890, p. 469; calling for legalised abortion and free birth control and sex education centres, VP 20/04/1971, p. 23.

⁶ (1894) 1 QB 186.

⁷ See *May*, p. 103.

⁸ Minutes of the Proceedings of the Legislative Council 24/06/1998, p. 580; Legislative Council PD 24/06/1998, p. 6319.

⁹ Legislative Council PD 27/05/1998, pp. 5207-8.

¹⁰ Minutes of the Proceedings of the Legislative Council, 25/05/2000, p. 601-2.

orders the Legislative Assembly does not accept petitions which have been received electronically.

13.2.2 Petitions for the production of the proceedings of the House in court

Until recently, petitions were received by the House requesting the production of proceedings of the Legislative Assembly in court or a Special Commission of Inquiry. In such cases it was necessary for the House to agree to a resolution granting the prayer of the petition before any proceedings could be used in court.¹¹

It is now accepted that the proceedings of Parliament may be tendered as evidence in court and other places out of Parliament for the purpose of establishing facts so long as no questioning or impeaching of the proceedings of Parliament occurs.¹² Accordingly, there is no need for the House to grant permission for the proceedings to be used in court for such purposes. In addition, it has been recognised in statute that the proceedings of Parliament can be used in courts for specific purposes. For example, section 34 of the *Interpretation Act 1987* provides that parliamentary proceedings, including *Hansard*, reports from committees and the *Votes and Proceedings* can be used in the interpretation of Acts and statutory rules.

13.2.3 Petitions for leave to appear at the Bar of the House

On occasion, the House has received petitions requesting that leave be granted to enable a particular person or counsel to be heard at the Bar of the House. These types of petitions request leave to appear to enable persons to speak for¹³ or against¹⁴ bills currently before the House or in relation to individual grievances against the Government.¹⁵ As noted, individual grievances in modern times tend to be dealt with by agencies such as the Office of the Ombudsman and the Administrative Decisions Tribunal and as such petitions requesting leave to appear in relation to individual grievances are no longer submitted to the House – the last one being presented on 23 October 1929.

Petitions requesting a person to attend at the Bar of the House must be agreed to by the House. Leave to appear at the Bar of the House has been granted following the receipt of a petition on 17 occasions. The majority have been in relation to legislation before the House with leave being granted in relation to individual grievances on only two occasions.¹⁶ A former member who had been judged guilty of conduct unbecoming a member has been granted leave to appear before the Bar of the House¹⁷ and counsel has been granted leave to appear in relation to a report of a select committee.¹⁸ The last occasion on which leave was granted to appear at the Bar of the House was in May 1931 in relation to the Administration of Justice Bill, when the House heard from counsel of both the Bar Council of New South Wales and the Incorporated Law Institute of New South Wales.¹⁹

¹¹ For examples, see VP 14/10/1982, pp. 95-6; VP 03/11/1982, pp. 120-2; VP 24/05/1984, pp. 140-2; and VP 18/04/1985, pp. 370 and 372.

¹² See section 3.4 of Part Two for further discussion on the admissibility of parliamentary proceedings in court.

¹³ See for example, VP 05/03/1878, p. 135.

¹⁴ See for example, VP 19/03/1874, p. 350; VP 05/03/1879, p. 319.

¹⁵ See for examples: VP 23/11/1897, p. 435; VP 04/12/1902, p. 532; VP 15/09/1920, p. 47.

¹⁶ VP 20/04/1886, p. 193; and VP 03/11/1920, p. 119.

¹⁷ VP 03/04/1883, p. 186.

¹⁸ See VP 30/08/1882, p. 17 (Petition Presented); VP 01/09/1882, p. 31 (Prayer granted); and VP 12/09/1882, p. 55 (Counsel heard).

¹⁹ VP 13/05/1931, p. 193 (Petitions presented); and VP 19/05/1931, p. 198 (Leave granted to both petitioners to appear).

The Legislative Assembly continued to receive requests for leave to be given to appear at the Bar of the House every few years up until the 1960s but have not received any since that time.²⁰

13.3 Petitions not in accordance with the standing orders

Petitions which are not in accordance with the standing orders have been referred to as "representations" and some have been presented, by leave, by the Leader of the House.²¹ Members may also refer to petitions which are out of order in private members' statements and, with the leave of the House, can place such petitions on the Table for the information of members. However, most petitions which do not conform to the standing orders are returned to the member for forwarding to the relevant Minister by letter.

13.4 Petition formats

The House will accept petitions from members in both the modern and more traditional formats.

13.4.1 Modern format

To the Honourable the Speaker and Members of the Legislative Assembly of New South Wales. *(The preamble)*

The Petition of..... *(The petitioners - identify here who the petitioners are, in general terms e.g., citizens of New South Wales or residents of the State of New South Wales or residents of [name of town, region or electorate])*

Brings to the attention of the House..... *(The grievance - insert here the petitioners' grievance or the circumstances of the matter)*

The undersigned petitioners therefore ask the Legislative Assembly to..... *(The request - outlining the action that the House should, or should not, take)*

(Signatures) (Names) (Addresses)

Note: The request of the petition (the fourth paragraph) must be repeated at the head of each sheet of signatures.

13.4.2 Traditional format

To the Honourable the Speaker and Members of the Legislative Assembly of New South Wales in Parliament assembled. *(The preamble)*

The Petition of..... *(The petitioners - identify here who the petitioners are, in general terms, e.g., citizens of New South Wales or residents of the State of New South Wales or residents of [name of town, region or electorate])*

Respectfully sheweth..... *(The grievance - insert here the petitioners' grievance or the circumstances of the matter)*

Your Petitioners therefore humbly pray that your Honourable House *(The request - outlining the action that the House should, or should not, take)*

And your Petitioners, as in duty bound, will ever pray.

(Signatures) (Names) (Addresses)

Note: The request of the petition (the fourth paragraph) must be repeated at the head of each sheet of signatures.

²⁰ A petition requesting leave for Counsel to appear at the Bar of the House in relation to the *Judicial Officers Bill* was received by the Legislative Council in 1986. However, the Council did not grant leave, see Legislative Council Minutes 28/10/1986, p. 403 and 29/10/1986, p. 415.

²¹ VP 09/09/1999, p. 56.

Under review

Chapter 14 Questions Seeking Information

The standing orders permit questions seeking information to be asked by any member¹:

- To Ministers relating to public affairs, matters under the Minister's administration and proceedings in the House for which they have carriage (S.O. 126).
- To the chair of a committee, relating to the affairs of the committee (S.O. 127).²

There is no provision in the standing orders for questions (either during Question Time or written) to be put to the Speaker. The proper course is for the member to raise the matter with the Speaker in the Speaker's chambers.³ Despite rulings by recent Speakers of the House to this effect, there are early precedents of questions being put to the Speaker, with Speaker Meagher ruling in 1916 that questions could be put to the Speaker in the House so long as they are confined to points of order or proceedings arising in the House.⁴

Questions asked during question time about Ministers and whole of Government matters are asked of the Premier, who at times has also answered questions on behalf of Ministers.⁵ Ministers are also able to answer questions on behalf of another Minister.⁶

The rules which should be followed by members in asking questions are set out in standing order 128 and have been elaborated on by Speakers' rulings:

- Questions addressed to a Minister should relate to public affairs with which the Minister is officially connected, or to any matter of administration for which the Minister is responsible.
- Questions relating to proceedings pending in Parliament should be addressed to the Leader of the House.
- Questions relating to the affairs of the committee may be addressed to a member who is the chair of the committee.
- The purpose of a question is to obtain information, not to supply it; questions, therefore, should be brief and ask directly for the information sought.⁷

¹ Speaker ruled that members could ask questions prior to making their inaugural speeches, PD 12/05/1999, p. 127.

² For example, see PD 10/11/1993 pp. 5081-2 where the chair of a committee was asked a question during Question Time concerning the unauthorised publication of a committee's draft report. Standing orders were amended to remove provision for any member being asked a question on any business of the House for which they had carriage, VP 25/09/1996, p. 433. Question to Chair of Public Accounts Committee ruled to be in order, PD 31/10/2000, p. 9356. The Speaker ruled that questions to chairs must be on business that is before the committee PD 19/06/2001, p. 14767.

³ PD 26/11/1997, p. 2718.

⁴ PD 17/08/1916, pp. 924-5; VP 1916, p. 57.

⁵ PD 06/05/1997, p. 8050; PD 15/09/1999, p. 527; PD 16/09/1999, p. 672.

⁶ PD 06/05/1997, p. 8050; PD 17/06/1998, p. 6027.

⁷ Speakers' rulings have indicated that prefacing questions with the words "Are you aware..." is tantamount to giving information: Murray, PD 27/10/1994, p. 4864; Ellis, PD 12/08/1971, p. 294; Kelly, PD 04/11/1976, p. 2420; Kelly, PD 03/04/1979, p. 3554; Kelly, PD 22/11/1979, p. 3568; Rozzoli, PD 25/05/1988, p. 520.

- Questions should not be based on newspaper reports unless the member asking the question can vouch for the accuracy of the press reports.⁸
- Questions requiring information set forth in accessible documents such as statutes, reports and printed speeches are not permissible.⁹ However, there appears to be a tendency for Speakers to allow questions where the information would require research or where the information is just becoming available.¹⁰
- Questions concerning the conduct of members have been ruled out of order, even when no member is specifically referred to, as such questions reflect on all members and do no credit to them.¹¹

Questions should not contain:

- (1) statements of facts¹² or names of persons unless they are strictly necessary to render the question intelligible and can be authenticated.
- (2) argument or expression of opinion.¹³
- (3) inference.
- (4) imputation.¹⁴
- (5) epithets.¹⁵
- (6) ironical¹⁶ or offensive expressions or
- (7) hypothetical matter.¹⁷

Questions should not ask for:

- (1) an expression of opinion.
- (2) legal opinion.¹⁸
- (3) an announcement of Government policy.¹⁹
- (4) confirmation of rumour²⁰ or media reports.

⁸ See considered ruling given by Speaker Ellis where he warned all members that should they assure the House that material reported is true and accurate when in fact it is not the case the member may be held in contempt by the House, PD 01/11/1967, p. 2697.

⁹ See ruling of Speaker Ellis, PD 12/10/1967, p. 2361.

¹⁰ See for example, PD 25/03/1975, pp. 5184-5 where Acting Speaker Brown permitted a question on a judgment which had just been handed down because it was unlikely to be available at the time.

¹¹ For example, see PD 08/08/2000, pp. 7943 and 7945. However, Ministers have made personal attacks on other members when answering questions and the Speaker has ruled them to be in order noting that if a member referred to in an answer wishes to take a point of order in relation to the matter it is for that member to do so, PD 29/04/1992, pp. 3011 and 3014.

¹² See PD 03/09/1992, p. 5477 where the Speaker warned members that questions which gave facts rather than seeking information would be ruled out of order. The particular question was not ruled out of order on this occasion but the Speaker stated he would like members to take this as a precedent on which to frame questions.

¹³ See ruling of Speaker Ellis, PD 14/10/1969, p. 1579.

¹⁴ Speaker ruled a question out of order because of the manner in which it was asked, PD 02/06/1996, p. 820; and on another occasion the Attorney General asked a member to withdraw the imputation that he was not performing his duty to which the Speaker ruled that although the question contained an imputation, the words used were not offensive and that the Attorney General would have adequate time to refute any imputations during his answer, PD 20/03/1992, p. 1636.

¹⁵ See ruling of Speaker Ellis, PD 12/03/1970, p. 4211 where a part of the question was not allowed as it used intemperate language.

¹⁶ Whilst questions with ironical expressions are discouraged the test is whether the question truly sought information or pressed for action. For instance, a question on whether a referendum would be held on "April Fool's Day" was allowed because the member wanted to know for when it was planned. PD 09/11/1966, p. 2289.

¹⁷ VP 02/06/1998, p. 668.

¹⁸ On one occasion a point of order was raised that a question asked in the House had asked for a legal opinion to which the Speaker ruled that although the question asked whether a matter had legal validity in NSW, the question was capable of being answered factually and in simple terms and therefore was in order, PD 27/11/1992, p. 10446. On another occasion, a question which asked whether firms tendering identically could be charged with restrictive trade practices was allowed because the question asked what action the Government intended to take, PD 28/09/1965, p. 946.

¹⁹ Announcement of a policy and a change in the implementation of a policy distinguished, PD 20/05/1997, p. 8828; noting a change in existing legislation was not an announcement of policy, PD 20/05/1997, p. 8830.

Amendments to the standing orders in 2009 removed the prohibition on asking a question that anticipated debate on business that was to come before the House on the basis that this was an antiquated rule and there was no guarantee as to when business on the Business Paper might come before the House to be debated. Accordingly, it is in order for a question to be asked that seeks information about business that is proposed to come before the House, such as bills that have been given notice of.

Questions substantially the same as a question on the Questions and Answers Paper are not allowed to be asked during Question Time and questions which are badly framed may be ruled out of order.²¹ Furthermore, Speakers' rulings have indicated that questions are not in order if the answers to any such question is contained in public documents or documents which could be considered to be of a public nature²² or if they renew or repeat in substance questions already answered or refused.²³ However, Speakers have also ruled that a question similar in nature to an earlier question may be asked so long as it does not renew or repeat in substance questions already answered or declined to be answered.²⁴

It is not in order to ask whether certain things, such as statements made in a newspaper, are true, but attention may be drawn to such statements if the member who puts the question makes himself responsible for their accuracy. It is also in order to ask questions which reflect on persons outside the Chamber.²⁵

All questions, whether they be written or asked in Question Time, should be framed in interrogative forms "what", "where", "will", "why" and "when". The use of words such as, 'Is it a fact....' suggests that the question is seeking an opinion or giving information. In fact, time and again Speakers have said that "...the true and only valid purpose of a question is to seek factual information...or to press for action."²⁶

Answers to questions must be relevant (S.O. 129) and in answering a member must not enter into debate.²⁷

14.1 Question Time

Within the routine of business specified in standing order 97, and in the sessional order adopted for the current Parliament, Question Time occurs on Tuesday, Wednesday and Thursday at approximately 2.15 p.m.²⁸ On some occasions when the House has resumed a sitting which was suspended on a previous day or days standing and sessional orders have been suspended to allow additional Question

²⁰ PD 15/10/1969, p. 1638 and PD 27/08/1974, p. 647.

²¹ PD 15/11/1994, p. 4999.

²² PD 08/09/1971, p. 842.

²³ See ruling of Speaker Ellis, PD 23/09/1971, p. 1413 and ruling of Speaker Kelly, PD 24/11/1977, p. 10247. See also rulings by Speaker Rozzoli PD 24/06/1992, pp. 4110-1 and 15/10/1992, p. 7153.

²⁴ PD 24/06/1992, pp. 4110-1.

²⁵ See PD 27/10/1993 where the Speaker ruled that there was no bar to asking questions which reflect on a person outside the Chamber.

²⁶ See ruling of Speaker Ellis, PD 27/10/1970, p. 6917.

²⁷ See rulings of Speaker Ellis, PD 20/11/1968, p. 2626 and PD 21/10/1971, p. 2255; Speaker Cameron, PD 04/09/1975, p. 803 and PD 15/10/1975, p. 1857; and Speaker Rozzoli, PD 18/05/1988, p. 229.

²⁸ On one occasion standing and sessional orders were suspended to allow the routine of business normally occurring at 2.15 p.m. on Tuesday to commence at 10.00 a.m. on Tuesday 6 November 2001 due to the running of the Melbourne Cup in the normal period for Question Time.

Time periods.²⁹ The Speaker has also delayed Question Time in the House, due to the absence of Ministers³⁰ and members supporting the Government, by leaving the Chair until the ringing of one long bell.

The procedure for Question Time is set out in standing order 131. The duration of questions is limited to 45 minutes or the answering of 10 questions, whichever is the later. This was first introduced in 1992 following concerns about Ministers using up the time available for questions by making lengthy responses. A ruling of Speaker Ellis in 1966 indicated that any attempt to deprive private members of the opportunity to ask questions during Question Time by asking lengthy and involved questions and thereby limiting the time available to ask questions would not be tolerated. Speaker Ellis also advised that such questions would be placed on the Questions and Answers Paper unless the Minister to whom the question is directed advises the Chair that a brief answer can be provided or that an answer will be provided by way of a ministerial statement. In such cases the Minister would be given an opportunity to make the statement at the conclusion of Question Time.³¹

In November 2010, an amendment was made to standing order 131 to provide that an answer to a question must not exceed five minutes. However, at the conclusion of the Minister's answer the member who asked the question may, at the discretion of the Speaker, seek additional information from the Minister. The Minister's response on the additional information must not exceed two minutes. A request for additional information in accordance with standing order 131 is not a supplementary question.³²

The amendment to the standing order also provides the Speaker with discretion to order that the timing clock be paused during a Minister's answer to a question.³³ This provision was included in the standing order to ensure that the five minutes a Minister has to answer a question is not eroded by the taking of numerous points of order or other disruptions.³⁴

The Leader of the Opposition is entitled under standing order 131 to be called first by the Speaker³⁵ and the Speaker traditionally extends a high degree of latitude to the Leader of the Opposition when asking their question and may in exceptional cases allow questions normally out of order.³⁶

The Speaker has asked members to rephrase questions with two distinct parts, although two part questions related to the same matter have been allowed.³⁷ Parts of questions have also been ruled out of order for asking for an opinion rather than seeking factual information.³⁸

²⁹ VP 26/11/1997, p. 351. On 24 and 25 November 1999 Question Time was held although both days were continuations of the sitting which began on 18 November 1999, VP 18/11/1999 pp. 271 and 291.

³⁰ PD 14/12/1993, p. 6035 where the Speaker left the Chair for 15 minutes to ensure more Ministers were present in the Chamber; and VP 19/06/2001, p. 1277 where the Speaker, having received advice from the Leader of the House that some members were having difficulty attending in Parliament due to a trade union blockade, left the Chair for approximately 3 hours.

³¹ PD 03/03/1966, p. 3826.

³² See ruling of Speaker Hancock, PD 26/05/2011, p. 1188.

³³ VP 11/11/2010, pp 2467-8

³⁴ See PD 2/12/2010, p 28905 when the Speaker ordered the clock be paused during a Minister's answer when a point of order was taken.

³⁵ Person representing the Leader of the Opposition failed to receive the call as they did not seek the call, PD 20/11/1996, p. 6302; PD 18/06/1998, p. 6157; PD 17/09/1998, p. 7644.

³⁶ See comments by Speaker Murray PD 18/06/1998, p. 6157 and PD 28/10/1998, p. 9199.

³⁷ PD 15/04/1997, p. 7505; PD 09/04/1997, p. 7330; PD 21/08/1968, p. 419.

³⁸ PD 13/10/1992, p. 6652.

One supplementary question (the answer to which counts towards the 10 answers) may be asked each Question Time. A supplementary question must be asked by the member asking the original question, provided that it:

- (1) clearly arises from the Minister's answer;³⁹
- (2) only relates to a question asked by the same member at the same Question Time;
- (3) is asked immediately following the original question; and
- (4) must not be addressed to another Minister.⁴⁰

The Speaker has also ruled that if a supplementary question has been ruled out of order the member is prevented from asking a further supplementary question.⁴¹

Ministers may at the end of Question Time provide additional information to an answer already given at that day or a previous sitting (S.O. 131(5)).

According to *May* the purpose of a question is to obtain information or press for action.⁴² However, as has been noted by other parliamentary authorities, given the media coverage of Question Time in the House it is also a period of political opportunism.⁴³ Question Time in the Legislative Assembly provides both Opposition and Government members an opportunity to ask questions of Ministers and committee chairs. Questions asked by members supporting the Government tend to be pre-arranged⁴⁴ and give Ministers opportunities for announcing good news or making statements. Such questions are referred to as "Dorothy Dixers".⁴⁵ Speakers have commented that it is not for the Chair to judge whether questions are so-called "Dorothy Dixers".⁴⁶ However, on one occasion, the Speaker expressed doubts about the propriety of a question and its reply arguing that all the House had been doing was carrying on a debate about a bill which had already been completed. The Speaker advised the House that he would in future not allow questions of that nature if they referred to debates of the same session.⁴⁷

It should be noted that the practice, in many of the provincial legislatures in Canada, is that Government Members rarely ask questions in the House during the official question period which means that the Official Opposition is entitled to the first question and other parties in Opposition later questions. This tends to be because there are a number of parties in Opposition, unlike in New South Wales where the two-party preferred system is ingrained. For example, in the Legislative Assembly of New Brunswick, the members supporting the Government do not usually ask questions during the official question period given that such questions will be seen as staged questions and answers. Similarly, in the Legislative Assembly for Prince Edward Island the Speaker exercises his discretion and allocates the first 30 minutes of the official question period and usually the remaining 10 to the parties in

³⁹ PD 28/05/1998, p. 5423; PD 04/06/1998, p. 5821; 24/09/1998, p. 8033.

⁴⁰ PD 24/06/1992, pp. 4110-1.

⁴¹ PD 08/04/1992, p. 2399.

⁴² *May*, p. 345.

⁴³ *House of Representatives Practice*, 5th edition, p. 527.

⁴⁴ For example, see PD 13/05/1993, pp. 2071 and 2079 where a Minister noted that he had prior notice of a question.

⁴⁵ The name itself derives from that of a newspaper columnist who published answers to questions that were presented as coming from readers, but were actually written by the columnist herself. See the Collins Australian Dictionary of Political Terms, 1994 p. 60.

⁴⁶ PD 29/11/1967, p. 3855.

⁴⁷ PD 24/10/1967, p. 2398.

Opposition. In the National Assembly of Quebec, the Official Opposition is provided with the opportunity to ask the majority of questions with Government members limited to asking two questions every three sittings and Independent members to asking two every five sittings.⁴⁸

14.2 Written Questions

Written questions are published in the Questions and Answers Paper and the same rules are applicable as to questions asked during Question Time. Under the standing orders questions must be handed in writing⁴⁹ to a Clerk at the Table or lodged in the Table Office by 12 noon.

The procedure for written questions is set out in standing order 132:

- Members are able to lodge three questions per sitting day (the Leader of the Opposition four) which are cumulative over one sitting week. This has been slightly varied by sessional orders to provide that member are able to lodge 9 questions per sitting week (the Leader of the Opposition 12) in order to encourage members not to lodge all questions towards the end of the week and assist with the publication of the Questions and Answers Paper.⁵⁰ Standing and sessional orders were once suspended to allow members to submit additional questions on notice during a single sitting which extended over several days.⁵¹
- Ministers must answer questions within 35 calendar days or be subjected to explaining their failure to answer to the House. However, on a number of occasions the Speaker has not called the Minister in explanation due to the fact that the answer was unintentionally late⁵² or because answers were lodged late in the sitting.⁵³ There is, however, no requirement under the standing orders for a chair of a committee who has been asked a written question to answer within a certain timeframe or even to answer the question at all. However, invariably questions are answered because if a question is left unanswered it will continue to draw attention by appearing on the Questions and Answers Paper each day.
- A question containing argument, unbecoming expressions or otherwise not conforming with the practice of the House may under the authority of the Speaker, be amended by the Clerk or divided if it contains matters that are not relevant to each other. The Speaker can also direct that a question not be printed or be removed from the Questions and Answer Paper.
- Ministers are required to lodge a signed hard copy of the answer and provide an electronic copy. On sitting days answers that are due must be submitted by 12.00 noon in order to be published in the next sitting day's paper. Any answers lodged after this time will be published at a subsequent time.

⁴⁸ Information collected for a survey in 2003 on oral questions in the Canadian Provincial Legislatures for the Canadian Association of Clerks-at-the-Table.

⁴⁹ Speaker's ruling that questions on notice must be lodged in writing, PD 31/3/1993, p. 1038.

⁵⁰ VP 3/5/2011, p. 43

⁵¹ VP 18/11/1999, p. 296.

⁵² VP 06/12/1996, p. 483; after prorogation, PD16/04/1996, p. 62.

⁵³ Received late during adjournment, PD 19/09/1995, p. 1061.

On a number of occasions members have argued that not receiving an answer to a written question, either in full or in part, is a matter constituting a breach of privilege. However, given that the standing orders do not restrict the way in which Ministers answer questions, no privilege is involved.⁵⁴ In fact, in one instance the Speaker ruled a notice of motion out of order on the grounds that it claimed that the Minister had not answered a question properly. The Speaker also stated that in future he would rule out of order similarly worded notices and noted that there were alternative avenues available to members to express their dissatisfaction with Ministers replies.⁵⁵

A member must seek the leave of the House to withdraw a written question. The appropriate time for a member to seek leave is during the placing or disposal of business after each category of business has been called over.⁵⁶ There is no provision for a member to seek leave to withdraw a written question of another member.⁵⁷ Furthermore, in practice Government members rarely submit written questions.

When the House prorogues all questions unanswered lapse. Members are not able to carry over unanswered questions from one session to the next. However, it is usual for the majority of questions to be answered before a prorogation due to the requirement for Ministers to answer written questions within 35 calendar days.⁵⁸

⁵⁴ See for example, PD 31/03/1993, p. 1038; PD 12/05/1993, p. 1991.

⁵⁵ See ruling of Speaker Rozzoli, VP 01/04/1993, p. 135.

⁵⁶ See section 12.3 of Part One for further information on the placing or disposal of business.

⁵⁷ VP 20/11/1996, pp. 640-1.

⁵⁸ Under the previous standing orders of the House members were able to carry over unanswered questions from one session to the next in the same Parliament without affecting limits.

Chapter 15 Notices of Motions

A notice of motion is a statement of intention to move a motion on a particular day. A member may not move a motion unless notice of the member's intention to move the motion appears in the business paper, except as otherwise provided by leave, standing or sessional orders or resolutions of the House (S.O. 142). This means that in most cases notice must be given at least one day before the motion is moved. A notice of motion sets out the words of the motion.

The Speaker asks for notices of motions for bills, government business and for business with precedence (motions of no confidence or censure and other motions for business with precedence)¹ immediately after ministerial statements and before Question Time. Notices of motions for general business (general notices) must be given at the commencement of each sitting in accordance with the routine of business, as amended by sessional order (S.O. 97, 98 and 133).

In accordance with the standing and sessional orders, members can also give notice of a general business (general notice) which will be the subject of a motion for re-ordering before Question Time on the Wednesday, the day preceding debate on general business general notices and orders (S.O. 133).

When called upon, the member reads the notice aloud and then hands a signed copy to the Clerk. A notice must also bear the date upon which the notice was given. There is no requirement in the standing orders for a notice to be typed. It is acknowledged that members may wish to expedite motions and accordingly, if a motion is legible it will be accepted.²

A member, by request, may give notice for another member, not then present, with the written authority of the member wishing to give the notice (S.O. 135). Motions can also be moved by a member on another member's behalf with written authority.³

The terms of a notice may be changed by handing in an amended notice which must not exceed the terms of the previous notice. Alterations must be made prior to the motion being moved (S.O. 139).⁴

A member, or another member with written authority from the member, may withdraw a notice of motion standing in their name or postpone it to a date later than that originally fixed (S.O. 141). Members who provide written authorisation to have their notices withdrawn or postponed by another member must specify which particular notices are covered by the authority.⁵ Notices of motions of former members on the business paper are removed by the direction of the Speaker.⁶ Speaker Rozzoli noted that this was because: they could not be withdrawn by the

¹ Standing Orders 118 and 133 provide that no notice is required for motions for condolence or the printing of papers even though both are considered to be business with precedence as such motions can be moved any time.

² VP 27/02/2002, p. 40.

³ PD 04/09/2001, p. 16306.

⁴ VP 16/12/1909, p. 407; PD 16/11/1966, pp. 2512-3; VP 05/05/1998, p. 544. Notice amended to correct the name used in the motion, PD 10/11/1998, pp. 9527-8.

⁵ A written authority was handed to the Acting Speaker to postpone a specific notice of motion. Another notice in the same member's name was called on by the Clerk and a point of order was raised that in the spirit of the letter, other notices in the absent member's name should also be allowed to be postponed. The Speaker ruled that, as the letter had only referred to a specific notice of motion, another member could not postpone the notice, and it would lapse, PD 13/04/2000, pp. 4831-2

⁶ VP 31/03/1998, p. 426; VP 27/10/1998, p. 989; VP 17/10/2001, p. 1510.

former member; they could not be moved by any other member; and the House was not in the possession of the motions as they had not been proposed from the Chair.⁷ Any member desiring to give a fresh notice of motion in the same terms as the removed notices can do so at the appropriate time.⁸

The Clerks, under the authority of the Speaker are able to alter notices of motions,⁹ or divide a motion on notice if it contains matters that are not relevant to each other (S.O. 137). This generally only occurs in exceptional circumstances as members are responsible for the veracity of the statements that appear in notices. On one occasion it was claimed that the notice of motion contained an untrue statement and, that as the assurance of a Minister had been given that the statement was untrue, the inaccurate statement contained in the notice of motion should be ruled out of order. However, the Speaker did not agree stating that "...the mere denial by a Minister of a statement is to preclude a notice of motion being tabled, then the cornerstone of Parliament will be demolished, which provides for freedom of speech, and the freest expressions, in connection with the redress of grievances and the remedy of abuses."¹⁰

Notices of motions to disallow statutory rules are accorded precedence and it has been argued that they should lapse if not moved on the day they are called. However, the Speaker has ruled that such notices of motions may be re-ordered or postponed in the same way as any other motion or matter before the House and that notices of motions only lapsed if the member who gave the notice did not move or seek to postpone it on the appropriate day or did not seek to postpone it at the call over.¹¹

Members (except Ministers) may not give more than one notice of motion consecutively, except for notices of motions to disallow statutory rules. On one occasion a member who had given a notice of motion which was held over subject to a ruling from the Chair attempted to give a second notice which the Speaker ruled out of order on the ground that a member cannot give two notices of motion consecutively.¹²

If a notice of motion is in accordance with standing orders it will appear on the business paper for the sitting day following the day on which notice was given. The Speaker may order that a notice of motion not conforming to the practice of the House not be printed in the business paper (S.O. 137).¹³ This includes notices containing argument or unbecoming expressions.

Motions must put a concise proposition upon which the House may vote.¹⁴ On one occasion the Speaker noted that a notice of motion should be termed so as to give a

⁷ See ruling of Speaker Rozzoli, PD 29/04/1992, pp. 3016-7; and rulings of Speaker Murray, PD 17/01/2001, p. 17469 and VP 31/03/1998, p. 426.

⁸ See comments by Speaker Murray, VP 27/10/1998, p. 989; and VP 31/03/1998, p. 426.

⁹ See for example, PD 25/11/1915, pp. 3934-6 where the Speaker altered a notice of motion given by interpolating the word "alleged" into the motion. See also PD 16/09/2004 where the Speaker altered a notice of motion to remove inflammatory and argumentative language.

¹⁰ See ruling of Speaker Meagher, PD 25/11/1915, pp. 3934-6.

¹¹ PD 12/05/1994, p. 2457.

¹² PD 25/11/1992, p. 9896.

¹³ On 11 November 2003 a notice of motion given that day was withdrawn by the member and did not make it to the business paper.

¹⁴ VP 15/05/1997, p. 892.

precise proposition for determination by the House. He went on to emphasise that the giving of a notice of motion is not intended as an opportunity to make a long argument or convey the substance of a proposition nor are they to be “tendered in the spirit of mockery or designed merely to give annoyance.” The Speaker then advised the House that the Clerks would, under his authority, eliminate any unnecessary statements or arguments from notices prior to their publication in the business paper.¹⁵

The member giving the notice is responsible for the veracity of the statements in it and at times the judicial or constitutional appropriateness of motions may be called into question. However, Speakers have repeatedly overruled objections that Parliament was interfering in federal matters and have supported the principle that as a sovereign Parliament the House can express an opinion on any matter which commends itself to the House including demanding reports,¹⁶ expressing views,¹⁷ passing judgement¹⁸ and urging action¹⁹ on judicial and federal matters alike. In addition, Speakers have allowed motions that do not specifically deal with public matters. For example, a motion relating to internal party matters was allowed as a number of questions had been recently asked about the subject.²⁰ A notice of motion to expunge another notice of motion from the business paper is out of order.²¹

Notices of motions and motions have been ruled out of order for:

- Being given in a spirit of mockery.²²
- Being argumentative, and ironical.²³
- Being too long.²⁴
- Requiring debate on non-existent, hypothetical or uncertain circumstances.²⁵
- Being incapable of being actioned.²⁶
- Being vague, non-specific and unparliamentary.²⁷
- Being the same in substance as a question already resolved by the House that session (S.O. 154).²⁸
- Oral version differing to the notice of motion lodged with the Clerk.²⁹
- A paragraph of the motion not being in accordance with the facts.³⁰
- Posing too many questions or placing too complex a question before the House.³¹
- Being speculative in nature.³²
- Calling on Ministers to fully answer questions.³³

¹⁵ VP 27/02/2002, p. 40.

¹⁶ See ruling of Speaker Ellis, PD 03/11/1970, p. 7168.

¹⁷ See ruling of Speaker Ellis, PD 05/11/1969, p. 2262.

¹⁸ See ruling of Speaker Ellis, PD 10/11/1970, p. 7508.

¹⁹ See ruling of Speaker Ellis, PD 20/08/1968, p. 331.

²⁰ PD 03/06/1998, p. 5681.

²¹ PD 20/10/1971, pp. 2172 and 2177.

²² VP 08/04/1998, pp. 488-9.

²³ VP 29/04/1998, p. 513, directed that the notice be amended; VP 01/04/1993, p. 1166.

²⁴ PD 13/09/1977, p. 7727; PD 14/05/1997, p. 8549.

²⁵ VP 19/11/1996, p. 614; PD 19/11/1996, p. 6415; PD 26/11/1969, p. 3161.

²⁶ PD 17/10/1961, p. 1554.

²⁷ PD 18/04/1996, p. 258; PD 11/11/52, p. 2008.

²⁸ PD 27/03/1990, p. 1082.

²⁹ VP 23/05/2000, p. 481.

³⁰ VP 20/06/2000, p. 601.

³¹ See ruling given by Speaker Rozzoli where he noted that in cases where motions were ruled out of order that they could be modified or members given the opportunity to recast them, PD 17/09/1992, p. 6008.

³² PD 25/11/1992, p. 9896.

- Being offensive to the Speaker.³⁴

Notices of motions have also been ruled out of order on account of infringing the sub judice convention.³⁵ However, a ruling made by Speaker Rozzoli held that the sub judice rule applies to the debate which ensues after a motion has been moved and that a notice of motion which touches on sub judice issues may not be ruled out of order until such a time as the motion is moved.³⁶ (See section 11.12 of Part One for further information on the sub judice convention).

Members who lodge notices of motions which do not accord with the standing orders of the House may be given an opportunity on a later date to re-lodge their notice, suitably redrafted.³⁷

Members must raise a point of order at the time a particular notice is given if they want consideration being given to it being ruled out of order as members are unable to challenge notices of motions that have been on the business paper for a reasonable period of time. For instance, during the giving of notices a member raised a point of order that a notice of motion was excessively long to which another member argued the business paper already contained notices that were as long and that the same points of order should have been raised for them. The Speaker ruled that motions that had remained on the paper unchallenged for some time are beyond the point of challenge.³⁸

Notices of motions are categorised and placed on the business paper in accordance with the standing orders and practice (see section 8.2 of Part One). Certain types of motions, e.g. to set the days and hours of sitting and no confidence motions in the Government, are accorded precedence under standing order 118 and notices of those motions are placed ahead of other notices in the business paper under a separate category of "Business with Precedence". Entries under the headings of "Government Business - Notices of Motions" and "General Business - Notices of Motions" will also appear in the business paper.

[Members are able to defer general business notices of motions by advising the Clerk in writing on Wednesday \(see Section 12.3 of Part One\).](#) Members are able to withdraw notices of motions standing in their name during the placing or disposal of business each day or when they are called on to be moved. A motion is not required to defer or withdraw as a notice not yet moved is not in the possession of the House.

Unless leave of the House is granted, notices cannot be given after the House proceeds to consideration of the orders of the day. Notices of motions take precedence of orders of the day, and if called upon, must be moved, withdrawn or postponed by the member in the order in which they appear on the business paper, or lapse (S.O. 99).³⁹

³³ PD 01/04/1993, p. 1166 where a notice of motion calling on a Minister to fully answer a question on notice was ruled out of order for being argumentative.

³⁴ PD 05/09/1911, p. 324 where a motion was directed against the Speaker.

³⁵ VP 29/06/1999, p. 179.

³⁶ See ruling of Speaker Rozzoli, PD 17/09/1992, pp. 6006-8.

³⁷ See ruling of Speaker Rozzoli, PD 31/03/1993, p. 1038.

³⁸ PD 08/03/1994, p. 304.

³⁹ Standing orders amended to provide that the Clerk, rather than the Speaker, calls on notices of motions, VP 25/09/1996, p. 433; notice withdrawn, VP 15/11/1995, p. 383; notice postponed, VP 16/11/1995, p. 393; notice lapsed, VP 16/11/1995, p. 393.

When the House is prorogued all notices of motions before the House lapse and there is no provision within the standing or sessional orders to enable the restoration of motions that were before the House prior to prorogation. However, on a number of occasions notices of motions that had lapsed due to a prorogation have been restored to the business paper.⁴⁰ This was achieved by resolution of the House. For example, when the House resumed for the third session of the 52nd Parliament in February 2002 a motion was agreed to by the House which provided that:

- Members, or the Leader and Shadow Leader of the House on their behalf, may submit to the Clerk, by the close of business on Friday 8 March 2002, written notification of any general business notices of motions and orders of the day (standing in their name) which lapsed due to prorogation, which they wish to restore to the business paper;
- Notices requested to be restored will be listed in a supplement to the business paper entitled “Restored Business”; and
- Notices of general business given on and after 27 February 2002 will have precedence over restored business.⁴¹

The Speaker did not accept restoration of any notices that were out of date or no longer valid. Not one of the restored notices was moved during the third session of the 52nd Parliament.

⁴⁰ Notices can only be restored to the business paper during the same Parliament.

⁴¹ VP 27/02/2002, p. 45.

Chapter 16 Motions, Questions, Votes and Resolutions

16.1 Form of questions

16.1.1 Motions

After a notice of motion has been given and moved, the motion may be dealt with either by being put to the vote, by being withdrawn or by lapsing.

The general principle governing questions proposed from the Chair is that the question before the House should be stated before each contribution after the mover has moved the motion and before the House votes on a matter.

Any question proposed should reflect as closely as possible the terms of the motion moved. However, in the case of lengthy or complex motions it is reasonable for a “shorthand” form of the question to be proposed. For example, a long motion could reasonably be abbreviated to:

The question is "That the motion be agreed to".

In the case of routine or procedural motions, such as those for the introduction of bills where the question is put immediately after the motion has been moved, it is reasonable to also put the question in the simplest form:

The question is "That the motion be agreed to".

If a question is capable of being divided, a member may move a motion for the question to be put as separate questions. This question is decided without debate or amendment (S.O. 153).

A member may at any time (without interrupting a member speaking) request the Speaker or occupant of the Chair to re-state the question currently before the House (S.O. 78).

Members can also move a motion after 7 clear days notice that the House rescind any previous resolution (vote) of the House of the same session (except a motion for the passing of a bill) (S.O. 155).¹ In cases where a motion conflicts with an earlier resolution of the House it is better practice to rescind the earlier motion and agree to a new one. For instance, the House agreed to a resolution on 17 November 1994 ordering a Minister to comply with an order for papers which would be conveyed by the Clerk to the Premier under the provisions of the then standing orders.² The following week a motion was moved to provide for the Minister to comply with the resolution agreed to on 17 November 1994. However, this motion changed the information that was required to be produced. Given that the motion was substantially different to the resolution originally agreed to by the House on 17 November, the Speaker suggested that it be reworded to the effect that it would rescind the resolution agreed to on 17 November in order to avoid a dangerous precedent being set.³ An amended motion rescinding part of the resolution agreed to

¹ For examples, see PD 17/11/1994, pp. 5263-9; PD 21/11/1994, p. 5405; PD 22/11/1994, pp. 5565 and 5567; PD 23/11/1994, pp. 5693-4; and PD 24/11/1994, p. 5832.

² VP 17/11/1994, pp. 505-7.

³ PD 22/11/1994, p. 5567.

by the House on 17 November 1994 and ordering the production of certain papers was agreed to on 23 November 1994.⁴

16.1.2 Amendments

When considering amendments to motions, in most cases, the question from the Chair is:

The question is "That the amendment be agreed to".

If the amendment is agreed to, a further question is put:

The question is "That the motion, as amended, be agreed to".

If the amendment is not agreed to, the Speaker restates the original question on the motion.

It is also possible to propose amendments to an amendment before the Chair.⁵ However, any amendment to an amendment must be relevant to the initial amendment⁶ and there may only be two questions before the Chair at any one time.

The Speaker would restate the motion:

The member for.....has moved (state the amendment), upon which the member for.....has moved that the amendment be amended (state the amendment). The question is "That the amendment to the amendment be agreed to".

If agreed to, the next question would then be:

The question is "That the amendment of the member for..... as amended by the amendment of the member for be agreed to".

If agreed to, the next question would be:

The question is "That the motion, as amended, be agreed to".

A question which has been resolved in either the affirmative or negative cannot be offered again in the same session.⁷ The key principle of this rule is that judgement on the matter under consideration must have been expressed. Accordingly, a subject which has been debated and withdrawn, or on which the decision for some other reason has been withheld, may be again brought on during that session (S.O. 154).⁸ However, standing and sessional orders may be suspended to bring on the debate on a motion that has already been agreed to provide a member who had not spoken to the motion with an opportunity to do so.⁹ For further information on amendments to motions see Chapter 17 of Part One.

16.2 The previous question

The previous question is an old form of procedure which is used to possibly evade decision on an issue.¹⁰ It is called the previous question because it is put before the

⁴ VP 23/11/1994, p. 544.

⁵ Second amendment to a motion accepted as an amendment to the first amendment, PD 19/10/1999, p. 1561.

⁶ See for examples, PD 24/02/1993, p. 17 and PD 19/09/1991, p. 1432.

⁷ Issues that have been raised as matters of public importance can be debated more than once by the House. This is as a matter of public importance is not a motion and as no vote is taken standing order 154 does not apply, PD 13/11/2002, p. 6678.

⁸ May, p. 388.

⁹ See for example, VP 12/09/1991, p. 147.

¹⁰ VP 19/09/1950, pp. 21-23.

main question (i.e. the original motion) and determines whether the original motion shall or shall not be submitted to the House.¹¹ The previous question is moved in the form "That the question be not now put".¹² If agreed, the question is deferred and the business falls off the Business Paper. The matter can be brought back on another day with a new notice of motion if required. If the previous question is negated it has the same effect as the closure and any substantive motion then before the House will immediately be submitted to the vote (S.O. 149).¹³ If the previous question is moved on the first of a series of questions which will be put *seriatim* the decision applies to all of the questions (S.O. 150).

The previous question cannot be moved upon an amendment but after an amendment has been disposed of it can be moved on the main question.¹⁴ A member may conclude a speech by moving the previous question, which is forthwith proposed from the Chair.¹⁵ The previous question is not open to amendment or debate (S.O. 80).¹⁶

Sessional orders have been adopted suspending standing order 149 and 150 for the current session following a recommendation from the Standing Orders and Procedure Committee, which considered the procedure to be an old form of procedure which had been replaced by other procedures such as the closure.

¹¹ See *May*, pp. 395-6, where it is noted that the previous question is moved in order to withhold from the decision of the House a motion that has been proposed from the Chair.

¹² Under the previous standing orders of the House the previous question was in the form "That that question be now put". In contrast to the current procedure, by negating the previous question the actual proposal before the House was not decided but was deferred and the House moved to the next item of business. See comments by Speaker McCourt where he advised the House that if the previous question is negated then the "whole matter" before the House is dropped, PD 05/12/1905, p. 4588; See also VP 18/12/1908, pp. 348-9. The House then moves to the next item of business. See comments by Speaker Lamb PD 19/09/1950, p. 225.

¹³ See for example, VP 11/10/1859, p. 168; VP 12/06/1984, p. 161.

¹⁴ *May*, p. 396.

¹⁵ VP 05/12/1905, p. 343.

¹⁶ However, see PD 05/12/1905, p. 4589 where Speaker McCourt noted that "in our standing orders it does not say that when the motion is moved there should be no debate. There is a wide difference between the previous question and the closure." Standing Order 80 now specifies that there is to be no amendment or debate on a motion "That the question be not now put".

Under review

Chapter 17 Amendments to Motions

(For amendments to bills see section 21.7 of Part One).

17.1 Form of amendments

An amendment is an alteration proposed to be made, or made, to a motion. Amendments may be moved to leave out words; to omit words with a view of inserting or adding other words; or to insert or add other words (S.O. 157).

Members must be able to understand the exact effect of every question upon which they are called to vote and this particularly applies to amendments. This aim may only be achieved when a motion proposed to be amended, which deals with complicated issues, is separated into two or more distinct questions.¹

When the question is proposed to agree to the second reading of a bill, amendments may be moved to the question to provide for the debate to take place at a later time (S.O. 200), to refer the bill to a specific committee (S.O. 198)² or to defeat a bill (i.e. that the bill be disposed of) (S.O. 199). After a bill has been considered in detail an amendment may be moved to the motion "That this bill be now read a third time" to reconsider a bill in whole or in part (S.O. 217).

The fundamental rule that debate must be relevant to the question extends to amendments. Every amendment proposed to be made either to a question or to a proposed amendment should be so framed that, if agreed to by the House, the question or amendment, as amended, would be intelligible and internally consistent.

As a general rule it may be said that amendments are relevant, and as such admissible, if they are on the same subject matter as the original motion, but not when foreign to it. Speakers have ruled that any amendment to a motion must be within the scope of the motion, relevant and not subversive of the principle.³

There is one type of amendment that can be proposed that can result in an alternative proposition being agreed to by the House – amendments to omit all words after "That" with a view to inserting other words.⁴ Such amendments are intended to evade an expression of opinion upon the main question or to express an opinion substantially contrary to the main question. These amendments must be relevant to the original motion and cannot be a simple negation of the original motion, as simply rejecting the motion is expressed by voting against it.⁵

Debate on an amendment to a motion may include debate on the original motion. A motion that has been superseded by an amendment may be moved again during the same session only if the successful amendment avoided expressing a final opinion on the substance of the original motion. In contrast, a motion superseded by an

¹ VP 22/11/1992, pp. 528-9.

² See for example, VP 03/07/2003, p. 259 where the *Government (Open Market Competition) Bill* was referred to the Public Accounts Committee for consideration and report.

³ See ruling of Speaker Ellis, PD 17/09/1968, pp. 917-8 and ruling of Speaker Rozzoli, PD 12/10/1994, pp. 3839 and 3841.

⁴ See for example, PD 22/09/2004, p. 69 where an amendment to a bill was moved in the form "omit all words on these lines..."; and PD 26/02/2004, p. 6697 where an amendment to a general business motion was moved in the form omit all words after "That."

⁵ Amendment rejecting the original motion allowed as the amendment provided different reasons than the original motion, PD 14/05/1997, p. 8612.

amendment which is contrary or incompatible with the original motion is deemed to have been resolved by the House and may not be moved again that session.⁶

An amendment is out of order if it raises a new matter which should only be considered on a distinct motion upon notice.⁷

The object of an amendment may be to alter a question so as to gain the support of members who, without such alteration, would have either voted against it or abstained from voting altogether; or it may be to present to the House an alternative more acceptable proposition. The moving of amendments has also been used as a device to enable members, who have already spoken in a debate, to speak again.⁸

17.2 Procedures for amendments

A member speaking after an amendment has been moved is deemed to be speaking to the original motion and to the amendment. A member who has addressed the original motion and desires to speak after an amendment has been moved, is confined to that amendment, the question before the House being the proposed amendment.⁹

An amendment which has been moved may be withdrawn only by leave of the House. An amendment cannot be withdrawn in the absence of the mover, except with the authority of the mover. The consent to withdrawal must be unanimous because the amendment is in the possession of the House. Speaker's rulings have indicated that an amendment to a motion can only be withdrawn if no other member, apart from the mover, has spoken to it. This is because all members must be afforded the same opportunity to speak to amendments moved in the House.¹⁰ For instance, a censure motion was moved in the House to which an amendment was proposed. Another member then moved that this proposed amendment be amended. The mover of the first amendment then sought leave to withdraw his proposed amendment, however, as the mover of the censure motion had exercised her right to speak on the amendment the Speaker ruled that it was necessary to first put the question on the amendment to the amendment.¹¹

When any proposed amendments have not been agreed to, the question is put on the motion as originally proposed.

When an amendment has been agreed to, a question is then put that the original motion, as amended, be agreed to (S.O. 166).

⁶ For further information see *May*, pp. 397-403; for example, see PD 27/10/1994 pp. 4876-8 where an amendment was ruled out of order as the text of the amendment was contained within the broader scope of an amendment previously dealt with in the same session.

⁷ Amendment to the motion that "Standing and sessional orders suspended to allow the introduction and progress up to and including the Minister's second reading speech of a bill at this sitting" ruled out of order as it was not relevant to the motion. The proposed amendment asked the Premier to advise the House on his actions in relation to law and order policies. PD 04/09/2001, p. 16318. See also PD 29/03/2006, p. 21709, where the Speaker ruled that an amendment to a censure motion was not an amendment but was a different censure motion.

⁸ For instance, an amendment moved to a motion (concerning the proposed sitting days for the House) "that the matter be deferred", was accepted with the Speaker noting that the effect of the amendment was to adjourn the debate but that it would provide for certain members to speak again, PD 02/09/1992, pp. 5408-10.

⁹ PD 04/03/1992, p. 411; see also Mr O'Doherty speaking on the Appropriation and cognate bills, PD 26/05/2000, p. 5972 and PD 20/06/2000, p. 7206.

¹⁰ See for example, PD 16/11/1993, pp. 5389-90, 5408, 5410, and 5418-20.

¹¹ See for example, PD 16/11/1993, pp. 5408, 5410, 5418-20.

An amendment which has been moved must be dealt with before a second amendment to the original question can be moved (S.O. 162), although an amendment to an amendment may be moved as if that amendment were the original question (S.O. 164). In addition, it is the practice that only two amendments to a question may be before the House at the same time.¹²

Some limit is necessary and it is the practice of the House that an amendment to an amendment is allowable but that no motion to amend further can be entertained until one of the two amendments is disposed of. When an amendment is moved to an amendment that has not been voted on by the House, it is the second amendment which is put to the vote first. If the amendment to the amendment is negatived the House then proceeds to vote on the original amendment as it was moved. If the amendment to the amendment is agreed to the House will then vote on whether the amendment as amended should be agreed to.¹³

There is no limit, however, to the number of amendments that may be moved to a question provided they come within this rule. However, it is not competent for a member, having spoken in a debate, to move an amendment later. A practice has developed of a member foreshadowing a subsequent amendment when speaking to an amendment and another member later moving the amendment of the member who foreshadowed the amendment.¹⁴

An amendment which conflicts with a previous decision of the House is not in order and, as a general rule, it is out of order to move, as an amendment to a question, a notice of motion standing on the business paper due to the fact that it is out of order for a member to anticipate discussion of any matter which is on the business paper (S.O. 77). Furthermore, members may not amend their own motions once it has been moved, except by leave of the House.¹⁵

Under the standing orders amendments in the House do not need to be seconded.¹⁶ This includes amendments moved when a bill is being considered in detail.

When an amendment is proposed to leave out words, the question is put "That the words proposed to be left out stand part of the question". If that question is agreed to, a further amendment cannot be proposed to the words which the House has resolved shall stand unless the amendment is to add words (S.O. 161). If such amendment is negatived, no further amendment to omit words may be entertained. In contrast, if the alternate question "That the amendment be agreed to" (S.O. 158) is negatived, another amendment may be moved.

An amendment may be moved to leave out words with a view to inserting others. This type of amendment requires two questions. The first is "That the words proposed to be left out stand". If this is agreed to, the amendment is disposed of. If the question is negatived, i.e. the House decides to leave out the words, the way is

¹² See Bourinot, p. 320; See VP 05/05/2008, p. 548 where with the concurrence of the House, a member moved a number of amendments to a motion (code of conduct) as one motion which was debated and put to the House as a single question.

¹³ See PD 19/10/1999, p. 1568.

¹⁴ PD 24/02/1993, p. 17; VP 03/06/1998, p. 691.

¹⁵ PD 04/12/1991, p. 5557.

¹⁶ Prior to the adoption of the current standing orders in November 2006 the standing orders required amendments to be seconded. However, in practice this was not enforced as it was assumed there was a seconder for both party members and Independent members.

then open to insert words. Hence the maxim "first create the blank". The blank having been created, the second question is proposed, "That the words proposed to be inserted, be so inserted". When it is proposed to insert words in place of words left out, the words proposed to be inserted are themselves open to amendment (S.O. 157). Subject to the wording of the amendment, it may be considered more convenient to put the single question, "That the amendment be agreed to". Once carried the motion may be further amended.

After the House has given a decision on an amendment to any part of a question, an earlier part cannot be amended. Similarly, where an amendment to any part of a question has been proposed by the Chair, an earlier part cannot be proposed to be amended unless the later amendment is withdrawn (S.O. 161). This is the same in relation to amendments to amendments in that any amendment to an amendment must be consequential to the original amendment. As such, if an amendment to an amendment is proposed which would have the effect of changing the intended purpose of the original amendment it can only be moved if the first amendment has not been proceeded with.¹⁷ The rationale behind this approach is to deal with a motion sequentially and logically with an aim of reaching consensus on the minimum wording acceptable to the majority of the House.

Amendments must be submitted in writing to the Clerks-at-the-Table and be signed by the mover (S.O. 159).¹⁸ For discussion of amendment to bills, see section 21.7 of Part One.

¹⁷ PD 19/09/1991, p. 1435.

¹⁸ See for example, PD 14/12/1993, p. 6047 where an amendment was ruled out of order as it had not been handed to the Clerks in writing.

Chapter 18 Orders of the Day

An order of the day is a bill or other matter not yet concluded which the House has ordered to be taken into consideration for a future day or in some cases for a later hour of the same day.

A motion, having been moved, becomes an order of the day when the debate on it has been adjourned. After being adjourned upon the request of the member in charge, it is set down as an order of the day for a later time by the Speaker (S.O. 167). [Proceedings on a bill become an order of the day after the bill has been introduced \(i.e. read a first time\), and the mover's second reading speech has been made. After the mover's second reading speech the debate is usually adjourned and the resumption set down as an order of the day for a future day.](#)¹

Business is most commonly brought before the House through the Speaker directing the Clerk to read the order of the day (S.O. 169). The Clerk reads the title of the bill or other business as set out in the business paper and the stage the business is up to.

[General business orders of the day are dealt with in the order in which they stand on the Business Paper \(S.O. 105 and 168\). However, in accordance with standing order 105\(2\) \(which is currently 105\(4\) as amended by sessional order\) any general business interrupted by the operation of the routine of business stands adjourned and is set down as an order of the day with precedence of other notices and orders.](#)² [However, an interrupted debate on a general business order of the day does not receive priority over any general business notice of motion or order of the day accorded precedence by the House in accordance with standing order 106.](#)

Each week, the House may give one general business order of the day for bills precedence on general business days (S.O. 106) (see section 12.3.2 of Part One). If debate on an order of the day is resumed then adjourned, the order maintains its relative position in the order of general business, subject to whether or not another general business order of the day has been given precedence. In contrast, Ministers may arrange for government business to be taken in any order they desire (S.O. 102). The anticipated order of government business is set out by the Leader of the House in the Daily Programme.

It is not mandatory for the House to consider a particular order of the day set down for a specified date. The House may adjourn before that order is reached, or the order may be postponed to another day. Orders not reached on any particular day retain their relative position on the business paper.

[An order of the day lapses if the House is counted out.](#)³

¹ In recent years standing and sessional orders have been suspended to enable many pieces of legislation to go through all stages at one sitting and no adjournment has occurred. See VP 31/03/2004, p. 720; VP 14/09/2004, p. 968.

² See ruling of Speaker Rozzoli, PD 22/04/1993, p. 1462.

³ VP 15/11/1921, p. 121.

After an order of the day has been read by the Clerk, the member who has carriage of the order is entitled to pre-audience, i.e., the right to speak first, even if the member has already spoken on the question (S.O. 64(1)).⁴ This procedure enables Ministers or members to add to their second reading speech or to correct any misunderstanding arising in debate.⁵ Of course this right to pre-audience can be superseded with the consent of the House. For instance, standing and sessional orders have been suspended to allow the Premier to speak on a bill prior to the member who had pre-audience, following the resumption of the adjourned debate.⁶

When the order of the day is read, the member, or another member with the written authority of that member, may also postpone its consideration without motion or move a motion to discharge the order of the day (S.O. 170).⁷ If the order of the day is a bill the motion moved is "That the order of the day be discharged and the bill be withdrawn."

If an order of the day for the resumption of an adjourned debate is read by the Clerk and a member does not rise to speak when the question is again proposed from the Chair, the question is immediately put.⁸

Unlike notices of motions of former members, which are removed from the business paper, orders of the day standing in the name of former members remain on the business paper but with the name of the member who moved them deleted. This is because the bills have been introduced and are in the possession of the House. However, unless the former member was a Minister such orders of the day cannot be withdrawn nor taken any further. Speaker Rozzoli noted that such orders of the day have reached a "procedural dead-end" because under the standing orders motions cannot be withdrawn in the absence of the member, except with their authority. In the case of former members that authority cannot be obtained as the member has resigned.⁹ Speaker Rozzoli also referred to the ruling given by Deputy Speaker Hedge on 26 September 1933¹⁰ that while it was competent for one Minister to move a motion on behalf of another Minister it was not competent for one member to move a motion on behalf of another member. It was however noted that any member desiring to give a fresh notice of motion for any order of the day of a former member could be given. Such motions would need to seek to discharge the order of the day and withdraw the bills by order of the House before a similar bill could be introduced.¹¹

However, it should be noted that on one occasion an order of the day standing in the name of a member whose election was declared null and void and whose seat was

⁴ VP 10/04/1997, p. 761; VP 26/11/1996, p. 66; member spoke again on behalf of the member in charge, VP 09/12/1991, p. 434; VP 20/11/1996, p. 638.

⁵ PD 01/03/1989, pp. 5497-8. This procedure also enables a Minister who has carriage of a bill to move a motion for the bill to be withdrawn/discharged. See for example, VP 04/05/2004, pp. 754-5.

⁶ VP 24/11/1994, p. 556

⁷ VP 20/09/1966, p. 84.

⁸ VP 14/11/1911, p. 121.

⁹ PD 29/04/1992, pp. 3016-7.

¹⁰ VP 26/09/1933, p. 70.

¹¹ See ruling of Speaker Rozzoli, PD 24/04/1992, p. 3016, where he noted that orders of the day, being in the possession of the House, remain on the business paper until discharged, withdrawn or otherwise dealt with. See also comments by Speaker Murray, VP 27/10/1998, p. 989; and VP 31/03/1998, p. 426.

declared vacant on 30 August 1938 was removed from the business paper on the following day by direction of the Speaker.¹²

During the placing or disposal of business in the routine of business, an order of the day for a bill may be discharged and the bill withdrawn on one motion, which is not subject to debate nor amendment. (S.O. 100(4) and S.O. 80(13)).

A lapsed order of the day may be restored by motion without notice, after orders of the day have commenced and no other business is before the House (S.O. 172).¹³

Calling over, postponing and reordering orders of the day are addressed in Chapter 12 of Part One.

¹² R.E.A. Ward, *New South Wales Legislative Assembly, A Short Guide to the Rules and Practice*, September 1977, p. 45, where reference is made to a ruling given by Speaker Weaver in 1938.

¹³ General business items restored, VP 17/09/1997, p. 43.

Chapter 19 Divisions and Bells

19.1 Divisions

A division is a method adopted to ascertain the view of the House when the Speaker's expressed opinion as to whether the "ayes" or "noes" have it, is challenged. In questions of any importance, it is usual for sections of the House to challenge the Chair's opinion by calling for a division. This is frequently done even though there can be no doubt that the division lists will support the Speaker's decision. Often the purpose of calling for a division is to place votes on record (S.O. 173-4). Speakers have adopted the practice of putting the question in favour of the side from which the motion came unless there is a distinct difference between the noes and the ayes.¹

A division can only be called by a member who gave voice against the majority as declared by the Speaker and one minority voice only is required (S.O. 174). The call for a division must be made before any new motion is proposed or other proceedings commenced.² The voice of the whip or other office holder is taken to be that of their colleagues as well.

Members may vote against a motion moved by them but cannot change their vote after challenging the Speaker's determination and a division is called (i.e. call "aye" but be recorded as voting "no").³ On one occasion a division was called off after the member who had called the division stated that he misunderstood the rules (that a division can only be called by a member in opposition to the Speaker's determination). The Acting Speaker ruled that, in view of the member advising that he had made a mistake in calling for a division, called off the division and restated the question.⁴

When a division has been demanded the division bells are rung and the timer activated by one of the Clerks-at-the-Table. At the expiration of the time allowed for the ringing of the division bells (4 minutes), the doors are locked and the Speaker then again restates the question. Every member present in the Chamber once the doors are locked must vote, "ayes" to the right and "noes" to the left of the Chair.

The Speaker appoints two tellers from each side who are by tradition the whips and their deputies. It is disorderly for a member appointed to act as a teller to refuse to do so unless excused by the Chair. To refuse is to disobey the Chair which is considered gravely disorderly and offenders may be removed by the Serjeant-at-Arms by direction of the Speaker or "named" in accordance with standing order 250.⁵ On one occasion the Speaker appointed tellers for the "noes" from the "ayes", when four members were excused by the Speaker after declining to act as tellers.⁶

The names of the members present are recorded by the tellers on lists handed to them by the Speaker. The endorsed lists are entered into the *Votes and*

¹ See comment by Speaker Rozzoli, PD 01/09/1992, p. 5302.

² See comments by Speaker Ellis where he made a definitive statement on the right of all members to call for a division, PD 25/10/1967, p. 2467.

³ See rulings by Speaker Ellis, PD 19/09/1967, p. 1322 and PD 23/11/1972, p. 3067 and ruling of Speaker Cameron, PD 03/03/1976, p. 3890.

⁴ PD 29/05/2002, p. 2185-6.

⁵ VP 18/08/1931, p. 698 and VP 12/03/1929, p. 295.

⁶ PD 12/11/1975, p. 2587.

Proceedings and *Hansard*. Pairs are recognised in the standing orders (S.O. 186) and enable members to be absent from the House during sittings by agreeing with a member from the opposite side of the House (through their Whip) that they will be absent at the same time. This effectively means that the votes are neutralised and any majority unaffected. Whilst pairs are recognised in the standing orders they are unofficial and organised by private arrangement with the whips.⁷ Speakers' rulings have held that:

- No point of order can be raised in relation to a matter of pairing;⁸
- The arrangement is purely one between the whips and is unofficial;⁹ and
- The Chair is not privy to any private arrangements made between the whips and other members of the House.¹⁰

Practice of the House has also been that:

- Divisions have been deferred for a few moments to allow a paired member to leave the Chamber;¹¹ and
- In instances where the Speaker's attention has been drawn to an irregularity in the pairing arrangements divisions have been called off and the question put again.¹² However, there have been occasions where the Speaker has not called a division off purely on account of an anomaly with the pairs.¹³

The same procedure is taken when the House is considering a bill or other matter in detail. Under the former committee of the whole procedure the same procedure was taken for divisions except that the names of members present during a division were only recorded in *Hansard* rather than in the *Votes and Proceedings*. As bills are now considered in detail by the House all divisions are recorded in both *Hansard* and the *Votes*.

When it is evident that there are five or fewer members on one side in a division, the Chair declares the question at once and the names of those members opposing the majority are recorded in the *Votes and Proceedings* (S.O. 181). If a minimal number of members vote on one side (five or more), to accommodate the large number of members who wish to vote on the other side, the Chair may nominate the back two rows of the Chamber of one side to be voting with the majority side.¹⁴

Divisions have been called off and conducted again due to problems with the lifts¹⁵ or irregularities in the pairing arrangements.¹⁶ Divisions have also been deferred for a short time to allow a paired member to leave the Chamber,¹⁷ or to a later time due to a disturbance in the House.¹⁸ The House has suspended standing and sessional orders to prevent divisions being conducted:

⁷ VP 30/10/1996, p. 543.

⁸ PD 10/09/1975, p. 946.

⁹ PD 28/09/1976, p. 1071.

¹⁰ PD 30/10/1996, pp. 5549-50.

¹¹ PD 08/09/1999, p. 180.

¹² PD 19/09/1991, p. 1433; PD 06/11/2001, p. 18130; PD 05/12/2001, p. 19591.

¹³ PD 10/09/1975, p. 946.

¹⁴ PD 20/06/1996, p. 3518.

¹⁵ PD 20/06/2002, p. 3543; PD 05/06/2002, p. 2609; PD 24/10/1996, p. 5328; PD 06/12/1995, p. 4294.

¹⁶ PD 22/09/1994, p. 3569.

¹⁷ PD 08/09/1999, p. 180.

¹⁸ PD 21/05/1997, p. 9014; also VP 23/05/1996, pp. 167 and 168; VP 30/05/1996, pp. 204 and 205-6.

- during private members' statements,¹⁹
- on specified days,²⁰
- for a specified time,²¹ and
- while the House dealt with specified items of business.²²

Divisions have been called off and the motion agreed to on the voices, however this requires the consent of the House.²³ On one occasion the Opposition claimed to have called a division inadvertently and asked for it to be called off. Government members did not agree and the Speaker stated that the Chair does not make the decision but acts in accord with the will of the House. As the House did not agree to call off the division it proceeded.²⁴

In accordance with Standing Order 187 no divisions can be called during private members' statements. This has been expanded by a sessional order which provides that in addition to private members' statements, no divisions can be called during community recognition statements, matters of public importance or the discussion on a petition signed by 10,000 or more persons.

A member may not vote in a division on a question if the member has a direct pecuniary interest in the question under discussion. Such interest must be one of direct personal pecuniary benefit and not something which is shared in common with other citizens (S.O. 176-7). The fact that members have a pecuniary interest in a matter which the House is discussing does not prevent them from participating in the debate. It is only in division when a member must refrain from voting. In 1873, Speaker Arnold gave his opinion that the House was bound to accept a member's denial of having a pecuniary interest,²⁵ while earlier, in 1862, Speaker Hay said that "in the absence of proof as to the actual nature of the interest possessed by the Honourable Members, they would best be left to exercise their own discretion in giving or withholding their votes."²⁶

The votes of members have been challenged upon substantive motions without notice. For instance, in 1884 a motion was moved "That the vote of Mr Russell Barton be disallowed upon the ground of personal interest". The motion was negated.²⁷ In 1879 "That the vote of the Honourable Sir Henry Parkes, Member for Canterbury on the third reading of the *Lands Act Further Amendment Bill* be disallowed because the Honourable Member has a direct personal pecuniary advantage in the passing of the Bill." Mr Parkes made an explanation to the House and the motion was negated.²⁸ On one occasion when the question arose in committee,²⁹ the Chairman refused to accept the motion, giving his opinion that it must be moved in the House. The matter was referred to the House, where the

¹⁹ VP 16/11/1999, pp. 239-40.

²⁰ VP 24/06/1999, p. 168.

²¹ VP 11/11/1999, p. 230.

²² VP 15/09/1999, p. 77; VP 10/11/1999, p. 222.

²³ PD 12/05/1999, p. 125.

²⁴ PD 28/10/1999, p. 2342.

²⁵ VP 22/01/1873, p. 115.

²⁶ VP 30/10/1862, p. 582.

²⁷ VP 07/08/1884, p. 654.

²⁸ VP 11/06/1879, p. 569.

²⁹ Under the current standing orders the House considers bills in detail and no longer resolves into a committee of the whole. Accordingly, a motion to disallow a member's vote is permitted on all divisions.

Speaker supported the Chairman's ruling.³⁰ However, in 1909, the Chairman of Committees quoted from the House of Commons *Hansard Debates*, Vol. 145, p 1233, to show that a motion to disallow a vote could be moved in committee.³¹

A member having voted by voice for one side cannot then vote on the other side in a division and, if satisfied that this has occurred, the Speaker will record the vote according to that originally called (S.O. 175). However, on one occasion a member who had been clearly heard call "the noes had it" after the Chairman determined in favour of the "ayes" denied it was his intention to call a division and when he did not vote with the "noes" no further action was taken.³² Members have also at times drawn the Chair's attention to the fact that they have given their voice for one side but had inadvertently voted with the other side and the record has been corrected accordingly.³³ A member must not change seats (i.e. their vote) once the doors are locked.³⁴ Furthermore, a member may not vote if not present in the House when the doors are locked and if this occurs a motion may be moved for the vote not to be counted (S.O. 178-9).

19.1.1 Successive divisions

Under standing order 185, if a second division is called and the bells ordered to be rung following limited or no intervening debate after an earlier division, the Speaker may, with the leave of the House, order the doors to be locked and the vote taken, before the full four minutes has expired. The Chair will consult before doing this.

19.1.2 Taking points of order in a division

Members taking a point of order during a division must remain seated (S.O. 180(2)) and attract the attention of the Speaker.³⁵ The onus is on members to ensure that they attract the attention of the Chair when seeking the call to raise a point of order.³⁶

19.1.3 Error in the count

If there is confusion or error in the numbers reported, the House would proceed to another division (S.O. 182). Complaints about the accuracy of the record of a division in the *Votes* or *Hansard* must be raised as a point of order. The Speaker may correct the record if satisfied that an error has occurred (S.O. 183). In practice, errors are in the first instance corrected by seeking the advice of the whips.

19.1.4 Deferred divisions

Under standing order 187 divisions called before 10.30 a.m. on days when the House meets at an earlier time are deferred until 10.30 a.m. At that time any business then before the House is interrupted and recommenced after the conduct of the division(s). The standing order also provides that on any Friday when the House sits divisions are deferred, set down as an order of the day for the next sitting day

³⁰ VP 03/05/1876, p. 319. No motion to disallow the vote of any member was moved in the House.

³¹ VP 22/09/1909, p. 456. A motion was moved to disallow the votes of two members on the *Fire Brigades Bill* on the basis that the members were "interested parties, drawing salaries as members of the Fire Brigades Board". The Chairman ruled that the motion was not in order noting that a vote can only be challenged on the basis that a member had a private pecuniary interest. He considered that whilst the members might have an interest in the existing Board that they could have no private pecuniary interest in a board proposed to be established under the bill.

³² PD 18/11/1999, pp. 3280-1.

³³ VP 20/11/1963, p. 718.

³⁴ PD 06/04/2006, p. 22254.

³⁵ Prior to the adoption of the current standing orders in November 2006 members were required to cover their heads (e.g. place a piece of paper on their heads). This practice originated in the UK House of Commons in the 18th Century. See *An Introduction to the Procedure of the House of Commons*, by Lord Campion, 3rd edition, 1958, p. 184.

³⁶ See PD 30/04/1992, pp. 3280-1.

and the third reading.⁴⁴ By voting against the legislation the member was considered to have automatically expelled himself from the ALP.⁴⁵ He did, however, remain in his seat as a non-Government member until the next election.

A similar incident occurred in July 1956 when the Parliamentary Labor Party voted to recommend the expulsion of Mr Clive Evatt, Member for Hurstville, from the party. Mr Evatt had voted twice with the Opposition on motions to disallow train and tram fare increases.⁴⁶ Mr Evatt was subsequently expelled by the party's State Executive and it was declared that he had "automatically expelled himself by voting against the New South Wales Labor Government and acting against the decisions of Caucus on several occasions."⁴⁷

Furthermore, on 2 December 1959, Labor lost control of the Legislative Council when seven Labor MLCs were expelled for crossing the floor on a bill to abolish the Council.⁴⁸

Pairs are usually recorded in all divisions including those subject to a free vote. However, on one occasion when a free vote was taken in the House no pairs were recorded. This meant that members who were not in Parliament on that day were not recorded as being paired for that particular division and as such it is not clear from the recorded results of the division whether members abstained from the vote or were absent from Parliament on that day. One of the members who had been absent from the House on that day made a personal explanation to the House in order to place on record that she had not abstained from the vote and noted which way she would have voted.⁴⁹

In recent times a number of bills have been subject to a free vote by all or at least one of the political parties in the House including:

- *Superannuation Legislation Amendment (Same Sex Partners) Bill 2000* – members of the Liberal/National Coalition were allowed a free vote;
- *Drug Summit Legislative Response Amendment (Trial Period Extension) Bill 2002* – members of the Liberal/National Coalition were allowed a free vote;
- *Drug Summit Legislative Response Amendment (Trial Period Extension) Bill 2003* – members of the Liberal/National Coalition were allowed a free vote;
- *Human Cloning and Other Prohibited Practices Bill 2003* and *Research Involving Human Embryos (New South Wales) Bill* – all parties allowed members to exercise a free vote; and
- *Crimes Amendment (Sexual Offences) Bill 2003* – all parties allowed members to exercise a free vote.

⁴⁴ PD 27/05/1987, pp. 12657-67.

⁴⁵ See Petersen, George, *George Petersen Remembers: The Contradictions, Problems and Betrayals of Labor in Government in New South Wales*, 1998, p. 399.

⁴⁶ PD 13/06/1956, p. 515 and 04/07/1956, pp. 739-40.

⁴⁷ See the *Sydney Morning Herald*, 14 July 1956, p. 1.

⁴⁸ Hagan, Jim and Turner, Ken, *A History of the Labor Party in New South Wales 1891-1991*, 1991, p. 187.

⁴⁹ See for example, PD 27/05/2003, p. 1167.

19.3 Bells

Bells are located in all rooms and corridors in Parliament House and are rung to summon members to the Chamber for a meeting, division or quorum or to indicate that the House has adjourned.

Assembly bells do not ring in Council members' rooms nor in the lifts.

On each sitting day a warning bell, of 20 seconds duration, sounds fifteen minutes before the Assembly is due to sit or resume sitting (S.O. 35) and rung again prior to the time the House is due to meet.

The bells are also rung for four minutes when a division is called, except when there are successive divisions and there has been limited or no intervening debate, in which case the Speaker may order that the doors be locked and the vote taken forthwith.

In addition, the bells are also rung prior to the House proceeding to any ballot (S.O. 351) and two short bells are rung upon the House adjourning.

At times the House resumes sitting on the ringing of a long bell. Such occasions include when a quorum is called and one long bell rings continuously for up to four minutes until a quorum is formed⁵⁰ or when the House resumes a suspended sitting.⁵¹ (See section 10.1.2 of Part One for further information on suspending a sitting until the ringing of one long bell).

In 1993, following concerns by members about access to the lifts within Parliament House during divisions a strategy was put in place to ensure that members are given priority use of the lifts during divisions.⁵² Under the system currently in place, there is a sign advising that in the event of a division that lights will flash outside of the lifts on each floor indicating that the lifts are for the use of members only at this time.

Members are also issued with pagers that can be activated by the Whips in the event of a division.

19.3.1 Timing for Bells

Under standing order 35 and the practice of the House the timing for bells is as follows:

TUESDAYS (Government Business Day – First sitting day of the week)
Bells are rung at 12.45 p.m. 12.56 p.m. and at 2.13 p.m.

WEDNESDAYS, THURSDAYS AND FRIDAYS
Bells are rung at 9.45 a.m. 9.56 a.m. and at 9.58 a.m.

AFTER LUNCH
Bells are rung at 2.00 p.m. and at 2.13 p.m.

DIVISION

⁵⁰ PD 15/10/1991, p. 2137; PD 20/09/1995, p. 1219; PD 08/04/1998, p. 3886.

⁵¹ PD 22/03/2005, p. 14701; PD 6/12/01, pp. 19869-70.

⁵² See comment by Speaker Rozzoli, PD 21/05/1993, p. 2685.

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First bell 10 seconds, pause 10 seconds; second bell 10 seconds, pause 10 seconds; third bell 20 seconds. The doors are locked four minutes after the bells are first rung.

QUORUM

One long continuous bell (for up to four minutes until a quorum is present in the Chamber).

HOUSE ADJOURNMENT

Two short bells.

ONE LONG BELL

A continuous bell rung at the discretion of the Chair.

This standing order has been varied by sessional order for the current session to provide for the following:

TUESDAY

Bells are rung at 11.45 a.m. for 20 seconds and at 11.58 a.m. for 60 seconds.

WEDNESDAY

Bells are rung at 9.45 a.m. for 20 seconds and at 9.58 a.m. for 60 seconds.

THURSDAY

Bells are rung at 9.45 a.m. for 20 seconds and at 9.58 a.m. for 60 seconds.

AFTER LUNCH

Bells are rung at 2.00 p.m. for 20 seconds and at 2.13 p.m. for 60 seconds.

AFTER DINNER

Bells are rung at 6.58 p.m. for 20 seconds.

DIVISION

First bell 10 seconds, pause 10 seconds; second bell 10 seconds, pause 10 seconds; third bell 20 seconds. The doors are locked four minutes after the bells are first rung.

QUORUM

One long continuous bell (for up to four minutes until a quorum is present in the Chamber).

HOUSE ADJOURNMENT

Two short bells.

ONE LONG BELL

A continuous bell rung at the discretion of the Chair.⁵³

⁵³ VP 14/02/2012, p. 516

Chapter 20 Passage of Legislation

20.1 Introduction

The introduction and passing of bills is the most important function of Parliament. The procedure of the three readings of a bill, based in historic origins of the earliest Parliaments, has been streamlined in modern times. In the earliest English Parliament, before printing or general literacy, the entire contents of a bill were read aloud at each stage so that members knew what they were agreeing or not agreeing to. Readings were retained not out of sentiment but because they represent in brief symbolic form the transition of a bill from one stage of its progress to the next.¹

In November 2006 the Legislative Assembly adopted new standing orders that modernised the terminology used for the various stages in the passage of legislation through the House to more accurately express what was happening and the term “reading” was replaced. The first stage is now referred to as the introduction of the bill (previously the first reading), the next stage is when a bill is agreed to in principle (previously the second reading). Finally, when a bill has been agreed to in the form in which it will leave the House, it is declared by the Speaker to have passed (previously third reading).

Sessional orders adopted in April 2012, provided for a revision of the terminology used for the stages in the passage of legislation back to the first², second and third readings.³

Documents related to the legislation before the House may also be tabled when a bill is introduced to Parliament. For instance, when an amendment is proposed to the *Parliamentary Contributory Superannuation Act 1971* a certificate issued by the Parliamentary Remuneration Tribunal approving the amendment must be tabled when the bill is introduced. Another example occurred in 2003 when a bill was introduced into the Legislative Assembly, which required that a document outlining further conditions in relation to the legislation be tabled when the bill was introduced into the Legislative Council. The document in question was tabled, by leave, when the Parliamentary Secretary in the Council moved that the bill be read a second time.⁴

A bill is a draft Act of Parliament presented to a House of Parliament by a member. It becomes an Act when, after passing both Houses, it receives royal assent.⁵ However, in certain circumstances defined in ss. 5A and 5B of the Constitution Act, the Governor may give the assent without the bill having passed the Legislative Council.

Nothing prevents identical bills from being introduced into both Houses simultaneously. However, only one such bill would receive assent. It is more likely to

¹ Extract from *Balancing Tradition and Progress*, a report from the House of Representatives Standing Committee on Procedure, August 2001, p. 4.

² A bill is introduced on the motion “That this bill be now introduced” and the bill is taken to be read a first time without question put.

³ VP 04/04/2012, pp. 743-51.

⁴ *Clyde Waste Transfer Terminal (Special Provisions) Bill 2003*, clause 4. See also Legislative Council Minutes, No. 34, 19/11/2003, p. 438.

⁵ Deputy Speaker ruled that an error in placing a bill on the Table or other technical fault in procedure does not interfere with or invalidate the bill before the House, PD 22/10/1997, p. 1272.

occur in relation to private members' bills. For instance, a bill in relation to Local Government amalgamations was introduced into both Houses in 2003. The bill successfully passed the Council but the bill that was introduced into the Assembly was negatived at the second reading stage. This meant that when the Council bill was reported in the Assembly the Speaker ordered it to be withdrawn on the basis that the same question cannot be determined twice.⁶

20.2 Public bills

A public bill is one which deals with a matter or matters of general public interest. Public bills may also refer to a specific person or persons or to a group of people. Whilst such bills are unusual a number of them have been introduced into the House.⁷ Public bills may be introduced and sponsored through both Houses by either a Minister or a private member, with Ministers introducing Government legislation. In one instance a Minister gave notice of a bill that did not fall within her portfolio responsibilities. A point of order was raised by a member of the Opposition that the bill was a private member's bill. However, there are no rules prohibiting a Minister from giving notice of their intention to introduce legislation which does not fall within their portfolio and the point of order was not upheld.⁸

Standing order 366 allows Parliamentary Secretaries to introduce Government legislation on behalf of Ministers and have carriage of the Government's business, and to be seated at the Table⁹ in order to undertake the functions undertaken by Ministers in this role. Standing orders have also been suspended to allow certain private members to introduce and have charge of certain Government bills.¹⁰

Bills may be originated in either House, except that bills for appropriating any part of the public revenue, or for imposing any new rate, tax or impost (so called "money bills"), must originate in the Legislative Assembly (Const. Act s. 5). (See Chapter 22 of Part One for further information on financial procedures).

In relation to public bills introduced by private members, it should be noted that such bills can only be introduced and considered at the time set aside for general business unless the House has agreed otherwise. There is nothing to prevent the Government from treating a private member's bill as a Government bill. The following table provides a summary of the private members' public bills that have been passed by the Parliament since the commencement of the 51st Parliament in 1995:

Session	No. of Private Members' Public Bills introduced in the Legislative Assembly	No. of Private Members' Bills assented to	Bills assented to	Member who had carriage in the House
1995-96 (1st)	22	2	<i>Queanbeyan Showground</i>	P.L. Cochran (non-Government)

⁶ VP 30/10/2003, p. 405; PD 20/10/2005, pp. 19033-4.

⁷ In 1993 a private member introduced a public bill to provide for the quashing of the conviction for murder imposed on Douglas Harry Rendell, and to provide for the assessment of compensation in relation to that conviction, PD 20/05/1993, pp. 2439-41. See also PD 13/10/1994, p. 3952 where a private member introduced a bill providing for a specific person to be admitted to the Bar was introduced.

⁸ The Minister had given notice of a bill that affected her constituency but did not fall within her portfolio responsibilities, PD 23/10/2002, p. 5776.

⁹ The Speaker has ruled that the requirement for a Minister to be seated at the Table during debate is a convention rather than a rule, PD 26/06/2001, p. 15332. The Speaker ruled that sessional orders do not prevent a Parliamentary Secretary from sitting at the Table during a motion of no confidence in a Minister, PD 06/06/2000, p. 6643.

¹⁰ VP 27/10/1998, p. 995.

session of the 51st Parliament)			(Variation of Purposes) Bill; Threatened Species Conservation Bill	member); Dr P.A.C. Macdonald (non-Government member)
1996-97 (2nd session of the 51st Parliament)	36	6	Public Servant Housing Authority (Dissolution) Bill; Traffic Amendment (Learner Driver Supervisors) Bill; Trustee Amendment Bill; Warnervale Airport (Restrictions) Bill; Lane Cove National Park (Sugarloaf Point Additions) Bill; Parliamentary Precincts Bill;	D. Beamer (Government member); P.B. Gibson (Government member); J.H. Turner (non-Government member); P.R. Crittenden (Government member); J.A. Watkins (Government member); J.C. Price (Government member)
1997-99 (3rd session of the 51st Parliament)	27	0		
1999 (1st session of the 52nd Parliament)	0	0		
1999-2002 (2nd session of the 52nd Parliament)	42	2	Workplace (Occupants Protection) Bill Crimes Amendment (Child Protection-Physical Mistreatment) Bill	G.R. Torbay (non-Government member) A.G. Corbett (non-Government member in LC – taken up by the Government in the LA)
2002 (3rd session of the 52nd Parliament)	44	4	Bail Amendment (Confiscation of Passports) Bill; Crimes (Sentencing Procedure) Amendment (General Sentencing Principles) Bill; Environmental Planning and Assessment Amendment (Illegal Backpacker Accommodation) Bill; Public Health Amendment (Juvenile Smoking) Bill	A.A. Tink (non-Government member); G.R. Torbay (non-Government member); D. Barr (non-Government member); Introduced in the Legislative Council by a non-Government member and then carried through the Legislative Assembly by a Parliamentary Secretary on behalf of a Minister as a Government bill.
2003-06 (1st session of 53rd Parliament)	40	3	State Arms, Symbols and Emblems Bill Sydney University Settlement Incorporation Amendment Bill Constitution Amendment (Pledge of Loyalty) Bill	Introduced into the Legislative Council by a non-Government member and carried through the Legislative Assembly by C. Moore (non-Government member). Introduced into the Legislative Council by a non-Government member and carried through the Legislative Assembly by a Minister. P. Lynch (Government member).
2006 (2nd)	22 (this includes bills	2	Snowy Hydro	Introduced into the Legislative

session of the 53rd Parliament)	that were restored to the business paper after prorogation)		<i>Corporatisation Amendment (Parliamentary Scrutiny of Sale) Bill</i> <i>Firearms Amendment (Good Behaviour Bonds) Bill</i>	Council by a non-Government member and carried through the Assembly by S. Whan (Government member). Introduced into the Legislative Council by a non-Government member and carried through the Assembly by G. R. Torbay (non-Government member).

20.3 Private bills

A private bill deals with matters for the particular interest or benefit of a person or body of persons. It is not a measure dealing with public policy and is therefore not sponsored by the Government but by a private member. Private bills must not be confused with bills of a public nature introduced by a private member.

Today few private bills are introduced, the most recent being passed in 1992,¹¹ and have previously, for convenience, usually been introduced into the Legislative Council. It is not unusual for a private bill to be introduced by the Government as a public bill. The standing orders of the Legislative Assembly provide that a private bill from the Legislative Council is to be treated as a public bill (S.O. 361).

Private bills can only be initiated by petition. Standing orders 358-363 set out the special procedures for private bills. Under standing order 358(1), notice of intention to introduce a private bill on petition must be given three months prior to the presentation of a petition to apply for the bill and this notice must be published once a week for four consecutive weeks in the Government Gazette and in at least one major newspaper published in Sydney and in the district affected by the bill. This notice of intention must state what private interests are to be affected by the proposed bill.

The next stage is for the petition, with a printed copy of the proposed bill attached and signed by one or more parties applying for the bill, to be presented to the House (S.O. 358(2)). The petition must contain proof of the publication of the notice in the Gazette and the newspapers, a true statement of the general objects of the bill and a request to introduce the bill (S.O. 358(3)).

Members are requested to sponsor a private bill, which is usually the local member for the area affected by the bill. The sponsoring member will give a notice of motion to introduce the bill following its receipt by the House and the bill will be introduced within 30 days of the notice of motion being given (S.O. 358(4)). A motion to introduce a private bill cannot be objected to nor can it be amended or debated (S.O. 358(5)).

Before being introduced, the bill is to be printed and sufficient copies provided (S.O. 358(6)). In addition standing order 358(7) provides that:

Before being introduced, and from time to time thereafter, the Clerk shall be entitled to claim such expenses from the promoters of the bill as the Clerk deems reasonable.

¹¹ *Tamworth Tourist Information Centre Bill*, VP 27/11/1992, p. 762.

However, the House may suspend standing and sessional orders to permit the waiving of the remaining parliamentary expenses to the promoter of a private bill.¹²

After the bill has been read a first time, it is referred to a select committee (SO 358(8)). If this committee reports in favour of the bill, it is proceeded with as in the case of public bills, and a later time set down for the bill to be read a second time (SO 360(5)). Private bills which receive assent are not numbered as is the case with public bills (SO 362).

20.4 Hybrid bills

A hybrid bill is a public bill which affects particular private interests in a manner different from the private interests of other people or bodies in the same category or class.¹³ These types of bills are not common in New South Wales.

20.5 Cognate bills

Standing orders 193-197 deal with the procedure for cognate bills, i.e. the simultaneous consideration of bills which are related to each other and presented as a package. Whenever a member informs the House (in the notice of motion for their introduction) that bills are cognate or when such bills are sent from the Council, they will be dealt with together during their various stages through the House, except when the bills are considered in detail where they may be considered separately.

The standing orders also provide:

- that an amendment may be moved to separate one or more cognate bills (SO 194);
- that a motion can be moved for the question to be put separately on each bill at the second and third reading stage (SO 195); and
- that the bills must not be presented to the Governor for assent until all have been passed or otherwise disposed of (SO 197).¹⁴

An example of the operation of standing order 197 occurred on 1 June 1999 when messages were reported from the Legislative Council informing the Legislative Assembly that it had returned several cognate bills without amendment and had discharged the order of the day for the second reading of the *Public Finance and Audit Amendment Bill 1999*, which had been one of the cognate bills. The House later agreed that, notwithstanding the order of the day for the second reading of the *Public Finance and Audit Amendment Bill* being discharged by the Legislative Council, the remaining cognate bills in the package be presented to the Governor for assent as cognate bills.¹⁵

20.6 Stages in the passage of a bill

The several stages in the passage of a bill are as follows:

¹² See for example, VP 24/11/1992, p. 707.

¹³ *May*, pp. 640-1.

¹⁴ VP 25/05/1999, pp. 80-1; VP 18/11/1999, pp. 292-4.

¹⁵ VP 01/06/1999, pp. 110 and 112.

20.6.1 Bills originating in the Legislative Assembly

(1) Notice of motion (S.O. 188)

When the Speaker calls for notices of motion (for bills) the member rises and reads the notice of motion (which in most cases has been prepared by the Parliamentary Counsel).

"Mr Speaker,
I give notice to introduce the ... (short title of the bill)."

After reading the notice of motion, the member must hand three copies of the notice to the Clerk of the House, including the original signed by the member (S.O. 134) - two are for records, the third is kept in the Chamber for immediate reference.

The full text of the notice is printed in the business paper. In the rare situation that legislation introduced does not correspond to the title of the bill as set out in the notice of motion the House may give its concurrence for the notice to be corrected. For instance, when the *Constitution (Amendment) Bill* and cognate *Constitution (Entrenchment) Amendment Bill* were introduced in 1992 the Speaker drew the attention of the House to a procedural difficulty in that the long title of the bills did not correspond with the order of leave, that is, the terms of the notice of motion. In order that the records of the House were correct, the Speaker proposed that, with the concurrence of the House, the notices of motion be corrected to accord with the title of the bills as introduced. Concurrence was given.¹⁶

(2) Introduction, first and second reading (S.O. 188)

A bill is introduced after a notice of motion has been given either at the same of a subsequent sitting. If a bill has not been given notice of standing orders are required to be suspended to permit the bill to be introduced without notice. When the item of business is called on the member will rise and say:

*"Mr/Madam Speaker,
I move, That a bill be introduced for an Act ... (long title of the bill)."*

The Speaker puts the question "That the bill be now introduced."

(When agreed to) The member then says:

"Mr/Madam Speaker, I bring up the bill."

and hands three copies to the Clerk.

This constitutes the introduction of the bill and the bill is taken to be read a first time without question put. There is no debate at this formal stage.

The standing orders provide that the bill is automatically printed with its explanatory note (if any) after the motion for introduction is agreed to. The bill is then generally available to members and others. In practice, Parliamentary Counsel provides multiple copies when bills are introduced. After introduction, a copy of the bill is

¹⁶ PD 17/11/1992, p. 9004 and PD 18/11/1992, p. 9179.

available from the Legislative Assembly Table Office. An electronic version is also loaded onto the Parliament's website.

The mover may then proceed with their second reading speech after moving the following motion:

*"Mr/Madam Speaker,
I move, That this bill be now read a second time."*

Alternatively, the member may ask the Speaker to set down the second reading as an order of the day for (a later time).

The motion for a bill to be read a second time provides the vehicle for a wide-ranging debate on the bill.

After the member's speech, another member (usually the member who will speak first on the opposing side) then moves a motion to adjourn the debate.

When this is agreed to, the member moving the second reading will say:

*"Mr/Madam Speaker,
I ask that you fix the resumption of this debate as an order of the day for a future day."*

Under standing order 188(1) the debate cannot resume until at least five clear days ahead (e.g., if the motion is moved on Wednesday, debate cannot resume until the following Tuesday). Standing orders must be suspended to provide for the resumption of the second reading debate earlier than 5 clear days or to permit the bill to pass through all stages in one sitting.¹⁷

(3) Bill declared urgent (S.O. 189)

Under the standing orders, a member in charge of a bill may seek to deal with a bill as an urgent bill, provided that copies of the bill have been made available to members (S.O. 189).¹⁸

After making the second reading speech, the member will say:

*"Mr/Madam Speaker, I declare this bill to be an urgent bill."
The Speaker puts the question, "That the bill be considered an urgent bill" and if agreed to (no debate or amendment permitted) the member moves that the bill be now read a second time.*

The second reading debate and other stages may be proceeded with forthwith or at any time during the time set aside for Government Business or General Business depending on whether it is a bill introduced by a Minister or by a private member.

¹⁷ See for example, VP 31/03/2004, p. 714; VP 31/03/2004, p. 720; VP 14/09/2004, p. 968; VP 02/09/2003, p. 281; VP 15/10/2003, p. 355; VP 28/10/2003, p. 398; VP 19/10/2004, p. 1032; VP 18/10/2006, p. 260.

¹⁸ VP 08/06/1995, p. 176; VP 23/11/1995, p. 452.

The procedure for declaring an urgent bill is rarely used, Ministers in particular usually prefer to expedite procedures by suspending standing orders. However, it is a useful device for private members who must first obtain the leave of the House to move a motion to suspend standing orders.

(4) Resumption of adjourned second reading debate

If standing orders have not been suspended to provide otherwise, the adjourned second reading debate is resumed after five clear days. At this time, the Speaker calls upon the Clerk to read the order of the day for the resumption of the debate.

It is the practice of the House that the member who secured the adjournment of the debate has the right to speak first on the resumption of debate, subject to the right of pre-audience of the member in charge of the bill. The name of the member who adjourned the debate is recorded on the Business Paper.

The second reading is the stage at which the general principles of the bill are considered. The exact scope of the second reading debate has not been clearly delineated. For example, in some cases debate has been restricted to "the provisions of the bill"¹⁹ and in others to "the objects, or principles of the bill."²⁰ Whatever the exact limits the basic object is to avoid irrelevant discussion. Speakers' rulings have implied that where a bill is specific and of limited application debate is limited,²¹ but when the bill is a comprehensive measure²², a very complex one²³, or one which sets out new precedents²⁴ the debate may be wide-ranging.

Apart from this general principle setting the scope of debate, certain rulings of Speakers have helped to define what members can and cannot refer to during the second reading debate. For instance, brief reference may be made to an earlier bill on a similar matter,²⁵ complementary legislation,²⁶ an analogous situation,²⁷ matters which members believe should be included or considered,²⁸ and a bill that is not yet law.²⁹ Members, are however, generally prohibited from discussing a bill clause by clause,³⁰ referring to portions of the principal Act not affected by the bill³¹ or to the principles of the principal Act,³² and debate at large on Government policy.³³

Amendments may be moved to the question for a bill to be read a second time to refer the bill to a specific committee, dispose of the bill (S.O. 199), or defer its

¹⁹ See ruling of Acting Speaker Darby, PD 26/09/1973, pp. 1328-9.

²⁰ See ruling of Speaker Ellis, PD 02/03/1972, pp. 4803-6.

²¹ See rulings by Speaker Ellis, PD 08/03/1967, p. 3905; Acting Speaker Darby, PD 19/08/1970, p. 5308; PD 20/08/1970, p. 5356.

²² See for example, PD 17/11/1970, p. 7904 on the *Summary Offences Bill*.

²³ See for example, PD 07/11/1967, p. 2887 on the *Civil Aviation (Carriers Liability) Bill*.

²⁴ See for example, PD 10/09/1969, p. 829 on the *Listening Devices Bill*.

²⁵ See ruling of Acting Speaker Clough, PD 21/11/1967, p. 3453.

²⁶ See ruling of Acting Speaker Bruxner, PD 22/04/1971, p. 195.

²⁷ See ruling of Acting Speaker Clough, PD 05/11/1969, p. 2285.

²⁸ See ruling of Speaker Ellis, PD 22/08/1967, p. 659. In this situation relevancy is the test.

²⁹ See ruling of Speaker Ellis, PD 29/11/1967, p. 3920.

³⁰ See ruling of Acting Speaker Clough, PD 03/04/1968, p. 422.

³¹ See ruling of Speaker Ellis, PD 08/12/1971, pp. 4127-9; PD 02/03/1972, pp. 4803 and 4806.

³² See ruling of Acting Speaker Duncan, PD 17/03/1976, p. 4417.

³³ See ruling of Speaker Ellis, PD 02/03/1972, pp. 4803 and 4806 where it is noted that whilst members are generally prohibited from debating Government policy generally, members may refer to anything, including Government policy, if it has been raised by the Minister during the second reading.

consideration to a later time (S.O. 200)³⁴. Amendments to clauses of the bill are moved when the bill is considered in detail.

At the conclusion of the debate, the member who moved the second reading has a right of reply. The Speaker then puts the question, "That this bill be now read a second time."

If the question is agreed to, the Speaker will call on the member in charge of the bill to move the third reading of the bill unless a member has requested the consideration of the bill in detail; or the member in charge of the bill moves for consideration of the bill in detail pro forma; or requests the Speaker to set down consideration of the bill in detail as an order of the day for a later time (S.O. 203 as amended by sessional order). If a bill has not been considered in detail, the motion for the third reading cannot be debated nor amended.

In accordance with standing order 202, an order of the day for the second reading (or any subsequent stage of a bill), having been discharged and the bill withdrawn, the House may direct on motion for another bill to be brought in.³⁵ This in effect means that a new bill on the same subject matter to that previously given notice of may be brought in without notice replacing the bill that has been withdrawn. However, the new bill is required to go through all stages although standing orders may be suspended to expedite its passage.³⁶ Alternatively, notice of motion may be given afresh and another bill introduced in the normal manner.³⁷

(5) Consideration in detail

After a bill has been read a second time, any member may request that a bill be considered in detail; or the member in charge of the bill may move a motion for the consideration in detail pro forma or request the Speaker to set down consideration of the bill in detail as an order of the day for a later time.³⁸

When a bill is considered in detail an opportunity is provided for members to move amendments to the bill, as the bill is dealt with clause by clause and schedule by schedule (or in groups of clauses and schedules by leave). It also may allow for a question and answer session in respect of the specifics of the legislation, as members may speak more than once.

During the consideration in detail stage debate may be adjourned and the resumption of the proceedings on the bill will be set down as an order of the day for a later time. When the bill is next considered by the House it will resume at the point

³⁴ Deferring consideration of a bill is effected by moving an amendment to the second reading to omit the word "now" with a view to adding words indicating a later time. Under this procedure a member will specify a certain time frame such as "That this bill be read in six months" or any other time. This procedure does not dispose of the bill but rather defers debate on it for the specified timeframe. Hence, the bill will remain on the Business Paper as an order of the day with the resumption set down for a specific date. Prior to the adoption of the procedure to amend the second reading to dispose of a bill in 1992, the motion "That the bill be read in six months" effectively killed off the bill, whereas under current practice it defers consideration of it.

³⁵ See for example, VP 24/3/1936, pp. 220-1

³⁶ See for example, VP 10/12/1958, p. 165.

³⁷ See for example, VP 22/09/1971, p. 117, VP 28/09/1971, p. 128 & VP 30/09/1971, p. 143 in relation to the *Housing (Amendment) Bill 1971*.

³⁸ Under the former standing orders the member in charge of the bill could request the Speaker to set down consideration of a bill in the committee of the whole as an order of the day for a future time. If this was not done or if leave was not sought or not granted for the third reading to be moved forthwith, the Speaker left the Chair and the House resolved itself into a committee of the whole to consider the bill in detail.

where proceedings were adjourned.³⁹ Once the proceedings in consideration in detail have been completed the member in charge of the bill may move the third reading of the bill forthwith or, if the bill has to be reprinted because considerable amendments were made, ask the Speaker to set down the third reading as an order of the day for a later time. The only amendment that is able to be moved to the motion "That this bill be now read a third time" is for the House to reconsider the bill in detail (either in whole or in part).

If a bill has been amended it may be reprinted (the "second print" version incorporates amendments) before the bill is read a third time and forwarded to the Legislative Council for concurrence. To allow time for reprinting, the member will say:

*"Mr/Madam Speaker,
I ask that you fix the motion for the third reading as an order of the day
(for a future time) (S.O. 238 as amended by sessional order)."*

If there are a large number of amendments proposed to be inserted in a bill from one source (e.g. Government amendments) there is a procedure that allows for members to be able to see the amendments in their context. In order to facilitate this, the member in charge of the bill may move that the bill be considered in detail pro forma after the second reading. The following motion is moved:

*"Mr/Madam Speaker,
I move, That this House consider the bill in detail pro forma".*

This question is put without amendment or debate. If passed, the Chair puts the question, "That the amendments as printed be inserted in the bill".

If that motion is agreed to the bill is reprinted in its amended form.

(6) Third Reading

At the conclusion of the second reading, or if the bill is considered in detail at the conclusion of that stage, the member in charge of the bill will say:

*"Mr/Madam Speaker,
I move, That this bill be now read a third time."*

The motion for the third reading is usually a formal proceeding but it can be debated if a bill has been considered in detail and the mover has a right of reply.

The third reading of a bill affords the last opportunity for discussion. The scope of the debate is restricted and comments should be brief. It is not in order to revive discussion of individual clauses. Members must confine themselves to the principles of the bill and must not merely repeat the second reading debate.⁴⁰ Furthermore,

³⁹ In contrast under the former procedures where bills were considered in a committee of the whole debate in committee could not be adjourned. Rather, to bring proceedings in committee to an end before their conclusion, a motion was required to be moved, "That the Chairman do now leave the Chair, report progress and ask leave to sit again (at a future time)".

⁴⁰ See ruling of Speaker Ellis, PD 13/09/1967, p. 1135.

members must not canvass newspaper statements⁴¹ nor refer to any matter outside the scope of the order of leave.⁴² Similarly, personal remarks are not allowed⁴³ as the debate simply provides members with an opportunity to make concluding remarks on the general principles of the bill.

If a bill is not considered in detail no debate nor amendment can be moved to the motion for the third reading. If the bill is considered in detail an amendment can be made to the motion for the third reading to reconsider a bill and the motion may be debated.

After the bill has been read a third time, it has passed all stages in the Legislative Assembly. The bill (with a certification from the Clerk)⁴⁴ is then forwarded to the Legislative Council with a message seeking its concurrence. The Council may then agree to the bill and return it for the Governor's assent, return the bill with amendments for the Assembly's consideration, withdraw the bill or not pass the bill.⁴⁵

It is accepted practice for bills that have passed through both Houses to be sent to the Governor for assent even if the message agreeing to any amendments made by the Council is yet to be reported.

20.6.2 Bill sent from the Legislative Council

The Speaker reports the receipt of the bill by reading the message from the Legislative Council.

The bill is automatically introduced and deemed to be read a first time – no motion is proposed.

The member who is in charge of the bill then moves the motion "That the bill be now read a second time" and gives the second reading speech on the bill or asks the Speaker to set down the second reading as an order of the day (for a future time). Standing order 229(4) (as amended by sessional order) provides that a truncated second reading speech may be given if the bill is received in the same form as introduced into the Council.⁴⁶

After the mover's speech the debate may be adjourned until a later time or can be proceeded with forthwith (the five clear day rule does not apply). After the bill has been introduced the bill is dealt with in the same manner as an Assembly bill (S.O. 229).⁴⁷

⁴¹ *Ibid.*

⁴² See ruling of Speaker Ellis, PD 03/04/1973, p. 4279.

⁴³ See ruling of Speaker Cameron, PD 25/11/1975, p. 3183.

⁴⁴ Under the former standing orders the Chairman was also required to certify the bill if it has been considered in committee of the whole.

⁴⁵ See for instance VP 08/04/1997, p. 709 where the Council discharged an Assembly bill.

⁴⁶ Minister gave a truncated second reading speech simply referring to the speech in the Council, PD 05/12/1995, p. 4130; Minister tabled speech for incorporation in Hansard, VP 18/11/1999, p. 268; Minister indicated that he had made an error in not having made his second reading speech on a Legislative Council bill before another member had spoken. The Minister did not deliver a second reading speech but advised the House that the speech made by the Minister on the Legislative Council was to be adopted by the House. PD 20/06/2001, p. 14961.

⁴⁷ Standing orders have been suspended to allow the consideration of clauses and schedules of two bills originating in the Legislative Council to be considered "in globo" and for any amendments to one of the bills to be dealt with by the Chair proposing one question, "That the amendments be agreed to", VP 29/06/1999, p. 197.

If the order of the day for a private member's bill that originated in the Legislative Council is discharged a message is sent to Council.⁴⁸

Council bills may be removed from the Business Paper in accordance with standing order 154 if they are the same in substance as bills already considered by the House. For example, the Speaker has directed that the order of the day for the second reading of a bill from the Council be removed from the Business Paper when the House has already dealt with the matter of an identical bill⁴⁹ or a bill that is the same in substance.⁵⁰

In relation to non-Government bills from the Legislative Council, standing order 229(2) provides that a message forwarding a private member's public bill from the Legislative Council cannot be reported until the Speaker is advised which Member of the Assembly will have carriage of the bill. The message can be reported at any time and the second reading speech is set down as an order of the day and is placed on the Business Paper in its relative order. When the bill is called on the member in charge of the bill will give their second reading speech and in accordance with standing order 299(5) debate on the bill can be adjourned or continued forthwith. If a Minister takes carriage of a private member's bill from the Legislative Council it may be introduced and considered during Government Business.⁵¹

20.6.3 All stages during one sitting by suspension of standing orders

Standing and sessional orders may be suspended to allow for a bill to be passed through all stages in one sitting. If a Minister is in charge of the bill the Minister does not have to seek leave to suspend standing and sessional orders (S.O. 365). However, private members require the leave of the House to move a motion to suspend standing orders.

The member moves:

"Mr Speaker,

I move, That standing and sessional orders be suspended to allow the (short title of bill) to be brought in and passed through all stages in one sitting."⁵²

The above motion may also provide that the consideration of the bill take precedence over all or some other business set down for that day.⁵³

20.6.4 Assent

After the bill has passed both Houses of Parliament, the originating House will arrange for the bill to be prepared for the assent.⁵⁴

⁴⁸ VP 30/11/1996, p. 545.

⁴⁹ PD 30/10/2003, p. 4496.

⁵⁰ PD 20/10/2005, pp. 19033-4.

⁵¹ See for example, VP 4/12/2008, p 1133 when the Minister for Education and Training took carriage of a private member's bill from the Legislative Council.

⁵² VP 10/11/1999, p. 219.

⁵³ VP 03/06/1999, pp. 130 and 136.

⁵⁴ See article by Jessica Richardson, "Modernisation of Royal Assent in Canada" in *Canadian Parliamentary Review*, Summer 2004, pp. 32-6 in relation to the history of the royal assent procedure where it is noted that "the practice of signifying royal assent to bills passed by Parliament began during the reign of Henry VI, (1422 – 71) when the practice of introducing bills in the form of petitions was replaced by bills in the form of complete statutes. The Sovereign would attend Parliament in the House of Lords and give his consent in person. This practice was continued until 1541, when the task of signifying royal assent was assigned to a Royal Commission in order to spare King Henry VIII the indignity of having to give royal assent to the Bill of Attainder, which provided for the execution of his wife Catherine Howard. From this occurrence, the practice of appointing Lords Commissioners responsible for giving royal assent developed."

A vellum copy of the bill (including any amendments) is prepared by the Parliamentary Counsel's Office. This copy is printed on yellow paper, akin to a vellum, and is referred to as the "vellum". The vellum is then signed by the Clerk of the originating House to certify that it has passed. It is also countersigned by the Assistant Speaker, who certifies as to its form. It is then sent to the Governor for signature (S.O. 239). The *Constitution Act 1902* also provides that the Crown may assent to any bill whilst personally present in the State.⁵⁵

At the same time that the vellum is sent to the Governor, paper copies are sent to the Attorney-General who will sign an "opinion" letter that there is no objection to the Governor assenting to the bill.⁵⁶ When this opinion is received, the Governor will sign the vellum and a message informing of this is sent to the Parliament and the Minister.

The signed vellum is returned to the originating House with the message and an Act number is allocated in the order of assent.

The assent details, including the Act number are published in the *Government Gazette* and the vellum is sent to the Registrar General for enrolment as a deed.

There have been occasions where injunctions have been sought to prevent a bill from receiving assent. In such instances courts have generally taken a position that enables the bill in question to complete all stages of the legislative process, including assent, before they will intervene.⁵⁷ This view stems from the idea that the Parliament as an independent arm of Government should not be interfered with by other arms of Government.⁵⁸ Courts will however, intrude upon the law-making process if it can be shown that there will be no avenue available to challenge the validity of legislation once the law-making process is completed⁵⁹ or when a bill fails to comply with a mandatory manner and form procedural provision.⁶⁰ For further information on judicial review of the legislative process see section 3.4.1 of Part Two.

20.6.5 Commencement of Acts

The commencement date of Acts, under the provisions of the *Interpretation Act 1987*, is 28 days after the date of assent, except where the Act itself provides for its

⁵⁵ Section 8A(2) of the *Constitution Act 1902*.

⁵⁶ Advice received from the Attorney-General's Department in 1927 notes that this procedure must occur prior to the Royal Assent being given but that there is no known authority, statutory or otherwise, for the procedure. Rather, it is the result of "custom and usage", and has been followed by successive Attorney-Generals from the earliest days of Responsible Government, having possibly originated in the first instance through the request of a cautious Governor to the Attorney-General for a memorandum that he was justified in assenting to some bill of a controversial nature. This procedure does not apply to bills which the Attorney-General had advised should be reserved "for the signification of His/Her Majesty's pleasure" – the procedure in such cases being defined by the Royal Instructions. See also PD 01/03/1927, p. 1734 where Mr McTiernan, the then Attorney-General, noted that the role of the Attorney-General is limited to advising the Governor whether or not there are any reasons why a bill should be reserved for the royal assent and that it is up to the courts to determine whether a bill that has passed the Parliament is constitutional. Reference is made to comments made by the Chief Justice Griffith in *D'Emden v Pedder* (1904) 1 CLR 91 at pp. 117-8 that "It is, however, the duty of the court and not of the Executive Government to determine the validity of an attempted exercise of legislative power. The assent of the Crown cannot, nor can the non-exercise of the power of veto, give effect to an invalid law. And it would be to impose an entirely novel duty upon the Crown's advisers if they were to be required before advising whether the power of veto should be exercised, to consider the validity under the Constitution of the provisions of each Act present for the royal assent. That, as already said, is the function of the judiciary. And even if such a duty were cast upon the Executive Government, it could neither relieve the judiciary of their duty of interpretation nor affect the principles to be applied in that interpretation."

⁵⁷ See *Eastgate v Rozzoli* (1990) 20 NSWLR 188 and *Bignold v Dickson & Ors* (1991) 23 NSWLR 683

⁵⁸ See comments by Kirby P in *Bignold v Dickson & Ors* (1991) 23 NSWLR 683 at 703-4

⁵⁹ See comments by Priestley and Handley JJA in *Eastgate v Rozzoli* (1990) 20 NSWLR 188 at 204

⁶⁰ See *Trethowan and Anor. v Peden and Ors.* (1930) 31 SR (NSW) 183 and *Attorney-General (WA) v Marquet* (2003) HCA 67.

commencement, whether by proclamation at some future time or by nomination of a specific date such as the date of assent or otherwise. For instance, Acts have been passed which have commenced on the day on which the bill for the Act was introduced into the Legislative Assembly⁶¹ and in 2003 a bill was introduced which provided that a particular time on a particular day could be appointed by proclamation as the time for the commencement.⁶²

Attempts have also been made to force the Government, through a resolution of the House, to have certain sections of legislation proclaimed to commence. For instance, a member of the Opposition attempted to amend a motion to adopt a report from the committee of the whole on a bill by adding the words "That this House formally resolves and calls on the Government to proclaim all sections of the Act." The proposed amendment was negated on division.⁶³

20.6.6 Other proceedings on bills

20.6.6.1 References of bills to committees

Bills may be referred:

- to a specific committee as an amendment to the motion "That this bill be now read a second time" (S.O. 198 as amended by sessional order) or by specific motion;
- to estimates committees if an Appropriation or Parliamentary Appropriation Bill (S.O. 246(1)); and
- to legislation committees (S.O. 323(1)).⁶⁴

In respect of legislation committees, the member must move the required motion (which does not need notice) immediately after the motion for the second reading is agreed to by the House. As a legislation committee specifically reports on proposed amendments to the clauses and schedules of the bill, its report, when tabled, is set down by the Speaker for consideration in detail with the bill.

Motions referring legislation to a committee are procedural steps in the stages of a bill and the practice of the House has been not to debate such motions.⁶⁵

20.6.6.2 Reconsideration

Members have an opportunity under standing order 217 (as amended by sessional order) to move for the reconsideration of a bill which has already been considered in detail. When the motion for the third reading is proposed any member can move an amendment to the motion to reconsider a bill in whole or in part.⁶⁶

When the Speaker proposes the question "That this bill be now read a third time", a member may move:

⁶¹ The *Penalty Notices Validation Act 2000* and the *Duties Amendment (Land Rich) Bill 2003*.

⁶² The *Workers Compensation Amendment (Insurance Reform) Bill 2003*, Clause 2.

⁶³ VP 30/11/2001, p. 1685 and VP 04/12/2001, p. 1695; see also VP 30/11/2001, p. 1686 and VP 04/12/2001, p. 1694.

⁶⁴ VP 25/02/1992, p. 33.

⁶⁵ VP 16/11/1993, p. 555.

⁶⁶ Under the former procedures of the House when bills were considered in detail in committee of the whole members were provided with two opportunities to have a bill reconsidered (1) recommittal of a bill on the motion for the adoption of the report from the committee of the whole VP 20/05/1993, p. 273; VP 03/05/1994, p. 214; VP 05/06/1996, pp. 227-8, and (2) recommittal of the bill on the motion for the third reading VP 04/03/1993, p. 68; VP 19/11/1993, pp. 597-6; PD 26/10/1994, p. 4692.

"That the question be amended by leaving out all words after the word 'That' with a view to inserting the words 'the House reconsider clause(s)..., schedule(s) ..., the whole bill'".

The Speaker will propose the question:

"The original question was: That this bill be now read a third time.

Upon which the member for ... has moved, That the question be amended by leaving out all words after the word 'That' with a view to inserting instead the words 'the House reconsider clause(s)..., schedule(s) ..., the whole bill'.

The question now is 'That the amendment be agreed to'."

(If agreed to), The Question now is "That the House reconsider clause(s)..., schedule(s) ..., the whole bill'."

20.6.6.3 Withdrawal

The procedure for withdrawing a bill which is already before the House is for the member who has carriage of the bill to move, "That the order of the day be discharged and the bill be withdrawn."⁶⁷ This motion is moved when the order of the day is read for the resumption of debate on the bill, or during the placing or disposal of business.

20.6.6.4 Divided bills

On occasion, a bill sent to the Legislative Council has been returned to the Legislative Assembly as a divided bill. For instance, in 2000, an instruction was given to the committee of the whole in the Legislative Council to split the *Industrial Relations Amendment Bill 2000* into two bills – the *Industrial Relations Amendment Bill 2000* and the *Industrial Relations Amendment (Independent Contractors) Bill 2000*.⁶⁸ The first bill was returned to the Assembly with amendments which were agreed to and the bill was assented to on 12 July 2000. The second bill, however, was never returned to the Assembly and it lapsed when the Parliament was prorogued in February 2002. It was not restored to the business paper in the next session.

In this case, the Assembly considered the amendments proposed to the Bill, which had been divided, agreeing with one amendment but disagreeing with the other. A message was sent to the Council stating that the Assembly considered that the established rules and practices of the Houses provided ample opportunity for the consideration and amendment of bills by each House and that the division of a bill in the House in which the bill did not originate is highly undesirable. The message also stated that the Assembly's action in this particular case was not to be taken as a precedent.

⁶⁷ VP 02/06/1999, p. 117; VP 18/11/1999, p. 301

⁶⁸ VP 29/06/2000, p. 669.

The division of a bill is a form of amendment. Given this, the Council may not divide a bill that it cannot amend, such as any bill appropriating money for the ordinary annual services of the Government.⁶⁹ However, in such cases the Council may request the division of the Bill.

20.6.6.5 Restoration of bills following prorogation

A bill which has lapsed because of prorogation, before it has been passed, can be restored to the business paper and proceeded with in the next session from the point of interruption as if its passage had not been so interrupted. If a motion for restoration is not agreed to by the House in which the bill originated, the bill may be re-introduced as a new bill. (S.O. 237).⁷⁰

Under standing order 237 bills can only be restored to the business paper by motion on notice moved by the member in charge of the bill. An Assembly bill in the possession of the Assembly at prorogation, including consideration of Council amendments, may be proceeded with by the member in charge moving a motion on notice restoring it to the business paper after receipt of a message from the Council requesting the same.⁷¹ If the motion for restoration is not agreed to, a message is sent to the Council accordingly.

In respect of a Council bill, the current standing orders require a notice of motion to be given, ostensibly to enable the House to decide when the matter will go forward and who will have carriage of the bill if this is in doubt.⁷² On one occasion a member, by leave, moved that standing and sessional orders be suspended to allow a notice of motion for the restoration of a Council bill to take precedence when general business notices of motions (for bills) were called on. The member subsequently moved that following the message from the Legislative Council in relation to the bill that the second reading be restored to the business paper as an order of the day.⁷³

If an Assembly bill is in the possession of the Council, a message may be sent to the Council requesting that the bill be restored to the Council's business paper. However, the Council does not have to agree to this request and has, at times, discharged or withdrawn the bill rather than restoring it to the business paper.⁷⁴

20.6.6.6 Cut off date for the consideration of Government bills received from the Legislative Assembly

On occasion the Legislative Council has adopted a sessional order which has the potential to affect the way Government bills are passed through the Parliament by specifying cut off dates for consideration of Government Bills received from the Legislative Assembly. For example, a sessional order adopted in March 2002 provided:

"That, during the present session and notwithstanding anything contained in the Standing and Sessional Orders, and unless otherwise ordered, the following procedures apply to the passage of Government Bills:

⁶⁹ The Council is precluded under section 5 of the *Constitution Act 1902* (NSW) from amending such bills.

⁷⁰ VP 7/06/2002, p. 281.

⁷¹ VP 13/03/2002, pp. 69 and 72; and VP 14/03/2002, p. 81.

⁷² The standing orders prior to those approved by the Governor on 12 December 1994 made provisions for a motion for restoration to be moved without notice immediately upon the reporting of the Council's message.

⁷³ See for example, VP 13/03/2002, p. 69 and VP 14/03/2002, p. 81.

⁷⁴ See for example, VP 04/03/1993, p. 67 and VP 29/04/1993, p. 198.

1. Where a Bill is introduced by a Minister, or is received from the Legislative Assembly:
 - (a) after 18 June 2002 (Budget Session), debate on the motion for the second reading is to be adjourned at the conclusion of the speech of the Minister moving the motion, and the resumption of the debate is to be made an Order of the Day for the first sitting in September 2002;
 - (b) after 19 November 2002 (Spring Session) debate on the motion for the second reading is to be adjourned at the conclusion of the speech of the Minister moving the motion, and the resumption of the debate is to be made an Order of the Day for the first sitting day in 2003
2. However, if after the first reading, a Minister declares a Bill to be an "urgent Bill" and copies have been circulated to Members, the Question "That the Bill be considered an urgent Bill" is to be decided without amendment or debate, except a statement not exceeding 10 minutes each by a Minister and the Leader of the Opposition, or a Member nominated by the Leader of the Opposition, and one cross-bench Member. If that Question is agreed to, the second reading debate and subsequent stages may proceed forthwith or at any time during any sitting of the House."⁷⁵

The Government's program in the Assembly was not unduly affected by this sessional order as motions were passed by the Legislative Council to enable it to deal with Government bills forthwith, at a later hour of the sitting or through all stages in any one sitting.⁷⁶ This meant that any amendments made by the Council to Government bills were returned to the Assembly in a timely fashion with little delay. In addition, the Government introduced a number of bills into the Legislative Council which meant that the sessional order did not apply.⁷⁷ A similar sessional order was adopted in May 2003,⁷⁸ November 2003⁷⁹ and June 2004.⁸⁰

20.6.6.7 Bills submitted to referenda

Part 2 of the *Constitution Act 1902* provides for a referendum in two situations:

- (1) When the Legislative Assembly and Legislative Council do not agree on the provisions of a bill, with the exception of appropriation bills (section 5B); and
- (2) When changes are proposed to the powers of either House or the procedures for election to the Parliament (sections 7A and 7B).

Referenda are to be conducted in accordance with the *Constitution Further Amendment (Referendum) Act 1930*. Essentially, this Act provides that the provisions of the *Parliamentary Electorates and Elections Act 1912* with regard to the conduct of elections are to be applied, so far as they are applicable, to a referendum as if it were an election. There have been 16 referenda held in New South Wales in relation to bills since the *Constitution Act 1902* was enacted:

⁷⁵ See the Legislative Council, *Minutes of Proceedings* 20 March 2002, pp. 72-4.

⁷⁶ PD 25/09/2002, p. 5243 and 19/11/2002, p. 6895.

⁷⁷ See for example, the *Environmental Planning and Assessment Amendment (Anti-Corruption) Bill 2002*, which fell under the portfolio responsibilities of the Minister for Planning (a Member of the Legislative Assembly), was introduced into the Legislative Council first rather than the Legislative Assembly.

⁷⁸ See Legislative Council, *Minutes of Proceedings*, 20/05/2003, pp. 91-2.

⁷⁹ See Legislative Council, *Minutes of Proceedings*, 18/11/2003, pp. 420-1.

⁸⁰ See Legislative Council, *Minutes of Proceedings*, 01/06/2004, pp. 808-9.

1. In December 1903 a referendum was held to reduce the number of members in the Legislative Assembly. This was passed with the number of members dropping from 125 to 90.
2. In June 1916 a referendum was held on liquor reform. Voters were given the choice of choosing any hour between 6.00 p.m. and 11.00 p.m. for closing time in a preferential ballot, with the majority of voters supporting a 6.00 p.m. closing time.
3. In September 1928 the voters overwhelmingly rejected a proposal to prohibit liquor in the State.
4. In May 1933 a referendum was held to reform and alter the powers of the Legislative Council, which was supported by the majority of voters.
5. In February 1947 a referendum was held on the closing hours for hotels, where the voters continued to support the 6.00 p.m. closing time.
6. In November 1954 the question regarding the closing time for hotels was once again put to the electors. It was voted that hotels could remain open until 10.00 p.m.
7. In April 1961 a referendum was held to abolish the Legislative Council. This was rejected by the electors.
8. In April 1967 electors in the South East of New South Wales were asked whether they supported the establishment of a new state in that area as described in the *New State Referendum Act 1966*. This was rejected by the electors in the area and was not submitted to a state-wide referendum.
9. In November 1969 electors were asked whether they supported an amendment to the law to enable hotels to trade on Sundays between 12 noon and 6.30 p.m. which was rejected.
10. In May 1976 electors showed their overwhelming support for daylight saving in a referendum.
11. In June 1978 electors passed a referendum which provided for the election of members of the Legislative Council directly by the people.
12. In September 1981 two referenda were held in conjunction with the General Election. In relation to the first referendum, the electorate overwhelmingly supported a referendum on the disclosure of pecuniary interests by members of Parliament.
13. The second referendum held in September 1981 was in relation to extending the maximum period between Legislative Assembly elections to four years. This was rejected by the majority of voters.

14. In May 1991 electors approved of a bill to reduce the number of members in the Legislative Council and their maximum term of office to two terms of the Assembly (i.e. 8 years). The bill also provided for the filling of casual vacancies in the Council in the same way as the Senate.
15. In conjunction with the March 1995 General Election electors approved a bill to prevent Parliament from changing laws about the independence of the judiciary without a referendum.
16. At the same time electors approved of a bill to make the term of Parliaments in New South Wales fixed at four years.

20.7 Impact of Commonwealth Legislation upon State Legislation

The introduction of bills into the New South Wales Parliament consequential upon Commonwealth legislation has resulted in some unusual procedures:

Corporations Bill 2000

On 30 November 2000 the Attorney General introduced the *Corporations (Commonwealth Powers) Bill*, a bill for an Act to refer certain matters relating to corporations and financial products and services to the Parliament of the Commonwealth for the purposes of section 51(xxxvii) of the Constitution of the Commonwealth.

In an unusual procedure which was intended to be repeated in each State, the Attorney-General tabled the following five documents each bearing identification "as part of the tabled text" for the purposes of the *Corporations (Commonwealth Powers) Bill*:

- Commonwealth Australian Securities and Investments Commission Bill.
- Commonwealth Corporations Bill Volume 1 Part 1.
- Commonwealth Corporations Bill Volume 1 Part 2.
- Commonwealth Corporations Bill Volume 2 Part 1.
- Commonwealth Corporations Bill Volume 2 Part 2.

Dairy Industry Bill 2000

The bill deregulating the dairy industry in New South Wales had to be passed by both Houses by a certain date in order for farmers to qualify for the Commonwealth restructure package. The Opposition and certain Independent members were pressing for amendments to the bill to provide for a State-funded top up compensation package. The amendments providing for this package were defeated in the Assembly but passed in the Council. The Assembly disagreed with the amendments with reasons and the Council in turn insisted on its amendments.

Under the Assembly standing orders the available options left for the Assembly were to agree to the amendments; insist on its disagreement and lay the bill aside or request a conference. In the end the Government suspended standing orders to permit a motion to be moved in committee of the whole "That the Assembly insists on its disagreement to the Legislative Council amendments a second time". In committee, the Leader of The Nationals moved an amendment to this motion to refer the amendments to a conference of managers of both Houses to report this day. The amendment was negatived and the original motion agreed to.⁸¹ In the Council,

⁸¹ PD 29/06/2000, pp. 7855-66.

the amendments were not insisted on after the Government gave an undertaking to look at other avenues of assistance.

20.8 Certificate of Parliamentary Remuneration Tribunal

Section 4 of the *Parliamentary Contributory Superannuation Act 1971* (by virtue of an amendment to the Parliamentary Remuneration Act made in 1998), states:

It is not lawful for the Legislative Assembly to originate or pass any vote, resolution or Bill for the amendment of this Act unless a certificate approving the amendment made by the vote, resolution or Bill has been first issued by the Parliamentary Remuneration Tribunal, or any successor of the Tribunal, during the Session in which the vote, resolution or Bill is proposed to be passed.

Under section 14A of the *Parliamentary Remuneration Act 1989*, in determining whether any amendment is warranted, the Tribunal "(a) must have regard to the Heads of Government Agreement, which commenced on 1 July 1996, relating to the exemption of certain State public sector superannuation schemes from the Superannuation Industry (Supervision) Act 1993 of the Commonwealth, including whether the amendment is consistent with that agreement; (b) must have regard to the effects of any proposed amendment on the present and future liabilities of the Parliamentary Contributory Superannuation Fund; and (c) may obtain and have regard to, actuarial advice relating to the costs and effects of any proposed amendment".

The first use of this provision, which clearly limits the law making power of the House under the NSW Constitution, was made when the Government introduced the Superannuation Legislation Amendment (Same Sex Partners) Bill 2000. In the case of the Parliamentary Contributory Superannuation Scheme, the amendments extend the definition of spouse for the purposes of the Act to a person who is in a de facto relationship, within the meaning of the *Property (Relationships) Act 1984*, with a member or former member of the scheme. The effect of this is that same sex partners or persons who are entitled to, or are receiving, benefits are now dealt with as spouses and will be entitled to the benefits payable to spouses on the death of the member or former member.

The certificate of the Parliamentary Remuneration Tribunal (PRT) stating that in the PRT's opinion, the amendments to the *Parliamentary Contributory Superannuation Act 1971* contained in the bill were warranted, was tabled following the first reading of the bill and also when the House considered amendments made by the Legislative Council.⁸²

⁸² VP 01/11/2000, p. 834 and VP 19/12/2000, p. 1028. See also VP 12/11/2003, p. 444; VP 15/11/2005, p. 1752.

Under review

Chapter 21 Consideration in Detail

21.1 Introduction

After a bill has been read a second time, the Speaker will call on the member in charge of the bill to move the third reading forthwith unless:

- a member has requested that the bill be considered in detail; or
- the member in charge of the bill moves a motion to consider the bill in detail pro forma; or
- the member in charge of the bill requests the Speaker to set down consideration of the bill in detail as an order of the day for a later time. (S.O. 203 as amended by sessional order).

The consideration in detail stage has replaced the former committee of the whole. However, many of the procedures are similar.

Under the previous practice the House proceeded to committee of the whole after a bill had been read a second time without question being put unless leave was granted or sought for the third reading to be taken forthwith, or for the bill to be committed pro forma, or if the Speaker was requested to set down consideration of the bill in committee of the whole as an order of the day for a future time.

When the House resolved itself into a committee of the whole the Speaker relinquished the Chair in favour of the Chairman of Committees who took the Clerk's chair at the Table. Under the current procedure where the House considers a bill in detail there is no requirement for the Speaker or other member presiding to relinquish the Chair. The presiding member does however step down from the Chair and sit at the Table.

Under the former committee of the whole procedure, the Speaker was able to participate in proceedings including taking a deliberative vote in any divisions taken in committee. Early Speakers often voted in committee¹ and in many cases did so in order to maintain a quorum.² From 1905 until 1991 Speakers chose not to exercise this right. However, the practice resumed during the 50th Parliament (1991 to 1994), when the balance of power in the House was held by three Independent Members of Parliament, with the Speaker exercising a deliberative vote in the majority of divisions held in the committee of the whole House.³ The practice was also used extensively during the 51st Parliament when the Government had a slight majority and political necessity required that the Speaker exercise a deliberative vote in the committee of the whole in order to ensure that the Government's legislative program proceeded in a timely and appropriate manner.⁴ Under the current procedure the House considers the legislation rather than the committee. However, amendments made to the *Constitution Act 1902* in June 2007 have ensured that this right of the Speaker to participate fully in the consideration in detail stage has been maintained.⁵

¹ See VP 09/03/1859, p. 315 where Speaker Cooper voted in a number of committee divisions on the supply estimates for 1859.

² See VP 01/02/1859, p. 303.

³ For examples, see PD 02/12/1994, pp. 6247-8 on the *Protected Disclosures Bill*; and PD 25/09/1991, pp. 1767-8 on the *Industrial Relations Bill*.

⁴ For example, see PD 31/05/1995, p. 476 on the *Liquor Amendment Bill* and the *Registered Clubs Amendment Bill*.

⁵ Section 31 of the *Constitution Act 1902* provides the Speaker may, when not presiding, take part in any debate or discussion and vote on any question, which may arise in the Legislative Assembly.

The House considers a bill or other matter in detail pursuant to:

- (1) the directions in the standing orders; or
- (2) a resolution of the House.

The consideration in detail stage is the only stage where a bill can be amended, hence it is also necessary for Legislative Council amendments in a bill to be considered in detail by the House.

The House cannot amend a bill that has been read a second time in a manner that is destructive of the principles agreed to at the second reading stage. However, the House can "destroy" a bill by negating a clause or clauses, the omission of which will nullify the bill.⁶

It is interesting to note that in the former committee of the whole, a bill could not be defeated but could be "laid down".⁷ As such, while a bill was only able to be withdrawn in committee with the leave of the House, a committee of the whole could indirectly "destroy" a bill by:

- reporting progress, without asking leave to sit again;
- agreeing to a motion "That the Chairman do now leave the Chair" or in other words refusing to proceed with the bill; or
- by negating a clause or clauses, the omission of which would nullify the bill.⁸

The Chair has ruled that there is nothing stopping a committee of the whole from negating any clause or clauses which may destroy the bill. However, the Westminster practice has been for the member in charge of the bill to withdraw it and to introduce another bill in an amended form upon which the House and committee is likely to agree.⁹ In 1934, Deputy Speaker Hedges commented on bills in committee noting that "it was not the practice to rule bills out of order after they had been committed simply because of an irregularity which was capable of being corrected in committee, or upon recommitment."¹⁰

21.2 Business dealt with in the consideration in detail stage

Most of the business dealt with by the Assembly may be considered in detail, but there are certain matters which the standing orders require to be so considered:

- (1) Motions for referenda in accordance with section 5B of the *Constitution Act 1902*;
- (2) Legislative Council amendments in bills (S.O. 223);
- (3) Messages from the Governor recommending bills for Loan or Appropriation and accompanying Estimates and Statements (S.O. 244)¹¹; and
- (4) Reports of Estimates Committees appointed by the Legislative Assembly (S.O. 246(4)).

⁶ *House of Representatives Practice*, 5th edition, 2005, pp. 364-5.

⁷ See *May*, p. 601, where reference is made to observations made by John Moore, a member of the Long Parliament, in his unpublished diary on 16 April 1641 which argue that "no committee can destroy a bill, but they may lay it down".

⁸ *May*, p. 601.

⁹ See PD 06/05/1992, pp. 3680-1.

¹⁰ VP 01/07/1934, p. 116.

¹¹ See ruling of Speaker Arnold, VP 08/10/1873, pp. 61, 64, 80 and 93-4. Confirmed by Speaker Dooley, PD 20/12/1926, pp. 12-3.

The House is not limited to considering bills in detail but may consider other matters in detail, such as the terms of a resolution, in order that members are able to speak more than once on the same question.¹²

The general rules applying to the House guide the proceedings during the consideration in detail stage unless otherwise specified. For example, during the second reading debate members are usually limited to one speech but during the consideration in detail stage, members are not so limited (S.O. 242).

21.3 Limited powers of the House during the consideration in detail stage

It is important to remember that during the consideration in detail stage the House may consider only those matters referred. This point usually arises when a member desires to import matters by way of amendment, the nature of which (although at first glance appearing to be relevant and as being "within the title" of the bill) are outside the *scope* of the bill (or other matter) which has been referred for consideration in detail by the House (see section 21.12.1 of Part One).

The consideration in detail stage follows the same procedures as the former committee of the whole and accordingly a number of precedents are relevant to the discussion. It has been ruled that it was not competent for a committee to question the legality of proposed legislation and that it was not in order to change a motion in such a way as to make it express an opinion.¹³ The same principles apply when the House is considering a bill or matter in detail and the only course open to members is to agree to the motion or vote it out.

In addition, during the consideration in detail stage a bill cannot be ruled out of order. A motion such as "That the bill be laid aside" or an amendment "That the bill be disposed of" cannot be accepted.¹⁴

When the House is considering a bill or matter in detail it is not within the powers of the Chair to rule any clauses out of order. Having been referred for consideration in detail they must be presumed to be in order.¹⁵ Clauses must be dealt with either by amendment or otherwise.

Under the former committee of the whole procedure a committee could not adjourn. Occupants of the Chair held that any motion to adjourn the debate in the committee may be viewed as an obstructive motion and have refused to accept the motion.¹⁶ However, "progress" could be reported at any time upon the motion of any member. In practice, the Chairman did not report the precise progress that had been made with the matter referred to the committee (as, for instance, "The committee has finished consideration of the first three clauses") but merely reports, "Mr Speaker, the committee reports progress and asks leave to sit again".

In contrast to the previous practice the current procedure enables the House to adjourn the debate during the consideration in detail stage and the matter becomes an order of the day and the proceedings in consideration in detail will resume when

¹² VP 12/05/1960, p. 323.

¹³ PD 12/05/1960, p. 4046.

¹⁴ VP 26/11/1929, p. 561.

¹⁵ PD 30/11/1897, p. 5319; PD 27/09/1916, p. 2149.

¹⁶ VP 10/12/1958, p. 205; PD 13/05/1931, pp. 2670-1.

the order of the day is next considered. There is no requirement for the Chair to seek permission for the House to consider the matter in detail again.

When a division on a proposed amendment has been deferred pursuant to standing and sessional orders the deferred division will be considered by the House at the appropriate time. For example, under the current standing orders a division cannot be held until 10:30 a.m. on those days when the House sits before that time. Any division deferred during the consideration in detail stage will be held at 10:30 a.m. and any business then before the House will be interrupted and recommenced after the division(s). In contrast, under the former practice, deferred divisions during a committee of the whole were set down as an order of the day and were conducted when the bill was next considered in committee. This required the Chairman to report progress and seek leave for the committee to sit again.¹⁷ On one occasion a division called for in committee was deferred pursuant to the then standing orders as it was before 9:30 a.m. The committee considered other clauses of the bill and the deferred division was conducted later in the committee stage without the need for the Chairman to report progress and seek leave to sit again.¹⁸

The motion, "That you (the Chairman) do now leave the Chair and report progress, and ask leave to sit again" did not have to be accepted if, *in the opinion of the Chairman*, it was moved with the object of causing obstruction¹⁹ or was not consistent with the regular and orderly conduct of business. However, when the motion was accepted, the question was put without debate in accordance with the standing orders.²⁰

If a committee of the whole failed to "ask leave to sit again" when reporting progress, the order of the day lapsed and consideration of the business in question could not be resumed until the order of the day was restored to the business paper for a future day.²¹ This was achieved upon a motion of which it was not necessary to give notice. Business interrupted by a count-out could be similarly "revived".

If the House did not agree to the question "That leave be given to sit again", the order of the day fell from the business paper and could not be restored unless the vote by which the leave was refused was rescinded.²²

A committee could not suspend the operation of any standing or sessional order, nor could a member be suspended by a committee. The Chairman could, however, direct the Serjeant-at-Arms to remove a member who had been called to order more than three times. This action debarred the member from the House and from all the rooms set apart for the use of members until the termination of such sitting.²³ Under the current consideration in detail procedure the Chair is able to suspend a member

¹⁷ See for example, VP 28/06/2002, p. 371 where an Independent member moved amendments to a bill and the division on the amendments was deferred. Following the suspension of standing and sessional orders the bill was recommitted to allow the deferred division to be conducted.

¹⁸ See PD 05/06/1996, p. 2527 and pp. 2534-5. The former standing orders provided that members could not call a division on any question before 9.30 a.m. on any sitting day. The standing order was rescinded on 14 October 1996. The current standing orders prohibit members from calling a division before 10.30 a.m. on days when the House meets at 10.00 a.m.

¹⁹ PD 03/05/1994, pp. 1817-8.

²⁰ PD 09/10/1918, p. 2063; PD 21/10/1997, p. 1115; Chairman ruled that a resolution of the House requiring that "all questions being put for all remaining stages" precluded the consideration of the question that he leave the Chair and report to the House, PD 21/10/1997, p. 1113.

²¹ VP 16/11/1866, p. 369.

²² VP 20/11/1923, pp. 145-6.

²³ See also PD 22/08/1991, pp. 452-66.

in the same way that a member can be suspended during any other proceeding in the House.

In committee it was not in order to lay papers upon the Table. However, members did place documents upon the Table in order that other members had access to them during debate.²⁴ This practice remains the same for the consideration in detail stage.

Questions of privilege could not be decided by a committee of the whole. Privilege matters were dealt with by the House once the Committee had formally reported the matter. Speaker Ellis ruled in 1970 that in future "...a contempt which takes place in committee must immediately and briefly and without debate be brought to the attention of the Chairman." He added that the Chairman's normal report to the House (either of progress or whatever) shall be deemed to contain a report of the alleged breach of privilege. Thus the House will be in possession of such information as will enable the matter to be raised in the House.²⁵ In contrast a matter of privilege suddenly arising during the current consideration in detail procedure can be determined by the House immediately.

Under the former committee of the whole procedure the Chairman was unable to decide:

- questions of order upon any proceedings in the House;²⁶
- whether a guillotine notice covering committee stage was defective because it also included reference to another stage in the passage of legislation;²⁷
- whether Legislative Council amendments were in order;²⁸ or
- whether, when the Chairman took the Chair in committee, the committee was properly constituted because of alleged breaches of the standing orders before a committee had been set up.²⁹

Despite these limitations a ruling given by Speaker Ellis in 1970 indicates that the Chairman in committee could use whatever procedures were deemed necessary to preserve order in the committee. The former practice of the House was for the Chairman in committee to regulate debate and to enforce the observance of the rules which governed its conduct. Further, it was the duty of the Chair to intervene in the first instance for the preservation of order, if, in the Chair's judgement, interference was demanded.³⁰ If the Chairman refrained from interference (either because the Chair did not consider it necessary to do so or because it did not perceive that a breach of order had been committed) it was also the right of any member who wished to raise a point of order to rise in his or her place and direct the attention of the Chair to the matter provided he did so the moment the alleged breach of order occurred.³¹

²⁴ PD 12/03/1958, pp. 2611-2.

²⁵ PD 11/03/1970, pp. 4133-4.

²⁶ VP 26/09/1912, p. 116.

²⁷ VP 26/11/1929, p. 564.

²⁸ PD 03/11/1909, p. 3223.

²⁹ VP 26/09/1912, p. 116.

³⁰ See *May*, pp. 795-7.

³¹ PD 03/09/1970, pp. 5585.

This ruling reinforced the view expressed by Speaker Young in 1887-88 that if any wrong had been done, the proper time to take exception to it was at the time of the transgression.³² The same principles apply in the consideration in detail stage.

21.4 Debate

Except where otherwise specified, the same rules of debate apply to the proceedings in the consideration in detail stage as those that apply to other debates in the House:

- Time limits for speeches during the consideration in detail are set out in standing order 85 and are applicable to each question proposed; that is, to each clause, to each amendment to each clause, a clause as amended, and so on.
- During the consideration in detail stage there is no "reply" as there is during other debates in the House, hence when the mover of a motion or an amendment speaks a second time the debate is not closed. This was also the case during the former committee of the whole procedure.³³
- Extensions of time may not be granted, as is the case in other debates in the House.³⁴ However, Ministers have, by leave, moved that members whose time has expired during debate in committee be permitted to conclude their remarks.³⁵

The primary consideration in debate during the consideration in detail stage is relevancy. The discussion is to be of those matters that the House has decided should be considered in detail. This follows the same principles of the former committee of the whole where discussion was to be confined to those matters that were referred to the committee for consideration.

The scope of debate during the consideration in detail stage is quite restricted.³⁶ Agreeing to the second reading decides the principles of a bill, whereas when a bill is considered in detail members consider how the principles are best carried out.³⁷ In accordance with the basic rule, debate is confined to the matter of the actual question proposed from the Chair.³⁸ Therefore, at most, the content of each clause or group of clauses is at issue, and except in the cases of one-clause bills the scope of debate is obviously confined.³⁹ To raise doubts as to the necessity for a bill is not in order during the consideration in detail stage,⁴⁰ nor is it proper to canvass to the Minister's reply to the second reading debate.⁴¹

Strictly speaking when an amendment is proposed to a clause or to a motion only the amendment may be debated until the amendment has been disposed of.⁴²

Bills are considered clause by clause, and schedule by schedule, unless leave is granted to consider the bill in groups of clauses or schedules, the object being to

³² PD 02/11/1887, pp. 890-1.

³³ PD 29/10/1952, p. 1749.

³⁴ PD 30/10/1928, pp. 1338-40 (Dissent negatived).

³⁵ PD 09/06/2000, p. 7026.

³⁶ But see PD 12/11/1952, p. 2112.

³⁷ PD 27/10/1965, p. 1564.

³⁸ PD 30/09/1952, pp. 996-7.

³⁹ PD 07/11/1951, p. 4139.

⁴⁰ PD 24/10/1939, p. 6854.

⁴¹ PD 27/10/1965, p. 1564.

⁴² PD 10/03/1955, p. 2907; PD 30/09/1952, p. 997.

ensure as far as possible that the details of the bill are adequate to implement the principles of the bill as agreed to at the second reading stage.

When Legislative Council amendments are being considered, debate is confined to the amendments themselves. No other part of the bill is being considered in detail. However, if an amendment has a direct bearing on some other part of the bill a degree of latitude is sometimes allowed.

Priority of the call is given to the member in charge of the business being considered in detail, followed usually, though not necessarily, by the Leader of the Opposition or by the member leading on behalf of the Opposition.

Generally speaking, the proceedings during the consideration in detail are less formal than those of other proceedings. Relevant interjections are permitted, being rather similar to the "interventions" in the Commons⁴³, although in New South Wales the member speaking remains on his or her feet and the interjector remains seated unless a point of order is being taken.

21.5 Constituent parts of a bill

A bill may consist of:

- (1) Explanatory note.
- (2) Long title.
- (3) Preamble.
- (4) The words of enactment.
- (5) The enacting provisions.
- (6) The short title.
- (7) Schedule or schedules.
- (8) The headings.

(1) *Explanatory Note*. Since 1938 it has been a requirement under the standing orders for an "*Explanatory Note*" to be affixed to the front of each bill when it is introduced. Such notes briefly and simply set out the provisions of the bill. The Explanatory Note is not considered in detail. In 1994 the standing order was amended to delete this reference and to simply provide that any explanatory note affixed to the bill be printed after the first reading. Under the current standing orders a bill is printed, with an explanatory note if applicable, once it has been introduced (S.O. 188(7)).

(2) *The Long Title* (the formal title) sets out in general terms the purposes of the bill. It is only amended if amendments made in the body of a bill render alteration necessary. It is not necessary to mention all the Acts affected (S.O. 188(1)).

(3) *The Preamble*, which, when it appears in a bill, runs into the words of enactment, and sets forth the reasons and intended effects of the proposed legislation.⁴⁴ Nowadays, preambles are rare, and for many years have appeared only in private bills (S.O. 360) and bills dealing with

⁴³ An intervention is somewhat similar to an interjection, although the member who intervenes is able to speak if the member who was speaking allows it. See *May*, p. 432.

⁴⁴ *May*, p. 536.

Commonwealth/State arrangements.

- (4) *The words of enactment* (the enacting formula)⁴⁵ are contained in the paragraph (not numbered) which reads "The Legislature of New South Wales enacts:" This paragraph may *not* be amended by the House and, therefore, is not proposed by the Chair (S.O. 206). However, the words of enactment may be altered by the Clerk should circumstances provided for by ss. 5A⁴⁶ and 5B⁴⁷ of the Constitution Act arise.
- (5) *The enacting provisions.* The enacting provisions of a bill follow immediately after the words of enactment and are divided into numbered clauses which may be subdivided into subclauses, paragraphs and subparagraphs. (The clauses of a bill become "sections" when, by the signification of the assent, a bill becomes an Act; in debate, to assist clarity, one refers to "clause so-and-so" of a bill, but "section so-and-so" of an Act.)
- (6) *The Short Title* usually forms the subject of clause 1 of a bill. The short title may be used in citing an Act in any other Act.⁴⁸ Obviously, it is the most convenient method of reference in debate. The figures indicating the year which follow the words of the short title are regarded as an integral part of the short title. The short title may not be amended by the House unless changes to the substance of the bill render it necessary.⁴⁹

Should a bill, introduced in one year, be not passed until the following year, the alteration of the year number in the short title by amendment is not required. The change may be made administrably by the Clerk.⁵⁰

Short titles of bills are usually not open to amendment unless amendments to the substance of the bill render it necessary.⁵¹ However, there are exceptions to this principle. For instance in 2005 the short title of the *Crimes Amendment (Road Accidents) Bill* was amended to insert the words "(Brendan's Law)" after the words "(Road Accidents)". The amendment was symbolic and did not affect the substance of the bill.⁵²

If the clause containing the short title has been omitted it may be inserted by the House upon reconsideration, when the motion is moved for the bill to be a third time, or by a proposed Legislative Council amendment.⁵³

- (7) *The Schedule or Schedules* appear after the last clause, and are those matters not conveniently inserted in the clauses which precede them in the manner of appendices to a Report. There is an increasing trend for substantive amendments to be in Schedule 1 in short bills.

⁴⁵ *Constitution Act 1902*, sec. 5C for variations.

⁴⁶ Regarding disagreements between the two Houses in relation to appropriation bills

⁴⁷ Regarding disagreements between the two Houses on bills and the submission of the bill to the public by referendum.

⁴⁸ *Interpretation Act 1987*, sec. 66.

⁴⁹ PD 10/04/1992, p. 2622.

⁵⁰ See PD 02/03/1961, pp. 2870-1.

⁵¹ See statement by Speaker Rozzoli, PD 10/04/1994, p. 2622. For example see PD 18/11/1993, p. 5668.

⁵² PD 12/10/2005, pp. 18453-4. See also PD 27/06/1996, pp. 3757-8.

⁵³ PD 06/05/1992, p. 307.

- (8) *The Headings* to a Part, Division or Subdivision, or Schedule in an Act are taken to be part of an Act⁵⁴ and other headings, marginal notes, footnotes or endnotes *may* be taken to be part of the Act if it is referred to expressly in some other part of the Act or is the heading, etc, to a form or table in the Act

Clerical, typographical format and other obvious errors in a bill may be corrected by the Clerk before it is sent to the Council (S.O. 219).

A Bill can also be split into a number of different bills. For example, in the Legislative Council the Minister for Industrial Relations moved a motion, which was agreed to, for an instruction to be given to the committee of the whole in the Legislative Council that the *Industrial Relations Amendment Bill 2000* be split into two.⁵⁵ The Legislative Assembly considered that the established rules and practices of the Houses provided ample opportunity for the consideration and amendment of bills by each House and that the division of a bill in the House in which it did not originate was highly undesirable.⁵⁶ See section 20.6.6.4 of Part One for further information on divided bills.

21.6 How consideration of a bill proceeds

21.6.1 *Pro forma consideration in detail*

After a bill has been read a second time, the member in charge of the bill can move "That the House consider the bill in detail pro forma" (S.O. 204 as amended by sessional order).⁵⁷

A bill is considered in detail pro forma because of numerous or complicated amendments and it appears to the member in charge of the bill that the amendments would be better understood in the context of the bill.

The member in charge must have already had the proposed amendments printed and circulated. The question is put, "That the amendments, as printed, be inserted in the bill". No debate or amendment is permitted upon this question but whether the proposed amendments are in order may be questioned.⁵⁸

If the question is agreed to, the bill is reprinted in its amended form and on its reconsideration it will be considered as if considered for the first time.

If either the question for the pro forma consideration in detail or the question on inserting all the amendments is negatived the bill is proceeded with in the usual way. The amendments which the House did not agree to insert as one question may, with debate, be moved separately in the appropriate places.

Amendments inserted in a bill by a pro forma consideration in detail should not include any amendment in the title.⁵⁹ If necessary, the title may be amended afterwards to cover the amendments.

⁵⁴ *Interpretation Act 1987*, sec 35.

⁵⁵ Legislative Council Minutes 28/06/2000, p. 567.

⁵⁶ VP 29/06/2000, pp. 670-1 and 674.

⁵⁷ Bills committed pro forma: VP 17/09/1974, p. 105; VP 21/02/1967, p. 243; VP 18/11/1975, p. 234; VP 26/02/1980, p. 256 (cognate bills); VP 04/03/1980, p. 271; VP 22/03/1983, p. 259; VP 26/02/1985, p. 244; VP 23/10/2001, p. 1536.

⁵⁸ VP 04/07/1911, p. 101.

⁵⁹ PD 04/07/1911, pp. 1258 and 1264.

Essentially, the procedure is used when there are many amendments so that members are able to see how the bill would look with the amendments incorporated. By considering a bill in detail pro forma the House is still able to consider the bill in detail at a later stage to agree to the amendments.

21.6.2 Consideration in detail of a bill

Proceedings on a bill being considered in detail are commenced by the Speaker or other occupant of the Chair who, without receiving a motion, announces the name of the bill and, if leave has not been sought to deal with the bill in groups of clauses/schedules, "reads" the first clause. For a clause to be "read" it is sufficient if the clause number is recited (S.O. 207). Having so read the clause the Chair proposes "That the clause/schedule be agreed to" (S.O. 208) and debate may proceed. Clauses (and schedules) are considered in their numerical order and they may be considered separately or, by leave, in groups, or as a whole (S.O. 208). On one occasion, when it was proposed to consider a number of clauses of a bill as a group, the Chair ruled that the division be deferred because if the question was now put it would preclude debate on the proposed amendments and noted that he proposed to deal with each of the clauses individually so that the various amendments could be debated.⁶⁰ Standing and sessional orders have also been suspended to enable one question to be proposed in respect of the clauses and schedules of a bill during the consideration in detail.⁶¹

A Minister and the Leader of the Opposition (or deputy) are not limited in the number of times speaking as long as there are intervening speakers but the length of each contribution is limited as set out in standing order 85, as amended by sessional order. Other members may speak three times to each question, i.e. three times to each clause, any individual amendment proposed and, if the clause has been amended, three times to the question "That the clause/schedule as amended by agreed to", and so on (S.O. 85). Each time the clause is amended, this question is also proposed.

Having dealt with clause 1, clause 2 is similarly proposed by the Chair for consideration followed by clause 3 and so on until all the clauses have been dealt with. Then any schedules to the bill are considered in the same fashion, followed by any postponed clauses and postponed schedules (S.O. 209). If appropriate, the Chair then proposes the question "That the preamble be agreed to" (S.O. 205).

It is competent for the House to postpone the consideration of a clause which has been amended (S.O. 213). This is achieved by carrying a motion "That consideration of the clause be postponed". (The question is open to debate.) The effect of this is to postpone consideration of the clause until after the remaining clauses and schedules have been dealt with.

It is not in order to move that a clause be postponed until a specified date or time or order in relation to the other clauses.⁶² If more than one clause is postponed, they

⁶⁰ PD 18/05/1993, pp. 2189, 2217 and 2224.

⁶¹ VP 21/06/2001, p. 1308.

⁶² PD 25/10/1922, p. 3022.

are later considered in the order in which they were so postponed. A clause must be postponed in its entirety.

It is not in order to move an amendment for the omission of a clause. To achieve this, a member votes against the question "That the clause/schedule be agreed to".

Proposals for new clauses and new schedules should be made in their numerical order (S.O. 209). However, if the first amendment of a group of related amendments fails to be passed the remainder cannot be moved.⁶³

To omit a clause and insert another in its place, it is necessary to *negative* the clause when it is proposed and then move for the replacement clause.

A clause (or schedule) having been agreed to (either as proposed or amended) may not be considered again by the House unless, the House agrees to reconsider the bill (S.O. 217). A bill is seldom reconsidered in its entirety, and is usually reconsidered in relation to a specified clause (or clauses) or the insertion of new clauses. When the House is reconsidering a bill, only those particular matters set out in the reconsidered clause (or clauses) are open to consideration and amendment.

The preamble, if any, stands postponed until after the clauses (and schedules) have been dealt with (S.O. 205). The preamble may be amended if it appears to the committee that it is inconsistent with any clause in the bill regardless of whether such inconsistency was in the bill originally considered in detail or only after a clause has been amended.⁶⁴

The long title of a bill is not proposed for consideration unless an amendment "has been made in the bill necessitating an amendment of the long title" (S.O. 211), and therefore, if considered at all, is the very last matter proposed. If any amendments agreed to in any clause or schedule render the long title inaccurate, the long title is proposed and the necessary amendment moved, followed by the question "That the long title, as amended, be the long title of the bill" (S.O. 211).

As stated earlier, a bill may not be ruled out of order during the consideration in detail stage on the grounds of any irregularity. Furthermore, it is outside the authority of the Chair to rule out of order a bill which proposes to amend an Act not already passed into law.⁶⁵ This follows a ruling given by Speaker McCourt in 1905 who said, in reply to a similar point taken during the second reading of a bill, "he did not consider he was called upon to decide whether the *Local Government (Shires) Bill* was an Act or not, it was sufficient that the Order of Leave covered the general scope and purport of the matters comprised in the bill".⁶⁶

It is also permissible for the House to consider two bills, the provisions of one complementary to, and containing references to, the other bill before the latter bill has become law.⁶⁷

⁶³ See for example, PD 20/08/1991, p. 195.

⁶⁴ PD 29/11/1906, p. 4252; PD 12/09/1923, p. 812.

⁶⁵ PD 27/11/1919, pp. 3114-5.

⁶⁶ PD 20/09/1905, p. 2309.

⁶⁷ PD 30/10/1963, p. 6059.

21.7 Amendments to bills

It is necessary, when moving an amendment, to inform the Speaker (and the House) the precise point at which the clause under consideration is affected. To facilitate this, the lines on each page are numbered.

The position of an amendment is described by giving (i) the page number(s); (ii) the clause number; and (iii) line number, in that order. For example, having secured the call, a member proceeds:

- Page 5, clause 8, line 17. After the word "house" insert the word "brick"; or
- Page 6, clause 10, line 12. Omit the words "but not earlier than six months"; or
- Page 8, clause 14, lines 4 to 10. Omit the words "brick house", insert instead "solid structure".

Proposed amendments must be handed to the Chair in writing and signed by the mover (S.O. 159). Leave is not required to move amendments without reading them.⁶⁸

The Speaker does the utmost to preserve the rights of all members. For instance, if it appears to a member that an amendment moved would, if proposed from the Chair, preclude the moving of another amendment, the attention of the Chair must be drawn to this fact. The Chair will then request the first member to resume their seat to enable the second member to move their amendment.⁶⁹

Once an amendment has been proposed from the Chair, any prior amendment may not be accepted unless the amendment which has been proposed is, by consent of the House, withdrawn.⁷⁰

Usually only one clause is considered at a time and therefore it is not in order to move one amendment with the object of dealing with two or more clauses, although leave may be obtained to move a number of amendments *in globo* (i.e. together as the one question).⁷¹ The grouping of amendments for debate is generally done for the convenience of the House and permits debate to range over a number of amendments that are linked or raise different aspects of the proposal under consideration and it is a way of preventing repetition.⁷² The Chair with the concurrence of the House may also propose a bill by parts.⁷³

Three different forms of amendments may be moved (S.O. 157).

- (1) to leave out words;
- (2) to leave out words in order to insert or add other words; or
- (3) to insert (or to add) words.

If an amendment is agreed to, the clause, *as amended*, is proposed (S.O. 212), and if an amendment is negatived the clause, as read, is again proposed "That the clause/schedule be agreed to" (S.O. 208).

⁶⁸ PD 28/10/1998, p. 9287.

⁶⁹ PD 14/02/1918, p. 2629.

⁷⁰ SO 171, but see VP 12/12/1929, p. 586.

⁷¹ PD 18/08/1909, p. 1330; PD 07/03/1967, p. 3829.

⁷² See *May*, p. 550.

⁷³ See for example, PD 06/12/1966, p. 3205 where the *National Parks and Wildlife Bill* was agreed to in parts.

When an amendment has been considered and either accepted or rejected, it is not in order to move an amendment to an earlier part of a clause (S.O. 161 (3)) unless the bill is reconsidered.⁷⁴ However, if a proposed amendment is *withdrawn*, the earlier portion of the clause still remains open to amendment (S.O. 161(3)).

Amendments that propose to change the principles of a bill, that have been agreed to at the second reading stage, have been ruled inadmissible and out of order for being subversive.⁷⁵

21.8 Notice of amendments to bills

Since 1964 it has been the practice in the House for members to give written notice of amendments to be moved. Prior to this they were given orally and the Chair would request an amendment to be in writing only if necessary. Today, notice of amendments are not given orally in the House, but are handed to one of the Clerks-at-the-Table in accordance with standing order 159, which provides that "Amendments must be in writing and signed by the mover". Amendments upon proposed amendments must also be given in writing.

It is preferable that amendments be foreshadowed in the second reading debate and written notice handed to the Clerks. Whilst there is no requirement in the standing orders for members to give notice, if copies of their amendments are available to members in advance the consideration in detail stage is greatly assisted. For instance, experience has shown that Ministers more often accept amendments which they have had time to examine, and other members, when they are in possession of the exact wording of amendments, do not debate at cross-purposes. It also facilitates the Chair putting amendments in the correct order so a member's right to move an amendment is not compromised.

21.9 Test votes

Inevitably the occasion will arise when amendments clash. For instance one member desires to move for the omission of a paragraph while another member seeks to amend the same paragraph.⁷⁶ If the first amendment was accepted and proposed the second amendment could not be entertained because of the provisions of standing order 161(3).

This situation is met by the device known as "test votes" whereby the Chair (in the case instanced above) would propose only those words of the first amendment down to the point where the second amendment would begin.⁷⁷ If the House decides to leave out the words, the first amendment is held to have been agreed to without further question. If the House decides that the words stand, the first amendment is negated and the Speaker will propose the question for the second amendment.⁷⁸

⁷⁴ PD 13/11/1952, p. 2180.

⁷⁵ PD 03/05/1994, pp. 1817-8.

⁷⁶ For example see VP 21/03/1963, p. 675 where a member proposed to leave out all words from lines 1 – 39 of a bill and a further proposal was moved to insert an amendment in line 4 of the same lines.

⁷⁷ PD 29/09/1904, pp. 429-30. For another example see PD 07/05/1992, pp. 3920-1.

⁷⁸ See for example, PD 03/04/1963, p. 4125 where a member proposed to leave out all words of a particular clause in a bill and another member wished to omit only some of the words and the Chairman put the question in the form "That the words proposed to be left out...stand part of the clause" in order to preserve the rights of both members. In this case, the question was resolved in the affirmative which meant that the second amendment to omit some of the words was then put to the Committee.

A second kind of test vote is taken when a proposed amendment requires alteration to the text of a clause at two or more separate points, or it may be that a proposal requires an amendment in one clause and a consequential or supplementary amendment in another clause to complete the proposal.⁷⁹ Cases such as these may be decided by a test vote on the first of the amendments. If the first amendment fails the consequential or supplementary amendments are held to have failed; but if the first amendment succeeds those consequential must be put to the House in the usual fashion. This is not always the case, for instance, on one occasion a number of amendments were moved to a bill that overlapped and in order to save confusion all the proposed amendments were considered as one question rather than dealing with each amendment separately by way of a test vote.⁸⁰

Therefore, when it appears to a member that a decision upon a proposition would prevent the member from moving another, the member must immediately draw the attention of the Chair to this situation and the Chair will propose the first amendment in such a form as to preserve the rights of both members.⁸¹

Once a clause has been agreed to it cannot be again considered unless the House agrees to reconsider it in detail (S.O. 215).

21.10 Voting for or against amendments to bills

An amendment to "insert" is proposed by the Chair in the form "That the words proposed to be inserted be so inserted" (S.O. 157(3)). Consequently, to vote *for* the amendment, a member votes with the "ayes". But an amendment to "leave out" is proposed in the form "That the words proposed to be left out *stand* part of the question" (S.O. 157(1)). Therefore to vote for the amendment a member casts their vote with the "noes", or, in other words, against a proposition for the words to remain.

When the purpose of an amendment is to leave out words with a view of inserting other words in their place, two questions are proposed, viz:

- (1) First, to create a "blank" – "That the words proposed to be left out stand part of the question".

If resolved in the affirmative the amendment is disposed of, but if it is negatived the question then becomes:

- (2) "That the words proposed to be inserted be so inserted", which requires an "aye" majority.

Since 1994, the standing orders have allowed an alternative question to be put by the Chair – "That the amendment be agreed to". If it is a Government proposal, the practical effect is that it allows Government members, in the case of a division, to remain on their side of the Chamber. This form of question should not be proposed

⁷⁹ VP 05/03/1931, p. 631.

⁸⁰ PD 04/03/1964, pp. 7553-63.

⁸¹ VP 26/03/1958, p. 270; PD 22/08/1963, p. 4389; PD 27/02/1964, p. 7332; PD 25/11/1959, pp. 2330-1; PD 31/03/1960, p. 3497.

if members have alternative proposals for the insertion of words after words are left out and a blank created.

21.11 Amending amendments to bills

It is in order to move an amendment upon an amendment as if the amendment were an original question (S.O. 164). The form for the motion is "I move, That the amendment be amended by ... (here state the proposal)".⁸²

In the case of an amendment to leave out words with a view of inserting other words, if the member desires to leave out more or fewer words than the mover of the amendment proposed, this is done upon the question "That the words proposed to be left out stand". However should it be desired to amend the words it is proposed shall be inserted, the "blank" must first be created, i.e. the words proposed to be left out must first be left out.⁸³

When the following question "That the words proposed to be inserted be so inserted" is proposed, then is the time to move any amendment upon the amendment.⁸⁴

An amendment to an amendment that seeks to reinstate to the motion those parts of the original motion that the first amendment sought to exclude is out of order.⁸⁵

21.12 Admissible and inadmissible amendments to bills

Inadmissible amendments include amendments which:

- (i) Directly or indirectly conflict with the principles of a bill as read.⁸⁶
- (ii) An amendment cannot be "subversive of the principle", but it may "modify" a principle.⁸⁷
- (iii) Contradict a principle already *agreed to* or seek to incorporate one already *negated* by the committee.⁸⁸
- (iv) Contain proposals earlier submitted and negated.
- (v) Would render the provisions of a bill inconsistent.⁸⁹
- (vi) In effect, contravene an Act of Parliament.⁹⁰
- (vii) Introduce a new principle.⁹¹
- (viii) Are offered to an inappropriate clause.⁹²
- (ix) Would render a bill unintelligible.⁹³
- (x) Are moved in a spirit of mockery.⁹⁴
- (xi) Would make a clause inoperative.⁹⁵
- (xii) Propose to omit a whole clause. (This is achieved by voting against the clause.)

⁸² See for example, VP 28/04/1964, p. 742 where an amendment was moved to add words to a proposed amendment.

⁸³ PD 09/10/1935, p. 564.

⁸⁴ See also *May*, p. 403. For example see VP 11/12/1928, p. 471-3 where the committee agreed to the omission of a word and both a Minister and private member moved for a word to be inserted in lieu thereof.

⁸⁵ See ruling of Speaker Murray, PD 11/06/1996, p. 2728.

⁸⁶ PD 18/10/1917, pp. 1845-6; PD 04/03/1918, p. 3186; PD 27/06/1934, p. 1335.

⁸⁷ PD 24/10/1906, p. 3120.

⁸⁸ PD 11/10/1905, p. 2819; PD 22/05/1996, pp. 1359-60.

⁸⁹ PD 25/10/1905, p. 3159.

⁹⁰ PD 08/11/1906, p. 3545; PD 17/10/1912, p. 2214.

⁹¹ PD 03/04/1935, p. 6899; Amendments (including new types of leases in the *Native Title Amendment (New South Wales Bill)*) ruled to be outside the leave of the bill, PD 22/09/1998, p. 7770; Amendments ruled outside the leave of the bill as the title only referred to social housing tenancies while the amendments pertained to all residential tenancies, PD 27/10/1998, p. 9068.

⁹² PD 11/03/1931, pp. 1838-9.

⁹³ PD 13/12/1904, p. 2456.

⁹⁴ PD 16/08/1917, p. 582; VP 08/04/1998, pp. 488-9.

⁹⁵ PD 08/11/1934, p. 3912.

- (xiii) Would make the operation of a bill contingent upon an affirmative vote at a referendum of the people.⁹⁶
- (xiv) Would omit an existing provision for a referendum.⁹⁷
- (xv) Seek to amend a schedule to a bill when such schedule is the copy of an agreement requiring ratification or authorisation. However, schedules of this nature may be negated.⁹⁸
- (xvi) Would, in a bill providing for a charge upon the Consolidated Fund (the "Crown") involve an additional charge; or, in a bill not already providing for expenditure, create one.⁹⁹
- (xvii) An amendment which is the direct negative of the motion proposed by the mover, is not in order.¹⁰⁰
- (xviii) An amendment that relates to a specific person is outside the scope of a bill which is generic and prospective.¹⁰¹

The Chair is not able to rule on the constitutionality of amendments to a bill.¹⁰²

21.12.1 Scope and Relevancy

When the House decides that a bill or other matter should be considered in detail the House must only consider matters within the scope of the bill or other matter being considered.

The broad terms in which long titles of bills are usually drawn often lead to a misconception of the scope of permissible amendments. An amendment which may well be within the title of a bill may be quite unrelated to the provisions of the bill. The "dragnet" wording which commonly concludes a long title: "... and for other purposes" does not throw the entire provisions of the principal Act, which the bill seeks to amend, open to amendment or, for that matter, debate.

The key to the interpretation of standing order 210, which provides that an amendment must be "within the long title of the bill or relevant to the subject matter of the bill and are otherwise in conformity with the standing orders and practice" lies in the words *of the bill*. The purport of these words is frequently overlooked, and many inadmissible amendments are moved as a consequence. The position is more clearly set out by rulings from the Chair.

The long title of a bill seldom sets forth the specific matters which the bill deals with even though standing order 188(1) requires that, "The title of a bill must agree with the notice of intention to present it, and every clause must come within the title. It shall not be necessary to specify in the long title every Act which it is proposed to amend."

A good example of amendments that were considered to be outside the scope of the bill was found in 1894 when the *Parliamentary Electorates and Elections Further Amendment Bill (No. 2)* was introduced with the object of the bill providing for the names of persons who had been omitted from the electoral rolls to be placed on

⁹⁶ PD 21/08/1912, p. 617.

⁹⁷ PD 23/09/1903, pp. 2709, 2717.

⁹⁸ PD 16/10/1923, pp. 1604-5; PD 03/12/1924, p. 4162.

⁹⁹ PD 29/09/1904, p. 432; PD 10/10/1906, p. 2691; PD 13/09/1916, p. 1716 (But see PD 23/09/1931, p. 6514).

¹⁰⁰ See House of Commons Parliamentary Debates, 4th series, vol. 167, p. 475.

¹⁰¹ PD 08/05/1997, pp. 8345-6.

¹⁰² PD 22/09/1998, p. 7770.

amended rolls. An amendment was moved to provide for electors who were absent from the electoral district in which they were enrolled to be able to vote for such district through a postal vote. The Chairman ruled that, whilst amendments moved might be covered by the title of the bill, they were out of order unless they were considered to be within the scope or subject matter of the bill. Debate on the admissibility of the amendment continued and the Speaker resumed the Chair to rule on the matter.¹⁰³

The Speaker upheld the Chairman's ruling but subsequently sought advice from the Clerk of the House of Commons in the United Kingdom about "...whether it was regular to consider an amendment or new clause which, though fairly covered by the title, was not relevant to the provisions of the Bill itself as brought in and read a second time." The Clerk of the House of Commons advised the Speaker that he was correct in upholding the decision of the Chairman to rule the amendment out of order and commented "...that the relevancy of an amendment to a Bill must be tested not by the title of the Bill but by its subject matter; indeed it was to establish this principle that the House of Commons passed [its] standing order no. 34, and unquestionably, according to the rulings delivered from the Chair...a clause to establish a letter vote is wholly outside the scope of a Bill restricted to the registration of electors."¹⁰⁴

Another illustration of an amendment being outside the scope of a bill lies in the *Maitland Sewerage Bill 1932*, which sanctioned the construction of sewerage works in West and East Maitland.¹⁰⁵ The bill followed the established form of such works bills in that certain sections of the *Public Works Act, 1912*, were not to apply to the proposed work, and the maximum cost was stated.

An amendment to the effect that the work be done by men receiving "Award rates and conditions" was held to be irrelevant and outside the scope of the bill.¹⁰⁶

A more recent example of an amendment which was ruled out of order for being outside the leave of a bill and contrary to the principles agreed to at the second reading stage occurred in 1996 in relation to the *Transgender (Anti-Discrimination and Other Acts Amendment) Bill*. This bill amongst other things sought to amend the *Anti-Discrimination Act 1977* to include discrimination on transgender grounds as a separate ground of discrimination and this was agreed to in principle at the second reading stage of the bill. The Opposition attempted to move a number of amendments to the bill that were considered by the Government to be subversive to the objects and principles of the bill in that the proposed "amendments were aimed at changing the nature of the protection provided by the bill [which made] discrimination and vilification on transgender grounds unlawful to making discrimination on the ground of sexual preference unlawful." The Chairman agreed and ruled the proposed amendments out of order.¹⁰⁷

¹⁰³ See PD 16/05/1894, pp. 3087-117.

¹⁰⁴ The Speaker tabled the correspondence between himself and the Clerk of the House of Commons on 12 September 1894, see VP 12/09/1894, p. 51.

¹⁰⁵ PD 27/02/1935, p. 5968

¹⁰⁶ See also:

Dairy Industry (Amendment) Bill, PD 01/12/1932, pp. 2555-7

Industrial Arbitration (Amendment) Bill, PD 04/03/1918, p. 3186

Local Government (Amendment) Bill, PD 23/09/1925, p. 1013

¹⁰⁷ PD 22/05/1996, pp. 1359-60

In other words, an amendment which might be related to the general subject under consideration need not necessarily be relevant to the particular subject contained in the bill under consideration, and is therefore, inadmissible, being beyond the scope of the bill.¹⁰⁸ As *May* indicates this is as “no matter ought to be raised in debate on a question which would be irrelevant if moved as an amendment, and no amendment should be used for importing arguments which would be irrelevant to the main question”.¹⁰⁹

An extension of this rule of relevancy to the "subject matter" of the bill does not permit amendments to sections of Acts which are not varied in an amending bill. For example, if a bill proposed to amend a certain section of a principal Act only those sections referred to in the amending bill could be considered and amended in committee. Any amendments to other sections of the principal act would be considered outside the scope of the bill.¹¹⁰

The prime purpose of a bill may be considered when amendments are proposed to it to ensure that they are relevant. For instance, on one occasion a Minister asked that amendments to a bill be ruled out of order as they were contrary to the spirit of the bill. The Chair considered that the prime purpose of the bill was to amend a timetable for the carrying out of certain functions under an Act and that the bill specifically referred to the first year in which the altered timetable would operate. As such, the Chair considered that amendments to alter that date were in order.¹¹¹

21.12.2 Money amendments (See also Chapter 22 – Financial Procedures)

It is not within the power of the Parliament to proceed upon any question of expenditure out of the Consolidated Fund or for any other tax or impost before a message of recommendation has been received from the Governor. This restriction does not apply to Ministers (S.O. 190).¹¹²

A number of amendments moved by members who were not Ministers have been ruled out of order under the standing orders:

- A proposed amendment to the *NSW Grain Corporation Holding Limited Bill* to relocate money provided by the Commonwealth Government as a grant to build a grain terminal at Port Kembla to the Illawarra region was ruled out of order as there had been no recommendation by a message from the Governor;¹¹³
- A proposed amendment to the *Casino Control Bill* was ruled out of order because it sought to establish in the Special Deposits Account in Treasury a Health Fund where the duty paid to the Casino Control Authority was to be placed in order to fund the recurring costs of health services, and a message was not obtained from the Governor authorising this appropriation.¹¹⁴

Motions that do not refer to the appropriation of any specific money but merely call upon the Government to take certain steps have been considered in order. For

¹⁰⁸ VP 18/10/1894, p. 136; VP 03/08/1910, p. 200; PD 09/11/1993, pp. 5022 and 5024

¹⁰⁹ *May*, p. 400

¹¹⁰ For example see PD 28/08/1991, pp. 709-10.

¹¹¹ PD 25/10/1994, p. 4587.

¹¹² *Constitution Act 1902*, s. 46(2).

¹¹³ PD 06/05/1992, pp. 3681-2.

¹¹⁴ PD 08/04/1992, p. 2434.

instance, a motion was moved by an Independent member for a select committee to be appointed upon Homefund and FANMAC and that the Government provide the necessary financial resources to undertake inquiries. When a point of order was raised that the motion contravened section 46 of the *Constitution Act 1902* the Speaker argued he could not support the point of order as he did not consider the motion was so specific that it came within the provision of section 46 as it did not refer to the appropriation of any specific money.¹¹⁵

Messages do not usually specify the precise expenditure involved. However, Temporary Chairman Bruntnell explained that this did not necessarily mean that funds were unlimited. In 1921 he stated: "... if a message from the Governor is to have any meaning it must imply that there is in the mind of the authorities behind the bill some specific limitation to the amount of money involved, otherwise the message would be of no value at all."¹¹⁶ In addition, other comments made in the House have argued that it is accepted that the expenditure involved in a bill as *presented* pursuant to leave is the maximum covered by the Governor's message.¹¹⁷

21.12.3 Amendments ultra vires

Whether or not an amendment would render a bill *ultra vires* under the Constitution is not a point to be determined by the Chair – it is one which should be raised in the courts after a bill becomes law.¹¹⁸

Although members often seek and receive guidance, the Chair will not rule on hypothetical amendments.¹¹⁹

21.12.4 Examples of amendments ruled out of order

Amendments ruled out of order include amendments:

- to a general bill which would make it apply to a specific person;¹²⁰
- to an amendment which contained words in the original motion;¹²¹
- incapable of being actioned;¹²²
- subversive of the principle of the bill;¹²³
- introducing new principles;¹²⁴
- conflicting with a previous decision of the House that session;¹²⁵
- to amend the terms of reference of a Royal Commission;¹²⁶
- to a motion of no confidence in the Speaker to refer certain standing orders to the Standing Orders and Procedure Committee that was considered beyond the scope of the original motion;¹²⁷
- to a bill amending a section of a principal Act which would amend a different section of the principal Act.¹²⁸

¹¹⁵ PD 20/04/1993, pp. 1323 and 1330.

¹¹⁶ Mr Bruntnell, PD 17/11/1921, p. 1833.

¹¹⁷ Sir Henry Parkes, PD 04/03/1880, pp. 1383-4.

¹¹⁸ PD 19/10/1926, p. 356; VP 06/11/1935, p. 103.

¹¹⁹ PD 28/10/1965, p. 1593; PD 02/11/1887, p. 891.

¹²⁰ PD 08/05/1997, p. 8346.

¹²¹ PD 11/06/1996, p. 2728.

¹²² VP 18/08/1996, p. 398.

¹²³ PD 22/05/1996, pp. 1359-60.

¹²⁴ PD 07/07/1995, pp. 784-5.

¹²⁵ PD 30/11/1944, p. 1484.

¹²⁶ PD 11/03/1953, p. 37.

¹²⁷ PD 07/12/1995, p. 4419.

¹²⁸ PD 06/12/1995, pp. 4293-4.

21.13 Acts may be altered, etc. in same session

Under the provisions of s. 27 of the *Interpretation Act, 1987*, an Act may be amended or repealed in the same session as that in which it was passed.

21.14 Legislative Council's amendments to bills

Amendments made by the Council in a bill and any subsequent messages received relating to amendments are considered in detail by the House (S.O. 223).¹²⁹

After the Speaker reports a message from the Council returning a bill with an amendment or amendments, consideration may take place immediately or at a later time (either later that same day or a future day). Standing order 222 prescribes that the Speaker fixes the time for consideration. The Speaker will consult the member in charge of the bill before so doing.

Before consideration takes place, a schedule of the amendments, numbered in the order in which they stand in the bill, should be available to members.¹³⁰

Occasionally, particularly towards the end of a session, the House will suspend standing orders to allow the consideration in detail of Council amendments to several bills at the same time.¹³¹

21.14.1 Procedure for consideration of Council amendments to Assembly Bills

Amendments may be considered separately (*seriatim*) or all together as one question (*in globo*).¹³²

When the House resolves to consider Council amendments in detail the Chair announces the business to be considered in detail and calls the Minister in charge.

If the Minister intends to move for agreement (or disagreement) with all the amendments, a motion will usually be moved, "That the House agrees (or disagrees) to the Legislative Council's amendments." Before the question has been proposed from the Chair any member present may move a motion for the question to be put as separate questions in accordance with standing order 153.¹³³ If agreed to the Chair will propose each amendment separately, "reading" each one in its numerical order as, for instance, "Amendment No. 1," and call the Minister (or member in charge) who will move the appropriate motion (refer (1) to (5) below). It is competent to postpone consideration of an amendment in the same fashion as clauses are postponed during the consideration in detail after the second reading. However, if the closure under standing order 90 (guillotine) has been agreed to, the amendments must be put in globo.¹³⁴

In dealing with Council amendments the committee may under standing order 224:

¹²⁹ VP 18/12/1924, p. 425.

¹³⁰ The Council's message, which is printed in the Votes and Proceedings, refers to the clauses and lines of the bill as it left the Assembly after the third reading.

¹³¹ VP 19/06/1997, p. 1067; VP 18/12/1995, pp. 593-4; bills considered, VP 25/11/1998, p. 1194.

¹³² In 1931 Council's amendments were (by consent) taken in groups. VP 16/09/1931, p. 708.

¹³³ VP 06/06/1930, p. 739.

¹³⁴ VP 06/06/1930, p. 742.

(1) agree to them; (2) disagree to them;¹³⁵ or (3) amend them.

In addition, there are combinations of these treatments which may be adopted to aid the Houses in arriving at a compromise in their disagreements; namely:

- (4) Agree and amend another portion of the bill which has a *direct* bearing upon the subject matter and the treatment of an amendment.¹³⁶
- (5) Disagree but amend other words having a direct bearing upon the purport of the amendment as in (4) above.¹³⁷
- (6) Amend to correct drafting errors.

The procedure for these ways of dealing with Council amendments are as follows:

- (1) & (2) To agree (or to disagree) requires one motion "That the House agrees (or disagrees) to the Legislative Council's amendment(s)".
- (3)(a) To amend an amendment which *inserts* words needs only a motion "That the Legislative Council's amendment be amended by ..." and words may be inserted or added or left out and others inserted or added in lieu.¹³⁸ Proposed amendments to Council's amendments are themselves open to amendment. A preliminary motion that the House agree before an amendment is amended is not required.
- (b) To amend a Council amendment which *leaves out* words the House must first disagree to the amendment – this reinserts the words left out – then a second motion is necessary to amend these words.¹³⁹ The House can also disagree to just part of a Council amendment.¹⁴⁰
- (4) To agree to an amendment and arising out of such agreement amend another part of a bill, it is necessary first to agree to a motion "That the House agree", and when moving for agreement the mover must give notice of his or her intention to move the consequential amendment at the appropriate place, because normally only the actual amendments are under consideration and are proposed by the Chair.¹⁴¹
- (5) To disagree and amend another part of the bill as consequential, again two motions are necessary: the first to disagree and the second motion to amend.
- (6) To correct drafting errors requires an ordinary motion to amend.

There are also times when the House will need to propose consequential amendments due to the outcome of proceedings on the bill in the Legislative

¹³⁵ VP 02/04/1963, p. 688; see also VP 25/11/1998, p. 1144 where the Assembly rejected a Council amendment because it was of the view that the vote on the amendment in the Council was improperly recorded.

¹³⁶ PD 22/01/1926, p. 4390.

¹³⁷ PD 22/01/1926, p. 4401.

¹³⁸ PD 04/12/1963, p. 6757; VP 02/04/1963, p. 689; VP 30/07/1931, pp. 682-3; PD 30/07/1931, p. 4882.

¹³⁹ For example see PD 12/08/1931, pp. 5289-91.

¹⁴⁰ See for example, PD 14/11/1916, pp. 2706-13.

¹⁴¹ PD 04/12/1963, p. 6757.

Council. For instance, on one occasion a bill having returned from the Legislative Council was further amended by the Assembly to, among other things, provide alternative proposals to those already rejected by the Council. The message sent to the Legislative Council agreed to a number of amendments, disagreed to others and proposed further amendments. It also emphasised that the proposed amendments maintained the intent of the proposed law and that this action should not be drawn into a precedent by either House.¹⁴² This required the reconsideration of all clauses and schedules of the bill concurrently with the Council's amendments.¹⁴³

Standing order 226 deals with the Council's response to amendments made on its amendments. This provides that if the Council returns an Assembly bill with a message either:

- (1) insisting on the original amendments to which the Assembly has disagreed; or
- (2) disagreeing to amendments made by the Assembly on the original amendments of the Council; or
- (3) agreeing to amendments made by the Assembly on the original amendments of the Council, with further amendments.

The Assembly may:

As to (1):

- Agree to the amendments to which it had previously disagreed;
- Insist on its disagreement to such amendments and lay the bill aside;
- Request a conference.

As to (2):

- Withdraw its amendments and agree to the original amendments of the Council;
- Insist on its amendments to which the Council has disagreed and lay the bill aside;
- Request a conference.

As to (3):

- Agree to such further amendments of the Council;
- Disagree and insist on its own amendments which the Council has amended and lay the bill aside;
- Request a conference.

This standing order does not affect the right of the Assembly to proceed in accordance with the provisions of section 5B of the *Constitution Act 1902* which provides that a referendum may be held on a bill to which the two Houses have not agreed after all avenues of communication have been exhausted.

An unusual motion was moved by the House in 2000 when the Assembly disagreed

¹⁴² PD 10/03/1992, pp. 878-934.

¹⁴³ See also, VP 10/03/1992, p. 113 where standing and sessional orders were suspended to allow the committee of the whole when dealing with Council amendments to a bill to also reconsider in the usual manner all other clauses and schedules being considered.

to the amendments made by the Council for a second time. Instead of laying the bill aside as provided for under standing order 226, when amendments were disagreed with for the second time, the House suspended standing and sessional orders and passed a resolution which “insisted on its disagreement a second time to the Legislative Council amendments”. A message with reasons was sent to the Council.¹⁴⁴ The Legislative Council did not insist on its amendments.

Messages are sent informing the Council when its amendments are agreed to or disagreed to, a conference is desired, or the bill has been laid aside (S.O. 227). If amendments are disagreed to, the message is to contain reasons for the disagreement (S.O. 224). The reasons are prepared by the member in charge of the bill and are not debated (S.O. 80(6))¹⁴⁵ or subject to a vote.

While not specifically provided for in standing order 224, the Assembly has, in the past, used the additional option of disagreeing with a Council amendment and proposing a further replacement amendment. The further amendment is consequential on the rejection of the Council amendment. The message to the Council, seeking concurrence with the further amendment, includes reasons for the Assembly's disagreement and may give reasons for the further amendment.¹⁴⁶

If a closure motion is moved, pursuant to a guillotine notice, in relation to Council amendments to a bill, all amendments not dealt with are put as one question.¹⁴⁷

When consideration of the amendments has been completed the House will send a message to the Legislative Council advising of its decision (i.e. to agree or disagree to the Council's amendments or to make further amendments) or, with the concurrence of the House, reconsider the Council's amendments in detail.

Under the former committee of the whole procedure the Chairman would leave the Chair without a question being put after the consideration of Council amendments to report the result of the committee's deliberations to the House.¹⁴⁸ Upon the motion for the adoption of the report, the House could adopt the report, reject it, or recommit the amendments for reconsideration.¹⁴⁹

21.14.2 Debate on Council amendments

It is not always practicable to confine the debate strictly to the precise substance of the Council's amendments, but the Chair is bound to ensure that members do not indulge in second reading speeches and discuss the contents of the bill other than those subject to the proposed amendments.¹⁵⁰ Only the subject matter of the amendments appearing on the printed schedule are, in fact, before the House when the amendments are considered in detail.

¹⁴⁴ VP 29/06/2000, p. 680.

¹⁴⁵ PD 28/10/1998, p. 9292.

¹⁴⁶ VP 28/10/1998, pp. 1008-14; VP 21/05/1879, p. 527; PD 04/10/1906, p. 2584; PD 27/11/1906, p. 4131; PD 22/01/1926, p. 4390; PD 22/01/1926, p. 4401; PD 17/02/1926, pp. 240-1; VP 18/06/1997, p. 1023.

¹⁴⁷ VP 12/12/1928, p. 470; PD 12/12/1928, p. 2771.

¹⁴⁸ VP 06/06/1930, p. 742.

¹⁴⁹ PD 17/02/1926, p. 254.

¹⁵⁰ PD 07/03/1918, p. 3358.

However, new ideas may be introduced and discussed if they relate to additional clauses that are necessary in consequence of the amendments made by the Legislative Council.¹⁵¹

21.15 Reconsideration

On the motion for the third reading a bill may be reconsidered as a whole or in relation to any specified clauses or schedules, or for the insertion of new clauses or schedules (S.O. 217 as amended by sessional order). This was formerly known as recommittal when bills were considered by a committee of the whole. A bill could be recommitted in whole or in part¹⁵² on the motion for the adoption of the report from the committee,¹⁵³ and also on the motion for the third reading.¹⁵⁴

When a bill or portion is so referred for reconsideration, the rule against considering the same question twice in the same session does not apply. Hence it is possible for the House, when reconsidering a bill in detail, to reverse its previous decisions, even to the extent of omitting amendments which it had already inserted. In fact, it is by reconsidering a bill that irregularities made during the consideration in detail stage may be corrected.¹⁵⁵

When a bill is reconsidered, only those portions of the bill specifically referred are open to debate and amendment.¹⁵⁶

On occasion, members who have missed their opportunity to participate in the original consideration in detail of the bill may attempt to reconsider it in order to move an amendment.¹⁵⁷ This is due to the fact that bills may be amended in substance only during the consideration in detail stage.

¹⁵¹ See for example, PD 10/03/1992, pp. 885-934.

¹⁵² See VP 18/11/1993, p. 583 where a bill was recommitted on the third reading for consideration of specific clauses and new clauses.

¹⁵³ VP 20/05/1993, p. 273.

¹⁵⁴ VP 04/03/1993, p. 68; and VP 19/11/1993, p. 597-6.

¹⁵⁵ See ruling of Deputy Speaker Hedges, PD 11/11/1934, p. 1804 where he commented that it is not the practice to rule bills out of order after they have been committed because of an irregularity in committee which was capable of being corrected upon recommittal.

¹⁵⁶ See *May*, pp. 624-5.

¹⁵⁷ PD 13/11/1952, p. 2180.

Chapter 22 Financial Procedures

By convention, Appropriation bills (allocating money for expenditure) may be introduced on motion without notice and without debate. After introduction, the motion "That the bill be now read a second time" may be moved forthwith.¹ Taxation bills (raising revenue) are introduced on notice.

22.1 Appropriation bills

Appropriation bills give legislative sanction for the expenditure of public moneys from consolidated revenue and other sources.² It is on the motion "That the bill be now read a second time" that the Treasurer makes the Budget Speech.³ The tradition of laying the estimates for the expenditure of the year before the lower House first occurred in the United Kingdom House of Commons in 1380 when Speaker Guilesborough demanded of the Crown that a schedule of the exact sums needed, and the purposes for which they were required, be laid before the Commons.⁴

In the debate on the appropriation bills (called the 'Budget Debate'), the general financial structure of the State is open to discussion. The debate may include the Government's fiscal policy and legislative proposals as they affect that policy. Principles, and not details, are discussed.⁵ Although the budget debate may be wide-ranging, remarks must always be based on financial issues contained in the Appropriation Bill and cognate bills.⁶ The Speaker has, in the past, suspended the anticipation rule during the currency of the budget debate.⁷

The budget papers, together with the Appropriation and cognate bills, are to be considered in detail by the House (S.O. 244). This is the stage where administration and details are also debated.⁸ The estimate of revenue and expenditure of each department is proposed as a separate clause. The responsible Minister is present at the Table when the Minister's departmental estimate is being considered in detail. Debate is restricted to matters directly related to the estimates (S.O. 245(1)).⁹ Detailed consideration by the House may be replaced by estimates committees (S.O. 246).¹⁰

In accordance with section 5A of the *Constitution Act 1902* any bill appropriating money for the ordinary annual services of Government that has been passed by the Legislative Assembly can be sent to the Governor for assent if the Legislative Council rejects or fails to pass it or returns it with a message suggesting any amendment to which the Legislative Assembly does not agree.¹¹

¹ VP 19/09/1995, p. 206.

² The Appropriation Bill was first passed in 1832. Short Address delivered to Members of the Royal Australian Historical Society by W.K. Charlton, Clerk of the Parliaments, 22 July 1944, p. 7.

³ Member asked to remove a copy of the Budget Speech from the Chamber as it was the tradition of the House that copies of the speech were not available until the speech has been delivered, PD 02/06/1998, p. 5538.

⁴ Laundy, Philip, *The Office of Speaker in the Parliaments of the Commonwealth*, 1984, pp. 13-4.

⁵ PD 18/10/1990, p. 8775.

⁶ PD 23/09/1992, p. 6329.

⁷ VP 08/05/1997, pp. 855-6.

⁸ PD 02/03/1973, p. 1505; PD 18/10/1990, p. 8775.

⁹ PD 24/10/1990, pp. 9163, 9165 and 9196.

¹⁰ The last occasion that an appropriation bill was committed was in 2000. See PD 20/06/2000, p. 7211. Recent practice has been to leave the detailed consideration of proposed budget estimates to the Legislative Council General Purpose Standing Committees which act as estimates committees.

¹¹ VP 27/06/1996, p. 350.

The meaning of "ordinary annual services of the Government" has not been tested in court but advice has been received that it should have a broad meaning to include "...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 other State agencies or instrumentalities."¹² However, a narrower interpretation has been given in some other jurisdictions.¹³

Parliament has not traditionally been considered to be an "ordinary annual service of the Government" in that the Parliament is not responsible to the Executive. In fact, it is a fundamental principle of the Westminster system that the Executive is accountable to the Parliament and as such the Parliament must have the necessary resources to hold the Executive to account and should never be frustrated in this role by the Executive. However, in 1996 the Legislative Council attempted to amend the *Appropriation (Parliament) Bill* to provide for 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 in addition to the normal work of the standing committees appointed by the House." The Legislative Assembly exercised its right under section 5A of the *Constitution Act 1902* to transmit the bill to the Governor for assent without the Council's amendment. This act could be interpreted as an acknowledgment that the Parliament's budget was to be considered part of the ordinary annual service of the Government.¹⁴

If the Lower House rejects or fails to pass a bill appropriating money for the ordinary annual services of the Government, the Governor may dissolve the House for the purposes of a general election as it is assumed that the Government no longer has the confidence of the House (Const. Act s. 24B(3)).

When the Treasurer has been a member of the Legislative Council, the practice has been for the Premier to introduce the appropriation bill and cognate bills and standing orders have been suspended to allow the Treasurer to make a statement in respect of the Budget from the floor of the Assembly at the commencement of the second reading debate.¹⁵ A proposed amendment to the motion of suspension of standing orders to allow the Treasurer to take questions has been consistently rejected by the House.¹⁶ Procedures have also been adopted to allow further debate in the Assembly on the Appropriation bills after they have already been passed by

¹² Advice of the Crown Solicitor provided to the Auditor-General re: section 5A Constitution Act 1902, dated 30 September 1996, available in the Auditor-General's Report to Parliament, 1996, Volume Two, pp. 430-41.

¹³ As noted in the abovementioned advice, in Western Australia a narrower interpretation of "ordinary annual services" applies. In 1994, the President of the Legislative Council of WA ruled that the setting up of a liver transplant unit at a hospital and the establishment of a counselling service by the Ministry of Justice to inform and assist next of kin during coronial inquiries were considered not to be ordinary annual services.

¹⁴ PD 27/06/1996, p. 3759.

¹⁵ See for example, VP 25/05/2006, p 59-60

¹⁶ VP 02/06/1999, p. 124; VP 22/04/1997, pp. 806-7, PD 22/04/1997, pp. 7826-8, VP 06/05/1997, p. 831; VP 15/05/1996, pp. 117, 118, VP 21/05/1996, pp. 145, 147, 149; VP 20/09/1995, p. 227 ff, VP 21/09/1995, p. 237ff, VP 21/09/1995, p. 250, VP 10/10/1995, p. 259.

the House,¹⁷ and to allow concurrent debate on the Appropriation Bill and cognate bills and a motion to take note of the Address in Reply.¹⁸

Since 1993, a separate Appropriation Bill for the Parliament has been passed highlighting its independence from the ordinary annual services of the Government.¹⁹ However, the Executive is still responsible for determining the final allocations which will be made to the Parliament.

It is not uncommon for cognate bills dealing with specific financial matters to be introduced at the same time as the Appropriation bills.

22.2 Estimates committees

Estimates committees are committees of Parliament set up to examine in detail the Government's estimates of revenue and expenditure for the following year and the Appropriation bills. A number of committees may be established to examine different program areas. The committees may call Ministers and officials of departments before them to explain the details of the budget and give an account of how money has been and is proposed to be spent. After holding hearings on the programs under consideration, the committees report to the House and recommend whether those items in the Appropriation bills should be approved or amended. Estimates committees may be established by either the Legislative Assembly or the Legislative Council or the two Houses may hold joint estimates committees meetings.

Standing Order 246 (as amended by sessional order) provides for the appointment of estimates committees during the second reading stage. Reports of these committees are considered in detail by the House and such consideration replaces consideration of the relevant clauses of the bills.

In accordance with standing order 246(3) failure of an estimates committee to report on any part of a proposed appropriation is taken to be a recommendation for that appropriation.

The Legislative Assembly held joint estimates committees with the Legislative Council from 1991 to 1994. Since 1995, the Legislative Assembly has not held estimates committees, despite passing resolutions proposing joint estimates committees with the Legislative Council, as the Houses have not agreed on the terms of such committees.²⁰

Since 1995, the Legislative Council has continued to appoint estimates committees or to refer the estimates to its general purpose standing committees. The Speaker has declined to appear before the Council standing committee in its consideration of estimates for The Legislature.²¹

¹⁷ Standing and sessional orders were suspended to allow the consideration of a motion following the forwarding of the Appropriation Bill to the Legislative Council. The motion provided that members who had not spoken in the second reading debate on the Appropriation Bill and cognate bills prior to it being forwarded to the Legislative Council could speak to the motion for a period limited to 20 minutes each. VP 27/06/2001, p. 1351.

¹⁸ VP 07/06/2002, p. 281.

¹⁹ In 2011, a separate Appropriation Bill for the Parliament was not introduced.

²⁰ VP 28/05/1998, pp. 643-56; VP 15/05/1996, pp. 123-4; motion calling on Leader of the House to establish estimates committee, VP 23/11/1995, p. 446.

²¹ VP 17/06/1997, pp. 991-2. The Speaker is able to refuse such a request as the convention is that one House cannot compel a member of the other House to appear before one of its committees. See section 2.3 of Part Two for further information on this convention.

The procedure for the consideration of the reports of the estimates committees in the Assembly simply requires the Chair to propose the following question:

The question is "That the report of Estimates Committee.....be adopted".

Members may speak for up to five minutes on this question and a Minister may speak for up to 15 minutes.

After each report is dealt with, the remaining clauses and schedules of the bills, not the subject of a report, are dealt with by the question:

"That the remaining clauses and schedules of the bill be agreed to".

22.3 Increasing the charge upon the Consolidated Fund

Section 46 of the Constitution Act provides that "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 . . .",²² while, by s. 5 of the same Act, 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 Assembly construes these provisions to mean that it is not competent for the House to increase any charge provided for in a bill as introduced, or involved in a motion, unless a message recommending increased expenditure is first received from the Governor²³ or the increase is proposed by a Minister.²⁴ In any additional message recommending an increase in expenditure the Governor may restrict amendments to specific paragraphs, subsections and sections.²⁵

The above mentioned statutory provisions also give rise to the Assembly's claim that the Council may not amend an Assembly bill to increase any tax or charge upon the people. Should the Council exceed its rights and so amend a bill, the Speaker draws this to the attention of the House.²⁶ The Assembly may consider amendments made by the Council if proposed by a Minister or an additional message is first received from the Governor.²⁷ If this course is pursued the Council is informed by message of the circumstance.²⁸

22.4 Temporary supply

Section 25 of the *Public Finance and Audit Act 1983* provides for the payment of money during the first three months of the new financial year. If the Appropriation Bill has not received Assent before 30 September, or if it appears likely that Parliament will not have passed the bill before that date, it is necessary for Parliament to pass what is known as a Supply Bill which authorises expenditure for a stated period. If the estimates are then before Parliament, the money appropriated

²² A message is not required for a bill introduced by, or a vote or resolution proposed by a Minister/s. Section 46(2) of the *Constitution Act 1902*.

²³ VP 24/07/1934, p. 131; PD 06/05/1992, p. 3681-2; PD 08/04/1992, p. 2434.

²⁴ A private member can introduce a bill that calls upon the Government to take certain steps or action so long as no reference is made to the appropriation of any specific money.

²⁵ VP 30/10/1940, p. 85.

²⁶ VP 04/12/1963, p. 437.

²⁷ VP 04/12/1963, p. 440.

²⁸ VP 04/12/1963, pp. 440-1; VP 10/12/1963, p. 449.

under a Supply Bill is at the rates set out in the Appropriation Bill. Should the Supply Bill be introduced before the presentation of the estimates, the rates are based upon those of the preceding year. There is no limit to the number of Supply bills which may be passed in any one year. During the financial year 1930-31, four such bills were passed before the Appropriation Bill was passed in June, 1931.

Since, 1996 the need for a supply bill has been removed by the practice of passing the budget before the beginning of the financial year.²⁹

22.5 Taxation measures

Any bill that proposes to introduce a new tax must originate in the Legislative Assembly. This is by virtue of section 5 of the *Constitution Act 1902*, which states “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.”

As noted, section 46 of the *Constitution Act 1902* provides that the House cannot 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 message of the Governor unless such measure is proposed by a Minister.³⁰

Because private members cannot obtain such messages, the practical effect of this provision is that only Ministers are able to introduce a bill for a new tax for a stated purpose.³¹

The *Constitution Act 1902* and the standing orders of the House are silent as to whether private members may introduce bills or amendments that vary the incidence of an existing tax, i.e. affect the proposed revenue but not its expenditure and do not change the purpose of the tax.

The practice of the House has been to rule out amendments, which have the effect of increasing the sum of any proposed tax or impost. Rulings from the Chair have therefore precluded amendments which lower exemptions as this would increase the tax proposed;³² amendments which extend the area of a tax;³³ or which omit a provision for exemption for a special class of taxpayer³⁴.

However, on one occasion the Chair ruled that provision for the repeal or reduction of taxation or the granting or extension of exemptions can be effected in the same way as an ordinary bill.³⁵ As such it appears that a private member is able to introduce a bill to amend existing legislation, which provides for a taxing regime, where the effect of the amendment would be to reduce the given rate of taxation.

²⁹ In 2011, the Budget for the 2011-12 financial year was not introduced until September. However, the bills received assent prior to 30 September and accordingly there was no need for a separate supply bill.

³⁰ Standing order 243 is in accordance with section 46 of the *Constitution Act 1902*. See also rulings by Speaker Levy, PD 25/10/1922, p. 3017 and Speaker Weaver, PD 27/04/1939, p. 4329.

³¹ The Crown Solicitor has advised that private members' bills should not appropriate monies or taxes for particular purposes. See advice received from the Crown Solicitor re: Amendment of Land Tax Management Act and Land Tax Act – s.46, *Constitution Act 1902*.

³² See for example, PD 14/03/1895, p. 4502.

³³ See for example, PD 25/10/1922, pp. 3012-7.

³⁴ See for example, PD 13/11/1940, p. 961 and PD 12/12/1911, p. 2677.

³⁵ See ruling of Speaker Kelly, PD 07/09/1978, p. 1195 where he noted that financial bills introduced by members who are not Ministers which reduce taxation do not require a message from the Governor.

Private members are also able to introduce legislation that deal with matters associated with taxation such as taxation schemes and the collection of taxation so long as they do not appropriate monies from taxation to a particular purpose.³⁶

³⁶ See ruling of Speaker Rozzoli, PD 28/08/1991, p 705.

Chapter 23 Disorder

23.1 Member called to order

The most common way of dealing with disorder is for the Speaker or other occupant of the Chair to call upon the member being disorderly to obey the rules of the House by desisting from the conduct or by withdrawing words which are complained of as being offensive or disorderly. In the event of a member being called to order more than three times in one sitting for any breach of the rules, the Speaker may direct the member's removal from the Chamber for the remainder of the sitting (S.O. 249).¹ When a member is removed from the Chamber under standing order 249 the member is excluded from not only the House but from the entire Parliamentary precincts as defined in the *Parliamentary Precincts Act 1997* and cannot take part in any proceedings of the House or its committees, even if a committee is meeting outside the precincts.

A sessional order was adopted in April 2012, which enables the Speaker to remove a member for up to three hours, without the need to call a member to order first. The purpose of this standing order is to remove disorderly members for a set time period or a particular item of business such as the remainder of Question Time. Members have been removed under this sessional order until the Minister's reply to the second reading debate on a bill. This has meant that the member is able to return to the Chamber to vote on the bill.²

When the House is unruly, the Speaker may deem that all members called to order are on three calls to order³ and in cases of grave disorder the Speaker may even leave the Chair, resuming the debate at a later stage.⁴

Speakers have also threatened to use other measures to discipline disorderly members. For instance, on one occasion the Speaker, following continued interruptions by members when a Minister was replying to a question, warned all members that if they continued to interrupt that he would direct the questions to be put on the Questions and Answers Paper.⁵ On another occasion, the Speaker warned the House that he would refrain from giving the call during Question Time to those members who persistently interrupted proceedings.⁶

23.2 Member named

For more serious disorder, standing order 250 provides that:

"A member may be named by the Speaker, for:

- (1) Persistently and wilfully obstructing the business of the House.
- (2) Being guilty of disorderly conduct.
- (3) Using offensive words, and refusing to withdraw them.

¹ Speakers have at times been willing to consider re-admitting a member to the House after receiving an apology conveyed through the Serjeant-at-Arms e.g. PD 02/08/1939, p. 5675 where the Serjeant-at-Arms having conveyed a message to the Chair that the member in question desired to apologise, the Speaker stated "The Chair never has any personal feelings. The honourable member is prepared to apologise to the Chair and to the House, and that is all the Chair has to consider. All the Chair wishes to maintain is the dignity of Parliament. I therefore accept the apology." Members have also apologized through other members e.g. PD 19/11/1993, pp. 5859 and 5863.

² See for example, PD 19/6/2012, 13070

³ PD 21/04/1994, pp. 1629-30; PD 01/05/1996, p. 656.

⁴ PD 23/02/1989, pp. 5183-227; VP 30/11/1994, p. 589; VP 25/03/1958, p. 210.

⁵ PD 23/03/1966, p. 4511.

⁶ PD 24/08/1966, p. 474.

- (4) Persistently and wilfully refusing to conform to any standing order.
- (5) Persistently and wilfully disregarding the authority of the Chair."

Under standing order 75 a member must refer to other members by their title of office or by the name of their electorate. This is an ancient practice and is intended to reduce the temptation to make personal aspersions. The occupant of the Chair conforms to this practice when naming a member for disorder. The precedent was set in the United Kingdom House of Commons by Speaker Lenthall in 1641 when he found that he needed to go beyond an impersonal call for "Order".⁷

When a member has been "named" the Speaker is required to propose the question "That the member for ... be suspended from the service of the House" forthwith. No debate is allowed on the motion, except for an explanation by the member concerned, limited to five minutes (S.O. 251).⁸ On occasion, the Speaker has named a member following their removal from the Chamber. In such cases the Speaker has asked for the member to be returned to the Chamber in order to provide the member with an opportunity to make a statement in explanation.⁹

The duration of a suspension is two sitting (and all intervening) days for the first time the member is suspended that session, four days for the second time and eight days for each subsequent time. The incomplete portion of the sitting day during which the member was suspended counts as one sitting day (S.O. 252). When a member is suspended from the service of the House the member is excluded not only from the Chamber, but from the precincts of the Parliament as defined in the *Parliamentary Precincts Act 1997* and cannot take part in any proceedings in the House or its committees (S.O. 253).¹⁰ On one occasion the motion moved suspending the member from the House required the member to forfeit the relevant daily portion of his base salary for the period of suspension.¹¹ However, this penalty was not enforced as suspended members do not suffer loss of salary during the period of their suspension due to the fact that they are suspended only from the service of the House and away from the House they continue to represent their electorates.¹²

The Speaker, with the consent of the House, has ruled that a Member's expulsion had concluded after four calendar days of sitting even though only three sitting days had passed as two of those days were not separated by an adjournment as the Speaker had left the Chair until the ringing of a long bell.¹³

⁷ Extract from *Balancing Tradition and Progress, Procedures for the opening of Parliament*, House of Representatives Standing Committee on Procedure, August 2001 p. 5.

⁸ The Speaker directed the Serjeant-at-Arms to return a member to the Chamber to be named. The Speaker later made a statement that it was not the practice of the House to force a member to return to the Chamber, VP 22/05/1996, pp. 160-1, PD 27/06/1996, p. 3821; On another occasion the Speaker directed the Serjeant-at-Arms to remove a member from the Chamber. The Speaker then requested that the member be returned to the Chamber so that he could name him. Point of order taken that it was not in order for the Speaker to name a member after he had left the Chamber. However, that was not upheld and the member was named and subsequently suspended from the service of the House for two sitting days, PD 05/12/2001, p. 19590-2.

⁹ See for example, PD 21/02/1989, pp. 4914-7.

¹⁰ On one occasion, a member who had been named and suspended for two sitting days had entered the precincts whilst suspended. The Speaker subsequently named the member for this conduct and he was suspended for four sitting days, PD 28/03/1990, p. 1153. On another occasion, the House affirmed that "rooms set aside for the use of members" means the Parliamentary precincts, VP 22/08/1991, pp. 89-91.

¹¹ PD 22/08/1991, pp. 452-66.

¹² In 1995, the Premier said he was examining a proposal to dock the pay of suspended members, PD 25/05/1995, pp. 260-3. Such a proposal has never been given effect and it could be argued that the House does not possess such power given that it is clear that the House has no punitive power to punish a member. (See section 2.5 of Part Two where it is noted that the House has powers of self-defence but no punitive powers).

¹³ VP 19/06/1997, p. 1089.

The Serjeant-at-Arms is directed by the Speaker to remove a member suspended from service. In the event of a member refusing to leave the Chamber, the Serjeant-at-Arms may, by direction of the Speaker, be assisted by the attendants or the police.¹⁴ As with all motions proposed by the Speaker, motions for the suspension of a member from the service of the House can only be withdrawn with the leave of the House (S.O. 144).¹⁵

During the placing and disposal of business, any notices of motions standing in the name of a member who has been suspended from the service of the House can be postponed by another member on the suspended member's behalf with the written authority of that member under standing order 141. However, if notices of motions standing in the name of a suspended member are called on, and, not moved, withdrawn or postponed, they will lapse in accordance with standing order 99.

23.2.1 Disorder in former committee of the whole

The House no longer resolves itself into a committee of the whole to give detailed consideration to a bill or other matter. Rather, the House itself considers matters in detail. This means that the same procedure outlined above occurs when there is disorder in the consideration in detail stage. However, the past practice when disorder occurred in committee did not follow the same procedures and is worthy of note.

The Chairman of Committees could remove a member from the committee but the committee was not able to suspend a member. If the offence took place in committee the Chairman, after naming the member, reported the occurrence to the House and the procedure was then the same as if the offence had taken place in the House.¹⁶ When the matter had been disposed of, the committee resumed.

The Chairman's report was along these lines:

"Mr/Madam Speaker, I have to report that during the proceedings of the committee on the whole on the ABC Bill the member for.... was named by me for... (e.g. using offensive words and refusing to withdraw such words when called upon)."

The Speaker then announced:

"The Chairman reports that during the proceedings of the committee of the whole on the ABC Bill the member for... was named for using offensive words and refusing to withdraw such words when called upon. I now call upon the member to make any explanation the member may think fit."

Immediately the question of disorder was disposed of by the House, the Speaker left the Chair and the committee resumed.

Under the previous standing orders, if sudden disorder arose in committee, the Speaker, of their own initiative, could resume the Chair in the House to deal with the matter, after which the committee proceedings would be resumed. In 1886, the

¹⁴ VP 19/09/1911, p. 33.

¹⁵ PD 31/05/2000, pp. 6323-5.

¹⁶ VP 26/10/1967, p. 335.

Speaker resumed the Chair on his own initiative without a question being put “having observed that the proceedings...had fallen into grave disorder.”¹⁷

23.3 Expulsion

Under the provisions of standing order 254, a member adjudged by the House guilty of conduct unworthy of a member of Parliament may be expelled by vote of the House and the member’s seat thereupon declared vacant.¹⁸

When a member has been expelled, it is necessary for a motion to be moved declaring the member’s seat vacant. It has been ruled that this motion may not be debated.¹⁹ On one occasion, when a motion was moved to declare the seat vacant of a member who had been expelled by the House, a point of order was raised whether such a motion was in order given that the member had sent in his resignation and the Constitution Act in force at the time provided that when the Speaker receives the resignation of a member that the seat became vacant. The Speaker did not agree and decided that the motion was in order.²⁰

Four resolutions expelling a member from the Legislative Assembly have been passed, although one of those resolutions was subsequently rescinded. Mr Baker was expelled on 8 November 1881 after the House concluded that evidence produced by a Royal Commission proved that Mr Baker, “by agreeing with others to benefit himself in an improper manner out of a sum of money appropriated by Parliament ... has been guilty of conduct unworthy of a member...”²¹ Mr Baker was later brought to court. However, the case was dropped and the House rescinded the resolution passed in November 1881 on 1 May 1883.²² Mr Baker was re-elected to the Legislative Assembly in November 1884.

In the early hours of 13 November 1890, a resolution expelling Mr Crick was passed after he repeatedly abused members verbally, disobeyed the Chair and resisted removal from the Chamber.²³ Mr Crick was subsequently re-elected in December 1890 and became Minister for Lands in 1901. In 1905, a Royal Commission was appointed to inquire into the administration of the Lands Department which found that Mr Crick had been receiving bribes and he was subsequently charged with conspiracy. The House did not pass a resolution to expel him this time as the Speaker had ruled that the Parliament could not deal with Mr Crick’s conduct whilst the matter was before the Courts. The House did however suspend Mr Crick, which was supported by a standing order of the House that was passed and approved by the Governor on 19 July 1906.²⁴ The standing order provided that the House could suspend a member until the outcome of a criminal trial was known.²⁵ Mr Crick resigned his seat in December 1906²⁶ and the House subsequently passed a resolution on 11 December 1906 which stated that in light of the findings of the

¹⁷ VP 08/07/1886, p. 379.

¹⁸ Expulsion moved and negatived, VP 05/05/1998, p. 542.

¹⁹ PD 17/09/1929, p. 61.

²⁰ VP 13/11/1890, pp. 431-2.

²¹ VP 08/11/1881, p. 277; rescinded VP 01/05/1885, p. 280.

²² VP 01/05/1883, p. 280.

²³ VP 13/11/1890, p. 430.

²⁴ VP 19/07/1906, pp. 62-3.

²⁵ This is now covered by standing order 255 of the Legislative Assembly.

²⁶ See VP 06/12/1906, p. 373 where the Speaker informed the House that Mr Crick had resigned.

Report of the Royal Commissioner that Mr Crick "...is adjudged guilty of conduct which should render him ineligible to sit as a Member of this Assembly."²⁷

On 17 October 1917, motions were passed charging Mr Price with conduct unworthy of a member, expelling him from the House and declaring his seat vacant after a Royal Commission found him to have "wantonly and recklessly" made allegations against a Minister.²⁸ He was subsequently re-elected.²⁹

²⁷ VP 11/12/1906, p. 382.

²⁸ VP 18/10/1917, p. 128.

²⁹ For further information on the expulsion of members see the NSW Parliamentary Library Briefing Paper No. 17/2003, *Expulsion of Members of the NSW Parliament*, by Gareth Griffith, August 2003.

Chapter 24 Visitors

There are a number of standing orders and statutory provisions in relation to visitors to the Legislative Assembly and the Parliamentary precincts. Prior to the adoption of the current standing orders in September 2006 all persons who are neither members nor officers of the House were referred to as strangers. They are now known as visitors.¹ The term "strangers" is purely a technical one in its Parliamentary connotation and is not intended in any way to reflect any Parliamentary attitude towards members of the public.

Traditionally the House retains the right to exclude visitors from the galleries. If, during a sitting, the attention of the Speaker is drawn to the fact that visitors are present, a question may be put without debate, "That visitors be ordered to withdraw".² The power in the Chamber lies also in the Speaker to direct the withdrawal of visitors from any part of the Chamber or from the Parliament's precincts (S.O. 260).³ Officers of the House are not deemed to be visitors when withdrawal is ordered. In addition, unless the Speaker directs otherwise, the Parliamentary Reporting Staff are not considered visitors (S.O. 259).

A member may not take a visitor into any part of the Parliamentary building exclusively set aside for the use of members (S.O. 261).

In addition to the standing orders noted above, the *Parliamentary Precincts Act 1997* gives the Speaker, and any officers of the Parliament authorised by the President or the Speaker, authority to remove visitors from the precincts of the Parliament. If persons fail to comply with an order to leave the precincts or to provide their names and addresses, the Speaker, or an authorised officer, may arrest them to be dealt with according to law.⁴ This power has been conferred on the Speaker by statute⁵, as the Parliament has no inherent power to arrest, punish, fine or imprison a person.⁶

Proceedings have on occasion been interrupted by persons in the galleries. On one occasion the Public Gallery was cleared by direction of the Speaker and was kept closed for several weeks.⁷ On another occasion because of disorder, the Ladies (now "Northern") Gallery was cleared by direction of the Speaker.⁸ At times the Speaker has directed that specific persons be removed from the Public Gallery without closing it to all members of the public. For example, on one occasion after disorder in the Public Gallery, the Speaker ordered that it be cleared of all persons except the "school children and their masters." The Speaker left the Chair until the

¹ PD 05/10/1967, p. 2113; The public was first admitted to the debates in 1838, as the result of representations from certain magistrates, landholders and other free inhabitants, under regulations which were framed by a sub-committee and presented on 31 May 1838. Short Address delivered to Members of the Royal Australian Historical Society by W.K. Charlton, Clerk of the Parliaments, 22 July 1944, p. 5.

² VP 19/03/1930, p. 302.

³ On one occasion, a member raised the presence of a stranger sitting on the Government benches as a matter of privilege. The Speaker later advised the House that he had accepted the apology of the stranger and was of the view that no untoward motive was intended as a discourtesy to the House. As the business of the House was not impeded he intended to take no further action. VP 20/06/2001, pp. 1283, 1287; VP 25/06/2001, p. 1321.

⁴ Memorandum of Understanding with Police Commissioner entered into under the Act, VP 17/09/1998, p. 862.

⁵ See Part 4 of the *Parliamentary Precincts Act 1997*.

⁶ *Barton v Taylor* (11 AC 197); However, the *Parliamentary Evidence Act 1901* gives the Assembly power to punish a witness for refusing to answer a lawful question.

⁷ PD 13/07/1905, p. 804.

⁸ VP 10/08/1938, p. 65.

ringing of one long bell in order that the gallery was cleared in accordance with his order.⁹ On another occasion visitors in the gallery were directed by the Speaker to remove a sign they had displayed, and failing to do so, they were then removed from the gallery.¹⁰ Should there be any problem in removing members of the public who are disorderly, the Speaker can direct that the entire public gallery be cleared.¹¹ Speakers have argued that it is the responsibility of members to ensure that those they invite to sit in the public gallery maintain decorum at all times.¹² Speakers have also noted that it is a long-standing tradition that there be no communication between members of the House and persons in the gallery.¹³

On another occasion, following demonstrations outside the Chamber, Speaker Ellis stated that it was his duty to take whatever procedures were necessary within his power to prevent any persons not prepared to behave in a commonly accepted manner from entering the precincts of Parliament. Speaker Ellis ruled that until such time as the House otherwise directed, in future when a demonstration occurred outside the House, the gates would be closed to visitors. Strangers (now referred to as visitors) permitted to enter would be limited, and subject to certain conditions.¹⁴ In 2001, a demonstration was held by members of a construction union which effectively blockaded the Parliament building. Members of the public including members of the construction union, were not allowed access to the Public Gallery.¹⁵

24.1 Media representatives and the televising of proceedings

Press Gallery passes are issued to accredited representatives of registered newspapers, radio and television stations and those representatives are also allotted rooms within the Parliamentary precincts. The Speaker has control over the gallery and the press rooms. Any representative may be admitted to or excluded from the press gallery or rooms by the Speaker (S.O. 263).

In 1993 the House passed a resolution agreeing in principle to the desirability of audio and television broadcasting of the proceedings of the Legislative Assembly.¹⁶ Prior to this the House had agreed to permit the televising of proceedings at certain times for the purpose of television stations obtaining file footage.¹⁷ The resolution agreed to by the House in 1993 provided for the trial of a single television camera to operate in the House. Following consideration of the matter by the Standing Orders and Procedure Committee it was agreed the trial arrangements were to continue after Question Time until the dinner break or 6.15 p.m. in cases where there were no

⁹ PD 20/04/1971, p. 40.

¹⁰ See for example, PD 27/10/1993, p. 4524.

¹¹ See also PD 30/11/1994, p. 6066 where the Speaker ordered the removal of a particular person from the public gallery due to disorderly behaviour. When the person did not leave the gallery, the Speaker left the Chair until the public galleries were cleared.

¹² See ruling of Speaker Rozzoli, PD 30/11/1994, p. 6006.

¹³ See PD 21/05/1993, p. 2625 where the Speaker warned persons in the gallery that they should desist from further communication with members in the House.

¹⁴ PD 22/08/1972, p. 116.

¹⁵ PD 19/06/2001, p. 14765-6.

¹⁶ VP 12/05/1993, p. 218. See also VP 07/09/1993, p. 295 where the Speaker advised the House that a single television camera would operate in the House for the duration of Question Time for two weeks on a trial basis.

¹⁷ VP 07/05/1992, p. 321.

private members' statements or no dinner break.¹⁸ Such recording is at the discretion of the Speaker¹⁹ and authorised by standing orders 368, which provides:

The House authorises, on such terms and conditions as may be determined by the Speaker from time to time:

- (1) The filming of its proceedings and the proceedings in public of its committees; and
- (2) The broadcasting and re-broadcasting of such proceedings or extracts thereof in any form, both within and outside the Parliamentary precincts, by any medium.

Since 1993 the Speaker has entered into agreements with television stations regarding the video taping of proceedings, whereby the Assembly contracts a company to record the proceedings of the House, with costs being recovered from the media outlets. The Speaker has approved still photography in the Chamber when proceedings are being video taped and at other times with permission.²⁰

In 1995, the Parliament installed an in-house television system and the live video feed of proceedings is available throughout the precincts.²¹ Information identifying the member speaking and the item of business being conducted (titling) was added to the live video broadcast in 1997 and since February 2002 the proceedings of the House have been broadcast live over the Internet from the Parliament's website.²²

24.2 Lobbyists

Up until 2009, the Parliament had a system to allow registered lobbyists to have access to some non-public areas of the Parliamentary precincts. Essentially, an individual lobbyist could apply for registration to access Parliament House by submitting an application form for approval by the Presiding Officers. The application was required to be sponsored by at least three members.

This system was dispensed with in 2009 when the NSW Government established a Register of Lobbyists, which is administered by the Department of Premier and Cabinet. A code of conduct for lobbyists underpins the register. The Code provides that Government representatives (Ministers, Parliamentary Secretaries, Ministerial Staff, staff working for a Parliamentary Secretary, and persons working in public sector agencies) must only be lobbied by a professional lobbyist who is registered and has their details on the Register. It should be noted that private members (i.e. non-Ministers) are not referred to in the Code.

24.3 Addresses made to the House by visitors

Distinguished visitors may, by resolution, be invited to take a seat on the floor of the Chamber.²³ The President of Ireland, the President of the Seoul Metropolitan

¹⁸ VP 09/11/1993, p. 493.

¹⁹ See VP 28/04/1992, p. 243 where the Speaker ruled that television and audio recording not be permitted for the day's session.

²⁰ VP 23/05/1995, p. 34; VP 06/06/1995, p. 119.

²¹ VP 19/09/1995, p. 203.

²² See VP 26/02/2002, p. 4.

²³ VP 13/04/1875, p. 66; VP 30/11/1875, p. 25; VP 21/11/1878, p. 164; VP 11/12/1885, p. 62; VP 08/09/1921, p. 23; VP 09/11/1921, p. 110; VP 23/09/1947, p. 4; VP 09/12/1947, p. 117; VP 28/04/1948, p. 197; VP 20/09/1950, p. 25; VP 10/10/1950, p. 50; VP 15/10/1953, p. 99; VP 02/03/1955, p. 193; VP 22/09/1955, p. 65; VP 01/10/1957, p. 69; VP 31/08/1965, p. 25; VP 15/10/1974, p. 157.

Council, the First Secretary of the National Assembly of Wales and the President of the Hellenic Republic have all addressed the House.²⁴ Prior to the start of the Paralympic Games held in Sydney, the House suspended standing and sessional orders to allow the interruption of proceedings for two paralympic competitors to address the House.²⁵

Members of the Upper House, who have been the Treasurer, have been admitted to the floor of the House to deliver the Budget speech.²⁶ Resolutions have also been passed to enable Members of the Legislative Council to attend in the Legislative Assembly Chamber.²⁷

Since 1996, visitors have sometimes been invited to address the House on specific issues from the floor including an occasion when two people were invited to address the House, each representing the opposing side of the issue about to be debated by the House.²⁸

²⁴ VP 08/09/1998, p. 826; VP, 21/05/1997, p. 912; VP 02/06/2000, p. 546; VP 07/06/2002, pp. 280-1.

²⁵ VP 11/10/2000, p. 782.

²⁶ VP 10/10/1995, p. 259; VP 21/05/1996, p. 149; VP 06/05/1997, p. 831; VP 02/06/1998, p. 671; VP 02/06/1999, p. 152; VP 06/06/2006, p. 72.

²⁷ Legislative Council members have attended in the Chamber when distinguished visitors have addressed the House. VP 02/05/2000, p. 546, VP 07/06/2000, p. 560.

²⁸ Euthanasia, VP 16/10/1996, p. 471; Aboriginal "stolen generation", VP 18/06/1997, p. 1017; Republic Referendum, VP 27/10/1999, p. 177; Paralympians VP 12/10/2000, p. 9189.

Chapter 25 Papers and Documents

25.1 General rules and procedure

Papers are taken to mean annual reports of government departments and statutory authorities required to be presented to Parliament under legislation such as the *Annual Reports (Departments) Act 1985* and the *Annual Reports (Statutory Bodies) Act 1984*; statutory rules and instruments subject to disallowance under the *Interpretation Act 1987*; and other reports and documents required or desired to be tabled.

Under standing order 264 papers can only be tabled by:

- the Speaker;¹
- Ministers;²
- Chairs of committees;³
- the Clerk;
- statutory provision;
- resolution of the House; or
- command of the Governor.

Parliamentary Secretaries delivering a second reading speech on behalf of a Minister may table documents in accordance with specific statutory provisions⁴ or by the leave of the House.⁵

There is no authority under the standing orders for private members to table documents.⁶ However, members are able to lay documents on the Table of the House for the information of other members.⁷

Under standing order 266, Ministers are to table papers at the allocated time in the routine of business (i.e. after Question Time), or at other times by leave.⁸ The standing order also provides that on a subsequent day the Leader of the House may give a notice of motion regarding the printing of papers tabled or, alternatively, move such a motion without notice at any time. In practice the convention has become for the printing motion to be moved as required, such as at the end of the year, as a matter of housekeeping. The motion is treated as business with precedence and any member may speak to the motion for up to 3 minutes, including the Minister in reply. The Speaker may bring an end to the debate after 30 minutes by calling the Minister in reply. Amendments may be moved to a motion regarding the printing of papers.⁹ For instance, an amendment was once moved to a motion for the printing of papers that “copies of the Report of the Community Justice Centre for the year ended 30 June 1991 be forwarded to those who had written to the Minister for

¹ Speaker tabled letters, VP 01/06/1995, pp. 105-6

² Ministers have sometimes tabled exposure drafts of bills, VP 19/11/1999, p. 288

³ On the debate of committee reports tabled out of session before the election, the Speaker allowed newly elected chairs, or if the committee had not yet elected a chair, the former chair, to speak for 10 minutes, PD 25/05/1995, p. 251.

⁴ For example, in accordance with section 14A(3) of the *Parliamentary Remuneration Act 1989*. See VP 12/11/2003, p. 444.

⁵ See PD 12/11/2003, p. 4888 where a parliamentary secretary tabled a map referred to in the schedule of the bill with the leave of the House.

⁶ See PD 17/09/2003, pp. 3469 and 3475 where the Leader of the Opposition sought leave to table a statutory declaration in the House and was reminded by the Speaker that he had no power to table the document. See also PD 22/09/2004, p. 11288.

⁷ PD 25/06/2003, p. 2161; PD 30/10/2003, p. 4489; PD 24/02/2004, p. 6447.

⁸ In contrast, provision is made in the routine of business each sitting day for committee chairs to table reports.

⁹ Amendment moved (and negatived) to leave a certain report from papers to be printed, VP 16/05/1996, pp. 139-40.

Justice asking for funding.” The amendment was agreed to and the debate on the motion for the printing of papers was adjourned and was set down as an order of the day.¹⁰ The motion for the printing of papers was not agreed to as the order of the day was subsequently discharged.¹¹

Debate on motions regarding the printing of papers are required to be confined to the contents of the reports proposed to be printed and to reports which members believe should be included within the motion. Reports that may be included in any such motion are those reports that have been tabled since the last occasion upon which a similar motion has been debated. In addition, debate upon the operations or policy directive of any particular organisation which is the subject of a report should be limited.¹²

All papers ordered to be printed become "Parliamentary Papers" and are bound together and published by the Parliament in joint volumes and as such form part of the permanent Parliamentary record. Upon request, each member is entitled to receive one copy of each paper tabled and ordered to be printed (S.O. 270). Such papers are available from the Procedure Office.

Under standing order 267 access to tabled papers can be restricted to members only, with no copies or extracts permitted.¹³ In all other cases papers tabled are considered to be public documents.

There are provisions in legislation, e.g. the *Independent Commission Against Corruption Act 1988*, that allow reports to be presented to the Speaker when the House is not sitting. The report is deemed to be tabled and the Speaker authorises it to be made public. This includes reports of the Commission, which deal with members or with the Parliament itself.¹⁴

Similarly, under the annual reporting legislation, reports may be presented to the Clerk out of session and are deemed to be tabled and published.¹⁵ Reports of committees can also be tabled with the Clerk when the House is not sitting provided the legislation or terms of reference establishing the Committee so provide.¹⁶

A number of statutory provisions including the *Annual Reports (Departments) Act 1985* and the *Annual Reports (Statutory Bodies) Act 1984* state that if a report is tabled with the Clerk it must be recorded in the *Votes and Proceedings* of the Legislative Assembly on the first sitting day of the House after receipt of the annual report.¹⁷ This practice applies for all reports received by the Clerk regardless of whether statutory provisions make it mandatory.

¹⁰ PD 04/03/1992, pp. 409-13.

¹¹ PD 25/03/1992, p. 169.

¹² See ruling given by Speaker Rozzoli, PD 08/04/1992, pp. 2403-4.

¹³ PD 17/03/1994, p. 989.

¹⁴ VP 11/05/1999, p. 11.

¹⁵ House resolved that the Annual Report of the Joint Parliamentary Services (not under annual reporting legislation) may be received by the Speaker and printed with authority of the House, VP 25/11/1998, p. 1195; VP 18/11/1999, p. 296.

¹⁶ See for example, section 57(4) of the *Public Finance and Audit Act 1983*, which provides for the Public Accounts Committee to table reports with the Clerk of the Legislative Assembly if the House is not sitting.

¹⁷ See section 13 of the *Annual Reports (Departments) Act 1985* and section 11 of the *Annual Reports (Statutory Bodies) Act 1984*.

Under standing order 269, the House may order a Minister to lay papers on the Table.¹⁸ These papers are usually not ordered to be printed.¹⁹ The House may also pass resolutions authorising the Speaker to make arrangements for the return of documents which have been ordered to be tabled to their originating departments.²⁰ In the absence of statutory provisions to allow reports to be tabled out of session the Legislative Assembly takes the view that reports must be tabled in the House, by the relevant Minister or the Clerk when the House is in session.²¹

Under standing order 268 papers concerned with the Governor (the Royal Prerogative, the administration of justice etc.) may only be requested by an address of the House to the Governor.

25.2 Verifying documents quoted during debate

As noted in section 11.1.3 of Part One, members may quote from documents during a speech provided the quote is brief and the source of the document is properly identified before the member quotes from it.²² If members are not prepared to identify the source of a document being quoted from, they can be requested, through the Chair, to desist from reading it and to paraphrase it. For instance, a member raised a point of order that the member speaking was reading verbatim from a letter. The Acting Speaker ruled that the member speaking could read from the letter provided the member named the writer and vouched for the same. The member speaking noted that it would be inappropriate to name the person who wrote the letter to which the Acting Speaker ruled that the member could paraphrase the letter, but without identifying the name of the writer, could not quote from it verbatim.²³

The privilege attached to tabled papers is considered in section 4.2.2 of Part Two.

¹⁸ Minister moved for the production of papers, VP 04/06/1998, p. 706; PD 17/03/1994, pp. 942 and 989; PD 21/04/1994, pp. 1638 and 1676; PD 03/05/1994, p. 1745. See also VP 04/05/1994, p. 221; VP 10/05/1994 p. 241 and VP 14/09/1994, p. 302; VP 12/05/1994, p. 269 and VP 13/05/1994, pp. 292-3; VP 25/10/1994, p. 432 and VP 27/10/1994, p. 470; VP 15/11/1994, p. 478 and VP 16/11/1994, p. 485.

¹⁹ An equivalent provision in the Legislative Council's standing orders was challenged in the NSW Supreme Court as being beyond the powers of the House. The Court upheld the standing order and that decision (although not the reasons) was upheld on appeal to the High Court *Egan v Willis & Cahill* NSW CA. (1996) 40 NSWLR 650; (1998) 158 ALR 527.

²⁰ VP 11/12/2002, pp. 705-7 where the House authorised the return of a number of documents that had been tabled during the Fiftieth Parliament to their originating departments.

²¹ The Crown Solicitor has expressed the view that "where a statute provides that a Minister must 'table a document' or 'cause a document to be tabled', it means the Minister must either personally lay the document on the table in the House or cause somebody else who is authorised by [the standing orders] to lay the document on the table in the House. It does not mean the Minister may lodge the document with the Clerk of the House out of session. See Advice received from the Crown Solicitor re: "Meaning of term 'cause to be tabled' – reports to Parliament", dated 28 February 2006.

²² See for example, PD 03/03/1994, p. 166.

²³ PD 11/04/2001, pp. 13694-5.

Chapter 26 Committees

Committees allow both members of Parliament and the public (through submissions and evidence) to play a part in the formulation of public policy. They enable Parliament to more effectively scrutinise the Executive thereby making it more accountable to the people of New South Wales. Ministers and Parliamentary Secretaries do not usually serve on committees appointed by the Parliament and are specifically prohibited from serving on particular committees established by statute.¹

With the increasing scope and complexity of government, Parliaments are using committees more and more to assist them in fulfilling the above functions.

Parliamentary committees in New South Wales:

- oversee specific activities of the Executive in greater detail than the House;
- examine legislative proposals, regulations and the operation of policy in detail;
- link Parliament and the people, providing an authoritative forum where interest groups can put their views on the record;
- provide a Parliamentary link and ultimate accountability for a number of independent statutory officers such as the Auditor-General, the Ombudsman's Office, the Independent Commission Against Corruption et al; and
- are established to report to and better inform the Parliament.

The Legislative Assembly may appoint standing, select, sessional, statutory, legislation, estimates and joint committees. The terms "standing", "select" and "sessional" refer to the duration of the life of a committee. The rules for such committees are set out in chapter 23 of the standing orders.

The proceedings of a duly constituted Parliamentary committee are regarded as proceedings of the Parliament and so attract the protection of parliamentary privilege.²

26.1 Standing committees

A standing committee is appointed to investigate and report on a specific subject area for the life of a parliament (S.O. 315). Whilst they continue to exist until Parliament is dissolved, in the absence of statutory authority, they are generally considered unable to transact business during any prorogation of the Parliament.

The standing committees appointed for the 55th Parliament are:

- Standing Committee on Parliamentary Privilege and Ethics;
- Joint Standing Committee on Electoral Matters;
- Joint Standing Committee on Road Safety;
- Joint Standing Committee on the Office of the Valuer-General;
- Legal Affairs Committee;
- Social Policy Committee;

¹ For example, section 54(4) of the *Public Finance and Audit Act 1983* provides that a member of the Legislative Assembly is not eligible for appointment as a member of the Committee if they are a Minister of the Crown or a Parliamentary Secretary.

² For further information on parliamentary committees and privilege see Part Two.

- State and Regional Development Committee;
- Legislative Assembly Committee on Community Services;
- Legislative Assembly Committee on Economic Development;
- Legislative Assembly Committee on Environment and Regulation;
- Legislative Assembly Committee on Law and Safety;
- Legislative Assembly Committee on Transport and Infrastructure.

The House can also appoint standing committees concerned with matters internal to the House such as catering, the library and House procedural matters. There is no requirement under the standing orders for such committees to be established and there may be occasions when such committees are not appointed.³

The Speaker is an ex officio member of the Standing Orders and Procedure Committee as well as the Library Committee and the House Committee (S.O. 318) when they are constituted. However, it is not obligatory for either the Speaker, Deputy Speaker or Assistant Speaker to serve on any committee (S.O. 275).

The Standing Orders Committees of the respective Houses are able confer jointly if they desire and when established, the House Committees of both Houses act jointly as do the two Library Committees.⁴

Section 26.1.1 Standing Committee on Parliamentary Privilege and Ethics

This committee was first established by a resolution of the House in December 2003. The committee considers any matters relating to privilege referred to it by in accordance with standing order 92 or by resolution of the House. The committee is also the designated committee for the purpose of exercising functions under the *Independent Commission Against Corruption Act 1988* relating to Parliamentary ethical standards such as carrying out educative work relating to ethical standards and the giving of advice to elected representatives when requested on proper ethical standards. It is also responsible for reviewing the Code of Conduct for Members.

Section 26.1.2 Joint Standing Committee on Electoral Matters

The role of this committee is to inquire into and report on matters referred to it by either House or a Minister that relate to electoral laws and the administration of and practices associated with the electoral laws. Matters related to the electoral laws regarding the 26 March 2011 General Election, stand referred to the committee for inquiry.

Section 26.1.3 Joint Standing Committee on Road Safety

The committee was first established in 1982. Its role is to monitor, investigate and report on the road safety situation in New South Wales. Its terms of reference include reviewing and reporting on countermeasures aimed at reducing deaths, injuries, and the social and economic costs to the community arising from road accidents.

³ For example, the Library and House Committees were not established for the 53rd Parliament (2003-2007).

⁴ The Library Committee acts jointly with the Library Committee of the Legislative Council in accordance with the Legislative Assembly's resolution of 26 November 1968.

Section 26.1.4 Joint Standing Committee on the Office of the Valuer-General

The committee is responsible for monitoring and reviewing the exercise of the Valuer-General's functions with respect to land valuations under the *Valuation of Land Act 1916* and the *Tax Management Act 1956*. In particular, the committee is to monitor the methodologies employed for the purpose of conducting such valuations; the arrangements under which valuation service contracts are negotiated and entered into; and the standard of valuation services provided under such contracts.

Section 26.1.5 Specialist Standing Committees

Three specialist standing committees have been appointed by the Legislative Assembly for the current Parliament: Legal Affairs Committee; Social Policy Committee; and State and Regional Development Committee.

These committees are able to report on any proposal, matter or thing concerned with the subject area of the committee. The committees may be referred inquiries by the House or in writing from a Minister, or they may initiate an inquiry on their own motion. The terms of reference for these committees provides that the committees should not duplicate any inquiry under examination by a portfolio committee or another standing committee of the House.

The specialist standing committees are able to appoint sub-committees, consisting of 3 members, and to refer to a sub-committee any of the matters which the committee is empowered to consider. These sub-committees may be responsible for conducting hearings, briefings, visits of inspections and other activities but cannot make decisions concerning the conduct of an inquiry, such as the selection of witnesses, and the committee's reports.

In addition, a sessional order has been adopted for the current session to provide for a member to temporarily stand down from a specialist standing committee for a period of time, or for a particular inquiry, and for a member to be substituted for the period concerned.⁵

Section 26.1.6 Portfolio Standing Committees

Five portfolio standing committees have been appointed by the Legislative Assembly as follows:

Legislative Assembly Committee on Economic Development – The following portfolio responsibilities stand referred to the committee: Premier; Western Sydney; Treasury; Finance and Services; Planning and Infrastructure; Trade and Investment; and the Illawarra.

Legislative Assembly Committee on Community Services – The following portfolio responsibilities stand referred to the committee: Health; Medical Research; Education; Mental Health; Healthy Lifestyles; Ageing; Aboriginal Affairs; Disability Services; Family and Community Services; Women; Citizenship and Communities; Western New South Wales; and Sport and Recreation.

Legislative Assembly Committee on Transport and Infrastructure – The following portfolio responsibilities stand referred to the committee: Regional Infrastructure and

⁵ VP 22 June 2011, p. 212.

Services; Special Minister of State; Transport; Roads; Ports; Tourism; Major Events; Hospitality; Racing and the Arts; the Central Coast; and the Legislature.

Legislative Assembly Committee on Law and Safety – The following portfolio responsibilities stand referred to the committee: Attorney General; Justice; Police; Emergency Services; and the Hunter.

Legislative Assembly Committee on Environment and Regulation – The following portfolio responsibilities stand referred to the committee: Environment, Heritage; Small Business; Local Government; Fair Trading; Primary Industries; Resources and Energy; and the North Coast.

The five portfolio standing committees have been appointed to examine, inquire into and report on the following matters concerning their portfolio areas:

- (a) Any matter referred to it by the House;
- (b) Any relevant policy, bill or subordinate legislation;
- (c) Any relevant financial matter; and
- (d) Any relevant portfolio issue.

These committees have a number of functions:

- Legislative scrutiny – including evaluating the policy impact and consequences for each portfolio of any relevant bill introduced in Parliament, any existing legislation and any item of subordinate legislation.
- Financial matters – including the review of government financial management, by considering the financial documents, expenditure, performance and effectiveness of any relevant government department, agency, statutory body or state-owned corporation.
- Examination of any matter in annual and other reports – including the adequacy and accuracy of all financial and operational information and any matter concerning the efficient and effective achievement of the agency's objectives.
- Public works – consideration of any matter concerning public works related to the portfolio area.

A portfolio standing committee may be referred an inquiry by resolution of the House or in writing from a Minister.

In addition, a committee may initiate an inquiry on its own motion, except in the case of bills which must be specifically referred to the House in accordance with Standing Order 323 (Legislation Committees). Accordingly, the portfolio standing committees can initiate an inquiry in relation to reviewing the budget estimates but cannot consider the Appropriation Bills unless they are referred by the House.

As with the specialist standing committees, the portfolio standing committees are able to appoint sub-committees to undertake certain activities (see section 26.1.5 above).

Similarly, the sessional order regarding substitute members also applies to the portfolio standing committees (see section 26.15 above).

26.2 Statutory committees

Statutory committees are created under the authority of an Act of Parliament. Apart from any specific legislative provisions, they operate under the rules for standing committees. Statutory committees continue to exist whilst the Acts under which they are created are in force and Parliament continues to appoint members to serve on them. For example, the *Public Works Act 1912* has required the Parliament to elect a joint committee on public works, such a committee has not existed since the 1930s.

The statutory committees appointed for the [55th Parliament](#) are:

- Committee on Children and Young People
- Committee on the Independent Commission Against Corruption
- Committee on the Office of the Ombudsman and the Police Integrity Commission
- Committee on the Health Care Complaints Commission
- Public Accounts Committee
- Legislation Review Committee

26.2.1 Committee on Children and Young People

The joint Committee on Children and Young People was formed in August 2000. The terms of reference for the committee are set out in Part 6 of the *Commission for Children and Young People Act 1998*, sections 27-30 and Schedule 1. The committee's primary responsibility is to monitor and review the work of the Commission for Children and Young People and report its findings and recommendations to Parliament. In particular, the committee is required to examine and report on annual and other reports of the Commission for Children and Young People. The committee also has a broader responsibility to examine trends and changes in services and issues affecting children and young people, and to make recommendations as to the need for changes to the functions and procedures of the Commission for Children and Young People.

26.2.2 Committee on the Independent Commission Against Corruption

This joint committee is established under the *Independent Commission Against Corruption Act 1988*, and is the means by which the ICAC is accountable to Parliament. The committee monitors and reviews the ICAC's functions, its annual reports and the reports it makes to Parliament.

26.2.3 Committee on the Office of the Ombudsman and Police Integrity Commission

This joint committee was established in 1991 by amendment to the *Ombudsman Act 1974*, and arises from the Ombudsman's Annual Report of the previous year which noted that the position is often said to be one of an officer of the Parliament, and that

the activities of the office should be seen as an extension of the traditional work of parliamentarians, that is, taking up citizen's grievances against the bureaucracy. The committee's functions were expanded by the *Police Integrity Commission Act 1996*. The committee monitors and reviews the functions and the exercise of the functions of the Ombudsman's Office and of the Police Integrity Commission.⁶

26.2.4 Committee on the Health Care Complaints Commission

In 1994 this joint committee was established under the *Health Care Complaints Act 1993*, and has similar powers to the committees on the ICAC and Office of the Ombudsman and Police Integrity Commission in terms of reviewing the functions and annual reports of the Health Care Complaints Commission.

26.2.5 Public Accounts Committee

Established under the *Public Finance and Audit Act 1983*, the Committee has very wide powers to report on the efficiency, effectiveness and economy of government activity, principally through its powers to review the reports of the Auditor-General, the total state sector accounts and the reports of government agencies tabled in the House. The Committee is empowered to veto the appointment of candidates to the position of Auditor-General and is responsible for appointing independent reviewers to test the performance of the Auditor-General every three years. The Committee is not able to comment on proposals for public spending or matters of Government policy without a specific reference from the House or a Minister.

Attempts have been made in recent times to appoint members of the Legislative Council to the Committee. However, given the dominance of the Assembly in financial matters such attempts have been unsuccessful.⁷ See Chapter 22 for further information on the power of the two Houses in relation to public finances.

26.2.6 Legislation Review Committee

The Legislation Review Committee is established under the *Legislation Review Act 1987* and was formerly known as the Regulation Review Committee. When first established the committee was responsible for examining regulations and by-laws and reporting to the House on whether regulations should be disallowed. From 2003, the additional function of scrutinising bills before the Parliament was conferred on the committee. In doing so the committee is required to scrutinise legislation to ensure it does not unduly trespass on personal rights and liberties. The committee is also required to report on whether a bill makes rights, liberties or obligations unduly dependent upon non-reviewable decisions; inappropriately delegates legislative powers; or insufficiently subjects the exercise of legislative power to parliamentary scrutiny.

⁶ Review of the *Protected Disclosures Act 1994* under s. 32 of the Act referred to the Joint Committee of the Office of the Ombudsman, VP 16/04/1996, p. 16. It should be noted that section 32 provides that a joint committee of members of Parliament is to review the Act and that the Committee on the Independent Commission Against Corruption received a reference to review the Act from the House in 2005, VP 06/04/2005, p. 1333.

⁷ For example, in 2001, a resolution was passed by the Legislative Council to appoint three members of the Upper House to the committee. The resolution provided that in the event the Legislative Assembly does not agree to the appointment of Council members to the committee that the Legislative Council shall refer matters currently under consideration by the Public Accounts Committee to the Legislative Council General Purpose Standing Committee No. 1 for consideration and report. VP 30/11/2001, p. 1683. The matter was not considered by the Assembly and lapsed on the prorogation.

26.3 Select committees

A select committee may be appointed by either or both Houses to investigate and report on a specific matter. Select committees cease to exist when they have concluded their reports or at the time specified by the House.

In recent years joint select committees have been established to inquire and report on the Parliamentary Budget Office (2011); parliamentary procedure (2010); tobacco smoking (2006); the cross-city tunnel (2005); nuclear waste (2003); and the quality of buildings (2002). Some of these committees had specific reporting dates set out in the resolution agreed to by both Houses establishing the committee. A reporting date for a select committee can be extended by resolutions of the House (or both Houses in the case of a joint committee).⁸

26.4 Legislation committees

Legislation committees are committees established for the consideration of the provisions of a specific bill. To establish a legislation committee, any member may move a motion, without notice, immediately after the second reading has been agreed to (S.O. 323).⁹ However, standing and sessional orders have also been suspended to allow a motion to be moved referring legislation to a committee following a particular action or defined event in the House. For instance, standing and sessional orders were suspended to permit the Minister for Local Government to transmit to the Speaker the package of bills regarding local government reform and that upon receipt of the bills they were deemed to have been tabled and referred to a legislation committee.¹⁰

Under standing order 323 a legislation committee comprises three government and three non-government members and must report within six months. As a legislation committee specifically reports on proposed amendments to the clauses and schedules of the bill, when tabled, the report is set down by the Speaker for consideration in detail with the bill.

26.5 Estimates committees

Estimates committees examine in detail the Government's estimates of revenue and expenditure for the following year and the appropriation bills. See section 22.2 of Part One for detailed information on estimates committees.

26.6 Joint committees

Committees may be established jointly by the Legislative Assembly and the Legislative Council. While joint committees by convention are subject to the standing orders of the originating House, many are established under legislation and the provisions within such statutes govern the conduct of such committees.

⁸ See VP 20/11/2003, p. 496.

⁹ A bill can be referred to a specific committee in accordance with standing order 198 as an amendment to the motion "That the bill be now read a second time". The committee may canvass the public policy behind the bill. Such a referral does not establish a legislation committee which is referred the specific clauses and schedules of the bill.

¹⁰ VP 11/12/1991, p. 467.

Current joint committees (statutory and standing) are:

- Joint Standing Committee on Electoral Matters (see 26.1.2);
- Joint Standing Committee on Road Safety (see 26.1.3);
- Joint Standing Committee on the Office of the Valuer-General (see 26.1.4);
- Committee on Children and Young People (see 26.2.1);
- Committee on the Health Care Complaints Commission (see 26.2.4);
- Committee on the Independent Commission Against Corruption (see 26.2.2);
- Committee on the Office of the Ombudsman and the Police Integrity Commission (see 26.2.3); and
- Legislation Review Committee (see 26.2.6).

26.7 Powers of committees

26.7.1 Source of powers

Although there are many different types of parliamentary committees in New South Wales, their functions, powers and their procedures emanate from common sources:

(1) Acts of Parliament—

- *Parliamentary Papers (Supplementary Provisions) Act 1975* — authorises committees to publish material;
- *Defamation Act 2005* — confers a defence of absolute privilege against an action for defamation in respect of the publication of documents by committees;
- *Parliamentary Evidence Act 1901* — provides a code for the summoning, attendance and examination of witnesses by committees;
- *Parliamentary Committees Enabling Acts* — allows committees to continue operating beyond the prorogation or discontinuance of a session of Parliament;
- *Constitution Act 1902* — provides for a committee on the pecuniary and other interests of members to be established;
- *Commission for Children and Young People Act 1998*;
- *Legislation Review Act 1987*;
- *Public Finance and Audit Act 1983*;
- *Ombudsman Act, 1974*;
- *Independent Commission Against Corruption Act 1988*;
- *Health Care Complaints Act 1993*;
- *Police Integrity Commission Act 1996*; and
- *Public Works Act 1912* (currently no committee formed); and

(2) Article 9 of the *Bill of Rights 1688*, adopted in New South Wales by the *Imperial Acts Application Act 1969*, guarantees the privilege of freedom of speech for witnesses appearing before committees.

(3) The standing orders of both Houses (which are given force and effect by the *Constitution Act 1902*).

(4) The resolution of the House appointing the committee.

(5) The resolutions of the particular committee.

(6) Practice and convention.

26.7.2 Investigatory powers

The New South Wales Parliament, including its committees, has an inherent power to conduct inquiries. This is reflected in the fact that both Houses and its committees are able to compel witnesses to give evidence in accordance with the *Parliamentary Evidence Act 1901*.

However, a committee's powers of inquiry are confined by its functions. For instance, statutory committees such as the Committee on the ICAC or the Committee on the Health Care Complaints Commission (HCCC) have been established to oversight a statutory body but have no function to reconsider the decisions of the ICAC or HCCC respectively in relation to a particular investigation or complaint. Nor it could be argued do they have a function to review the operation of the ICAC Act or the Health Care Complaints Act generally, or the operation of other bodies with responsibilities under the legislation.¹¹ Similarly, a standing or select committee established by a resolution of the House has only those powers that are required to fulfil its functions as agreed to by the House. In some cases committee functions are left fairly wide with the resolution passed by the House indicating that the committee can investigate "any other relevant matter".¹²

There is also an issue as to whether the powers of a committee of the New South Wales Parliament are effectively limited to those matters for which the Parliament can legislate due to the inability of the Parliament and its committees to compel witnesses from other jurisdictions. As Professor Enid Campbell notes, this is an issue which is yet to be resolved by judicial decision.¹³ However, an opinion of the Judicial Committee of the Privy Council in 1914 held that the Australian Commonwealth Parliament could not legislate to establish a Royal Commission with power to compel witnesses to give evidence before it unless the terms of reference for the Royal Commission were confined to matters on which the Commonwealth Parliament could legislate.¹⁴ Professor Campbell has suggested that this must apply to all parliamentary committees established by the Parliament arguing that:

"...if any Australian House of Parliament were to visit a parliamentary witness with penal sanctions for failure or refusal to appear on summons or for refusal to testify before the House or any of its committees on a matter on which the Parliament could not legislate, the House's action possibly would be

¹¹ This is the view of the Crown Solicitor who argued in advice regarding the powers of the Committee on the Health Care Complaints Commission: "...the Committee is, as its name correctly implies, a Committee on the Commission: it has no function to review the operation of the Health Care Complaints Act generally, nor the operation of other bodies with responsibilities under that Act or under a health registration Act. Thus, the Committee has no power to enquire into the exercise by the New South Wales Medical Board of its functions, nor to enquire into the exercise by the Medical Tribunal of its functions, nor to report to the Parliament in relation to any matter relating specifically to the Board or the Tribunal. No doubt the context within which the Commission operates is a relevant consideration to the exercise of its functions: the existence of other bodies with their own statutory functions is not an irrelevant fact. However, there is a clear difference between noting the existence, powers and functions of, for example, the Board, and the quite separate step of enquiring into the exercise of the Board's powers and functions." See also section 64(2) of the *Independent Commission Against Corruption Act 1988*. For other examples see section 65(2) of the *Health Care Complaints Act 1993*; section 31B(2) of the *Ombudsman Act 1974*; section 95(2) of the *Police Integrity Commission Act 1996*; section 28(2) of the *Commission for Children and Young People Act 1998*; section 57(2)–(3) of the *Public Finance and Audit Act 1983*; and section 9(3) of the *Legislation Review Act 1987*.

¹² See for example, the resolution passed by the House to establish the Select Committee on Nuclear Waste, VP 08/05/2003, pp. 90–1.

¹³ Campbell, Enid, *Parliamentary Privilege*, 2003, p. 154.

¹⁴ See *House of Representatives Practice*, 5th edition, p. 645.

unlawful.”¹⁵

26.7.2.1 Delegation of investigatory power

In New South Wales, the power to delegate authority has been expressly conferred on the Public Accounts Committee by virtue of section 48A of the *Public Finance and Audit Act 1983*, which provides for the committee to appoint a person to conduct a review of the Audit Office.

It is unclear in the absence of statutory provisions whether a committee is able to delegate its powers to a person other than members of the Parliament.¹⁶ However, it has been held in the United Kingdom Court of Appeal that the conducting of an inquiry pursuant to an order of the House includes any inquiry conducted by a person other than a member of the House in accordance with such an order or resolution.¹⁷ This, it could be argued also applies to resolutions of a committee. See section 2.3 of Part Two for further information on the power of the Parliament to conduct inquiries.

26.7.3 Power to veto proposed appointments of statutory officers

A number of statutory committees have the power to veto proposed appointments of statutory officers, who report directly to the Parliament. For example, the Public Accounts Committee has the power to veto any proposal to appoint a person as Auditor-General within 14 days of having a proposal referred by the Treasurer.¹⁸ The actual proposal to appoint a particular person is made by the Executive with the relevant statutory committee merely accepting or rejecting the proposal.

The relevant legislation also provides that any information which comes to a committee's attention in relation to the appointment of a statutory officer, either in oral evidence given before a committee or in a document produced in evidence to a committee, must be treated as confidential and can require a committee to hold *in camera* hearings in relation to such information.¹⁹ Penalties are specified under the relevant Acts should any person, including a member of a committee, disclose confidential evidence and deliberations of the committee in this regard.²⁰

26.8 Conduct of inquiries

26.8.1 Terms of reference

Committees are provided with terms of reference as part of the legislation establishing the committee or by a resolution of the House. Within those terms of reference many committees have been given the power to generate their own specific inquiries. For example, under section 57 of the *Public Finance and Audit Act 1983* the Public Accounts Committee can determine the terms of reference for its inquiries.

¹⁵ Campbell, Enid, *Parliamentary Privilege in Australia*, 1966, pp. 163-4.

¹⁶ See Odgers' *Australian Senate Practice*, 11th edition, 2004, p. 58.

¹⁷ *Hamilton v Al Fayed* (1999) EWCA Civ 1111 (UK Court of Appeal, 26 March 1999).

¹⁸ See section 57A of the *Public Finance and Audit Act 1983*. See also section 66 of the *Health Care Complaints Act 1993*; section 64A of the *Independent Commission Against Corruption Act 1988*; and section 31BA of the *Ombudsman Act 1974*.

¹⁹ See section 58(2A) of the *Public Finance and Audit Act 1983*; section 72(2) of the *Health Care Complaints Act 1993*; section 70(1A) of the *Independent Commission Against Corruption Act 1988*; and section 31H(1A) of the *Ombudsman Act 1974*.

²⁰ See for example, section 58(2B and (2C) of the *Public Finance and Audit Act 1983*; and section 70 (1B and (1C) of the *Independent Commission Against Corruption Act 1988*.

The House can also refer a matter for investigation and report to a committee by giving it terms of reference setting out what the committee is to investigate and any reporting deadlines. Ministers are also able, in some cases, to refer matters to a committee. For example, see section 57(1)(f) of the *Public Finance and Audit Act 1983*, which provides that a Minister may refer matters to the Public Accounts Committee for inquiry and report.

Whereas the Joint Standing Committee on Electoral Matters can only “inquire into and report upon such matters as may be referred to it by either House of the Parliament or a Minister.”

In accordance with standing order 299(1) the Chair of a committee must advise the House at the appropriate time in the routine of business of any inquiries that have been referred to the committee by a Minister or that the committee has resolved of its own volition to conduct.

26.8.2. Gathering evidence

Parliamentary committees gather evidence for inquiries from a variety of sources, including written submissions, taking oral evidence from witnesses, and conducting background research and literature reviews.

26.8.2.1 Submissions

Once a committee has received or determined the terms of reference for an inquiry the general practice is to advertise these in the major newspapers with state-wide circulation inviting submissions to the inquiry from interested persons and the public. Committees may, in addition, write inviting submissions from interested parties or those with relevant knowledge in the inquiry subject.

There are a number of procedures in relation to submissions received by committees. For instance, once a submission has been received by a committee it must not be published or otherwise disclosed in that form without the committee’s authorisation. This is because unauthorised disclosure is prohibited by standing order 297 and may be a contempt of Parliament.

Submissions may be made public by resolution of a committee or when the report is tabled.²¹ Authors may request to keep all or part of their submission confidential. However, it is the prerogative of the committee as to whether such a request is agreed to as there may be instances where the committee is of the view the public interest is better served by publishing the information.

Submissions to a parliamentary committee attract the protection of parliamentary privilege under the *Defamation Act 2005* and the *Parliamentary Papers (Supplementary Provisions) Act 1975*. Legislation and case law in general treat the proceedings of parliamentary committees as parliamentary proceedings to which privilege applies. No action may be taken against a person for making a submission, and the submission may not be used in courts or tribunals to question the truth, motives or credibility of any person. However, any republication of a submission does not attract the same protection. For further information see Part Two.

²¹ Section 4 of the *Parliamentary Papers (Supplementary Provisions) Act 1975*.

Authors of a submission are sometimes asked to give oral evidence before a committee at either a public or *in camera* hearing and submissions may be incorporated as part of a witness' sworn evidence, which is another means of publishing it.

26.8.2.2 Public hearings

Committees conduct public hearings to obtain oral evidence from witnesses in relation to an inquiry. Public servants are often called to provide information about government decisions but cannot comment on the merits or otherwise of particular policies.

Many witnesses appearing before a committee do so on a voluntary basis. However, committees have been vested with powers to compel witnesses to attend.²²

In the past, committees would, as a general rule, issue witnesses appearing before them with a summons prior to them being sworn in to give evidence even if they were appearing on a voluntary basis. This is no longer the practice and only those witnesses that need to be compelled to appear before a committee are summoned. Given that the vast majority of witnesses voluntarily appear before a committee because they want to give evidence, the Speaker has approved the following practice to be observed by committees in relation to the issue of a summons:

- (1) In the normal course of events no summonses are issued to witnesses;
- (2) Confirmation of current practice to pay, with the prior approval as per the usual authorities for expenditure, for the transport and reasonable expenses of key persons who might otherwise not appear before a committee. NB: Witnesses are entitled to payment at the same rate as expert witnesses to the Supreme Court. Witnesses from government departments are not normally paid except in exceptional circumstances;
- (3) The use of a summons is reserved as a last resort to compel a person's attendance before a committee on a case by case basis after consultation with the Clerk-Assistant (Committees); and
- (4) As a summons is issued by a chair on an order from the committee that this be done by way of committee resolution.

When witnesses appear to give evidence before a committee, *Hansard* provides a transcript of the proceedings. Each witness is sent a copy of the evidence they have given to correct, unless the evidence was taken *in camera*, in which case the transcript is corrected in the presence of an officer of the committee at Parliament House. Corrections of transcripts are limited to any inaccuracy in the report. Alteration of phraseology and the introduction of new material into the transcript is not permissible, nor are changes to the questions.

Unless otherwise ordered, access to uncorrected transcripts of evidence taken by a committee is to be authorised by the committee and not otherwise made available to any person or organisation.

A committee can authorise publication of the evidence given before it (including documents) by resolution pursuant to the power conferred by the *Parliamentary*

²² Section 4 of the *Parliamentary Evidence Act 1901*.

Papers (Supplementary Provisions) Act 1975. The effect of this resolution is to protect any person who publishes the documents and evidence from any civil or criminal action or proceeding that may result from publication, including defamation to the extent that the publication is fair. For further information on witnesses see Chapter 27 of Part One.

26.8.2.3 In camera hearings

The *Parliamentary Evidence Act 1901*, which sets out the procedure for the taking of evidence from witnesses before the Parliament or one of its committees, is silent on when evidence should be taken *in camera*. However, the standing orders of the House imply that all committees are empowered to hold *in camera* hearings. Standing order 296 provides:

All persons other than committee officers shall be excluded when the committee is meeting *in camera*.

Whilst committees have been empowered to hold *in camera* hearings it has become accepted practice that parliamentary committees are required to take all evidence in public unless the evidence being given relates to a secret or confidential matter, and/or the witness requests that their evidence be taken *in camera*. For statutory committees this power is defined in the legislation establishing the committee. For instance, section 69 of the *Independent Commission Against Corruption Act 1988* requires the Committee on the Independent Commission Against Corruption to take all evidence in public unless the evidence relates to a secret or confidential matter or if it relates to the proposed appointment of a Commissioner.²³

The practice of the Legislative Assembly is that a witness is offered the opportunity to make application, before or during the hearing of their evidence, for any or all of the evidence to be heard *in camera*, and is invited to give reasons for any such application.

If a witness requests to have their evidence taken *in camera*, a committee would usually deliberate on the matter and make a decision based on: the public interest; the reasons put forward by the witness, including any disadvantages the witness, or a third party, may suffer through publication of the evidence; and the nature of the reference. Generally, such a request is agreed to as a matter of course if it otherwise means not hearing from the witness.

In addition, standing order 294 provides that the Chair or any member of a committee may also request that a witness give evidence *in camera* without the witness requesting to do so. It provides:

At a hearing any person may be admitted but may be excluded at the discretion of the Chair or at the request of any committee member.

The following general principles are considered by committees when considering whether to take evidence in public or *in camera*:

²³ See sections 69 and 70 of the *Independent Commission Against Corruption Act 1988*. See also, sections 31G and 31H of the *Ombudsman Act 1974*; section 58 of the *Public Finance and Audit Act 1983*; and sections 71 and 72 of the *Health Care Complaints Act 1993*.

- Where a committee has reason to believe that evidence about to be given may reflect adversely on a person or body;
- Sub judice issues;²⁴
- Evidence which might incriminate the witness;
- Commercial in confidence;
- Classified material;
- Medical records;
- Evidence which may bring advantage to a witness's prospective adversary in litigation; and
- Evidence likely to involve serious allegations against third parties.

In the event of any disagreement among the committee members regarding the presentation of evidence *in camera*, the chair's decision will prevail. If the application to give evidence *in camera* is denied, the witness should be notified of reasons for that decision.

Evidence taken *in camera* is confidential to the committee. However, it is the prerogative of the committee whether it chooses to publish all or part of that evidence at a later time. In such cases, the committee would consult with the witness in question in an effort to minimise any potential damage to the witness which may flow from any publication. Furthermore, the House has the authority to order the production and publication of undisclosed evidence. Any unauthorised publication of *in camera* evidence may be treated by the Legislative Assembly as a contempt of Parliament.

The House has agreed to release *in camera* evidence with certain conditions attached to its release. For instance, a motion was agreed to by both Houses to enable the release of *in camera* evidence taken by the Joint Select Committee upon Police Administration to the Royal Commission into the NSW Police Service with the condition that any request for the evidence to be released be in writing to the Presiding Officers and that it be used for investigative purposes only and not for publication.²⁵

26.8.2.4 Natural justice

High Court decisions, in particular *Annetts v McCann*²⁶ have emphasised that where a statute confers on a person a power or authority to make decisions or "findings" in an inquiry which may affect an individual's rights, interest, or reputation, the rules of natural justice regulate the exercise of that power.

Natural justice requires that where an inquiry contemplates making a finding which may adversely affect the interests (including in that term career or reputation) of a person, the inquiry must extend an opportunity to that person to respond and place any relevant evidence or any rational argument before the inquiry that the affected person may want, or that the person might have previously raised if they had been aware of the risk of that finding being made.

²⁴ By virtue of Article 9 of the *Bill of Rights*, Houses of Parliament and their committees cannot be held guilty of contempt of court by reason of their proceedings. However, given this immunity, committees should take any evidence that may have the potential to prejudice a trial or judicial inquiry, or may have a tendency to prejudice issues at stake or embarrass the court involved and thereby impede the administration of justice, in private.

²⁵ VP 30/11/1994, p. 596; VP 01/12/1994, p. 608; and PD 02/12/1994, p. 645.

²⁶ (1990) 170 CLR 596.

Notwithstanding that witnesses before committees may give defamatory evidence and be protected under the *Defamation Act 2005*, the rules of natural justice require that the inquiry observe “ordinary notions of what is fair and just”. In terms of committee work, this means that when evidence is given that may give rise to potential adverse findings against a person, procedural fairness must be observed and the person invited to put their version of events.

26.8.3 Reports

26.8.3.1 Preparation of a draft report

After considering all the evidence gathered, including submissions, hearings and the committee’s own research, the committee will write and adopt a report which is tabled in the House. The report will include the committee’s findings and recommendations. In the case of legislation committees the committee will propose amendments to the bill(s) under consideration. Select committees established to report on particular issues or bills cease to exist upon the tabling of their final reports.

Under standing order 300 the first draft report is to be the work of the chair and as such is often referred to as the chair’s draft report. The principle being that the draft report is considered in much the same way as a draft bill is presented by a Minister and considered clause by clause in detail.

The primary aim of the report is to inform Parliament of a committee’s inquiry and to make recommendations and may include the following common elements:

- the chair’s foreword;
- the names of the committee members and the secretariat;
- the resolution of Parliament establishing the committee;
- the text of the advertisement calling for submissions;
- the minutes of all committee meetings in which the inquiry was considered (these can be edited to include only that information directly relevant to the inquiry and exclude other unrelated matters that may have been considered by the committee at a meeting);
- a list of all submissions received and those submissions might be incorporated into the evidence tabled with the report; and
- a list of all witnesses and the organisations or departments they represented.

Pursuant to standing order 300 committee reports must remain confidential until the report is tabled, although, informal and confidential consultations may occur with Government departments as to the ramifications of recommendations if implemented prior to meeting to adopt a report and/or recommendations. Furthermore, a committee is always required to make its report to the House.

26.8.3.2 Consideration of the draft report

The procedures by which a committee is to deal with a draft report are prescribed by standing order 301, which provides that the draft report is to be dealt with as follows:

- (1) Unless previously circulated, the chair shall read the report;

- (2) The committee may order it to be circulated and a subsequent day named for its consideration;
- (3) Unless the committee otherwise resolves, the report shall be considered paragraph by paragraph – the question being “That the paragraph be agreed to”;
- (4) A member may move an amendment to the paragraph at the time it is under consideration;
- (5) After the draft report has been considered, the whole or any paragraph may be reconsidered and amended;
- (6) After consideration, the committee may adopt the report with or without amendment.

It is usual practice for the chair to circulate the draft report among committee members well before the meeting to enable committee members ample time for consideration and discussion. Copies of the draft report are confidential and it is a contempt for any member to publicly release material contained in the draft. Furthermore, information about the report cannot be publicly released without the committee’s approval.

As noted above, standing order 301(3) requires that, unless the committee resolves otherwise, the report be considered “paragraph by paragraph”. In practice, this means that a question is proposed after the committee has considered each paragraph “That the paragraph as read be agreed to.” Any objections or amendments to the paragraph under consideration should then be proposed. The paragraph or text may then be postponed or amended. Amendments may be made on a consensual basis, or alternatively, the committee may divide.

The alternatives to considering a report paragraph by paragraph are:

- the chair may put the question to the committee that the report be taken as read, and deal with the report chapter by chapter, or as a whole; or
- if the committee has not previously discussed their individual views on key issues, the chair might wish to get an indication by considering the recommendations first. Usually the recommendations are dealt with individually and formally approved by precise resolution.

26.8.3.3 Dissenting views

Standing orders do not provide for dissenting reports and the traditional view of the Legislative Assembly is that minority reports or other forms of protest or dissent cannot be appended to a report of a committee, except as included in the committee minutes. This follows the House of Commons practice where the House requires the opinion of the committee – i.e. the opinion of the majority – and not that of individual members.

There are traditional methods of opposing a report such as proposing amendments to paragraphs or recommendations in the report including the calling of divisions or simply voting against the paragraph or recommendation. A member could also vote against the motion “that the report be adopted”. Some committees have incorporated reference to minority views in the body of the report.

More specifically, a member would propose amendments to the particular parts of the report and the alternative text would be recorded in the minutes which are appended to the tabled report.

It should be noted that on occasion provision for a minority or dissenting report to be tabled is made in a committee's terms of reference.²⁷

26.8.3.4 Tabling the report

Standing order 306 governs the tabling of committee reports. It states:

- (1) The report and associated documents of any committee (not being a legislation committee) shall be presented at the time provided in the routine of business, or at any other time with the leave of the House.
- (2) The Member presenting the report may move "That the document be printed". This question shall be decided without debate or amendment.
- (3) Reports from committees shall stand in the order in which they are presented (or reported by the Clerk when received during an adjournment) as Orders of the Day "That the House take note of the Report".
- (4) Such Orders of the Day may be considered between 1.00 p.m. and 1.30 p.m. on Fridays. Any interrupted item of business shall stand as an Order of the Day for tomorrow.
- (5) Debate on an Order of the Day may be adjourned and the resumption of the debate set down as an Order of the Day for tomorrow.
- (6) When the Order of the Day is called on and not proceeded with, consideration of the report shall be postponed until the next Friday sitting when reports are considered. If the Order of the Day is called on at that subsequent sitting and is not proceeded with, the question shall be put.
- (7) If a committee has more than one report on the Business Paper, the Chair, or Member who tabled the report may move a motion without notice, amendment or debate to facilitate the consideration of two or more of the committee's reports together.
- (8) The Member tabling the report may speak for up to 10 minutes and any other Member may speak for up to 5 minutes to the question "That the House take note of the Report" with the question being put after 30 minutes. No reply is permitted.
- (9) Orders of the Day not commenced or not completed 12 months from the date of tabling shall lapse.

The standing order does not provide for the Chair to speak immediately upon the tabling of the report. However, the chair is required under standing order 302 to sign the report and if the chair is unavailable or refuses to sign the report another member appointed by the committee can sign the report.

This standing order has been varied by sessional order to provide for the take note debate on committee reports to occur between 1.00 pm and 1.30 pm on Thursdays, and for any debates called on and not proceeded with to be postponed until the next sitting day when reports are considered. Sessional orders have also altered the speaking times for the take note debate to provide for the member tabling the report

²⁷ VP 21/08/1991, pp. 69-70 in relation to the Joint Select Committee upon the Process and Funding of the Electoral System; VP 19/06/1997, pp. 1045-6 in relation to the Joint Select Committee upon Injecting Rooms.

to speak for up to 6 minutes and any other member up to 4 minutes, with the question being put after 22 minutes. In addition, clause (9) of the standing order, which provides that any order of the day for the consideration of committee reports will lapse 12 months from the date of tabling has been removed from the current sessional order.

Committees have, at times, tabled the submissions received and the transcripts of evidence.²⁸ Legislative Assembly practice is to not table all submissions received by a committee but only those forming part of the sworn evidence of a witness. Committees may alternatively choose to resolve to publish the submissions received and post the submissions on its website.²⁹ In the past, evidence gathered by committees appointed by the House was presented by the clerk of the committee at the Bar of the House.³⁰

Some committees have specific provisions for tabling when the House is not sitting in their establishing statute or terms of reference. When such specific provisions do not apply reference is made to standing order 305. It states that:

Should the House be adjourned and a committee agree to any report before the House resumes sitting:

- (1) The committee may send any such report, minutes and evidence taken before it to the Clerk;
- (2) Upon receipt the documents shall be deemed to be published, and the report shall be printed and may be circulated; and
- (3) The documents shall be reported in the House at its next sitting.

Some joint committees such as the Committee on the Independent Commission Against Corruption³¹ and the Standing Committee on Road Safety³² have specific tabling provisions in their establishing statute or terms of reference as agreed to by the Parliament. If there is no such provision, different procedures are to be followed when only one of the Houses is sitting at the time of tabling a joint committee report. If only the Legislative Council is sitting, the joint committee report is tabled in the Legislative Council and with the Clerk in the Legislative Assembly and vice versa when the Legislative Assembly is sitting and the Legislative Council is not.

26.8.3.5 Government response to committee reports

In accordance with standing order 303A, the Government is required to respond to any recommendations made in a committee report within six months of the report being tabled. If the House is sitting when the relevant Minister is required to table the response, the Minister must table the response at the time set aside in the routine of business for tabling papers. If the House is not sitting, the Minister may table the response with the Clerk and it will be reported to the House at the next sitting. The standing order provides:

- (1) On the tabling of a report from a committee, which recommends that action be taken by the Government, the Clerk is to refer the report to the relevant Minister(s), who must within six months of a report being tabled, report to the

²⁸ See for examples, VP 30/05/2002, p. 238; VP 11/04/2002, p. 162; VP 18/12/2002, p. 18

²⁹ Section 4 of the *Parliamentary Papers (Supplementary Provisions) Act 1975* provides a committee with the power to authorise the publication of documents received by it or evidence given before it.

³⁰ See for examples, VP 08/04/1870, p. 214; VP 25/06/1872, p. 131.

³¹ See section 68A of the *Independent Commission Against Corruption Act 1988*

³² See resolution of the House adopting the terms of reference for the Joint Standing Committee on Road Safety, PD 08/05/2003, p. 552.

House what action, if any, the Government proposes to take in relation to each recommendation of the committee.

- (2) If at the time at which the Minister seeks to report to the House, the House is not sitting, a Minister may present the response to the Clerk.
- (3) A response presented to the Clerk is:
 - (a) On presentation, and for all purposes, deemed to have been tabled and printed, and may be circulated.
 - (b) Reported to the House at its next sitting.

26.9 Committee meetings

26.9.1 First meeting

In accordance with standing order 279, the date and time of the first meeting is set by the mover of the motion for establishment if the mover is proposed as a member of the committee. Otherwise the Clerk of the Legislative Assembly calls the meeting.

One of the main tasks that the committee must perform at its first meeting is to elect a chair and a deputy chair, although some committees have a chair appointed by resolution of the House. In accordance with the standing orders the Speaker, once advised, will report the appointments of a committee chair and a deputy chair to the House (S.O. 282(2)).

The office of chair is not only important for matters of administration, meeting and other procedure but also in the determination of committee resolutions. Standing order 283 provides that any question which arises at a meeting of a committee is determined by a majority of the votes of the members present and voting. In addition, the standing order, and in many cases the founding statutes or the committee's terms of reference, gives the chair a deliberative vote, and in the event of an equality of votes, a casting vote.

26.9.2 Types of meetings

26.9.2.1 Deliberative meetings

Deliberative meetings are primarily held for committees to conduct their procedural and administrative functions. The day to day mechanics of committees, such as the election of the chair and deputy chair, adoption of minutes, scheduling of meetings, deciding on courses of inquiry, and the consideration of draft reports, all take place in deliberative meetings. It should be noted that the absolute privilege afforded by Article 9 of the *Bill of Rights* extends to written communications prepared for the consideration of a committee.³³

In accordance with the standing orders only committee members and committee officers are to be present during a deliberative meeting unless the attendance of other persons has been authorised by the committee (S.O. 295). In addition, standing order 295 provides that a committee is authorised to conduct a deliberative meeting by electronic communication without the members of the committee being present in one place so long as, when a committee deliberates, members of the

³³ This is due to the proceedings of committees being part of the proceedings in Parliament. See section 3.2 of Part Two for further information on what constitutes "proceedings in Parliament".

committee constituting a quorum are able to speak and hear each other contemporaneously.

26.9.2.2 Hearings

For the purpose of hearing witnesses, it is usual and proper practice for committees to hold formal meetings in which sufficient members are in attendance to constitute a quorum. As noted, such hearings are usually held in public but may, in some circumstances, be held *in camera*. Public hearings may be preceded by a deliberative meeting. Formal hearings are subject to the protection of parliamentary privilege and the requirements of the standing orders.

Hearings may occasionally go into deliberative mode to decide on courses of action when circumstances are difficult or unusual. These include the consideration of requests for evidence to be heard *in camera*, or if witnesses refuse to answer questions.

Committees are authorised under standing order 295 to hold a hearing by electronic communication without members of the committee or witnesses being present in one place provided that:

- (a) When a committee deliberates, members of the committee constituting a quorum are able to speak to and hear each other contemporaneously; and
- (b) When a witness gives oral evidence, members of the committee constituting a quorum are able to hear the witness contemporaneously and to put questions to the witness in each other's hearing.

26.9.2.3 Briefings and visits of inspection

A committee may also meet for the purposes of gathering information such as undertaking visits of inspection, conducting briefings, or attending conferences and seminars that have been arranged so as not to constitute a formal hearing. While such occasions constitute a committee meeting, formal decisions cannot be made at such meetings. For committee decisions to be made only committee members and committee staff may be present.

26.10 Procedures in relation to meetings

26.10.1 Minutes

The minutes of the meetings are the formal record of those who attended, the resolutions of the committee, and the topics discussed. The minutes do not record the details of debate or discussion. Standing order 285 states:

The minutes of committee meetings shall record:

- (1) Members present and apologies received.
- (2) Every motion and amendment moved and the name of the mover.
- (3) Every proceeding and decision not the subject of a resolution.
- (4) The names of Members voting in a division and whether for or against the motion.

The minutes of a committee meeting are drafted following the meeting and a copy is provided to each member of the committee with the notice of the next meeting. The minutes are then confirmed at the next meeting and adopted by a mover and

seconded. Strictly speaking a seconder is not necessary but are taken to reflect broader agreement to the record of events.

26.10.2 Quorum

The numbers of members required to constitute a quorum differs from committee to committee depending on the number of members appointed to serve. It is governed by the terms of reference as specified in the legislation or resolution of the House establishing the committee. However, for joint committees by convention at least one member from each House must be in attendance for a quorum to be constituted.

For Legislative Assembly committees that do not specify the conditions for the constitution of a quorum in their terms of reference standing order 280 applies, which provides that a quorum for committees is three members.

For joint committees that do not specify the conditions for the constitution of a quorum in their terms of reference, standing order 321 of the Legislative Assembly applies, which provides that at least three members of the House must be present at every meeting of a joint committee. This is mirrored in the standing orders of the Legislative Council (S.O. 220).

Under standing order 281, if a quorum is not present within 15 minutes of the time set for a meeting, the meeting lapses and the chair will convene another meeting as soon as is practicable. If a chair has not been elected the Clerk will issue notices for the next meeting.

A quorum is required in order for a committee to make decisions and it is arguable that a quorum is also required in order to make the proceedings of a committee valid and thus attract parliamentary privilege.³⁴ For further information on quorums and parliamentary privilege see section 3.2 of Part Two.

26.10.3 Presence of people other than members or staff of the committee

Standing order 295 provides that at a deliberative meeting only committee members and committee officers shall be present unless the attendance of other persons has been authorised by the committee. Committees often authorise the attendance of experts or statutory officers such as the Ombudsman to attend a deliberative meeting of a committee to provide a briefing to members on issues being considered by the committee.

In relation to hearings held by a committee for the purposes of gathering evidence from a witness, those held in public enable any person to attend and listen to the proceedings unless they have been specifically excluded at the discretion of the chair or at the request of any committee member (S.O. 294). When a committee meets *in camera* all persons other than the members and staff of the committee are excluded from the proceedings. (S.O.296).

26.10.4 Video and teleconferencing

As noted in sections 26.9.2.1 and 26.9.2.2 committees are authorised to hold deliberative meetings and hearings by electronic communication i.e. video and teleconferencing.

³⁴ See *House of Representatives Practice*, 5th edition, 2005, p. 693.

Standing order 295(2) was approved by the Governor in July 2009. Prior to this a committee could only hold a meeting or hearing by electronic communication if authorised by the House. For example, in 1999 both Houses authorised a joint committee to take evidence by telephone. The resolution passed by both Houses provided:

*That this House authorises the Committee on the Independent Commission Against Corruption to hold a meeting on Thursday 25 November 1999 by electronic communication without witnesses being present in the one place provided that a quorum of members is present in the one place and that the witness gives oral evidence and the quorum of members present are able to put questions to and hear the witness contemporaneously.*³⁵

Taking evidence by telephone in this instance was used to save the cost of flying a witness in from interstate and to minimise the inconvenience to the witness.

The New South Wales Parliament has a video-conference facility to enable committees to take evidence through such means.

26.10.5 Motions and voting

A number of standing orders govern the moving of motions and voting in committee meetings in particular circumstances. Standing order 283, unless otherwise ordered or authorised by statute, provides that a question arising at a meeting of a committee shall be determined by a majority of the votes of the members present and voting, and that the chair shall exercise a deliberative vote and, in the event of an equality of votes, shall exercise a casting vote, except upon a private bill.³⁶ Standing order 301 provides for the procedure that should be followed by committees when considering a draft report (see section 26.8.3.2 above).

Certain practices have arisen in relation to moving motions and voting in a committee that are not covered by the standing orders. For instance, practice has been that any resolutions put to a committee must be moved and agreed upon by a majority of members to be valid. Motions do not have to be seconded in committee, although seconding a motion indicates broader support among members of the committee. Divisions can be held on any question and it is generally accepted that dissent is able to be noted in the minutes. If more than one member dissents the standing orders do not provide how a division is conducted in a committee meeting. House of Commons (UK) practice for a division is for the Clerk to call over in alphabetical order each member's name who then answers "aye" or "no" or states that they decline to vote.³⁷

26.10.6 Conflicts of interest

Standing order 276 provides that a member cannot participate as a committee member in a matter under inquiry by a committee if personally interested or if the member has a direct pecuniary interest in the matter under inquiry not held in

³⁵ VP 10/11/1999, p. 226.

³⁶ Statutory committees such as the Committee on the Independent Commission Against Corruption and the Public Accounts Committee have statutory provisions which confer the chair of the committee with the power to have a deliberative and a casting vote, in the event of an equality of votes – see section 68(6) of the *Independent Commission Against Corruption Act 1988* and section 56(6) of the *Public Finance and Audit Act 1983* respectively.

³⁷ *May*, pp. 750-1.

common with other citizens of the State. This is an extension of the standing order regarding pecuniary interests, that is, a member is precluded from voting on any matter in the House in which the member has a direct pecuniary interest not held in common with other citizens of the State (S.O. 176).

Conflicts of interest may arise in relation to the personal views of members. However, in a Parliamentary environment strong personal views are not unusual and certainly do not disqualify a member from taking part in committee processes.

26.11 Confidentiality of committee documents and disclosure of evidence

The files and other records of a committee are confidential to it and may be made available to others only by order of the committee or of the House itself, or in limited circumstances, by authority of the Speaker.³⁸ Standing order 297 provides:

A Member or any other person shall not disclose evidence, submissions or other documents and information presented to the committee which have not been reported to the House unless such disclosure is first authorised by the House or the committee.

Documents which were in the public domain prior to their submission to a committee are not confidential.

In November 2006 a new standing order was adopted to permit committees to have access to evidence and records of similar committees appointed during a previous session of the same or of a previous parliament (S.O. 310). Prior to the adoption of this standing order the House regularly passed resolutions providing for committees to have access to the documents and proceedings of related committees from previous Parliaments³⁹ and sessions.⁴⁰

All transcripts of evidence taken by committees remain confidential until the committee authorises its release. This may be immediately after the transcript becomes available, after the witness has corrected the transcript or after the report to which the transcript relates has been tabled. In relation to *in camera* evidence, a committee must use its discretion as to whether or not such evidence should be released in the public interest, particularly if the witness does not agree to its release. In the case of statutory committees, if evidence has been given *in camera* in accordance with statutory confidentiality provisions, the committee can only disclose or publish such evidence with the written agreement of the witness.⁴¹

Section 4 of the *Parliamentary Papers (Supplementary Provisions) Act 1975* assumes that those seeking to disclose evidence taken *in camera* should seek the authorisation of the House or the committee concerned. For instance, in 1996 the Commissioner appointed to the Royal Commission into the NSW Police Service, after being granted access to *in camera* evidence of the Select Committee Upon Prostitution, requested the House to allow the Commission to make public the fact that certain evidence had been given to the select committee. The House did not

³⁸ Standing order 33 provides that: The Clerk shall have custody of all official records of the House and all papers tabled. Such papers shall not be taken from the Department of the Legislative Assembly without the permission of the Speaker.

³⁹ For example, see VP 28/05/2003, p. 1349.

⁴⁰ For example see VP 28/02/2002, p. 53 where a motion was required to enable a select committee which had lapsed due to prorogation to be re-established and given access to the records of the same committee which had been established in the previous session.

⁴¹ See for example, section 70 of the *Independent Commission Against Corruption Act 1988*.

authorise the request noting that such action had the “potential to breach Article 9 of the *Bill of Rights*.”⁴²

The following materials and evidence can be disclosed:

- parts of committee proceedings which are open to the public;
- any media release or public statement made by the chair of a committee with a view to informing the public of the nature of its inquiry;
- written submissions presented to the committee when the committee has given permission for them to be released for publication;
- written submissions forming part of the sworn evidence of a witness; and
- any submission which the chair may refer to any person for the purpose of assisting the committee in its inquiries.

Breaches of confidentiality can be reported to the House in the form of special reports or alternatively in a report to the committee chair.

26.12 Joint inquires and meetings

The House has passed resolutions to provide for inquiries to be undertaken on a joint basis. For example, in November 1997 the House gave leave to enable the Public Bodies Review Committee and the Standing Committee on Public Works to sit together for the purpose of conducting a joint inquiry into issues relating to and arising from the regulation of the procurement of goods and services, competitive tendering and contracting in the New South Wales public sector.⁴³

Leave of the House is also required for Legislative Assembly and joint committees to confer with a committee of the Council (S.O. 311). On occasion, both Houses have passed resolutions enabling the Legislative Council Privileges Committee to meet and hold joint hearings with the Legislative Assembly Standing Committee on Parliamentary Privilege and Ethics.⁴⁴

26.13 Effects of prorogation on parliamentary committees

Prorogation is the termination of a parliamentary session by the Governor, usually acting on the advice of the Government. [While section 10A of the Constitution Act 1902 empowers the Governor to prorogue Parliament it does not define "prorogue" or detail the effect of prorogation.](#) However, it is generally accepted that all parliamentary business is suspended or even ended by prorogation. This understanding has its roots in long standing parliamentary traditions originating at Westminster. *May* notes:

*The effect of a prorogation is at once to suspend all business, including committee proceedings, until Parliament shall be summoned again...*⁴⁵

A parliamentary committee is a subordinate body which derives its powers and authorities from the House or Houses establishing it. This may be by resolution, standing order or a specific enactment but in all cases a parliamentary committee is

⁴² PD 27/11/1996, pp. 6738-9.

⁴³ VP 20/11/1997, p. 299.

⁴⁴ VP 03/04/2001, p. 13007 and VP 09/06/2005, p. 1464.

⁴⁵ *May*, p. 274.

answerable to its creator. As such it follows that the authority of a committee cannot exceed the authority of its parent body:

*...a committee only exists, and only has power to act, so far as expressly directed by the order of the House which brings it into being. This order of reference is a firm bond, subjecting the committee to the will of the House; the reference is always treated with exactness and must be strictly interpreted ... 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.*⁴⁶

In the absence of specific statutory provisions or standing orders enabling a committee to continue its work during any prorogation the work of a committee comes to a close in accordance with the tradition noted above. Select committees established by resolution cease to exist on prorogation because the force of the resolution expires on prorogation. A similar committee established in a subsequent session is, in fact, a new committee. Prior to the adoption of standing order 310 specific authorisation was required from the House for select committees re-appointed after prorogation to access the records of its predecessor.⁴⁷ However, standing committees established by resolution, under standing order 315, continue to exist after prorogation and their membership is unaffected but they may not meet or transact business until the opening of the new session. However, Parliament may legislate to provide for the continuation of select committees and the authority for committees to sit and transact business following prorogation and into the next session.⁴⁸

Statutory committees are established by Acts of Parliament which usually provide for the committee to continue for the life of a Parliament and meet and transact business (including taking evidence) during the recess between a prorogued session and the next session of the same Parliament. For example, section 68(8) of the *Independent Commission Against Corruption Act 1988* provides that:

The Joint Committee may sit and transact business despite any prorogation of the Houses of Parliament or any adjournment of either House of Parliament.

As with all committees, statutory committees cease to exist when the Parliament is dissolved or expires with the effluxion of time.

26.14 General provisions

Unless otherwise ordered or provided for in legislation the following rules apply to committees appointed by the House:

- A committee consists of at least five and not more than ten members. In all committees three members form a quorum (S.O. 273 & 280);
- Members are appointed and discharged from committees by motion, which may be moved without notice when there is no question before the Chair (S.O. 274);

⁴⁶ Josef Redlich, *The Procedure of the House of Commons*, Vol II, AMS Press, New York, p. 196.

⁴⁷ Resolution passed by the House to refer all minutes and transcripts of proceedings and other documents of the Select Committee on Salinity appointed during the second session of the Fifty Second Parliament to the Select Committee on Salinity appointed during the third session of the Fifty Second Parliament. VP 28/02/2002, p. 53.

⁴⁸ For example see the *Parliamentary Committees Enabling Act 1996* and the *Parliamentary Committees Enabling Amendment Act 1997*.

- The names of the members to serve on a committee or the means of their appointment, such as nomination in writing to the Clerk by the leader of a party, may be contained in the motion appointing the committee (S.O. 277);
- If called for by a member, the committee's members shall be chosen by ballot (S.O. 278).⁴⁹ The demand for a ballot may be made after the member who has moved for the appointment of the committee has spoken in reply;⁵⁰
- A member (other than the Speaker, Deputy Speaker or Assistant Speaker (S.O. 275) should not decline to serve on a committee and there is no provision for a member to resign from a committee appointed by resolution unless a motion for the member to be discharged has been agreed to by the House.⁵¹ Provision is made in legislation establishing a number of statutory committees for members to resign by writing to the Speaker to do so.⁵² In 1974, on the motion for the appointment of a select committee to consider the system of appointment of judges to the High Court, two of the five members nominated to serve on the committee intimated to the House that they were not willing to serve.⁵³ A ballot was called for and the two members, notwithstanding their disinclination, were elected.⁵⁴ One of the two members concerned raised the matter as a matter of privilege. He stated that he was aware of the British convention that a member could not relieve himself from the obligation of a member to obey the commands of the House, by declining to serve on a committee. In stating that a *prima facie* case had not been established the Speaker said that he did not think that this was a case in which the House was totally bound by English precedent. He understood that the House had on occasions permitted a member of a select committee to resign from such committee and that on other occasions the House had discharged a member of a select committee and replaced him with another member.⁵⁵ At subsequent sittings each of the two members submitted their resignations to the Speaker, which were reported to the House. The matter was determined by the House discharging the two members and appointing members in their place;⁵⁶
- The chair and deputy chair are elected by the committee at the first meeting or if a vacancy occurs and the Speaker reports the appointments to the House (S.O. 282). However, exceptions to this rule have occurred where the chair of the committee was named in the terms of the motion appointing the committee;⁵⁷
- Under standing order 283 a question arising at a meeting of a committee is determined by a majority of the votes of the members present and voting. It also provides that the chair of a committee has a deliberative vote and in the event of an equality of votes a casting vote. However, at times the House has agreed to motions establishing committee which specifically provide that

⁴⁹ VP 29/09/1908, p. 133; VP 12/02/1918, pp. 190-1.

⁵⁰ VP 12/09/1905, p. 182.

⁵¹ May, pp. 741 - 742; PD 07/05/1942, p. 3318.

⁵² See for example section 6(1)(e) of the *Legislation Review Act 1987*.

⁵³ PD 19/02/1975, p. 3620.

⁵⁴ VP 19/02/1975, p. 295.

⁵⁵ PD 25/02/1975, p. 3809.

⁵⁶ VP 12/03/1975, p. 366; and VP 18/03/1975, pp. 380-2.

⁵⁷ PD 20/06/1956, p. 583 when the Attorney-General was appointed as Chairman on the Australian Constitution Committee; and PD 16/11/2005, p. 19863 when The Reverend the Hon. Fred Nile MLC was appointed Chairman of the Joint Select Committee on the Cross City Tunnel.

the chair shall only exercise a deliberative vote and in the event that there is an equality of votes that the question will pass in the negative.⁵⁸

- Under the standing orders, committees have power to send for persons, papers and records, exhibits and things (S.O. 288). The extent of such powers, except where supported by the *Parliamentary Evidence Act 1901* or any other statute, is uncertain (see Chapters 25 and 27 of Part One and section 2.4 of Part Two);
- Standing order 298 requires a committee to report immediately to the House any serious allegations about a member of the House disclosed to it at once without further investigation. This matter may only be considered by a substantive motion in the House;
- Lists of all committees are displayed on notice boards (S.O. 309);
- Bills may be referred:
 - (a) To a specified committee as an amendment to the question "That this bill be now read a second time" or by specific motion;
 - (b) To estimates committees if an appropriation or parliamentary appropriation bill; and
 - (c) To legislation committees.⁵⁹

⁵⁸ See motion appointing the Select Committee upon the Legislative Assembly Supplementary Budget Allocation, VP 16/10/1991, p. 246.

⁵⁹ It should be noted that the current committee system also provides for portfolio standing committees that are able to inquire into any bill introduced in Parliament within their designated portfolio areas. These committees are separate to legislation committees established under standing order 323.

Chapter 27 Witnesses

27.1 Summoning and calling witnesses

The *Parliamentary Evidence Act 1901*¹ makes provision for the summoning of witnesses, other than a member of Parliament, before the House or a committee. Any summons for a witness to appear before the House is signed by the Clerk,² and any summons to appear before a committee is signed by the chair or deputy chair in the chair's absence.³ However, as noted in section 26.8.2.2 of Part One the vast majority of witnesses appear before parliamentary committees without the need for compulsion and the Legislative Assembly has adopted a practice of summoning only those committee witnesses who would otherwise refuse to attend.

If a person fails to attend without reasonable excuse in response to a summons, the Speaker may send a certificate to a judge of the Supreme Court certifying such.⁴ The judge must then issue a warrant for the person's arrest in order for the person to be brought before the House or committee.

There have been a number of occasions where persons have been summoned to give evidence at the Bar of the House.⁵

- 20 October 1864 – Witnesses (Mr Lenehan, Dr Hamilton and Mr Hanson) summoned in relation to a charge against the Secretary for Public Works.⁶ The following day, the witnesses were directed to the Bar of the House by the Serjeant-at-Arms where they were examined.⁷
- 14 December 1888 – During debate on a motion regarding the tramways in Sydney, Mr Haynes, Member for Mudgee, rose on a matter of privilege advising the House that he had been offered a bribe to support a proposal to lease the tramways. The House agreed to a resolution that Mr Haynes disclose the name of the person who offered the bribe (Mr Huntley) and the House proceeded to pass a resolution to summon Mr Huntley to give evidence at the Bar. Mr Huntley was sworn under oath but withdrew for a short period as there was an objection by a member as to the course of proceedings. The Speaker stated his opinion as to the proper course to be pursued and Mr Huntley was recalled. The Speaker asked Mr Haynes to repeat his allegation and debate arose requiring the witness to withdraw whilst the Speaker named a member for “interfering with the orderly conduct of the business of the House”. Mr Huntley denied the allegation noting that Mr Haynes was almost “a stranger to him”.⁸

¹ Advice received from the Crown Solicitor indicates that a committee appointed by a resolution of the House has no greater power to compel the attendance of witnesses before it than is conferred upon it by the *Parliamentary Evidence Act 1901*. The standing orders cannot be regarded as a valid source of any additional power in that regard.

² Section 4(1) of the *Parliamentary Evidence Act 1901* and standing order 324 of the Legislative Assembly.

³ *Parliamentary Evidence Act 1901*, s. 4(2) and standing order 289 of the Legislative Assembly.

⁴ See section 7 of the *Parliamentary Evidence Act 1901*.

⁵ Prior to the enactment of the *Parliamentary Evidence Act 1901* witnesses were summoned pursuant to the *Parliamentary Evidence Act 1881*, which provided for witnesses to be summoned to appear before the House. The need for a new Act arose when committees appointed by the House had difficulties compelling witnesses to attend under the provisions of the 1881 Act. The 1901 Act was passed to specify that committees appointed by the House also have the power to summon witnesses.

⁶ VP 20/10/1864, p. 21.

⁷ VP 21/10/1864, pp. 28 and 29.

⁸ See VP 14/12/1888, pp. 130-1.

- 4 September 1890 – Mr A. G. Taylor⁹, editor of the newspaper *Truth*, was summoned by the House to give evidence in relation to an article in the newspaper which stated that “bribes have been offered to and asked for by members of Parliament.” Mr Taylor argued that the summons was an impersonal one as it had summoned the editor of *Truth* and not a specific person as required by the Act.¹⁰
- 30 January 1894 – A member rose on a matter of privilege noting that there had been an article published in the *Evening News* that referred to the refreshment rooms and gambling tables within Parliament House and stated that one member had lost a months salary “during one night’s carouse over the gambling table at the Parliamentary Refreshment room”. A resolution was agreed to by the House to summon Mr Hogue, editor of the *Evening News* to answer as to the truthfulness or otherwise of the article.¹¹ The following day, Mr Hogue was sworn at the Bar of the House and refused to answer certain questions put to him, whereupon, the House agreed to a resolution deeming Mr Hogue guilty of a contempt of Parliament. A motion was moved to commit Mr Hogue to gaol for one calendar month. However, this was not agreed to by the House. A further attempt to place Mr Hogue in the custody of the Serjeant-at-Arms was also defeated and Mr Hogue was discharged from further attendance.¹²

In the 19th century witnesses from government departments often gave evidence at the Bar of the House in the Committee of Supply (i.e. when the budget for the State was considered). In these incidences the witnesses were not summoned to appear, rather they appeared on a voluntary basis in order to give evidence as to why the departments they represented should receive certain funds.¹³

27.1.1 Examining a member of Parliament before the House or a committee

Parliamentary practice and convention dictates that a House may direct a member to appear before it but that a committee conducting an inquiry can only request the appearance of a member of Parliament to appear before it. This means that should a member refuse to give evidence to an inquiry no action can be taken against the member. Standing orders 325 and 326 govern this convention in the Legislative Assembly by providing:

325. The House may direct the attendance of one of its Members for examination and the Speaker shall issue such order.

326. The chair of a committee may request in writing a Member or officer of the House to attend a hearing as a witness. If the Member or officer refuses, the Committee shall take no action other than to report the refusal to the House. An officer means a member of staff employed solely by the Speaker.

As previously noted, should a House desire to examine a member of the other House, Parliamentary convention dictates that a request be sent to that House by message requesting the House to grant permission for the member to be examined. Standing orders 327 and 328 provide:

⁹ Mr Taylor was the member for Mudgee from December 1882 to his resignation in April 1887. He also served as member for West Sydney from October 1890 until June 1891.

¹⁰ See PD 04/09/1890, pp. 3514-20.

¹¹ VP 30/01/1894, p. 33.

¹² VP 31/01/1894, pp.45-8.

¹³ For examples, see VP 08/03/1859, p. 191; VP 23/03/1870, p. 155; VP 31/03/1870, p. 183; and VP 11/03/1874, pp. 336-7.

327. If the House or a committee, upon request wishes to examine a Member or officer of the Council, a message shall be sent requesting the Council to grant leave.

328. If the Council or one of its committees wishes to examine a Member or officer of the Assembly, the House may authorise the Member to attend if the Member agrees. The House may order an officer to attend.

It has also been the practice for one House to inform the other when it has granted leave for one of its members to appear before a joint committee.¹⁴

The request for the attendance of a member is based on established principles and practice of Westminster Parliaments, as *May* states “neither House can punish any breach of privilege or contempt offered to it by a Member or officer of the other.”¹⁵ However, while Parliamentary practice requires that one House make a request to the other House for one of its officers to attend, this is not required by the terms of the *Parliamentary Evidence Act 1901*.

On one occasion, a message was received from the Legislative Council advising that leave had been given for the Legislative Council members of a joint select committee to appear before and give evidence to the Legislative Council Committee upon Parliamentary Privilege in relation to the disclosure of *in camera* evidence taken by the committee and requesting that the Assembly pass a similar resolution.¹⁶ However, whilst the message was made an order of the day it was never considered by the House.

The convention that a request must be made in relation to calling a member of another House as a witness is equally applicable to any request for members of the New South Wales Parliament to attend before a parliamentary committee of another Parliament. For instance, the Senate on one occasion communicated with the Legislative Assembly requesting the attendance of the Premier to provide evidence before a Senate select committee. Following advice from the Crown Solicitor, the Speaker advised the House that it should take no further action in relation to the request if it so desired.¹⁷

For further information on the calling of members of Parliament before a House or a committee see section 2.3 of Part Two.

27.2 Swearing of witnesses

Section 10(2) of the *Parliamentary Evidence Act 1901* requires that “Every witness attending to give evidence before a committee...shall be sworn by the chair of such committee.” Section 12 of the Act provides that “No action shall be maintainable 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.” Given section 12 it appears that the provisions of the *Parliamentary Evidence Act 1901* in relation to the swearing in of witnesses do

¹⁴ See for example, VP 03/03/1993, p. 64 where a message was received from the Legislative Council advising that leave had been given for the Legislative Council members of the Joint Select Committee upon Police Administration to appear before and give evidence to the Legislative Council Standing Committee on Parliamentary Privilege in relation to its inquiry into the disclosure of *in camera* evidence taken by the committee.

¹⁵ *May*, p. 172.

¹⁶ See VP 03/03/1993, p. 64 and VP 04/03/1993, p. 70.

¹⁷ VP 19/11/1993, pp. 607-8.

not necessarily apply strictly although by practice almost all evidence taken by a committee is sworn either under oath or an affirmation. For further information see section 2.3 of Part Two.

On this point it is interesting to note that committees of the House of Representatives and House of Commons (UK) rarely swear in witnesses even though they have discretion to administer an oath to witnesses appearing before them.¹⁸

The requirement to be sworn may be fulfilled by swearing an oath or giving an affirmation.¹⁹ The format for oaths and affirmations are set out in the *Oaths Act 1900*. Some committees have adopted the practice whereby witnesses who have previously given evidence before a committee are deemed to be still on oath and are not required to be sworn again. The principle behind this practice is that the oath or affirmation taken by a witness is in relation to the giving of evidence before the committee but does not specify that it applies for the meeting at which the oath is taken.

27.3 Liability of witnesses

As noted, witnesses are protected from any defamation liability by section 12 of the *Parliamentary Evidence Act 1901*. In addition, section 27(2)(a) of the *Defamation Act 2005* provides a defence of absolute privilege for the publication of defamatory matter published in the course of the proceedings of a parliamentary body, including the giving of evidence before a parliamentary committee.

A witness refusing to give an answer to a lawful question from a committee, except as provided by s. 127 (religious confessions) of the *Evidence Act 1995*, may be deemed to be in contempt of Parliament and may be immediately detained in the custody of the Serjeant-at-Arms and, if the House orders, imprisoned for up to one month.²⁰ In addition, a witness who knowingly makes a false statement is liable for a period of penal servitude up to five years.²¹

It is not clear whether a witness can be subject to any other criminal liability. Article 9 of the *Bill of Rights 1688* provides that the proceedings of Parliament may not be questioned or impeached in a court or place outside Parliament. Whilst this article has been interpreted elsewhere and statutorily determined by the Commonwealth as preventing witnesses' evidence being used in court for other than determining whether something was said (e.g. the court cannot question the truth of what was said), New South Wales courts have previously admitted committee proceedings as evidence for other purposes, such as:

- to assist the defence in a criminal trial to impeach the credit of a prosecution witness;²²
- to compare evidence given to a committee with that given by the defendant in criminal proceedings;²³ and

¹⁸ See *House of Representatives Practice*, 5th edition, pp. 668-9 and *May*, p. 763 where it is noted that witnesses are usually only examined under oath when inquiries are of a judicial or other special character.

¹⁹ Section 10(3) of the *Parliamentary Evidence Act 1901*.

²⁰ Section 11 of the *Parliamentary Evidence Act 1901*.

²¹ Section 13 of the *Parliamentary Evidence Act 1901*.

²² *R v Saffron*, unreported, District Court of NSW, 21/8/1987.

²³ *R v Murphy* (1986) 5 NSWLR 18.

- to compare evidence given to a committee with that given by a prosecution witness in criminal proceedings.²⁴

In *R v Murphy*, the distinction was made that a parliamentary proceeding could not give rise to a cause of action itself but it could be used as evidence in proceedings on a matter occurring outside the Parliament and its committees. See section 3.4 of Part Two for a more detailed discussion on the use of evidence taken by committees in court proceedings.

27.4 What is a lawful question?

As noted, under the *Parliamentary Evidence Act 1901*, a committee may only compel a witness to answer a “lawful question”. If a witness refuses to answer any “lawful question” the witness shall be deemed guilty of a contempt of Parliament and may be committed by warrant under the hand of the presiding officer of the House in which the proposal for the appointment of the committee originated.

“Lawful question” under the Act has not been the subject of judicial interpretation in New South Wales but would appear to mean a question “which calls for an answer according to law, one that the witness is compellable to answering according to the established usage of the law”.²⁵

Types of questions which, it has been suggested, would fall outside what is “lawful” include questions that require answers which:

- are not relevant to the committee’s terms of reference, construed broadly;
- would tend to incriminate the witness;
- require giving a non-expert opinion or inference;²⁶
- would be against the public interest (public interest immunity);²⁷
- are prohibited by law, such as secrecy laws (does not include moral obligations to secrecy, such as that arising from professional oaths or ethical rules);
- would breach parliamentary privilege;
- would breach legal professional privilege; or

²⁴ *R v Foord*, unreported, Supreme Court of New South Wales, 1985.

²⁵ *Crafter v Kelly* (1941) SASR 237.

²⁶ Opinions can be given by experts as it is well established that such a witness may express an opinion in respect of matters which fall within his or her expertise. Advice has also been received that a witness appearing before a committee can be compelled to answer a lawful question which requires that witness to express an opinion and that a question, to be lawful, must be one which is relevant to the inquiry being conducted.

²⁷ Possible categories of immunity include the identity of informants or the revelation of information that could prejudice ongoing police investigations. In relation to State papers, the decision in *Sankey v Whitlam*, (1979-80) 142 CLR 1 at 41, established that the fundamental principle is that documents may be withheld from disclosure only if and to the extent, that the public interest renders it necessary and that the subject matter of the papers in question and all circumstances related to them must be considered in deciding whether the papers in question are entitled to be withheld from production. It should also be noted that commentators have argued that questions of public interest immunity are ultimately for the House or one of its committees to decide and that an official may not claim an excuse of ministerial direction to not answer a question as there is no excuse of superior orders in Australian law, and that a continued direction by a Minister not to answer questions could be an offence. See comments by Geoffrey Lindell, “Parliamentary Inquiries and Government Witnesses” in *Melbourne University Law Review*, 1995, volume 20, no. 2, pp. 383-422.

- would reveal information for the detection of crime, certain matters relating to the judicial process (e.g. jury deliberations) or communication with a spouse.

In addition, public servants are often called to provide information about government decisions but cannot comment on the merits or otherwise of a particular policy.

The law on this area is uncertain and changing. Different legal opinions have been expressed regarding whether all the above categories are not lawful questions.²⁸

Any objection to a question must be considered on its own merits. There is no fixed category of information which is subject to public interest immunity but every case needs to be assessed against the public interest. There is no general privilege to protect candour in the public service and while Cabinet proceedings are often subject to immunity, this is not necessarily the case.

It is for the committee to decide, in the first instance, whether a question is lawful and must be answered, but such a decision would be reviewable by a court if the witness should be detained for refusing to answer.

It should also be noted that in New South Wales there is no statutory application of the rules of evidence to inquiries by Parliament or its committees. It has been argued this means that evidence which would not be admissible in a court of law may be received and acted upon and that parliamentary witnesses may be obliged to answer questions in circumstances in which they would not be so obliged in a court of law.²⁹

27.5 Power to compel the production of documents

The *Parliamentary Evidence Act 1901* does not provide a mechanism for either a House or one of its committees to compel the production of documents or other material, as distinct from oral testimony. However, it has been held in both *Egan v Willis*³⁰ and *Egan v Chadwick*³¹ that Houses of Parliament have an inherent power to compel the production of documents from the Executive.

In relation to parliamentary committees, this power is conferred generally under the standing orders of the House, with standing order 288 of the Legislative Assembly providing:

A committee shall have power to send for persons, papers, records, exhibits and things.

A number of statutory committees have been empowered to call for documents under the establishing legislation, although this is not always the case. For further

²⁸ Cf, "Re: *Parliamentary Evidence Act*", Advice of Mary Gaudron QC, Solicitor General, 8 September 1983; "Re: Power of Standing Committee on State Development to require Production of Documents and things", CS89/2640, Advice of I V Knight, Assistant Crown Solicitor, 16 March 1990; "Powers and procedures of Joint Select Committees", SG 92/145, Advice of Keith Mason QC, Solicitor General, 20 October 1992; "Re: Section 11(1), *Parliamentary Evidence Act 1901*" 92/2271, Advice of G. W. Booth, Acting Crown Solicitor, 20 October 1992.

²⁹ Advice received from the Crown Solicitor, 16 March 1990.

³⁰ (1998) 158 ALR 527.

³¹ (1999) NSWCA 176.

information on the power to compel the production of documents see section 2.4 of Part Two.

Under review

Chapter 28 Standing and Sessional Orders

Section 15 of the *Constitution Act 1902* allows the Legislative Assembly to prepare and adopt standing rules and orders regulating its conduct, procedures and mode of communication with the Legislative Council. Such standing rules and orders are approved by the Governor and, once approved, become binding and of force.

The Governor does not act with the advice of the Executive Council when approving the standing orders of either House. The Crown Solicitor has argued:

Given that standing orders are concerned with the internal management of the Houses and that each is the best judge as to the standing orders that are necessary, I think s.15 [of the Constitution Act 1902] gives rise to an implication that the Governor is not to act with the advice of the Executive Council in relation to whether approval should be given to standing orders.¹

The standing orders are the main rules by which the House operates. There are 368 standing orders that may be supplemented by sessional orders. Sessional orders are temporary rules that vary the existing rules or introduce new procedures. Sessional orders are resolutions of the House and do not require the Governor's approval. However, sessional orders are only valid for the session of Parliament in which they have been adopted (S.O. 364).

28.1 Suspension of standing and sessional orders

In order to implement a procedure not provided for in the standing orders or to do something contrary to the standing orders (e.g. to move a motion without notice) it is necessary for the relevant standing orders to be suspended to allow for the procedure.

Ministers are able to suspend standing and sessional orders at any time without leave. All other members must seek the leave of the House to move a motion for the suspension of standing and sessional orders (S.O. 365).

The procedure under standing order 365 for suspension by leave is as follows:

- at any time in the proceedings a member may seek leave to move a motion to suspend standing or sessional orders;
- if leave (no dissenting voice) is granted, the mover, one other member (usually a member opposed to the suspension) and the mover in reply may speak for up to five minutes each to the question of suspension;
- if the suspension motion is agreed to, the member then moves the substantive motion.

It may be that there is no substantive motion and the objective of the member is achieved by the fact that the standing order is suspended (e.g. to not take private members' statements at a particular sitting).

Standing and sessional orders can be suspended at any time when there is no question before the Chair, including when a bill or other matter is being considered in detail. Under the former committee of the whole procedure no provision was made

¹ Advice received from the Crown Solicitor re: Whether the Governor must act with the advice of the Executive Council when approving standing orders, dated 1 May 2007.

for standing and sessional orders to be suspended during proceedings in committee as only the House is able to agree to a motion for suspension. However, proceedings in committee could be altered by the House agreeing to a motion to suspend standing and sessional orders in relation to proceedings that were to take place later in committee, e.g. to allow for Legislative Council amendments to a number of bills to be considered together in one committee of the whole.²

The closure cannot be moved on the debate to suspend standing orders.³

28.2 Amendments to the standing orders

The standing orders of the House may be amended or rescinded. Although motions to amend (this includes the adoption of new and the rescission of existing orders) usually flow from reports and recommendations of the Standing Orders and Procedure Committee, such a course is not mandatory and the House may proceed with such motions at any time.⁴

The motion: "That this House agrees to and adopts the amendments etc. as follow: ..." has been used when it is not proposed to consider proposals in detail;⁵ while, "That this House do now consider the proposed amendments in detail" has been used in the alternative.⁶

Amendments to standing orders, the adoption of new standing orders and repeal of standing orders may be taken *in globo*. However, any member may request that they be considered separately (i.e. *seriatim*).

The method of proposing amendments to standing orders differs from the style used for amending clauses or motions, in that several amendments to a standing order may be taken as one amendment. For instance, should it be desired to leave out a word or a phrase which occurs more than once in a standing order, it is sufficient to move "That (the words) *wherever occurring* be left out."

When proposals are considered in detail it has been ruled that only the amendments upon the actual proposals to amend a standing order are open to debate and amendment.⁷

28.3 Sessional orders

Standing order 364 allows the House to adopt sessional orders which have the force of, and may replace or modify, standing orders.⁸

Sessional orders only have effect for the duration of the session. Sessional orders are made by a resolution of the House and do not require approval by the Governor. Proposed changes to the standing orders are often trialled as sessional orders.

² VP 26/11/1997, p. 410 (8/12/1997, a.m.)

³ PD 20/11/1996, p. 6312; See also PD 25/05/2000, pp. 5680-1.

⁴ VP 08/05/1934, p. 24.

⁵ VP 08/05/1934, p. 24.

⁶ VP 25/10/1928, p. 85.

⁷ VP 20/07/1922, p. 251.

⁸ No confidence, VP 16/06/1998, pp. 725 and 727; division bells, VP 15/09/1998, p. 840; hours of meeting, VP 08/04/1997, pp. 737-40; divisions, VP 06/05/1997, p. 835; no confidence, VP 06/05/1997, p. 837; miscellaneous, VP 16/09/1997, p. 28; urgent motions & miscellaneous, VP 16/04/1996, pp. 25-6; sitting times, VP 30/05/1996, p. 215; miscellaneous VP 17/09/1996, pp. 385-6; urgent motions VP 25/09/1996, p. 440; suspension of standing orders, VP 30/10/1996, pp. 548-51; miscellaneous, VP 01/06/1995, pp. 113-7, VP 13/12/1995, pp. 561-2.

Chapter 29 A Citizen's Right of Reply

Since 1996, the Legislative Assembly has passed resolutions which establish a procedure by which persons, or corporations, may request a right of reply, if they consider themselves to have been adversely mentioned during proceedings in the House.¹

The procedure firstly requires a person who has been referred to in the Legislative Assembly by name, or in such a way as to be readily identified, to make a submission in writing, claiming that they have been:

...adversely affected in reputation or in respect of dealings or associations with others, or injured in occupation, trade, office or financial credit, or that the person's privacy has been unreasonably invaded, by reason of that reference to the person or corporation;

and make a request that consideration be given to an appropriate response being published by the Legislative Assembly or incorporated into Hansard.²

It is then the role of the Speaker to make a determination as to whether that submission should be referred to the Standing Orders and Procedures Committee (the Committee) for further consideration.

In making that determination, the Speaker will apply the criteria set out in Part 1 of the resolution, which requires that they be satisfied that:

- the subject of the submission is not so obviously trivial or the submission so frivolous, vexatious or offensive in character as to make it inappropriate that it be considered by the Standing Orders and Procedure Committee;
- the submission was received within 6 months³ after the relevant comments were made in the House, unless the applicant can show exceptional circumstances to explain the delay; and
- that it is practicable for the Committee to consider the submission under this resolution.

Should the Speaker refer a submission to the Committee, the Committee will then decide whether, or not, to consider it.

Where the Committee decides not to consider a submission because it finds that it is not sufficiently serious or frivolous, or that it is vexatious or offensive in character,

¹ VP 27/11/1996, p. 694-5; VP 17/09/1997, p. 42-5; VP 25/05/1999, pp. 90-2; VP 08/09/1999, pp. 32-3; VP 26/02/2002, pp. 12-4; VP 22/05/2006, pp. 14-5; VP 08/05/2007, pp. 36-8.

² See: Sessional Order (561) - Citizens' Right of Reply (adopted 15 September 2015, V&P No.28, pp. 325-327).

³ In November 2006 an amendment to the citizens' right of reply procedure was introduced. Persons are now required to make a request for a right of reply within 6 months of the relevant comments being made in the Legislative Assembly, unless the applicant can show exceptional circumstances to explain the delay.

A similar requirement is made in other Houses of Parliament that have a right of reply procedure. For example the House of Representatives require a request for a right of reply to be received within 3 months of the remarks being made in the House and the procedure in the Victorian Legislative Assembly provides that the Privileges Committee does not have to consider a submission for a right of reply if it is received after 6 months of the remarks being made in the House and the applicant has not shown exceptional circumstances to explain the delay.

then that decision shall be reported to the Legislative Assembly.

If the Committee does decide to consider a submission then it may meet with the person making the request or the member concerned. The Committee then reports its conclusions to the House as to whether, or not, a response should be published by the Legislative Assembly, or incorporated into Hansard.

Throughout this process, neither the Speaker, nor the Committee, may consider or judge the truth of any allegations made or of the response of the person concerned.

Any right of reply which is agreed to, must be succinct and strictly relevant to the comments made in the House and must not contain anything offensive or unreasonably adversely affecting a person or invading their privacy.

The citizen's right of reply does not affect members' freedom of speech in Parliament and they still have full and absolute parliamentary privilege for what they say in the House. The right of reply gives a citizen or corporation subject to allegations under that privilege an opportunity to have a response to those allegations published in the records of the forum in which they were made.

The "right of reply" is not an automatic right to have a response published but a procedure by which a person may seek this remedy. This is to ensure that the Parliament is not abused and to preserve the principle that only persons who are elected as representatives of the people should be able to speak in Parliament.

It should be noted that while publication of a citizen's right of reply by the Legislative Assembly, or its incorporation into Hansard, would attract Parliamentary privilege, the status of the initial submission to the Speaker is untested by the courts and may only attract qualified privilege under the law of defamation (i.e. privileged only if it was published in the absence of malice). The Legislative Assembly resolution prohibits publishing a response, which would unreasonably adversely affect a person.

To date, the Legislative Assembly has received 25 requests for a Citizens' Right of Reply. Of these 25 requests only two have met the criteria, as set out in Part 1 of the resolution, for the Speaker to refer the matter to the Standing Orders and Procedure Committee.

In the case of the first referral in 2006, the Committee decided that no further action should be taken. In the case of the second referral in 2013, on the recommendation of the Committee, a response was published by the Legislative Assembly.⁴

The full text of the current resolution which establishes the Citizens' Right of Reply Procedure for the 56th Parliament is as follows:

⁴ In 2013, the Committee considered a request for a right of reply received from Ms Lea Rosser and recommended that a response be published by the Legislative Assembly. See the report of the Legislative Assembly Standing Orders and Procedure Committee, Citizens' Right of Reply: Ms Lea Rosser, November 2013.

In 2006, the Committee considered a request for a right of reply received from Mr Gino Mandarino and concluded that no further action should be taken by the Committee or the Legislative Assembly. Mr Mandarino was not permitted a right of reply. See the report of the Legislative Assembly Standing Orders and Procedure Committee, *Citizens' Right of Reply: Mr G Mandarino*, September 2006.

That, during the current Parliament, unless otherwise ordered, the following Citizens' Right of Reply be adopted:

(1) That where a submission is made in writing by a person who has been referred to in the Legislative Assembly by name, or in such a way as to be readily identified:

- (a) claiming that the person or corporation has been adversely affected in reputation or in respect of dealings or associations with others, or injured in occupation, trade, office or financial credit, or that the person's privacy has been unreasonably invaded, by reason of that reference to the person or corporation; and*
- (b) requesting that the person be able to have consideration given to an appropriate response being published by the Legislative Assembly or incorporated into Hansard,*

and the Speaker is satisfied:

- (c) that the subject of the submission is not so obviously trivial or the submission so frivolous, vexatious or offensive in character as to make it inappropriate that it be considered by the Standing Orders and Procedure Committee;*
 - (d) the submission was received within 6 months after the relevant comments were made in the House unless the applicant can show exceptional circumstances to explain the delay; and*
 - (e) that it is practicable for the Committee to consider the submission under this resolution, the Speaker shall refer the submission to that Committee.*
- (2) That the Committee may decide not to consider a submission referred to it under this resolution if the Committee considers that the subject of the submission is not sufficiently serious or the submission is frivolous, vexatious or offensive in character, and such a decision shall be reported to the Legislative Assembly.*
- (3) That if the Committee decides to consider a submission under this resolution, the Committee may confer with the person who made the submission and any member who referred in the Legislative Assembly to that person or corporation.*
- (4) That in considering a submission under this resolution, the Committee shall meet in private session.*
- (5) That the Committee shall not publish a submission referred to it under this resolution of its proceedings in relation to such a submission, but may present minutes of its proceedings and all or part of such submission to the Legislative Assembly.*
- (6) In considering a submission under this resolution and reporting to the Legislative Assembly the Committee shall not consider or judge the truth of any statements made in the Legislative Assembly or the submission.*
- (7) That in its report to the Legislative Assembly on a submission under this resolution, the Committee may make either of the following conclusions:*
- (a) that no further action be taken by the Committee or the Legislative Assembly in relation to the submission; or*
 - (b) that a response by the person who made the submission, in terms specified in the report and agreed to by the person or corporation and the Committee, be published by the Legislative Assembly or incorporated in Hansard by the Speaker.*

- (8) *That a document presented to the Legislative Assembly under paragraph (5) or (7):*
- (a) *in the case of a response by a person or corporation who made a submission, shall be succinct and strictly relevant to the questions in issue and shall not contain anything offensive in character; and*
 - (b) *shall not contain any matter the publication of which would have the effect of:*
 - (i) *unreasonably adversely affecting or injuring a person or corporation, or unreasonably invading a person's privacy, in the manner referred to in paragraph (1); or*
 - (ii) *unreasonably adding to or aggravating any such adverse effect, injury or invasion of privacy suffered by a person.*
- (9) *That a corporation making a submission under this resolution is required to make it under their common seal.*
- (10) *The provisions of Standing Order 306, do not apply to any report made by the Committee to the Legislative Assembly under this resolution.*

Chapter 30 Register of Pecuniary and other Interests

The rationale behind the disclosure of pecuniary interests by members is aimed at addressing any potential conflict of interest between a member's public and private interests.

On 13 April 1981, the then Premier, the Hon. N.K. Wran QC MP, introduced the *Constitution (Disclosures by Members) Bill 1981*. When introducing the bill, the Premier said:

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 have found difficult to rebut.¹

The *Constitution (Disclosure by Members) Amendment Act 1981*, introduced s. 14A into the *Constitution Act 1902* which provides:

- (1) The Governor may, subject to subsections (4) and (5), make regulations for or with respect to:
 - (a) the disclosure by Members of either House of Parliament of all or any of the following pecuniary interests or other matters:
 - (i) real or personal property;
 - (ii) income;
 - (iii) gifts;
 - (iv) financial or other contributions to any travel;
 - (v) shareholdings or other beneficial interests in corporations;
 - (vi) partnerships;
 - (vii) trusts;
 - (viii) positions (whether remunerated or not) held in, or membership of, corporations, trade unions, professional associations or other organisations or associations;
 - (ix) occupations, trades, professions or vocations;
 - (x) debts;
 - (xi) payments of money or transfers of property to relatives or other persons by, or under arrangements made by, Members;
 - (xii) any other direct or indirect benefits, advantages or liabilities, whether pecuniary or not, of a kind specified in the regulations;
 - (b) prescribing the manner in which, and the times at which, pecuniary interests or other matters shall be disclosed and providing for the verification by statutory declaration or otherwise of any such disclosure; and
 - (c) the compilation and maintenance of registers of pecuniary interests or other matters disclosed by Members of either House of Parliament and the inspection and publication of any such register.

The section goes on to state that wilful contravention by a member of any regulation may lead to the House declaring that member's seat vacant; that the regulations apply equally to both Council and Assembly members; Parliamentary committees be afforded the opportunity to make representations to the Governor on the proposed

¹ PD 13/04/1981, p. 5710.

regulations² and that resolutions of both Houses are required to disallow any regulation made in this area.

In 1982, committees of both Houses reported to the Governor on the regulations which in their opinion should be made to enforce these provisions. The regulations thus made under s. 14A are contained in the *Constitution (Disclosures by Members) Regulation 1983*.³

Amendments to the regulation introduced in 2007 broadened the categories of pecuniary interests to be disclosed by members. Members must now disclose information about any service they provide to a person or, to that person's clients, that involves the use of the member's Parliamentary position if they are receiving payment for this service.

New members are required to lodge a primary return setting out their pecuniary interests within three months of the date they take the pledge of loyalty in accordance with section 12 of the *Constitution Act 1902*. A re-elected member is not required to make a primary return. All members are required to lodge an ordinary return for the prior financial year before 1 October each year, unless a primary return has been lodged after 30 April that year.

Amendments to the regulation, which came into force on 24 March 2007, require members to lodge a supplementary ordinary return by 31 March each year in relation to the period 1 July to 31 December of the previous year, or in the case of new members, who have previously lodged only a primary return, the period from the date of the primary return to 31 December of the previous year.

The amendments introduced in 2007 also provide for members to make discretionary returns, when and if they consider it appropriate to do so. Discretionary returns 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.

Pecuniary interest disclosure forms are available from the Procedure Office and are normally sent to all members after their initial election and before the two reporting periods.

A register containing all the returns is required to be compiled by the Clerk. It is required to be open to the public for inspection in the Clerk's Office between 10.00 a.m. and 4.00 p.m. on any work day and at all times whilst the House is sitting.

The Clerk of the Legislative Assembly is required to furnish to the Speaker a copy of the Register of Disclosures by Members for tabling in the House as a Parliamentary paper within 21 sitting days after the lodgement of ordinary returns. This Parliamentary paper will include the supplementary ordinary returns and any discretionary returns lodged within the previous 12 months.

² In accordance with this provision in 2006 proposed amendments to the regulation were referred by the House to the Legislative Assembly Standing Committee on Parliamentary Privilege and Ethics on 25 May 2006. The committee tabled its report on the proposed amendments on 1 September 2006.

³ The regulation has been amended in 2001 and 2007.

The schedule below sets out the dates and time-frames for reporting:

Type of return	Reporting period	Due date
Primary returns – Members elected for the first time	<i>most clauses:</i> As at on the “primary return date” i.e. as at Date of the first sitting day when Members take their seat in the Assembly	Primary return is to be lodged within 3 months after taking the pledge or oath (clause 4)
Ordinary Return	“at any time during the ordinary return period” ie 1 July – 30 June (clause 3)	by 1 October each year (clause 6)
Supplementary ordinary return	1 July – 31 December 2007 (clause 6A(1)(a)) For a new member who has previously only submitted a primary return in which case it is from the date the member took the pledge of loyalty or oath until 31 December.	by 31 March each year (clause 6A)
Discretionary return	Any time before due date for lodging next return that Member considers it appropriate to do so	

Chapter 31 Remuneration and Entitlements for Members

The first allowance for members was provided in 1889, when an Act was passed allocating £300 per annum to each member of the Legislative Assembly for expenses incurred by them in the discharge of their Parliamentary duties.¹ All members of the Legislative Assembly were to receive this allowance unless the member held the position of Speaker or Chairman of Committees and received an official salary in that capacity or the member held an office of profit under the Crown and would thereby be disqualified under the provisions of the Constitution Act then in force. From 1902 until the establishment of a Parliamentary Remuneration Tribunal in 1975, salaries and allowances for members of the New South Wales Parliament were provided for in the *Constitution Act 1902*² and various Parliamentary Allowances and Salaries Acts. This effectively meant that members of the Parliament of New South Wales fixed their own salaries and allowances.

Speakers considered that there was no pecuniary interest involved in relation to legislation regarding members' salary and allowances which would disqualify members from voting on such legislation. On 27 April 1922, Speaker Levy, ruled on the matter of pecuniary interest in considering the *Parliamentary Allowances and Salaries Bill* noting that a direct consequence of such an interpretation of the standing order would be that:

*[T]his House has no right to pass any measure relating to the salaries of Members of Parliament. That is a conclusion so repugnant to one's common sense that any construction of the standing orders which would lead to such a ruling is one which I cannot accept. I, therefore, rule that Honourable Members in voting on this bill have not the direct pecuniary interest which is contemplated by [the standing orders]. Consequently, I cannot sustain the point.*³

In 1975, the Parliament passed legislation establishing the Parliamentary Remuneration Tribunal and was no longer responsible for determining salaries and allowances for its members. This legislation provided that a judge of the Supreme Court be appointed as the Parliamentary Remuneration Tribunal with the task of determining the salaries and allowances of all members of Parliament, including Ministers and other office holders such as the Presiding Officers. The judge appointed to be the Parliamentary Remuneration Tribunal derived the power to make a determination of Parliamentary remuneration upon the handing down of a wages decision within the meaning of the *Industrial Arbitration Act 1940*.⁴ This created a number of difficulties in the 1980s as State wage cases were determined on grounds insufficient to empower the Tribunal to make such a determination. Given this, the *Parliamentary Remuneration Act* was passed in 1989 to link the payment of salaries of members in New South Wales to those in the Federal House of Representatives.

In 2011, an amendment to the *Parliamentary Remuneration Act 1989* removed the link between the salary paid to members of the New South Wales Parliament and the salary of members of the House of Representatives. Salaries are now determined by

¹ *Parliamentary Representatives Allowance Act 1889* 53 Vic No. 12.

² Section 28 of the *Constitution Act 1902* when enacted provided for an allowance for expenses incurred in the discharge of a member's parliamentary duty. The section was repealed by the *Parliamentary Remuneration Tribunal Act 1975* which was in turn replaced by the *Parliamentary Remuneration Act 1989*.

³ PD 27/04/1922, p. 148. For similar rulings see Ruling of Speaker Levy, PD 02/05/1922, p. 150; Ruling of Speaker Kelly, PD 25/11/1976, p. 3650; and Ruling of Speaker Rozzoli, PD 21/03/1990, p. 745.

⁴ This Act was repealed in 1991.

the Parliamentary Remuneration Tribunal. In making a determination fixing the basic salary of a member, the Tribunal can only approve salary increases for members of Parliament up to the amount prescribed in the Government wages policy.⁵

In addition to the basic salary, members who hold a recognised office receive a further salary and expense allowance component which is specified in Schedule 1 of the Act.

The Parliamentary Remuneration Tribunal now consists of a judicial member or a retired judicial member of the Industrial Relations Commission who is appointed for three years. This followed an amendment to the legislation in 1998 which also provided for the Tribunal to make binding determinations on a wide range of members' entitlements. A determination is made on an annual basis.

Since 2000, the Tribunal has determined that a Logistic Support Allocation (LSA) account be established for each member. This LSA is provided to members to fund the operational costs of undertaking their Parliamentary duties. It can be applied for many purposes, including transport, electronic and non-electronic communication and printing, stationery, and office supplies. The LSA cannot be used to purchase items or services already provided to members by the Parliament. The LSA entitlement is determined annually by the Tribunal.

The Presiding Officers may exercise their discretion in permitting expenditure. However, in doing so there must be sufficient funds in the member's Logistic Support Allocation, the items must not duplicate services already provided to members by the Parliament and the expenditure must be consistent with the guidelines and general conditions in the latest determination.

Allowances provided to members include an electoral allowance, a Sydney allowance and a committee allowance, if applicable.

The electoral allowance is based on the size of the electorate and other factors as determined from time to time by the Parliamentary Remuneration Tribunal. The allowance is provided to ensure that members can cover the costs associated with the performance of their parliamentary duties within their electorates.

The Sydney allowance is provided to members who reside in electorates away from Sydney to compensate for the additional costs associated with staying in Sydney to attend sittings of the House, meetings of parliamentary committees or other parliamentary business. In addition, members who reside in electorates outside of Sydney and office holders are entitled to have their travel expenses met for travel between their electorates and Sydney.

Committee allowances are paid to chairs of committees in recognition of the additional responsibilities of the office so long as the chair is not also a recognised office holder for purposes of the *Parliamentary Remuneration Act 1989*. For instance, the Deputy Speaker was the chair of the Legislative Assembly Standing Committee on Parliamentary Privilege and Ethics until the end of the 53rd Parliament

⁵ See section 4 of the *Parliamentary Remuneration Act 1989*.

and did not receive an additional allowance for his position as chair as he received an additional allowance in relation to his position as Deputy Speaker.

Every member of the Legislative Assembly is provided with an Electorate Mail-out Account which is to be used for the specific purpose of preparing and distributing letters/newsletters to constituents in their electorate.⁶

Each member of the Legislative Assembly is entitled to a fitted out, equipped and maintained electorate office to an appropriate standard. This means that all office equipment such as computers, photocopiers, faxes, copy printers, folding/inserting machines, shredders etc. are provided.

In 2001, legislation was passed to ensure that the Tribunal have regard to the financial implications of its determinations by requiring the Tribunal to seek the views of the Secretary of the Treasury and to take those views into account before making its determinations. This amendment ensures that the Tribunal is fiscally responsible.

The Parliamentary Remuneration Tribunal is also responsible for approving proposed amendments to the *Parliamentary Contributory Superannuation Act 1971*. (See section 20.8 of Part One for information on the certificates issued by the Parliamentary Remuneration Tribunal in relation to amendments to this legislation.)

Under the *Parliamentary Remuneration Act 1989* a person elected as a member of the Legislative Assembly is deemed to become a member on the date of election (i.e. polling day) and ceases to be a member if not elected, from polling day. As such, members continue to receive salary up to the day preceding polling day.

The Speaker continues to receive salary and allowances for the Office of the Speaker until the day prior to the election of his or her successor regardless of whether the position holder loses his or her seat or does not stand for re-election. This has been the case since 1884. There is also an argument that due to section 31A of the *Constitution Act 1902*, which provides for the Deputy Speaker to act in place of the Speaker when they are absent from the State, coupled with the absence of any legislation stating when the position of Deputy Speaker ceases, the Deputy Speaker continues until a new Deputy Speaker is elected and accordingly is paid until a successor is appointed.⁷ Other office holders such as the Assistant Speaker and committee chairs only receive the base salary of a private member once the House has been dissolved or the Parliament expires. Political office holders such as the Leader of the Opposition, and the party whips continue to be paid an expense allowance relating to their positions in addition to receiving the base salary of a private member up to and including the day prior to the appointment of their successors.

⁶ For further information on the allowances and entitlements received by members refer to the latest edition of the New South Wales Legislative Assembly, *Members' Handbook*.

⁷ See advice from the Crown Solicitor re: Remuneration of Deputy Speaker of the Legislative Assembly, dated 16 March 2007.

Under review

Chapter 32 The Mace

32.1 Origins of the mace

The mace that today forms part of the regalia of parliamentary institutions was originally used as a weapon. It was then carried ceremoniously by the royal bodyguards known as the Serjeants-at-Arms and utilised originally in France by Philip II (1165 – 1223) and in England by Richard I (1157-99):

It was the duty of the Serjeant-at-Arms at the time of Richard I to watch round the King's tent in complete armour with a mace, a bow, arrows, and a sword, and occasionally to arrest traitors and other offenders about the Court, for which the mace was deemed sufficient authority.¹

The fourteenth century saw the mace take on a new importance because the role of the Serjeants-at-Arms changed from one of guarding of the Sovereign's person to the new and wider responsibility of arresting offenders with whom the local courts were unable or unwilling to deal. It was an age when few could read written warrants and so to ensure that there would be no dispute over the serjeants' authority the butt of their maces were stamped with the Royal Coat of Arms. Maces were therefore both functional and symbolic when Royal Serjeants-at-Arms were first assigned to the Commons at the end of the fourteenth century.

It is not known when a mace was first carried before the Speaker in the House of Commons. However, it is thought that the use of the mace in Parliament probably dates back to when the King first appointed a Serjeant-at-Arms to attend upon the Speaker. The Serjeant's mace was the symbol of the authority delegated from the King to the Speaker.²

In the United Kingdom, historically, the House of Commons, without the mace being in place is not properly constituted nor are proceedings able to take place. A number of historical incidents highlight this tradition. For instance, King Charles I attempted to suspend the proceedings of Parliament merely by sending for the mace and sittings have been postponed when the cupboard in which the mace was kept could not be unlocked.³ The indispensable nature of the mace is also demonstrated when Cromwell dismissed the Long Parliament in 1653⁴ as the mace was ordered to be removed following the removal of all members from the House and the ejection of the Speaker from the Chair.⁵

32.2 Ceremonial significance of the mace

The mace is a trifold symbol of authority; that of the Sovereign, the Legislative Assembly and the Speaker.⁶ Historically, it represents the power and authority that the Sovereign has delegated to the House of Commons and as such is not taken into

¹ See Grose's *Military Antiquities Respecting a History of the British Army* as referred to in *The Mace: A Brief History* compiled by the Legislative Assembly Office of the Clerk, first published in 1975.

² See *An Encyclopaedia of Parliament*, revised edition, edited by Norman Wilding and Philip Laundry, 1961, pp. 374-9.

³ This was due to the fact that the official who had the custody of the key to the cupboard in which the mace is kept failed to turn up to work.

⁴ The Long Parliament was the fifth and last Parliament summoned by Charles I. It first met on 3 November 1640 and was expelled by Cromwell in 1653 and again in 1659 before finally being dissolved on 16 March 1660.

⁵ See *An Encyclopaedia of Parliament*, revised edition, edited by Norman Wilding and Philip Laundry, 1961, pp. 374-9.

⁶ See *May*, p. 220 where it is noted that the mace is the symbol of the powers and privileges of the House and is borne before the Speaker when he enters and leaves the Chamber at the beginning and end of a sitting.

the presence of that actual authority be it the Sovereign or the Sovereign's representative⁷ because the Royal authority vested in the House, and symbolised by the mace, lapses in the presence of the Sovereign.⁸ In the United Kingdom the mace is only lent to the Speaker by the Sovereign who resumes possession of it when Parliament is prorogued.⁹

In New South Wales the mace remains in its cabinet outside the office of the Speaker during any prorogation or dissolution of the Legislative Assembly.

The mace is also the symbol of authority with which all Serjeants-at-Arms are invested by the Crown. Thus, the Serjeant-at-Arms is the custodian of the mace.

The mace is a prominent feature in many Parliamentary ceremonies. The Speaker is preceded by the Serjeant-at-Arms, bearing the mace upon the right shoulder, when the Speaker enters and leaves the Chamber at the beginning and end of each sitting. By tradition, the mace [was](#) borne on the Serjeant's left shoulder when [ever](#) the Deputy Speaker [took](#) the Chair in the Speaker's absence. [Standing order 15 now provides for the Deputy Speaker to perform the duties of the Speaker in his or her absence. Consequently, as with the Speaker, the mace is now borne on the Serjeant's right shoulder when the Deputy Speaker takes the Chair in the Speaker's absence.](#)

The close ceremonial association of the mace with the Speaker has led many modern writers to the assumption that the mace is the symbol of the Speaker's authority. As stated by *May*:

*The chief characteristics attaching to the office of Speaker in the House of Commons are authority and impartiality. As the symbol of the powers and privileges of the House, the Royal Mace is borne before him when entering and leaving the Chamber at the beginning and end of a sitting, and upon state occasions by the Serjeant-at-Arms attending the House of Commons, and is placed upon the Table when he is in the Chair.*¹⁰

The Speaker of the Legislative Assembly at the time the mace was presented to the House, James Cameron, also noted that it is the symbol of the Speaker's authority in New South Wales.¹¹

When the Speaker is in the Chair the mace lies on rests on the Table, with the orb and cross surmounter pointing to the Government side of the Chamber.

The mace is not removed from the Table when the Speaker leaves the Chair during a suspension of a sitting, for example, during the dinner adjournment as the House, technically, is still sitting.

When the House considers bills or other matters in detail the mace also remains in place. In contrast, when the House resolved into a committee of the whole the mace

⁷ Extract from *Balancing tradition and progress: Procedures for the opening of Parliament*, House of Representatives Standing Committee on Procedure, August 2001, p. 13.

⁸ See information regarding the House of Commons mace in *The Houses of Parliament: A Guide to the Palace of Westminster* by Bryan Fell, pp. 82-7.

⁹ In practice, in the United Kingdom the mace is received by the Serjeant at Arms from the Lord Chamberlain of the Household and when the House is dissolved or prorogued it reverts to the custody of the Lord Chamberlain of the Household. *May*, p. 220.

¹⁰ *Ibid.*

¹¹ PD 15/10/1974, pp. 1858-62.

was placed on the lower brackets at the front of the Table and was lifted back to its position on the Table when the House adjourned or concluded the committee stage.

Before the election of the Speaker the mace is placed on these lower brackets and is replaced on the Table rests when the newly elected Speaker takes the chair. This action is symbolic of the fact that the House is not properly constituted until it has a Speaker. Standing order 11 sets out the procedure after the Speaker has been elected and makes the only mention of the mace in the standing orders of the House specifying that “the mace having lain under the Table shall be laid upon the Table.”¹²

The mace accompanies the Speaker when the House attends in the Legislative Council either for the Opening of Parliament or to receive an address from the Sovereign or Her Representative. *The mace may also accompany the Speaker for joint sittings of the Houses.* On these occasions the mace is not taken into the Legislative Council Chamber but is placed on rests in the area outside the Chamber in accordance with tradition. In the past, the mace has accompanied the members and officers of the Legislative Assembly to Government House for the presentation of the Address in Reply to the Governor’s speech opening Parliament, but was left at the entrance to Government House due to the fact that the symbol was unnecessary in the presence of the Sovereign’s representative. This is no longer the case with the mace remaining on the Table whilst the Address in Reply is formally presented to the Governor.

When a visitor is brought to the Bar of the House the visitor attends in the custody of the Serjeant-at-Arms with the mace. In the House of Commons, it was held that this penal jurisdiction formed the basis of the concept of parliamentary privilege and it is argued that as the exercise of such power “...had depended in the first instance on the powers vested in a Royal Serjeant-at-Arms, the mace, which was his emblem of office, became identified with the growing privileges of the Commons and was recognised as the symbol of the authority of the House.”¹³

32.3 The mace of the Legislative Assembly of New South Wales

Until 1974 the New South Wales Legislative Assembly was one of two legislatures in Australia that did not possess a mace, the other being the Legislative Assembly of Queensland.¹⁴ In New South Wales, the mace is therefore not treated with the same gravitas as in the House of Commons and the absence of a mace did not prevent the Legislative Assembly from sitting for the 120 years it did not have a mace.¹⁵ It should be noted that the House of Representatives has had use of the same mace since 1931 and there is a view that the House is not properly constituted unless the mace is present in the Chamber.¹⁶ It would appear that this is not a view that the Legislative Assembly holds and that the House would continue to conduct business as usual should the mace ever be displaced.

¹² See standing order 11(2).

¹³ House of Commons Library, *The Mace in the House of Commons*, 1957, pp. 6-7.

¹⁴ The Legislative Assembly of Queensland was presented with a mace on 29 November 1978.

¹⁵ See comments made by the then Premier, Sir Robert Askin, PD 15/10/1974, pp. 1860-1 when the mace was presented to the House in 1974.

¹⁶ See information on the mace from the House of Representatives website at <http://www.aph.gov.au/house/work/mace.htm>, accessed 22/01/2007.

The Legislative Assembly mace was presented on 15th October 1974, by the New South Wales Jewish Board of Deputies, to commemorate the 150th anniversary of the establishment of Parliamentary institutions in Australia.¹⁷ This follows Parliamentary traditions in Australia, in that maces in Australian legislatures have usually been conferred as gifts from other Parliaments, specific persons or from governments. For example, the mace in the House of Assembly of Tasmania was presented in 1956 by the Davies family in memory of those members of the family who had served in the Parliament and the maces in both South Australia and Queensland were presented on behalf of the respective governments.¹⁸ The Australian House of Representatives used a mace which was on loan from the Legislative Assembly of Victoria until it received a mace as a gift from the House of Commons in 1951.¹⁹

The New South Wales mace was made by Garrard & Co. Ltd, of London, the Crown Jewellers and is made of silver with an applied surface of gold (a technique known as "silver-gilt"). The mace is 5 feet in length, traditional in form, with the Royal Arms on the cushion at the head, the Arms of New South Wales on the front and an inscription on the back. Below the head are the caryatid brackets found on the British maces and the stem is chased with the Tudor rose entwined with the floral symbol of the State, the waratah. The inscription of the mace reads as follows:

Presented to the Legislative Assembly of New South Wales by the New South Wales Jewish Board of Deputies on behalf of the Jewish citizens of the State on the occasion of the Sesqui-Centenary of the Institution of Parliamentary Functions in Australia, 1974.

Prior to 1974 there were a number of attempts to obtain a mace for the Legislative Assembly. In August 1867 a report of the Standing Orders Committee was tabled which recommended that a mace be provided for each House of Parliament in New South Wales.²⁰ However, during the ensuing debate a motion was moved and agreed to adjourning the debate for six months²¹ and the motion was discharged from the business paper before the debate was resumed.²²

¹⁷ See PD 17/11/2004, p. 13051 where the Speaker noted the 30th anniversary of receiving the mace.

¹⁸ *The Mace: A Brief History* compiled by the Legislative Assembly Office of the Clerk, first published in 1975, pp. 22-4.

¹⁹ See *House of Representatives Practice*, 5th edition, pp. 110.

²⁰ See VP 21/08/1867, p. 174. The Legislative Council has a black rod rather than a mace. The black rod is the symbol of office of the Usher of the Black Rod, who is the Serjeant-at-Arms counterpart in the Legislative Council.

²¹ See VP 10/09/1867, p. 227 and VP 04/10/1867, p. 308.

²² See VP 24/03/1868, p. 640.

Chapter 33 Removal of Judicial Officers and Independent Statutory Officers

33.1 Removal of Judicial Officers

Under section 53(2) of the *Constitution Act 1902*, the holder of a judicial office may be removed from the office by the Governor, following an address from both Houses of Parliament in the same session. A judicial officer may be removed on the ground of proved misbehaviour or incapacity. In addition to the provisions of section 53, section 41(1) of the *Judicial Officers Act 1986*, also requires that a judicial officer may not be removed from office in the absence of a report addressed to the Governor from a Conduct Division of the Judicial Commission. The report must set out the Division's opinion as to whether 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. Such reports and related documents are tabled in Parliament in accordance with section 29 of the *Judicial Officers Act 1986*. The Parliament is not bound by any decision of a Conduct Division.

Neither the *Constitution Act 1902* nor the *Judicial Officers Act 1986* set out procedures as to how the two Houses are to adopt an address to the Governor removing a judicial officer. However, the procedure that has been followed in the cases that the Parliament has considered is for the judicial officer to appear before the Bar of the House, initially in the Legislative Council, and address the Members of the Legislative Council.¹ After the judicial officer has addressed the Council, a motion is moved to adopt an Address to the Governor seeking the removal of the Officer under section 53 of the *Constitution Act*. If agreed to a message would be sent to the Assembly seeking concurrence with the motion in the same way that a bill is sent to the other House for concurrence. The Assembly would then be able to call the Judge to address members of the Legislative Assembly and if the Address was agreed to by the Assembly in the same form as the Council it would then be forwarded to the Governor.²

There have been a number of cases where the Parliament has considered whether a judicial officer should be removed from office.

The first of these cases was in 1998 when Justice Vince Bruce was ordered to appear before the Bar of the House of the Legislative Council following a report of a Conduct Division, dated 15 May 1998. Justice Bruce subsequently appeared on 16 June 1998 and addressed members of the Legislative Council in relation to the report of the Conduct Division and to show cause why he should not be removed from office.³

A motion was subsequently moved in the Council: That (a) an address be adopted and presented to His Excellency the Governor seeking the removal of a judge of the Supreme Court under section 53 of the *Constitution Act*; and (b) a message be sent

¹ The resolutions of the Legislative Council have not permitted members to ask the judicial officer questions. See for example, comments of President Harwin, PD 15/06/2011, p. 2305 and PD 21/06/2011, p. 2897.

² Either House could initiate the procedure. However, it has been the practice for the motion to be moved initially in the Legislative Council. It should be noted that members of the Legislative Council have been afforded a conscience vote on such matters.

³ Legislative Council PD 27/05/1998, pp. 5207-8; PD 16/06/1998, pp. 5865-6.

to the Legislative Assembly requesting that they adopt an address in similar terms. However, the motion was resolved in the negative⁴ and accordingly no message was sent to the Legislative Assembly.

More recently, in 2011 two magistrates were separately called to address Members of the Legislative Council from the Bar of the House in relation to their conduct as judicial officers following reports of a Conduct Division of the Judicial Commission.

On 15 June 2011, Magistrate Jennifer Betts appeared before the Bar of the Legislative Council to deliver an address in relation to her conduct.⁵ The same procedure to that which applied in Justice Bruce's case was followed and accordingly a motion was moved after Magistrate Betts had addressed the Council for an Address to be sent to the Governor for the removal of Magistrate Betts on the grounds of incapacity. The motion was negated.⁶

Similarly, on 21 June 2011, Magistrate Brian Maloney appeared before the Bar of the Legislative Council to deliver an address in relation to his conduct.⁷ A motion was subsequently moved following his address for an Address to be sent to the Governor for the removal of Magistrate Maloney on the grounds of incapacity.⁸ Debate on the motion was adjourned as the Judicial Commission had informed the House it was considering a number of further complaints about Magistrate Maloney. The Legislative Council adjourned the debate on the motion to provide Magistrate Maloney the opportunity to address the new evidence.⁹ The President reported receipt of a further submission from Mr Maloney on 17 August 2012.¹⁰ The motion to send an Address to the Governor for the removal of Magistrate Maloney was subsequently negated on 13 October 2011.¹¹

33.2 Removal of Independent Statutory Officers

A number of holders of independent statutory offices are able to be removed by the Governor following an address from both Houses.¹² These include:

- The Electoral Commissioner;
- The Ombudsman;
- The Auditor-General;
- The Commissioner of the Independent Commission Against Corruption;
- The Inspector of the Independent Commission Against Corruption;
- The Commissioner of the Police Integrity Commission; and
- The Inspector of the Police Integrity Commission.

The conduct for which such officers may be removed is usually noted in the legislation establishing the office and includes incapacity, incompetence and

⁴ Minutes of the Proceedings of the Legislative Council, 25/06/1998, pp. 601-2.

⁵ Legislative Council PD 15/06/2011, pp. 2305-2314.

⁶ Minutes of the Proceedings of the Legislative Council, 16/06/2011, p. 210.

⁷ Legislative Council PD 21/06/2011, pp. 2897-2905.

⁸ Minutes of Proceedings of the Legislative Council, 22/06/2011, pp. 254-5.

⁹ *Ibid.*

¹⁰ Minutes of Proceedings of the Legislative Council, 17/08/2011, p. 353.

¹¹ Minutes of Proceedings of the Legislative Council, 13/10/2011, pp. 495-7.

¹² Other independent statutory officers can be removed by the Governor without any involvement from the Parliament.

misbehaviour.

There have not been any occasions where an independent statutory officer has been removed by the Governor following an address of both Houses. However, if the occasion should arise it is important that the House ensure procedural fairness is given to an independent statutory officer before a resolution is passed by the House to remove that officer. This would involve for example inviting the officer to address the House or both Houses to answer questions.¹³

¹³ See *Annetts v McCann* (1990) 170 CLR 596 where the High Court emphasised that where a statute confers on a person a power or authority to make decisions or "findings" in an inquiry which may affect an individual's rights, interest or reputation, the rules of natural justice regulate the exercise of that power.

Chapter 34 The Parliament's Role in Referring Matters to or Expanding Powers of Investigatory Bodies

34.1 Royal Commissions

Under the *Royal Commissions Act 1923* a Royal Commission is established when the Governor, by letters patent, issues a Royal Commission to a person to make an inquiry.¹ This effectively means that the Executive Government is responsible for establishing Royal Commissions and the formal approval of the Parliament is not required. However, there have been times when the House has passed resolutions calling on the Government to establish Royal Commissions² or extend its terms of reference.³ In these cases it is still left to the Executive Government to determine whether a particular inquiry is justified and a letters patent is required to be issued by the Governor.⁴

The Parliament has also passed specific legislation to increase the powers of an existing Royal Commission. For instance, in 1994 the Parliament passed legislation conferring additional powers on the Royal Commission which had been established to inquire into the NSW Police Service and to assist the Commission in the conduct of its inquiries.⁵

The Parliament has also agreed to resolutions calling on the Federal Government to establish Royal Commissions⁶ and members of the Opposition have attempted to move motions noting the "failure of the Government to provide adequate terms of reference" for Royal Commissions.⁷

34.2 Special Commissions of Inquiry

As with Royal Commissions, no formal approval of the Parliament is required to establish special commissions of inquiry. Such inquiries are decided upon by the Executive Government and are established when a letter patent is issued by the Governor.⁸ The Parliament does however, have a role in determining any additional powers such inquiries may be given and on one occasion passed legislation to enable a special commission of inquiry to consider material that would otherwise have been outside its powers because of the operation of parliamentary privilege.⁹

34.3 The Independent Commission Against Corruption

Section 73 of the *Independent Commission Against Corruption Act 1988* provides for the Legislative Assembly or Legislative Council to refer matters to the Independent Commission Against Corruption (ICAC). The first reference by the Parliament to the ICAC occurred in April 1992 when a motion was agreed to requesting it:

*To investigate the facts and circumstances relating to the resignation of the former member for Davidson from the Parliament of New South Wales and the appointment of him to a position in the Senior Executive Service or Public Service of New South Wales.*¹⁰

¹ See section 5 of the *Royal Commissions Act 1923*.

² For example see VP 11/05/1994, pp. 245-5 where the House agreed to a resolution calling on the Government to establish a Royal Commission into the NSW Police Service.

³ See PD 23/10/1996, p. 505 where the House passed a motion to extend the terms of reference of the Royal Commission into the NSW Police Service.

⁴ See section 3 of the *Royal Commission (Police Service) Act 1994* which states that the letters patent for the inquiry was issued by the Governor on 13 May 1994.

⁵ See the second reading speech for the *Royal Commission (Police Service) Bill* PD 22/09/1994, pp. 3628-9. There was no requirement for the Governor to issue letters patent as the legislation provided a Royal Commission that had already been established with additional powers.

⁶ VP 17/05/1990, p. 261 where the House agreed to a resolution calling on the Federal Government to appoint a Royal Commission to investigate the activities of the Mafia.

⁷ VP 17/08/1983.

⁸ See section 4 of the *Special Commissions of Inquiry Act 1983*.

⁹ See the *Special Commissions of Inquiry Amendment Act 1997* which provided that a House of Parliament, by way of resolution, may declare that parliamentary privilege is waived in connection with a special commission to an extent declared in the resolution. This provision no longer applies as the amendment expired six months after it commenced.

¹⁰ VP 28/04/1992, pp. 245-7.

The Parliament also referred matters to the ICAC for investigation and report in March 1994¹¹ and in November 2002.¹² [Under the legislation it is the duty of the ICAC to fully investigate any matter referred to it by resolutions of both Houses of Parliament.](#)¹³

Individual members of Parliament may also refer matters to the Independent Commission Against Corruption for investigation. However, it is up to the ICAC whether matters referred by individual members warrant a full investigation.

¹¹ VP 09/03/1994, p. 86 and VP 10/03/1994 pp. 96-7. Reference sent to the ICAC regarding the protection of paedophiles by members of the Police Service of New South Wales.

¹² VP 21/11/2002, pp. 648-9. Reference sent to the ICAC to consider the adequacy of the provisions of the Code of Conduct for members of the Legislative Assembly.

¹³ [Section 73 of the *Independent Commission Against Corruption Act 1988*.](#)

Chapter 35 Accountability Legislation

35.1 Independent Commission Against Corruption Act 1988

The *Independent Commission Against Corruption Act 1988* established the Independent Commission Against Corruption (ICAC) and conferred it with wide-ranging powers to investigate corrupt conduct (and a wide range of related matters) involving any public official in any public authority in New South Wales. The definition of “public official” specifically includes the Governor, Ministers, Executive Councillors, Parliamentary Secretaries and the members and Presiding Officers of both Houses of Parliament. The ICAC also has a charter to promote conditions under which corruption is not tolerated and has an advisory and educative role with the aim to prevent corruption in public institutions.¹ Reports of the Commission are tabled in Parliament.

Part 7 of the Act provides for a joint committee on the Independent Commission Against Corruption to be established at the commencement of each Parliament. The committee is not empowered to direct the Commission in any way nor can it have the ICAC reconsider its decisions or findings. For further information on the committee see section 26.2.2 of Part One.

Part 7A of the Act deals with Parliamentary ethical standards. It requires each House to establish a designated committee² whose functions include:

- (a) preparing draft codes of conduct for members of the House and draft amendments to codes of conduct already adopted, and
- (b) carrying out educative work relating to ethical standards applying to members, and
- (c) giving advice in relation to such ethical standards in response to requests for advice by the respective Houses, but not in relation to actual or alleged conduct of any particular person (ss. 72C & 72E).

In 1998, the Houses each adopted an identical Code of Conduct. The code, with amendments, has been adopted in all subsequent Parliaments. The Members’ Code of Conduct is a highly significant document as it is the relevant Code of Conduct for the purposes of section 9(1)(d) of the *Independent Commission Against Corruption Act 1988*. The legal relationship between the Members’ Code of Conduct and the ICAC Act means that a breach of the Code of Conduct may amount to corrupt conduct under the *Independent Commission Against Corruption Act 1988*, even if the conduct is not otherwise illegal. For further information on the Code of Conduct see Chapter 7 of Part One.

35.2 Ombudsman Act 1974

Under ss. 12 & 13 of the *Ombudsman Act 1974* the Ombudsman is empowered to receive complaints about the conduct of a public authority and make a decision as to

¹ see Parts 1, 3 and 4 of the *Independent Commission Against Corruption Act 1988* for definitions of “corrupt conduct”, “public authority” and “public official” as well as a full description of the functions and powers of the Commission.

² This function is performed by the Legislative Assembly Standing Committee on Parliamentary Privilege and Ethics and the Legislative Council Privileges Committee.

whether or not to investigate such complaints. Under s. 26 of the Act the Ombudsman is able to report on conduct which is:

- (a) contrary to law;
- (b) unreasonable, unjust, oppressive or improperly discriminatory;
- (c) in accordance with any law or established practice but the law or practice is, or may be, unreasonable, unjust, oppressive or improperly discriminatory;
- (d) based wholly or partly on improper motives, irrelevant grounds or irrelevant consideration;
- (e) based wholly or partly on a mistake of law or fact;
- (f) conduct for which reasons should be given but are not given; or
- (g) otherwise wrong.

“Conduct” is defined as any actual or alleged action or inaction relating to a matter of administration. As a matter of practice, the conduct forming the subject matter of complaints ranges from poor service through to serious misconduct leading to criminal charges. The Ombudsman conducts extensive investigations using the preliminary inquiries power under s. 13AA and is able to resolve the majority of complaints without resort to its royal commission and other compulsive powers (ss. 19 & 20).

The Ombudsman also has a role monitoring and reviewing certain police powers and inspecting gaol and juvenile justice institutions. The Ombudsman has an auditing role in telecommunications interception and controlled operations, and determines appeals in relation to inclusion or removal from the witness protection program. More recently the Ombudsman has acquired functions in relation to child protection which include:

- (1) keeping under scrutiny the systems for preventing child abuse;
- (2) overseeing and monitoring the conduct of investigations into allegations or convictions made against employees of designated agencies;
- (3) determining whether an investigation which has been monitored has been conducted properly, and whether appropriate action has been taken; and
- (4) directly investigating child abuse allegations or convictions against employees of designated agencies or the handling of or response to such a matter.

Members of Parliament fall outside the Ombudsman’s jurisdiction.³ However, the following functions are directly relevant to members:

- (1) the Ombudsman’s office may be able to provide a remedy for aggrieved constituents experiencing problems dealing with the bureaucracy;
- (2) the Ombudsman does have jurisdiction over members’ staff; and
- (3) the Ombudsman deals with complaints against the conduct of government agencies and staff within Ministers’ portfolio responsibilities.

³ See Schedule 1 of the *Ombudsman Act 1974*.

A joint statutory committee is appointed by both Houses under Part 4A of the *Ombudsman Act 1974* to monitor and review the exercise of the Ombudsman's functions. As with the committee overseeing the ICAC, there are some limitations as to the ambit of the committee's inquiries. See section 26.2.3 for further information.

Section 35.3 Government Information (Public Access) Act 2009

The stated objective of the *Government Information (Public Access) Act 2009* is to open government information to the public by:

- authorising and encouraging the proactive public release of government information by agencies, and
- giving members of the public an enforceable right to access government information, and
- providing that access to government information is restricted only when there is an overriding public interest against disclosure.⁴

The Act does not apply to the Parliament, Presiding Officers nor members. Schedule 4, clause 2(3) specifically excludes the Legislative Council, the Legislative Assembly and a committee of either of both Houses from the definition of "public authority". Schedule 4, clause 3(2) specifically excludes the offices of a member of the Legislative Council or the Legislative Assembly, the Presiding Officers, committee Chairs, Ministers, Parliamentary Secretaries or members of the Executive Council from the definition of "public offices" under the Act.

35.4 Anti-Discrimination Legislation

Under section 22B of the *Anti-Discrimination Act 1977*, it is unlawful for a member of Parliament to sexually harass a "workplace participant" or another member of Parliament in the workplace. It is also unlawful for a "workplace participant" to sexually harass a member of Parliament in the workplace.

More generally, the *Anti-Discrimination Act 1977* prohibits a wide range of discriminatory behaviour on the basis of race, sex, age, marital status, homosexuality, disability, transgender status, or a person's association with someone from one of these groups. The Act also prohibits sexual harassment, racial vilification and vilification of homosexuals, transgender people and people who have HIV or AIDS. Vilification is defined as a public act that could incite hatred, serious contempt or severe ridicule.

The Act is divided into parts which deal with each major type of discrimination separately. For example, Parts 2 and 3 deal with racial and sex discrimination respectively while Part 2A deals with sexual harassment. This enables the Act to clearly provide for a number of exceptions which are permissible or relevant in relation to one type of discrimination such as sport and sex discrimination (s. 38) or credit applications and age discrimination (s. 49ZYU).

⁴ Section 3 of the *Government Information (Public Access) Act 2009*.

The Act provides for a number of general exemptions to its provisions. These include any act done to comply with a law or an order of a court (s. 54), charities (s. 55), religious bodies (s. 56), voluntary bodies excepting cooperatives, financial institutions and registered clubs (s. 57) and the provision of housing for aged persons (s. 59). [Section 126A of the *Anti-Discrimination Act 1977* provides for the Minister to grant special exemptions to the Act to enable the provision of facilities, services and opportunities to meet the special needs of a group of people affected by unlawful discrimination.](#)

[Part 9 of the Act provides for the President of the Anti-Discrimination Board to receive, investigate and conciliate complaints of discrimination and vilification. The President may compel parties to a complaint to appear for the purpose of endeavouring to resolve a complaint by conciliation \(s. 91A\). Where, in the President's view, conciliation will not be successful, where conciliation has failed or the nature of the complaint warrants it, the President may refer the complaint to the Administrative Decisions Tribunal \(s. 93C\).](#)

The Tribunal may inquire into, conciliate and determine complaints. After holding an inquiry the Tribunal may dismiss a complaint, order the respondent to pay the complainant damages, order the respondent not to continue or repeat any unlawful conduct, or order the respondent to perform any reasonable act to redress loss or damage suffered by the complainant. [In relation to a vilification complaint, the Tribunal may order the respondent to publish an apology or a retraction, order the respondent to develop and implement a program or policy aimed at eliminating unlawful discrimination, or make an order declaring void any contract or agreement made in contravention of the *Anti-Discrimination Act 1977* \(s. 108\(2\)\).](#)

For the purpose of eliminating discrimination and promoting equality and equal treatment the Act also provides an educative and public policy development function for the Anti-Discrimination Board. The Board may: carry out investigations, conduct research and inquiries relating to discrimination; acquire and disseminate knowledge on all matters relating to the elimination of discrimination and the achievement of equal rights; arrange and coordinate consultations, discussions, seminars and conferences; review the laws of the State; consult with government, business, industrial and community groups; hold public inquiries; and develop human rights programs and policies (s. 119). The Board may also review matters referred by the Minister (s. 120).

[Part 9A of the Act contains provisions relating to equal employment opportunity in public employment intended to eliminate and ensure the absence of discrimination on the grounds of race, sex, marital or domestic status, and disability, and to promote equal employment opportunity for women, members of racial minorities and persons who have a disability \(s. 122C\). It establishes the office of Director of Equal Employment in Public Employment to advise and assist government authorities in relation to equal employment opportunity management plans, to evaluate the effectiveness of these management plans, and to report and make recommendations to the Minister \(s. 122I\). Each government authority is required to prepare and implement an equal employment opportunity management plan \(s. 122J\).](#)

35.5 Public Finance and Audit Act 1983

The *Public Finance and Audit Act 1983* furnishes the Auditor-General with wide-ranging powers to scrutinise the financial records and administration of public authorities in New South Wales. Section 6 of the Act prescribes the form of the consolidated financial statement for the State and the financial statements for the general government sector. Section 35 provides that the Auditor-General shall audit the books and records of agencies the Auditor-General is authorised or required to audit whenever and in such manner as the Auditor-General thinks fit and whenever required by the Treasurer to do so. The Auditor-General also has discretion to conduct special audits of particular activities of any authority to determine whether the authority is carrying out those activities effectively, economically, efficiently and in compliance with all relevant laws (s. 38B). After any inspection, examination or audit the Auditor-General is required to forward a report of the results to the Treasurer.

The Auditor-General's annual report of the consolidated financial statements and general government sector financial statements, and reports of special audits of particular activities are required to be presented to each House of Parliament (ss. 52A & 52B).

In pursuance of these functions the Auditor-General is entitled to full and free access to the books, records, documents and papers relating to the subject of an audit. In addition, the Auditor-General has compulsive powers and may compel the attendance of a person and the production of books, records, document or papers in the possession or under the control of that person as appear to be necessary for the purposes of an audit (s. 36).

The Legislative Assembly Public Accounts Committee is established under the Act (ss. 54 & 57) and is responsible for overseeing the Auditor-General and the Audit Office. For further information on the committee see section 26.2.5 of Part One.

The range of statutory bodies and departments covered by the *Public Finance and Audit Act 1983* and required to be audited by the Auditor-General is listed in schedules 2 and 3 to the Act. The Parliament of New South Wales is not listed in these schedules and so the Auditor-General does not have a legislated duty to audit its accounts and systems but does so under the invitation of the Presiding Officers. As such, audits of the Parliament do not necessarily have the same scope as audits of government agencies. However, in the past officers of the Audit Office have been seconded to the ICAC to assist it to examine matters relating to the Parliament and its members.

35.6 Protected Disclosures Act 1994

The *Public Interest Disclosures Act 1994* (previously known as the *Protected Disclosures Act 1994*) was enacted to protect "whistleblowers" who expose waste or wrongdoing in the public sector. More formally, the object of the Act, as defined in s. 3(1), is to encourage and facilitate the disclosure, in the public interest, of corrupt

conduct, maladministration, serious and substantial waste and government information contravention in the public sector by:

- (a) enhancing and augmenting established procedures for making disclosures concerning such matters;
- (b) protecting persons from reprisals that might otherwise be inflicted on them because of those disclosures; and
- (c) providing for those disclosures to be properly investigated and dealt with.

Section 8(1) of the Act provides that for a disclosure to be protected it must be made by a public official:

- (a) to an investigating authority (i.e. the Auditor-General, the Independent Commission Against Corruption, the Ombudsman, or the Police Integrity Commission);
- (b) to the principal officer of a public authority or investigating authority, or officer who constitutes a public authority;
- (c) to another officer of the public authority or investigating authority which the public official belongs, or an officer of the public authority to which the disclosure relates; or
- (d) to a member of Parliament or to a journalist.

The Presiding Officers, the Clerks and the Executive Manager, Parliamentary Services, have been included in the definition of "principal officers of a public authority". In order to be protected, disclosures from parliamentary employees and others need to be made to or referred to one of these officers. The Presiding Officers, Clerks and the Executive Manager are also able to receive or be referred disclosures made about Members and the "whistleblower" will be protected. The Speaker could also refer a disclosure received to a relevant public authority, for example the Legislative Council if it concerned a Council employee.

The Act also provides that disclosures to an investigating authority must be in accordance with the relevant legislation establishing that authority. For example, a disclosure to the Police Integrity Commission must be made in accordance with the *Police Integrity Commission Act 1996* (ss. 10-12A).

Section 19 of the Act requires that a disclosure made to a member of Parliament or to a journalist must meet certain conditions to be protected. The public official making the disclosure must have already made the disclosure to an appropriate officer or authority which had:

- (a) decided not to investigate; or
- (b) decided to investigate but not completed the investigation within 6 months; or
- (c) investigated but not recommended the taking of any action; or
- (d) failed to notify the person making the disclosure, within 6 months, of whether or not the matter is to be investigated.

In addition, the public official must have reasonable grounds for believing that the disclosure is substantially true and the disclosure must be substantially true.

Members of Parliament are able to make protected disclosures in addition to being able to receive them and protected disclosures may be made about members of Parliament.

Anyone wishing to make a disclosure of corrupt conduct against a member of Parliament may do so to the Independent Commission Against Corruption. Disclosures about serious and substantial waste can be made to the Audit Office but, as the Ombudsman does not have jurisdiction over members of Parliament, disclosures against members of Parliament concerning maladministration must be taken to the principal officer who, in the case of the Parliament, is the Speaker of the Legislative Assembly or the President of the Legislative Council.

35.7 Jury Act 1977

Under section 5 of the *Jury Act 1977* every person who is enrolled as an elector in New South Wales is qualified and liable to serve as a juror. However, exceptions include people disqualified from jury service because they are currently bound by an order of a court or because they are ex-prisoners⁵ or ex-juvenile offenders.⁶

Jury rolls for each jury district (which are based on groups of electoral divisions) are compiled periodically by random selection from the electoral roll. People included on this roll are notified and requested to complete a questionnaire to establish whether they are qualified or ineligible to perform jury service (ss. 12 & 13). It is at this point that ineligibility for, or an exemption from, jury service must be claimed. There are penalties for failing to complete the questionnaire (s. 61), for providing false or misleading information (ss. 13(3) & 62), for failing to inform the sheriff of disqualification or ineligibility (s. 62A), and failing to attend for jury service (s. 64). Any person who impersonates a juror (i.e. falsely claims to be someone summoned to attend as a juror) is guilty of an offence (s. 67).

Members of Parliament are ineligible for jury service along with a range of other persons who hold particular offices such as the Governor, a judicial officer, coroners, a member of the Executive Council, the Ombudsman, Crown prosecutors, public defenders, the Director of Public Prosecutions, the Solicitor General and the Crown Solicitor. A range of other people are also ineligible to serve on a jury due to their employment as police or criminal investigators.

Amendments to the Act in 2010, removed the exemption for parliamentary staff. The provisions are yet to come into force. However, if and when the provisions come into force parliamentary staff will be required to attend jury service.

A range of people may claim exemption from jury service including: clergy, vowed members of any religious order, dentists, pharmacists, medical practitioners, emergency services personnel, and a person who has: (a) within the 3 years that end on the date of the person's claim for exemption, attended court in accordance

⁵ Amendments made to the Act in 2010 disqualify certain prisoners from jury service for life and permit other prisoners to be eligible to serve on juries 7 years after serving a sentence of less than 3 consecutive months, or 10 years after serving a sentence of 3 consecutive months or more. These provisions are not yet in force.

⁶ Amendments made to the Act in 2010 provide that ex-juvenile offenders can serve on a jury 3 years after the expiry of the period of detention. These provisions are not yet in force.

with a summons and served as a juror or; (b) within the 12 months that end on the date of the person's claim for exemption, attended court in accordance with a summons and who was prepared to, but did not, serve as a juror.⁷

Under review

⁷ Amendments to the Act in 2010 removed the exemptions for: mining manager and under-managers of mines; people who are at least 70 years old; pregnant women; carers of children, sick, inform or disabled persons; and people who reside more than 56 kilometres from the place they are required to attend for jury service. These provisions are not yet in force.

Chapter 1 Introduction to Parliamentary Privilege

1.1 What is parliamentary privilege?

Parliamentary privilege refers to certain rights, powers and immunities from the law conferred on individual members of Parliament to enable them to fulfil their duties and for the Parliament to collectively perform its constitutional role. These rights, powers and immunities are particular to Parliaments. *May's Parliamentary Practice* describes parliamentary privilege as:

*The sum of the peculiar rights enjoyed by each House collectively as a constituent part of the High Court of Parliament, and by members of each House individually, without which they could not discharge their functions, and which exceed those possessed by other bodies or individuals.*¹

Generally, the privileges enjoyed collectively by Houses of Parliament are the right to discipline persons guilty of contempt or breaches of privilege; regulation and control of its internal affairs by making rules for themselves and controlling the Parliamentary precincts. Houses of Parliament also have the authority to maintain the attendance and service of its members and the right to initiate inquiries that may call witnesses and demand documents.²

The individual privileges enjoyed by members of Parliament are freedom of speech in parliamentary proceedings; exemption from jury service and, if the House is sitting; exemption from compulsory attendance in court as a witness. The United Kingdom House of Commons affords protection to its members against arrest for civil action. However, that privilege has not been conferred on the New South Wales Parliament as it was not considered reasonably necessary for its operation.³ In the United Kingdom and elsewhere, there is no immunity from an indictable offence. However, should a member be within the Parliamentary precincts when the police seek to make an arrest, the police should inform the Speaker that they have a warrant for the arrest of a member and gain the Speaker's permission to enter the premises.

It should be noted that parliamentary privilege exists fundamentally to ensure a House of Parliament can perform its functions and as such the individual privileges have only been conferred on members to the extent necessary to achieve this end.

1.2 Absolute and qualified privilege

Parliamentary privilege may be absolute or qualified. Essentially, a statement or action is privileged if the person making it is protected from legal action. An absolute privilege is one that does not give way to any other principle or right. For example, statements made by members of Parliament in the House are absolutely privileged and cannot be made the subject of an action for defamation. Qualified privilege is its own body of law which extends beyond the scope of parliamentary privilege. It

¹ May, Thomas Erskine, Sir, *Erskine May's Treatise on the Law, Privileges, Proceedings and Usage of Parliament*, 23rd Edition, edited by Sir William McKay, KCB, p. 75.

² Moore, Terry and James Robertson, *An Introduction to Parliamentary Privilege*, Canadian Parliamentary Review, Volume 24, No. 3, Autumn 2001, pp. 19-25.

³ *Norton v Crick*, 1894, 15 LR NSW 172.

covers statements made fairly in situations in which there is a legal or moral obligation to give the information and the person to whom it is given has a corresponding duty or interest to receive it and when someone is acting in defence of his or her own property or reputation. Qualified privilege also covers fair and accurate reports of public meetings and various other public proceedings. For example, the reproduction of a speech from *Hansard* in a newspaper would attract qualified privilege.

1.3 Breaches of privilege and contempts

Breaches of privilege are at times referred to as contempts. Standing order 91 provides that “a Member may rise on a matter of contempt or a breach of privilege...”. Whilst it has become customary in many Westminster Parliaments to refer to all offences against the House as breaches of privilege, it is those offences that violate the privileges of the House, whether directed at an individual or the House collectively, which are more specifically referred to as breaches of privilege. Certain other offences against the authority and dignity of Parliament are more correctly referred to as contempts.⁴

The Legislative Assembly has found a number of members and private individuals in contempt of the House, The last occasion being in March 1929. The following table sets out the incidents and the action that was taken by the House. Today, many of the incidents listed would not be considered contempts.

Date	Incident	Action taken by the House
20 November 1866	Mr Macpherson, Member for Central Cumberland, made offensive remarks to another member and refused to withdraw them when ordered to by the Speaker. He again refused when the House passed a motion requiring him to withdraw the comments.	He was adjudged guilty of contempt for wilfully disobeying an order of the House and was committed by warrant to the custody of the Serjeant-at-Arms. The motion for the warrant was rescinded after the member apologised to the House. ⁵
27 April 1878 (am)	Mr McElhone, Member for Upper Hunter, crossed the Chamber during the committee of the whole stage and in a threatening manner and with clenched fist, assailed Mr Gray, Member for Illawarra.	The Speaker called upon Mr McElhone to explain. Following an explanation the House agreed to a motion finding Mr McElhone guilty of contempt. Mr McElhone then apologised to the House and a further motion was agreed to by the House that Mr McElhone be released from his contempt. ⁶
6 October 1886	Mr Wisdom, Member for Morpeth, used disorderly words in committee and refused to comply with the resolution of the House ordering him to withdraw the words.	He was adjudged guilty of contempt and committed to the custody of the Serjeant-at-Arms on the warrant of the Speaker. A motion was moved later in the sitting to discharge the member from the custody of the Serjeant. ⁷
30 May 1888	Mr McElhone, Member for the Upper Hunter, used disorderly words in committee. When the Speaker took the Chair the member was asked to attend in his place. However, the Serjeant reported that he had failed to find the member on the premises.	The House committed the member to the custody of the Serjeant-at-Arms for contempt by Speaker's warrant. Later in the sitting the Serjeant reported that he had the member in custody and Mr McElhone was brought into the House to explain his behaviour and apologise. A motion was then moved discharging the member from the custody of the Serjeant. ⁸

⁴ Wilding, Norman and Philip Laundry, *An Encyclopaedia of Parliament*, Revised Edition, 1961, p. 499.

⁵ VP 20/11/1866, pp. 376-7.

⁶ VP 27/04/1878, pp. 267-8.

⁷ VP 06/10/1886, pp. 607-9.

⁸ VP 30/05/1888, pp. 480-6.

3 October 1889	During a division, Mr Crick, Member for West Macquarie, abused the Colonial Secretary and Government supporters by commenting: "You are a set of robbers and hounds. You ought to be prosecuted for looting the Treasury. You are led by that dirty Orange hound there. You dirty set of robbers".	Crick was found guilty of contempt of the House and was committed to the custody of the Serjeant-at-Arms. He was later brought to the House to explain and apologise and he was discharged from custody. ⁹
10 May 1893	Mr Grahame, Member for Newcastle, used threatening and foul language during debate.	The House adjudged him guilty of contempt for wilfully and vexatiously interrupting the orderly conduct of the business of the House. The Speaker issued a warrant for the Serjeant-at-Arms to take the Member into custody for an indefinite period of time. Later in the sitting the Member was admitted to the House to offer his apology and the House agreed to release him from the Serjeant's custody. ¹⁰
16 November 1893	Stranger in the public gallery, Mr Thomas Dodd, interjected during a speech of Mr Andrew Kelly, Member for West Sydney, on distress amongst the labouring classes, yelling out "it is a lie".	Mr Dodd was held to be in contempt. He was arrested by Serjeant-at-Arms by direction of the Speaker and was subsequently discharged from custody. ¹¹
30 January 1894	Mr John Neild, member for Paddington, rose on a matter of privilege noting that there had been an article published in the <i>Evening News</i> that referred to the refreshment rooms and gambling tables within Parliament House and stated that one member had lost a months salary "during one night's carouse over the gambling table at the Parliamentary Refreshment room". A resolution was agreed to by the House to summon Mr James A. Hogue, editor of the <i>Evening News</i> to answer as to the truthfulness or otherwise of the article. ¹²	On 31 January 1894, Mr Hogue was sworn at the Bar of the House and refused to answer certain questions put to him, where upon, the House agreed to a resolution deeming Mr Hogue guilty of a contempt of Parliament. A motion was moved to commit Mr Hogue to gaol for one calendar month. However, this was not agreed to by the House. A further attempt to place Mr Hogue in the custody of the Serjeant-at-Arms was also defeated and Mr Hogue was discharged from further attendance. ¹³
7 February 1894	Mr Schey, Member for Redfern, used disorderly words in committee.	The House adjudged him guilty of contempt and a motion was moved to commit him to the custody of the Serjeant. However, following an apology the motion was withdrawn. ¹⁴
25 June 1903	Mr Norton, Member for Northumberland, committed personal assault on Mr Broughton, Member for Sydney-King. He was named for interrupting the disorderly conduct of business of the House.	He was adjudged to be guilty of contempt. He was suspended for the remainder of the sitting. ¹⁵
25 June 1903	Mr Broughton, Member for Sydney-King, was named for interrupting the disorderly conduct of business of the House by the use of language calculated to provoke a breach of the peace.	He was adjudged to be guilty of contempt. The Member apologised and no action was taken. ¹⁶
3 November 1908	Mr Griffith, Member for Sturt, cast aspersions at the Chair by commenting that the Speaker did not give fair play to his side of the House. He was named for being disorderly and a motion was agreed to ordering him to apologise for his comments and withdraw them. Mr Griffith attended in his place and refused to withdraw the	He was adjudged by the House to be guilty of contempt for disobeying the orders of the House. A motion was agreed to that the member be suspended from the service of the House until he obeyed the order of the House. The Member resigned his seat that same day. He did however, return to the House as

⁹ VP 03/10/1889, pp. 442-50.

¹⁰ VP 10/05/1893, pp. 552-3.

¹¹ VP 16/11/1893, p. 128. See also section 2.6 of Part Two for further information on the power to remove visitors.

¹² VP 30/01/1894, p. 33.

¹³ VP 31/01/1894, pp. 45-6.

¹⁴ VP 07/02/1894, pp. 63-4.

¹⁵ VP 25/06/1903, pp. 22-3.

¹⁶ VP 25/06/1903, pp. 22-3.

¹⁷ VP 03/11/1908, p. 214.

	words used.	Member for Sturt 10 days later. ¹⁷
18 October 1911	Mr Wood, Member for Bega, was called to order and left the Chamber on a disorderly manner. He refused to return to the Chamber and was named by the Speaker. ¹⁸	He was adjudged to be guilty of contempt and suspended from the House until he apologised. On 5 December he entered the House and refused to withdraw when ordered to by the Speaker. The Serjeant-at-Arms removed him with the assistance of police. ¹⁹ The following day, the Speaker noted that if he wished to apologise he must convey that through the Serjeant and not enter the Chamber himself until asked. ²⁰ On 20 February 1912, Mr Wood apologised without reservation and was allowed to resume his seat in the House. ²¹
14 & 18 November 1912	Mr Perry, Member for Richmond, was removed from the Chamber on 14 November 1912 for defying the rulings of the Chair. ²² On 18 November 1912, Speaker Willis noted that it had been reported to him that Perry had returned to the Chamber on the night of his suspension. ²³	The House resolved that Mr Perry had been in contempt of the House and a motion was moved to suspend him for a week. However, an amendment to that motion was successfully moved limiting the suspension to that day's sitting. ²⁴
2 December 1915 (am)	Mr Stuart-Robertson, Member for Camperdown, used disorderly words in committee. He was ordered to apologise and withdraw the words but refused to do so.	He was adjudged guilty of contempt for failing to obey the orders of the House and a motion was moved to suspend him from the House until an apology was forthcoming. The motion was withdrawn after an apology was made. ²⁵
11 April 1916	Mr Cochran, Member for Darling Harbour, returned to the Chamber whilst on suspension and refused to apologise when ordered by the Speaker to do so.	He was deemed to be guilty of contempt for a wilful and vexatious breach of the Standing Orders and was subsequently suspended for the remainder of the session. ²⁶
11 July 1918	Mr Wright, Member for Wilyama, Was found to be guilty of obstructing the orderly conduct of business of the House and was removed from the Chamber.	He was declared to be guilty of contempt. He was readmitted to the House to apologise and the House accepted the apology. ²⁷
12 March 1929	Mr O'Sullivan, Member for Woollahra, refused to act as the teller for the Noes.	The Speaker named Mr O'Sullivan and a motion was agreed to that he was guilty of contempt and he was suspended for a week. A number of other members who refused to act as tellers were also deemed to be guilty of contempt for wilfully and vexatiously obstructing the orderly conduct of the business of the House. ²⁸
12 March 1929	Mr Lamaro, Member for Enmore and Mr Olde, Member for Leichhardt, declined to act as tellers for a division.	Both members were adjudged to be guilty of contempt and were suspended from the service of the House for a week. ²⁹

Most Westminster style Parliaments have the power to punish members and individuals for both breaches of privilege and for contempts. The Houses of Parliament in New South Wales do not have a general power to punish for contempt. The Houses can find members and private individuals to be in contempt but can only take action against them in self-defence and not as a punishment. There are

¹⁸ VP 18/10/1911, p. 87.

¹⁹ VP 05/12/1911, p. 151.

²⁰ VP 06/12/1911, p. 156.

²¹ VP 20/02/1912, p. 199.

²² VP 14/11/1912, p. 211.

²³ VP 18/11/1912, p. 217.

²⁴ VP 18/11/1912, pp. 219-20.

²⁵ VP 02/12/1915, p. 262.

²⁶ VP 11/04/1916, pp. 433-4.

²⁷ VP 11/07/1918, p. 41.

²⁸ VP 12/03/1929, pp. 295-6.

²⁹ VP 12/03/1929, pp. 291-7.

however specific powers under the *Parliamentary Evidence Act 1901* to punish witnesses who act contemptuously by refusing to answer lawful questions during examination (s. 11 of the Act).

1.4 Parliamentary privilege in New South Wales

New South Wales is the only Australian Parliament which has not legislated to define its privileges.³⁰ As such, the New South Wales Parliament has no privileges except those that are inherent in any legislative body. Unlike other Australian Parliaments, the New South Wales Parliament did not inherit, nor has it ever passed, legislation conferring upon itself the powers, privileges and immunities of the House of Commons.³¹ Recourse is therefore made to the common law and certain relevant statutory provisions to determine its privileges. This means that the Parliament's privileges are uncertain and open to adaptation to contemporary conditions by the courts.

It is argued that the New South Wales Parliament, not having legislated generally in respect of privilege, has only the following privileges:

1. Such powers and privileges as are implied by reason of necessity;
2. Such privileges as were imported by the adoption of the *Bill of Rights*;
3. Such privilege as is conferred by the *Defamation Act 2005*; and
4. Such privilege as is conferred by other legislation such as the *Parliamentary Evidence Act 1901*.³²

The following material is intended to provide an overview of the privileges of the New South Wales Parliament, including qualified privilege as it relates to members of Parliament. It highlights a number of court cases which can provide guidance as to what may be covered by privilege as well as other relevant issues. However, as the High Court noted in *Lange v Australian Broadcasting Corporation* even it is not bound by its previous decisions.³³ As such, this is a guide only.

³⁰ It should be noted that in Tasmania the privileges of the Parliament have a somewhat limited definition. See the *Parliamentary Privileges Act 1858* (Tas).

³¹ A number of attempts to confer the powers, privileges and immunities of the House of Commons have been made by the Legislative Assembly. See the *Parliamentary Powers and Privileges Bill 1878*; the *Parliamentary Powers and Privileges Bill 1901*; the *Parliamentary Privileges Bill 1912*; and the recommendations made by the Joint Select Committee upon Parliamentary Privilege in 1985.

³² See the Report of the Joint Select Committee Upon Parliamentary Privilege entitled *Parliamentary Privilege in New South Wales*, 1985 pp. 6-19.

³³ *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 554.

Chapter 2 Such powers and privileges as are implied by reason of necessity

As already noted, the New South Wales Parliament has never defined in legislation the extent of its privileges nor has it inherited the privileges of the United Kingdom Houses of Parliament. In fact, the Privy Council has held that colonial parliaments are only entitled to such privileges as are reasonably necessary for them to carry out their legislative functions. This view originated from the fact that many of the privileges of the Houses of Parliament at Westminster originated from the authority of Parliament as a court and not as a legislative body. Furthermore, the privileges acquired formed a special body of law and became collectively known as the *lex et consuetudo parliamenti* but had no statutory basis.

Whilst colonial legislatures have not been endowed with the same privileges and powers as those of the Houses at Westminster, the Privy Council did consider that the creation of such bodies implied that certain privileges would need to be conferred in order for them to carry out their functions as legislative bodies. Furthermore, the powers provided were meant to be protective rather than punitive in view of the fact that punitive powers were considered to be characteristic of a court rather than a legislative body.¹

Courts in Australia have consistently expressed the view that privileges conferred on Australian Houses of Parliament, due to the principles of necessity, are not static but should evolve as circumstances change. In *Armstrong v Budd*, Wallace P was of the view that the decisions of the Privy Council regarding the privileges that should be considered reasonably necessary should be “construed and applied in the light of modern conditions and current constitutional situations.”² He goes on to note that this does not mean that Houses of Australian Parliaments have increased their privileges over time but rather that “the word ‘reasonable’ in this context must have an ambulatory meaning to enable it to have sense and sensibility when applied to the conditions in 1969.”³

A similar view was also expressed in *Egan v Willis* where Justice Kirby argued that the cases determined by the Privy Council regarding the privileges of colonial legislatures are of historical value only and that those privileges which are considered reasonably necessary for Houses of Australian Parliaments today should be determined in the context of the federal system of Government in Australia. Justice Kirby argued that in order to define the extent of the privileges conferred on the Houses of the Parliament in New South Wales there is a need to identify:

*...the functions of the House in question and then specifying, by reference to the Constitution, statute law and the common law of Parliaments, those powers essential to the existence of the House as a chamber of parliament, or at least reasonably necessary to the performance by that House of its functions as such. The powers which fit those criteria are not frozen in terms of the exposition of the powers of colonial legislatures, whether in Australia or elsewhere.*⁴

¹ See Dawson, Robert, *Dawson's The Government of Canada*, 6th edition, edited by Norman Ward, 1990 pp. 113-5 where he discusses the application of parliamentary privilege in Colonial Legislatures.

² *Armstrong v Budd* (1969) 71 SR (NSW) 386 at 401.

³ *Ibid*, at 402.

⁴ *Egan v Willis* (1998) 158 ALR 527 at 575.

The following sections set out those privileges that have been deemed by the courts as necessary for a legislative body to carry out its functions. They are:

- freedom of speech;
- power to control its own proceedings;
- power to conduct inquiries;
- power to order the production of documents;
- power to regulate and discipline members as a defensive measure;
- power to remove visitors for disturbing proceedings; and
- immunity from legal proceedings.

It also sets out those privileges, which may exist in other jurisdictions, but have been deemed by the courts as unnecessary for the New South Wales Parliament to carry out its functions, namely:

- freedom from arrest;
- power to punish for contempt; and
- power to order the arrest of a stranger.

2.1 Freedom of speech

Freedom of speech is considered essential in order for Parliament to carry out its role of scrutinising the operation of the Government of the day, and inquiring into matters of public concern. The freedom of speech imported by the adoption of Article 9 of the *Bill of Rights*, which is in force in New South Wales by operation of the *Imperial Acts Application Act 1969*,⁵ will be considered extensively in Chapter 3 of Part Two. However, it should be noted that as far back as 1881 the New South Wales Supreme Court considered that freedom of speech was inherent in all legislative bodies as it was considered necessary for the conduct of the business of Parliament.

This view was expressed in *Gipps v McElhone*⁶ when the privilege of the freedom of speech in Parliament was brought into question. In this case the judges held that the privilege of freedom of speech did not rest upon the *lex et consuetudo* of Parliament, but was based upon the inherent necessity of the case.⁷ In doing so, the judges confirmed that absolute privilege is attached to statements made by a member in the Parliament as such privilege is essential for the conduct of the business of Parliament. Sir William Manning J stated:

*Doubtless there may be members of strong energy, easy credulity, and impulsive temperament who, in discussing a question of public interest, may injure an individual by reckless and injudicious statements. But it is of greater importance to the community that its legislators should not speak in fear of actions for defamation. It is most important there should be perfect liberty of speech in Parliament, even though it may sometimes degenerate into licence.*⁸

⁵ See *Imperial Acts Application Act 1969*, second schedule, part 1, sec. 6.

⁶ *Gipps v McElhone* (1881) 2 LR NSW 18.

⁷ *Gipps v McElhone* (1881) 2 LR NSW 18 at 25 (per Justice Windeyer).

⁸ *Gipps v McElhone* (1881) 2 LR NSW 18 at 24. See also *Chenard & Co. v Joachim Aressol* (1949) AC 127.

This is still the case in modern society. In 2002, the European Court of Human Rights in the *Case of A v the United Kingdom* reiterated the importance of absolute privilege attaching to statements made during the course of parliamentary proceedings. This case considered statements made by a member of the House of Commons, who referred to a constituent as the “neighbour from hell” during a debate on municipal housing policy. In his speech, the member, amongst other things, named the constituent, gave her precise address and made derogatory comments about her and her children. It was claimed by the constituent that her right to a fair trial in court had been violated given the fact that the member’s allegations made under parliamentary privilege could not be submitted in evidence.⁹

The majority of the court (6 out of 7) considered that whilst human rights may at times be abused by members who make allegations or defamatory statements about constituents or other persons as part of parliamentary proceedings, the importance of parliamentary privilege should not be undermined by the creation of exceptions to the immunity. In this instance, the majority of the court considered that whilst the remarks made by the member were unfortunate it could not restrict the absolute privilege attached to statements made as part of parliamentary proceedings on a case-by-case basis as such a precedent would seriously undermine the legitimacy of parliamentary privilege.¹⁰

It is interesting to note that in dissent, Judge Loucaides observed “...there should be a proper balance between freedom of speech in Parliament and protection of the reputation of individuals.” He went on to argue that this balance “can only be achieved through a system which takes account of the individual facts of particular cases on the basis of the relevant conditions and exceptions attached to both rights. Such balancing implies that neither of the two rights should be allowed to prevail absolutely over the other.”¹¹ This viewpoint had previously been rejected in *Prebble v Television NZ Ltd*¹² where it was held that statements made by members in Parliament could not be brought into question by a court of law and that parliamentary privilege overrides other interests. This is because, under a Westminster system of Government, all statements made by members as part of parliamentary proceedings enjoy absolute privilege by virtue of the *Bill of Rights* and cannot be questioned in court.

This freedom of speech also applies to proceedings of committees appointed by the Parliament, including the evidence given by any person to a committee. However, it is only available to an individual member of a committee speaking as part of a duly constituted meeting/hearing of the committee and not otherwise.¹³

⁹ See Summary of the Chamber Judgement in the *Case of A v The United Kingdom*, application number 00035373/97, 17 December 2002, as taken from www.echr.coe.int/Eng/Press/2002/dec/AvtheUKjudexpress.htm

¹⁰ *Ibid.*

¹¹ See the dissenting opinion of Judge Loucaides in the *Case of A v the United Kingdom*, application number 35373/97, 17 December 2002, as taken from <http://www.echr.coe.int/Eng/Judgements.htm> accessed 3 February 2003 where he notes that in a number of European countries absolute privilege does not necessarily apply to defamatory statements made in Parliament or it can be waived by a court.

¹² (1994) 3 NZLR 1.

¹³ For instance protection is not afforded to a member who is sued for statements outside of committee proceedings. See section 3.10.2 of Part Two for further information.

2.2 Power of the House to control its own proceedings

A central issue of parliamentary privilege is the extent to which a House of Parliament should have exclusive control over its own affairs. Apart from the power to control its own proceedings implicit in the *Bill of Rights* whereby the “proceedings in Parliament” cannot be “impeached or questioned” in any other place, Houses of Parliament also have the power to control their own proceedings by regulating the conduct of business of the House, adopting standing rules and orders, maintaining order in the House and controlling publications of the proceedings of the House.¹⁴ Any actions taken by the House may however, be subject to judicial review in order to ensure that they are within the power of the House.

Section 15 of the *Constitution Act 1902* confers the power on both Houses to make rules and orders regulating their “orderly conduct”. It provides:

- (1) The Legislative Council and Legislative Assembly shall, as there may be occasion, prepare and adopt respectively Standing Rules and Orders regulating:
 - (a) the orderly conduct of such Council and Assembly respectively, and
 - (b) the manner in which such Council and Assembly shall be presided over in case of the absence of the President or the Speaker, and
 - (c) the mode in which such Council and Assembly shall confer, correspond, and communicate with each other relative to Votes or Bills passed by, or pending in, such Council and Assembly respectively, and
 - (d) the manner in which Notices of Bills, Resolutions and other business intended to be submitted to such Council and Assembly respectively at any Session thereof may be published for general information, and
 - (e) the proper passing, entitling and numbering of the Bills to be introduced into and passed by the said Council and Assembly, and
 - (f) the proper presentation of the same to the Governor for Her Majesty’s Assent, and
 - (g) any other matter that, by or under this Act, is required or permitted to be regulated by Standing Rules and Orders.
- (2) Such Rules and Orders shall by such Council and Assembly respectively be laid before the Governor, and being by him approved shall become binding and of force.

This inherent privilege of the House to control its own proceedings is reflected by the fact that the Governor does not act with the advice of the Executive Council when approving standing orders. The Crown Solicitor has commented that as standing orders are concerned only with the internal management of the Houses each House is the best judge as to what standing orders are necessary.¹⁵

Whilst the power to make rules and orders for the orderly conduct of the Houses has been conferred through the principles of necessity, the statutory prescription that the standing rules and orders must be for the “orderly conduct” of each House means that they are subject to judicial review to ensure they fall within the power of the House to prescribe. For instance, in *Harnett v Crick* it was considered that the courts were able to question the validity of a standing order if such standing order did not relate to “orderly conduct”. The Judicial Committee of the Privy Council noted:

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

¹⁴ Carney, Gerard, *Members of Parliament: Law and Ethics*, 2000, p. 180.

¹⁵ Advice received from the Crown Solicitor re: Whether the Governor must act with the advice of the Executive Council when approving standing orders, dated 1 May 2007.

*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.*¹⁶

While the interpretation of standing orders is a matter exclusively for the authority of each House, it has been established that judicial review can occur in instances where a House has taken some punitive action if its powers have only been conferred by the principle of necessity. As noted previously, colonial legislatures were deemed to have protective but not punitive powers. For instance, in *Barnes v Purcell*¹⁷ Mr Barnes, a member of the Queensland Legislative Assembly, recovered damages from a police officer who, under the authority of the Speaker assisted the Serjeant-at-Arms in enforcing the disciplinary provisions in the Assembly's standing orders, and removed Mr Barnes from the premises.¹⁸

Justice Douglas considered that whilst the House was the sole judge of whether a member should be suspended from the service of the House its power to discipline its members was limited by law and the courts could determine whether such limits had been exceeded. He noted:

*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 a resolution of the House. I think it is not within the exclusive power of Parliament to determine such punishment by its own construction of standing orders. The courts in Australia and the Privy Council have construed standing orders to ascertain what power the House of Parliament has to inflict punishment, and it follows that they must have power to examine the extent of such punishment.*¹⁹

Whilst standing orders may be subject to judicial review in order to determine whether a House had the power to make such rules or if punitive action has been taken, if a dispute arises about a House's course of action under a particular standing order, the courts have ruled that the matter is one to be determined by the House. For instance, in *New Zealand Post Ltd v Prebble*²⁰ where a member of Parliament had come into the possession of confidential documents and refused to identify the source of the information, the High Court of New Zealand affirmed that the exercise by members of their parliamentary privilege, including disclosure in the House, is a matter for Parliament.

The matter was subject to a ruling by the Speaker in the House after New Zealand Post Ltd attempted to restrain the member (Mr Prebble) from publicising or otherwise making use of one of its confidential documents. New Zealand Post Ltd also wanted Mr Prebble to give up possession of it and identify his sources, and to obtain a declaration that his actions with respect to the document constituted a breach of confidence. The Speaker ruled that no question of privilege was involved and in doing so he noted that "even if there had been an attempt in legal proceedings to inhibit a member's actions in the House, the court had dealt with the matter with due regard for its privileges by first indicating that no order of the court could extend to Parliamentary proceedings and then dismissing the action."²¹

¹⁶ *Harnett v Crick* (1908) AC 470 at 475-6.

¹⁷ (1946) QSR 87.

¹⁸ See Campbell, Enid, *Parliamentary Privilege in Australia*, 1966, pp. 80-5.

¹⁹ *Barnes v Purcell* (1946) QSR 87 at 103.

²⁰ (2001) NZ 227.

²¹ New Zealand Parliamentary Debates, 27 February 2001, pp. 7912-3.

Similarly, in *Egan v Chadwick*,²² the Court of Appeal considered that the exercise by the New South Wales Legislative Council of its powers was a matter to be determined by the House. In this case, Mr Egan had refused to comply with an order for the production of papers and was subsequently suspended from service of the House. Mr Egan claimed that the House could not compel him to produce documents that would be subject to public interest immunity or legal professional privilege or to determine the validity of such claims.²³

The Court considered the question:

*Is it reasonably necessary for the proper exercise of the functions of the Legislative Council of New South Wales, for its power to require production of documents which at common law, would be protected from disclosure on grounds of legal professional privilege or public interest immunity? Shortly put, is the power of the Legislative Council, recognised in Egan v Willis, a power to call for unprivileged documents only?*²⁴

Chief Justice Spigelman argued that to restrict the powers of the Council in the manner suggested by Mr Egan would be an intrusion by the Court into matters which should be determined by the legislature itself. He noted:

*The common law rule of reasonable necessity for the performance of the functions of a House of Parliament should not, in my opinion, be found to operate in such a way as would require a judge to make decisions of this character. The restriction of the power to call for State papers to unprivileged documents would require the courts to do so, because it involves a balancing exercise in which the importance of information for a Parliamentary function falls to be assessed.*²⁵

The Court of Appeal held that the Council has the power to order the production of documents held by Executive Government. However, the judgment did not compel Mr Egan to hand over the documents in dispute as it was considered that it is for the Council to determine the remedy for any continuing refusal to produce the documents.²⁶

Another recent example of courts refusing to intrude upon the role of the Parliament occurred in *Halden v Marks*.²⁷ In this case, the Supreme Court of Western Australia reconsidered the decision to refuse an application for an interlocutory injunction restraining the proceedings of the Marks Royal Commission. The injunction sought to prevent the Royal Commission from inquiring into the circumstances surrounding the presentation of a petition to the Parliament as it was argued that by doing so parliamentary privilege would be infringed. In considering the matter the Supreme Court of Western Australia noted that there are two main categories where a court will rule on questions of parliamentary privilege. First, in cases where a question of parliamentary privilege is raised in a case already before the court, as, for example, where a party seeks to rely on something said or done in Parliament, and second, in cases where the courts have been asked to review action taken by Parliament to

²² (1999) NSWCA 176.

²³ For more information on this case see Griffith, Gareth, *Egan v Chadwick and other recent developments in the powers of elected Upper Houses*, New South Wales Parliamentary Library, Briefing Paper 15/99, August 1999.

²⁴ *Egan v Chadwick & ORS* (1999) NSWCA 176, paragraph 4.

²⁵ *Egan v Chadwick & ORS* (1999) NSWCA 176, paragraph 53.

²⁶ *Ibid*, pp. 32-3.

²⁷ (1995) 17 WAR 447.

enforce its proceedings, such as the suspension of a member of Parliament or where Parliament has, by warrant sought to subject a citizen to restraint by arrest.²⁸

In coming to its decision the Full Court noted the need to avoid conflict between Parliament and the courts. It was argued that even if the Parliament did not assert its privileges in relation to the petition that the court was not in a position to do so as the matter was one for the Parliament to deal with.²⁹

On a related issue, a recent case in the Alberta Court of Appeal, Canada, considered whether the payment of expenses of a defamation lawsuit against a Government MLA breached the privilege of the House by undermining parliamentary independence.³⁰ In this case another member of the Legislative Assembly of Alberta, Mr Carter, claimed that the Government's payment of the legal fees for the member out of the Government's Risk Management Fund was illegal. The court, upholding the decision of the lower court, confirmed that "the decision to extend general liability coverage to members of the legislature does not pass the 'necessity' test" and hence is not a matter of parliamentary privilege.³¹ Justice Berger, with whom the Court agreed, argued:

*The right to provide general liability coverage to MLA's and to determine eligibility on a case-by-case basis is not necessary for the Assembly to control its own affairs or to function properly. These discretionary benefits are, in my view, not to be likened to the Assembly setting its own budget including salaries. I am not persuaded that a legislative enactment vesting to the Executive Branch control of the discretionary entitlements of parliamentarians threatens the independence of the legislative branch.*³²

If the court had determined that such a matter did constitute a breach of parliamentary privilege it could have had all sorts of implications for tribunals such as the Parliamentary Remuneration Tribunal which is responsible for determining the entitlements of members of the New South Wales Parliament.

2.3 Power to conduct inquiries

It is taken that Houses of Parliament under the Westminster system of government have an inherent power to conduct inquiries. In *Egan v Willis* Justice McHugh noted the importance of a House being able to conduct inquiries in order to obtain information on the actions of the Government as part of the Parliament's role in holding the Executive to account. When delivering his judgment Justice McHugh referred to a number of judicial decisions upholding this principle:

In Stockdale, Lord Denman CJ described the House of Commons as "the grand inquest of the nation". In Howard v Gosset, Colridge J said that "the Commons are, in the words of Lord Coke, the general inquisitors of the realm". These statements summarise one of the most important functions of a House in a legislature under the Westminster system, namely, that 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. The Crown through its Ministers governs. Under the system of responsible government, those Ministers are responsible to the

²⁸ *Halden v Marks* (1995) 17 AWR 447 at 462.

²⁹ *Ibid*, at 463.

³⁰ *Carter v Alberta* 2002 ABCA 303.

³¹ *Ibid*, paragraph 23.

³² *Ibid*.

*Parliament. For that system to work effectively, for the Administration to retain the confidence of the Parliament, the Houses of Parliament must have access to information relating to public affairs and public finance which is in the possession of the government of the day.*³³

In fact as far back as the mid 19th century the Privy Council held that Houses of Parliament in Australia had the power to inquire into matters of public interest – in 1855 the Legislative Council of the Parliament of Van Diemen's Land established a select committee to inquire into alleged abuses in the Convict Department.³⁴

The issue of whether a House of Parliament can delegate its power to another person or body to conduct inquiries is unclear. There are a number of British precedents where the House of Commons delegated its authority to investigate to someone else³⁵ and in New South Wales the power to delegate authority has been expressly conferred on the House and its committees by virtue of a number of statutes. For example, section 48A of the *Public Finance and Audit Act 1983* provides for the Public Accounts Committee to appoint a person to conduct a review of the Audit Office, and the House is able to delegate its authority under legislation by establishing a royal commission or a special commission of inquiry to investigate a particular matter.

It has not been tested in New South Wales whether the House or one of its committees is able to delegate its powers in the absence of statutory provisions. In the United Kingdom however it has been held that conducting an inquiry pursuant to an order or resolution of the House includes any inquiry conducted by a person other than a member of the House in accordance with such an order or resolution. In *Hamilton v Al Fayed* it was held that a report of the Parliamentary Commissioner for Standards, produced pursuant to an order of the House, was privileged as if it had been produced by the House itself.³⁶

In New South Wales, the House may appoint a parliamentary committee to conduct formal investigations or it can conduct an inquiry itself. Standing order 324 provides for the summoning of witnesses to attend before the House. Committees appointed by the House possess coercive powers conferred by statute. The *Parliamentary Evidence Act 1901* provides the House and its committees with the express power to summon persons to appear before them. The summons must specify the date, time and place for compliance and witnesses are entitled to reasonable expenses for appearing.³⁷

The House or a committee may order a member to appear without a summons.³⁸ However, should the House or a committee wish to question a member of the other House courtesy dictates that a message is sent to the other House to request it to grant leave for the member to appear. The Legislative Assembly standing orders provide:

³³ *Egan v Willis* (1998) 195 CLR 424, p. 475.

³⁴ See the Privy Council decision in *Fenton v Hampton* (1858) 11 Moo PC 347 which held that the Legislative Council of colonial Tasmania had power to make inquiries.

³⁵ See *Odger's Australian Senate Practice*, edited by Harry Evans, 11th edition, 2004, p. 58.

³⁶ *Hamilton v Al Fayed* (1999) EWCA Civ 1111 (UK Court of Appeal, 26 March 1999).

³⁷ Section 6 of the *Parliamentary Evidence Act 1901*.

³⁸ Section 5 of the *Parliamentary Evidence Act 1901*.

326: *The chair of a committee may request in writing a Member or officer of the House to attend a hearing as a witness. If the Member or officer refuses, the committee shall take no action other than to report the refusal to the House. An officer means a member of staff employed solely by the Speaker;*

327: *If the House or a Committee, upon request wishes to examine a Member or officer of the Council, a message shall be sent requesting the Council to grant leave; and*

328: *If the Council or one of its committees wishes to examine a Member or officer of the Assembly, the House may authorise the Member to attend if the Member agrees. The House may order an officer to attend.*

A similar courtesy is afforded by other Parliaments, in that they can only request the attendance of a member of the New South Wales Parliament to attend as a witness before another Parliament and/or its committees. For instance, in 1993 the Senate requested that the Legislative Assembly require the attendance of the Premier to provide evidence before a Senate select committee. After seeking legal advice, the Speaker suggested that the House not take any action in relation to the request noting that:

- The Senate recognises the sovereignty of the New South Wales Parliament and the implication in the Commonwealth Constitution that the various State Parliaments will not interfere with each other by requesting the attendance of the Premier instead of demanding that the House require the Premier to attend before its select committee.
- The Assembly could, and would, rightfully claim the right of attendance of its members to its own service, and to direct otherwise would not have legal force. The Legislative Assembly cannot by resolution change the law.
- If the Senate committee demanded the Premier to attend before it, such a direction would most likely be *ultra vires* of the powers of the Senate in that a House only possesses powers to direct its own members in regard to its own functions and authorities.
- The concept of responsible government requires Ministers to be responsible to the Parliament to which they have been elected; and if the House did demand that the Premier attend, the effect would be to unlawfully bring the Premier to account before another Parliament.
- The attendance of the Premier is requested by the Senate, in his official capacity as Leader of the Executive Government in New South Wales and, in that capacity it would not be competent for this House to direct the Premier in the exercise of a discretion which is his alone to exercise or not.
- The House was thus not empowered to make demand of the Premier in this matter.³⁹

Protection is afforded to any witness before the House or one of its committees by virtue of the *Parliamentary Evidence Act 1901*. Section 12 of the Act states:

No action shall be maintainable 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.

³⁹ PD 19/11/1993, p. 5917.

Advice has been received that neither the penal or protective provisions of the Act would cover unsworn evidence although it would probably be privileged under the *Defamation Act 2005* and arguably would be privileged as a “proceeding in Parliament”.⁴⁰ The Act also provides that if a witness refuses to answer a lawful question they will be deemed to be in contempt of Parliament and may be forthwith given into the custody of the Serjeant-at-Arms or Usher of the Black Rod and, if the House so orders, to gaol for one month.⁴¹ If a witness is found by a court of law to have given false evidence, they will be liable for a term of imprisonment up to five years.⁴²

Beyond these provisions, it is unclear whether a witness can be subject to any other criminal liability. Whilst Article 9 of the *Bill of Rights 1688* provides that the proceedings of Parliament may not be questioned or impeached in a court or place outside Parliament, courts in New South Wales have permitted committee proceedings to be admitted as evidence for such purposes as:

- to assist the defence in a criminal trial to impeach the credit of a prosecution witness;⁴³
- to compare evidence given to a committee with that given by the defendant in criminal proceedings;⁴⁴ and
- to compare evidence given to a committee with that given by a prosecution witness in criminal proceedings.⁴⁵

Whilst power has been conferred to conduct inquiries there is some doubt over the capacity of Houses of Parliament in Australia to inquire into any matter whatsoever. Professor Carney notes that it has been suggested that “the division of powers between the Commonwealth, States and Territories restricts the scope of inquiry of their respective Houses” and that inquiries “may only relate to the exercise of legislative power, on the basis that the Australian Houses never inherited the ‘Grand Inquest’ role of the House of Commons.”⁴⁶ Essentially this means that the power of the New South Wales Parliament may be limited to matters that fall within its legislative capacity.

Given that Houses possess the power to conduct inquiries they must also be equipped to deal with witnesses who fail to appear before such inquiry. However, in 1858 this matter was not so clear. The Privy Council held in *Fenton v Hampton* that the Legislative Council of Van Diemen’s Land had no power to arrest and hold in custody a person judged to be guilty of contempt of the House for his refusal to appear as a witness before a select committee and then his failure to appear before the Bar of the House to explain why. This was due to the fact that the Privy Council had previously held in *Kielley v Carson* that Colonial Parliaments did not have an inherent power to punish for contempts.⁴⁷ Since this time the New South Wales Parliament has enacted legislation to ensure that it is empowered to deal with

⁴⁰ Advice received from the Crown Solicitor re: Questions arising under the *Parliamentary Evidence Act 1901* in relation to the taking of evidence from Aborigines, and in relation to the privilege of witnesses, dated 3 April 1980.

⁴¹ Section 11 of the *Parliamentary Evidence Act 1901*.

⁴² Section 13 of the *Parliamentary Evidence Act 1901*.

⁴³ *R v Saffron*, unreported District Court of NSW, 21/8/1987.

⁴⁴ *R v Murphy* (1986) 5 NSWLR 18.

⁴⁵ *R v Foord*, unreported, 1985.

⁴⁶ Carney, Gerard, *Members of Parliament: Law and Ethics*, 2000, p. 182.

⁴⁷ *Fenton v Hampton* (1858) 11 Moo PC 347: 14 ER 727.

witnesses who disrupt or interfere with any inquiries. As noted, section 11 of the *Parliamentary Evidence Act 1901* provides for a penalty for the refusal of a witness to answer questions put to them as part of an inquiry. It states:

- (1) 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, 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.
- (2) Such warrant shall be a sufficient authority for all gaolers and other officers to hold the body of the person therein named for the term therein stated.
- (3) No person acting under the authority of this section shall incur any liability, civil or criminal, for such act.

Warrants for the arrest of a witness who fails to appear before an inquiry being conducted by the House of one of its committees can be obtained from a Supreme Court judge.⁴⁸

The coercive powers of a House, under the *Parliamentary Evidence Act 1901* or otherwise, apply equally to members of that particular House even if they are Ministers such as in *Egan v Willis* and *Egan v Chadwick* where it was held that the Legislative Council had the power to punish Mr Egan for his failure to comply with an order for the production of papers, which constituted a contempt of the House under general law. This is the case even though New South Wales has no specific powers to punish members for contempt.

The power of the House to order the production of documents is given further consideration below.

2.4 Power to order the production of documents

Houses of Parliament and committees established by them are deemed to have an inherent power to order members and witnesses before them to produce documents. *Egan v Willis* and *Egan v Chadwick* are the two cases which have highlighted in recent times the powers of Houses of Parliament to order the production of documents from the Executive Government.

In *Egan v Willis* the New South Wales Court of Appeal unanimously held that "a power to order the production of state papers...is reasonably necessary for the proper exercise by the Legislative Council of its functions."⁴⁹ In arriving at this decision Chief Justice Gleeson noted that courts in the USA have held that it is a necessary function of a legislature to have the power to order that certain papers be produced to it. He referred to the judgment of the Supreme Court in *Quinn v The United States*⁵⁰ which held that:

There can be no doubt as to the power of Congress, by itself or through its committees, to investigate matters and conditions relating to contemplated legislation. This power, deeply rooted in American and English institutions, is indeed co-extensive with the power to legislate. Without the power to investigation...Congress could be seriously handicapped in its efforts to

⁴⁸ Sections 7 and 8 of the *Parliamentary Evidence Act 1901*.

⁴⁹ *Egan v Willis & Cahill* (1996) 40 NSWLR 650 at 664.

⁵⁰ *Quinn v The United States* (1954) 349 US 155 at 160 Warren CJ.

*exercise constitutional function wisely and effectively.*⁵¹

Chief Justice Gleeson went on to conclude that the same principle would apply in New South Wales. He argued:

*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.*⁵²

When the matter was appealed to the High Court, the majority (Gaudron, Gummow and Hayne JJ) confirmed that it was reasonably necessary for the Legislative Council to order one of its members, even when they are a Minister, to produce certain papers due to the legislative and scrutiny functions of an Upper House in a bicameral system of responsible government. They argued that:

*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."*⁵³

In his separate judgment, Justice McHugh did not refer to the necessity of a House to be empowered to call for papers in order to fulfil its functions. Rather, he argued that such power was inherent in a legislative chamber. He considered:

*...the powers and privileges of each of the Houses of the Parliament of New South Wales can only be understood by reference to the powers and privileges of the House of Commons and the great constitutional conflicts between the House of Commons on one hand and the Crown, the House of Lords and the courts of law on the other which remained unsettled until the 19th century. As a result, the privileges and powers of each of the Houses of the New South Wales legislature include the power to obtain information from a Minister who is a member of that House...*⁵⁴

Whilst this case clearly established the power of Houses of Parliament to order the production of papers, the issue of whether a House could call for those papers, which were subject to claims of privilege, was not decided. This was the issue considered in *Egan v Chadwick*.⁵⁵

In this case the New South Wales Court of Appeal held that due to the principle that ministers are accountable to the House of which they are a member, access to legal advice provided to the government is reasonably necessary for the Council to perform its functions, and it is for the House to determine the strength of any claim for privilege under public interest immunity or legal professional privilege. The majority (Chief Justice Spigelman and Justice Meagher) did find one restriction on a House of Parliament's power to order the production of documents – those documents which would reveal the deliberations of the Cabinet. For Justice Meagher the restriction was absolute.⁵⁶ However, Chief Justice Spigelman argued that the

⁵¹ As referred to by Gleeson CJ in *Egan v Willis & Cahill* (1996) 40 NSWLR 650 at 665.

⁵² *Ibid* (per Gleeson CJ).

⁵³ *Egan v Willis* (1998) 73 ALJR 75 at 84-5.

⁵⁴ *Ibid*, at 89.

⁵⁵ *Egan v Chadwick* (1999) NSWCA 176.

⁵⁶ *Egan v Chadwick & ORS* (1999) NSWCA 176 at paragraph 154 (per Justice Meagher).

restriction depended on the content of Cabinet documents but that those documents which would reveal the actual deliberations of Cabinet would remain confidential as the doctrine of responsible government encompasses the idea of collective Cabinet responsibility and the confidentiality of Cabinet deliberations.⁵⁷

Justice Priestley in dissent argued that no restriction fell on any documents as Government documents are generated at public expense for public benefit. He stated:

*Every act of the Executive in carrying out its functions is paid for by public money. Every document for which the Executive claims legal professional privilege or public interest immunity must have come into existence through an outlay of public money, and for public purposes.*⁵⁸

Priestley also argued that as Cabinet documents yield to the principle of Government accountability, the Council must have the capacity to call them stating:

*...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 be to the benefit of the people of a truly representative democracy.*⁵⁹

As previously noted the Court of Appeal's decision in *Egan v Chadwick* did not compel Mr Egan to hand over the documents in dispute as the matter was one for the Legislative Council to resolve. As such it would appear that whilst courts are willing to order that Houses have the power to take action against members and witnesses for refusing to comply with orders for the production of papers, they are not willing to order compliance as it is considered that this is a matter which should be determined by the House.

Whilst it is well established that legislatures are able to compel the production of documents from the Executive if they are not subject to cabinet confidentiality, there is some dispute about the power of committees to compel the production of documents generally. Standing order 288 provides committees with the power to send for persons, papers, records, exhibits and things. However, this power to summons for the production of documents has been refuted by witnesses before statutory committees on the basis that the legislation establishing the various statutory parliamentary committees differs in the manner it confers powers on the committees. For instance, the Joint Committee on the Office of the Ombudsman is provided with the power to order the production of documents from witnesses.⁶⁰ However, the legislation establishing the Public Accounts Committee is silent on whether the committee has the power to send for persons, papers and records, and the Audit Office has obtained a Crown Solicitor advising which indicates the committee does not have the power to require the production of documents. The Crown Solicitor noted:

While the Act recognises that in the course of the exercise by the PAC of its functions documents will be produced to it in evidence and provision is made for such evidence which relates to a secret or confidential matter to be taken in private and for the circumstances in which it can be published, there is no provision in the Act which expressly confers on the PAC

⁵⁷ *Ibid*, at paragraph 56-7 (per Chief Justice Spigelman).

⁵⁸ *Ibid*, at paragraph 135 (per Justice Priestley).

⁵⁹ *Ibid*, at paragraph 143 (per Justice Priestley).

⁶⁰ Section 31G(4) of the *Ombudsman Act 1974*.

*the power to require a person to produce a document (emphasis added).*⁶¹

In earlier advice received by the committee it was argued that the Public Accounts Committee has no inherent power to compel the production of documents, be they confidential or otherwise, and that such a power is not conferred by the *Parliamentary Evidence Act 1901*, which only governs the examination of witnesses before the committee. The Public Accounts Committee has recommended that the legislation establishing it be amended to clarify its powers in relation to the production of documents so that it is consistent with legislation pertaining to other statutory committees.⁶²

Parliamentary committees are limited in the action they can take in regard to any refusal to comply with an order for the production of papers. It could be argued that those committees that have been conferred such power by statute are in a much stronger position in terms of requiring compliance than those without statutory authority. However, it should be noted that *May* notes:

*Disobedience to the order of a committee made within its authority is a contempt of the House by which the committee was appointed. Individuals have been held in contempt who did not comply with orders for their attendance made by committees with the necessary powers to send for persons; as have those who have disobeyed or frustrated committee orders for the production of papers.*⁶³

It is interesting to note that in a judgment handed down in the Prince Edward Island Supreme Court in Canada in January 2003 it was held that parliamentary committees, as a natural extension of the House have an inherent power to summon witnesses and order the production of documents even in the absence of specific authorising legislation.⁶⁴ Given that the Prince Edward Island Legislature is a Westminster style Parliament the arguments in this case may well be applicable to New South Wales.

2.5 Power to regulate and discipline members

Unlike other Parliaments in Australia, the New South Wales Parliament has not, by legislation or resolution, adopted the powers, privileges or immunities of the House of Commons, or declared its privileges and powers in any comprehensive manner. Accordingly, in matters such as suspension and expulsion, the Houses rely on their inherent or implied powers and, in the case of the Legislative Assembly, the standing orders. The nature and extent of the inherent powers of former colonial legislatures is governed by common law principles originally formulated in a series of Privy Council decisions in the nineteenth century. According to these principles, the Houses of such legislatures possess only such powers as are “necessary to the existence of such a body, and the proper exercise of the functions which it is intended to execute.” The courts have determined that punitive action does not fall within the scope of this formulation. To be lawful, any action, which a House in New South Wales takes to deal with contempt or obstructions to proceedings, must be “protective” and “self-defensive” and not punitive.

⁶¹ Auditor-General's Report to Parliament for 2001, Volume One at p. 213.

⁶² See Public Accounts Committee, *Inquiry into the Collapse of the NSW Grains Board*, May 2001, p. 52-4.

⁶³ *May*, p. 131.

⁶⁴ See *AG Canada v McPhee and Ors* (2003) PESCTD 06, 14 January 2003.

2.5.1 Power to suspend

The power to suspend members from the service of the House for a defined period of time for wilfully obstructing the proceedings has been held on numerous occasions to be a necessary power for legislatures. Such powers do not permit the suspension of a member unconditionally nor do they provide authority to order a member who has left the Chamber to be arrested and brought back in order to be suspended. In addition, it has been held that a House of Parliament can only use the suspension of a member as a means of self-defence and not for punishment.

In *Barton v Taylor* the Privy Council upheld a judgment on appeal from the Supreme Court of New South Wales that the Assembly had the power to suspend a member from its service. In this case an action had been brought by Mr Taylor, a member of the Legislative Assembly, against the Speaker for removal of his person from the Chamber and preventing him from returning.

Mr Taylor had been named by the Chairman of Committees as having persistently and wilfully obstructed the business of the committee of the whole and was subsequently suspended from the House. Whilst on suspension Mr Taylor resumed his place in the Legislative Assembly where the Speaker requested him to withdraw. Having refused to do so the Serjeant-at-Arms accordingly removed him from the Chamber.

The Privy Council held that legislative bodies had the power to suspend members from the service of the House under the basis of necessity. In so doing it argued that the suspension could only be a protective and not a punitive measure and referred to the judgment of the Privy Council in *Doyle v Falconer* which held that “[t]he powers incident to or inherent in a Colonial Legislative Assembly are ‘such as are necessary to the existence of such a body and the proper exercise of the functions which it is intended to execute’, and do not extend to justify punitive action, or unconditional suspension of a member during the pleasure of the Assembly.”⁶⁵

Their Lordships adopted the words of Sir James Colvile in *Doyle v Falconer* which stated:

*If a member of a Colonial House of Assembly is guilty of disorderly conduct in the House while sitting, he may be removed or excluded for a time, or even expelled....The right to remove for self-security is one thing, the right to inflict punishment is another....If the good sense and conduct of the members of Colonial Legislatures prove insufficient to secure order and decency of debate, the law would sanction the use of that degree of force which might be necessary to remove the person excluded from the place of meeting, and to keep him excluded.*⁶⁶

In upholding the decision the Privy Council argued that whilst necessity dictates that Houses of Parliament are able to suspend members from the service of the House as a measure of protection or self-defence, this necessity does not confer a power for unconditional suspension. The Earl of Selbourne in delivering the judgment of the Privy Council said:

⁶⁵ *Barton v Taylor* (1886) 11 App Cas 197 at 203.

⁶⁶ *Ibid.*, at 203-4.

*[t]he principle on which the implied power is given confines it within the limits of what is required by the assumed necessity....[t]hat necessity appears...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....[t]he power, therefore, of suspending a member guilty of obstruction or disorderly conduct during the continuance of any current sitting, is, in their Lordships' judgment, reasonably necessary for the proper exercise of the functions of any Legislative Assembly of this kind; and it may very well be, that the same doctrine of reasonable necessity would authorise a suspension until submission or apology by the offending member....[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.*⁶⁷

He goes on to state that "[t]he resolution pleaded in this case was 'That Mr A G Taylor be suspended from the service of the House.' If more was meant than to suspend him for the rest of the then current 'service', their Lordships think that it ought to have been distinctly so expressed." As such "the suspension pleaded in this plea must not be construed as operating beyond the sitting during which the resolution was passed."⁶⁸

The Privy Council came to a similar conclusion in *Harnett v Crick* where a member of the New South Wales Legislative Assembly was suspended from the House for a defined period of time. In this case, Mr Crick, who was Secretary for Lands had been found guilty of corruption by a Royal Commission on the Administration of the Lands Department for taking bribes. On publication of the Royal Commission's report the Assembly moved a resolution to consider the findings of misconduct held against Mr Crick. As criminal charges had already been laid against the member with a trial pending the Speaker ruled that the House could not proceed on the matter, because Mr Crick might thereby be prejudiced in certain criminal proceedings. In response the Assembly agreed to a new standing order that would enable the House to suspend a member from the service of the House until such time as the verdict of the jury had been returned. Despite this standing order and Mr Crick's suspension, he persisted in attending the House, whereupon the Speaker called upon him to withdraw. After refusing to comply the Serjeant-at-Arms, under the Speaker's direction, removed him from the House.

The Privy Council upheld the decision of the New South Wales Supreme Court, which declared that the Assembly had the power to suspend a member for a limited time. The question at issue was the "validity of the standing order under which [Mr Crick] was suspended." In doing so their Lordships considered:

*If the House...justified temporary suspension, not by way of punishment, but in self-defence, it seems impossible for the Court to declare that the House was wrong in its judgment, and the standing orders and resolution founded upon it so foreign to the purpose contemplated by the Act, that the proceedings must be declared invalid. The suspension...enures only until a verdict be given in the criminal case or the House determines sooner to remove the suspension.*⁶⁹

This power to suspend a member from the House also arose in where the power of a House to suspend a member, who as a Minister, did not comply with an order for the production of papers was in contention. The High Court upheld the decision of the New South Wales Court of Appeal which found that "a power to order the production

⁶⁷ *Ibid*, 204-5.

⁶⁸ *Ibid*, at 206.

⁶⁹ *Harnett v Crick* (1908) AC 470 at 476.

of State papers is reasonably necessary for the proper exercise by the Legislative Council of its functions.”⁷⁰ The High Court also held that the Legislative Council had the power to deal with any non-compliance with an order for the production of papers of which suspension is only one measure the House can take.

The majority (Gaudron, Gummow and Hayne JJ) considered that the action taken by the Legislative Council to suspend Mr Egan from the service of the House due to his failure to produce documents in accordance with a resolution of the House was within the Council’s power.⁷¹ Justice Callinan expanded on this by noting that the action taken by the House in suspending Mr Egan was protective of the Council’s legislative powers and the good government of the State and was therefore reasonably necessary in order for the House to carry out its functions.⁷²

This inherent right also extended to members who acted in a disorderly manner when the House was in committee of the whole. Justice Windeyer argued in *Toohey v Melville* that the House is entitled to remove any obstruction from its proceedings in the committee of the whole stage of legislation as it is during normal debate, stating that the Legislative Assembly, when in committee, has the “same power of self-preservation against obstruction caused by intruders or disorderly members of its own body as it has when the Speaker is in the Chair.”⁷³ Legislation is now considered in detail by the House rather than in a committee of the whole. However, the comments made by Justice Windeyer that the House has the power to remove members for disorderly conduct no matter what business is before the House still apply.

2.5.2 Expulsion in the Legislative Assembly

As noted, the courts have determined that punitive action does not fall within the power of colonial Houses of Parliament and that any action such Houses take must be in self-defence. In 1969, the New South Wales Supreme Court confirmed the decisions of the Privy Council which had found that the power of a House of Parliament extended to suspending or expelling a member by way of self-protection in order to ensure its proceedings are conducted without disturbance. In *Armstrong v Budd* the Supreme Court unanimously held:

- (1) That in addition to the powers specifically conferred by the *Constitution Act 1902* the common law confers on each of the Houses of Parliament such powers as are necessary to the existence of the particular House and to the proper exercise of the functions it is intended to execute; and
- (2) That in a proper case a power of expulsion for reasonable cause may be exercised, provided the circumstances are special and its exercise is not a cloak for punishment of the offender.⁷⁴

Chief Justice Herron considered that the New South Wales Legislative Council had the power to expel a member adjudged guilty of conduct unworthy of a member and declare the member’s seat vacant so long as the expulsion was a protective and not a punitive measure. He argued that:

⁷⁰ *Egan v Willis & Cahill* (1996) 40 NSWLR 650 at 667 (per Gleeson CJ).

⁷¹ *Egan v Willis* (1998) 73 ALR 75 at 87 (per Gaudron, Gummow and Hayne JJ).

⁷² *Ibid*, at 122 (Per Callinan J).

⁷³ *Toohey v Melville* (1892) 13 LR (NSW) 132 at 137 (per Windeyer J).

⁷⁴ *Armstrong v Budd* (1969) 71 SR (NSW) 386.

*...in a proper case 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. On this aspect an analogy is seen in the order that a barrister be disbarred on the ground of unfitness. Such an order is entirely protective and notwithstanding that its exercise may involve great deprivation to the person disciplined, there is no element of punishment.*⁷⁵

Justice Wallace also concluded that the Legislative Council had the power to expel a member from its service as a defensive measure and that the power to do so could arise out of conduct outside the Chamber. He stated:

*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

The third judge, Justice Sugerman also agreed stating, “[w]hatever 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.”⁷⁷

Standing order 254 provides for the expulsion of members from the House:

A Member adjudged by the House guilty of conduct unworthy of a Member of Parliament may be expelled by vote of the House, and the Member’s seat declared vacant.

There have been a number of cases of expulsion in the Legislative Assembly.

- In 1881 a member, Mr Baker, was expelled for “conduct unworthy of a Member” namely, the misappropriation of funds.⁷⁸
- In 1890 Mr Crick was expelled having defied the ruling of the Chair in committee of the whole and afterwards having violently resisted the Serjeant-at-Arms when that officer was directed to remove him and further having continued such resistance until other officers rendered assistance, causing a great disturbance and scandal.⁷⁹
- In 1917 a member, Mr Price, was expelled pursuant to the standing orders. Mr Price had been expelled following the findings of a Royal Commission that certain claims made by him in Parliament alleging improper conduct by a Minister were made wantonly, recklessly, and without foundation.⁸⁰

For further information on the expulsion of members see section 23.3 of Part One.

⁷⁵ *Armstrong v Budd* (1969) 71 SR (NSW) 386 at 396.

⁷⁶ *Ibid*, at 403.

⁷⁷ *Ibid*, at 405.

⁷⁸ VP 08/11/1881, p. 277.

⁷⁹ VP 13/11/1890, p. 430.

⁸⁰ VP 18/10/1917, p. 128.

2.6 The power to remove visitors for disturbing the proceedings in Parliament

Given that the House has the power to control its own proceedings it follows that the House also has the power to remove any disturbance to its proceedings. In *Willis v Perry* Chief Justice Griffith in the High Court said that:

*...[t]he Speaker undoubtedly has 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.*⁸¹

Standing order 260 enables the removal of persons, other than members, from the House. It provides:

A person not being a Member who interrupts the orderly conduct of the business of the House, obstructs the approaches to the House, or causes a disturbance within the precincts of the House, may, by direction of the Speaker, be removed by the Serjeant-at-Arms.

The issue of whether the House has the power to make such rules and orders was considered in *Harnett v Crick* where the Privy Council considered the circumstances of an assault allegation in the Legislative Assembly. The Privy Council held:

*(1) That the House itself is the sole judge of 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 urgency 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.*⁸²

The Privy Council rejected the notion that a standing order had the force of law and operated to prevent the court from inquiring into its validity. Lord MacNaughten in delivering the judgment of the Privy Council referred to the provisions of the *Constitution Act 1902* relating to the Governor's approval of the standing rules and orders of the House and how such provisions do not validate the standing orders as law:

*...the provision in the Act as to the Governor's approval was not intended to have the effect of giving standing orders passed by the Assembly a validity which otherwise they would not have possessed. It seems rather to be a limitation on the powers of the Assembly, making the Governor's approval necessary for the validity of any standing order passed by that body under s.15.*⁸³

Advice from the Crown Solicitor regarding the provisions of the standing order enabling the removal of persons other than members, indicates that as the rule is expressly designed for the protection of the orderly business of the House it is necessary, protective and non-punitive.⁸⁴

On 16 November 1893 the Speaker ordered the Serjeant-at-Arms to arrest a person in the public gallery after the person had been held in contempt by the House for

⁸¹ *Willis v Perry* (1912) 13 CLR 592 at 598.

⁸² *Harnett v Crick* (1908) AC 470 at 465-6.

⁸³ *Harnett v Crick* (1908) AC 470 at 475.

⁸⁴ Advice received from the Crown Solicitor re: Control of Disturbances in Parliament House, dated 16 November 1983.

yelling out during a member's speech. The person was not held in the custody of the Serjeant-at-Arms but was discharged after having been removed from the gallery.⁸⁵ Advice received from counsel indicated that "the Assembly can only authorise the removal of a person, other than a member, who creates a disturbance in the House, and neither the Speaker nor the Assembly can legally interfere with his liberty longer than may be necessary for that purpose."⁸⁶

Another incident occurred in New South Wales in 1983 when a person who had been in the public gallery instituted proceedings for assault against an attendant who had been clearing the gallery at the direction of the Speaker. The person had been continuing to take notes even though she had been warned on numerous occasions over several months that note taking was not permitted in the public galleries. The attendant did not touch the person, but had a verbal altercation about using the correct exit door and had held a door shut against her when directing her to an alternative door. The matter was dismissed by the Court of Petty Sessions after the Magistrate heard evidence of both parties concerned.⁸⁷

The standing orders do not specifically prevent note taking by persons in the public gallery and note taking has been permitted in recent years so long as it does not distract any member of Parliament or the proceedings of the House.⁸⁸

Whether the Speaker has the power to arrest people within the Parliamentary precincts when they are not disturbing the proceedings in the Chamber is a matter of conjecture. In *Willis v Perry* Chief Justice Griffith expressed the view that the Speaker could act to ensure that the proceedings of the House were not disturbed and that this included the removal of persons who were not members of the House.⁸⁹ In this case the High Court upheld an earlier decision of the New South Wales Supreme Court that the precincts of the House referred to in certain standing orders did not include the grounds of Parliament House, but meant the Chamber and its associated area.⁹⁰ The Supreme Court's decision was by no means clear, with Justice Gordon specifically noting that "within the precincts of the said Chamber" meant "outside the Chamber, but in its vicinity"⁹¹, and Justice Ferguson arguing that it meant "in the parliamentary buildings."⁹²

In 1997, the New South Wales Parliament enacted the *Parliamentary Precincts Act 1997* which increased the Presiding Officers' ability to control activities within the Parliament's boundaries. The legislation was enacted to provide a statutory definition of the precincts of the Parliament and to vest its control in the Presiding Officers. The Act ensures that the Presiding Officers have the power to remove visitors from anywhere within the precincts if it is appropriate to do so even if they are not disturbing the proceedings in the House. However, it does not confer the power to

⁸⁵ VP 16/11/1893, p. 128.

⁸⁶ Advice received from Counsel re: Punishment of Strangers for Contempt, dated 27 November 1893.

⁸⁷ Advice received from the Crown Solicitor re: *Mrs Majories Lois Edwards v Allan John Henry Hands*, Parliamentary Attendant – Allegation of assault, dated 3 March 1982.

⁸⁸ Note taking had been prohibited on the basis that it is only the official publication of the debates (Hansard) that attracts parliamentary privilege. See section 3.10.1 of Part Two for further information on the privilege attaching to the republication of Hansard.

⁸⁹ *Willis v Perry* (1912) 13 CLR 592 at 598.

⁹⁰ *Perry v Willis* (1911) NSW SR 479. See also *Barnes v Purcell* (1946) St R Qd 87.

⁹¹ *Perry v Willis* (1911) NSW SR 479 at 489.

⁹² *Ibid*, at 491.

arrest visitors with a view to holding them in order that they be punished. See section 2.8.3 of Part Two for further information on this issue.

Part 2 of the Act defines the Parliamentary precincts, confers control and management thereof in the Presiding Officers and vests title to the Parliamentary precincts in the corporation. Section 7 provides:

7 Control and management of Parliamentary precincts

(1) Subject to this Act:

- (a) the Parliamentary precincts are under the control and management of the Presiding Officers, and
- (b) the Presiding Officers may take any action they consider necessary for the control and management of the Parliamentary precincts.

(2) Subsection (1) does not affect:

- (a) the powers of each House to control or manage its own affairs and proceedings, and
- (b) the orders of each House in relation to its own affairs and proceedings, and
- (c) the powers of each House in relation to the control and management of so much of the Parliamentary precincts as constitute the chamber of the House concerned or as are used exclusively or principally for the purposes of the House.

The Crown Solicitor has advised that the legislation does not confer control and management of the Parliamentary precincts on the corporation nor does it make acts of the Presiding Officers acts of the corporation.⁹³ Therefore, the corporation and the Presiding Officers have distinct roles and functions with respect to the Parliamentary precincts – the corporation as owner, with (limited) power to deal with land and the Presiding Officers with control and management, but not so as to affect the powers etc. of the Houses.

Section 13 of the Act provides for the constitution of the Corporation of Presiding Officers as a statutory body representing the Crown. It states:

13 Constitution of Corporation

- (1) There is established by this Act a corporation with the corporate name of the Corporation of the Presiding Officers of the Parliament of New South Wales.
- (2) The affairs of the Corporation are to be managed and controlled by the Presiding Officers. Any act, matter or thing done in the name of, or behalf of, the Corporation by the Presiding Officers is taken to have been done by the Corporation.
- (3) Without limiting subsection (2), the Presiding Officers have and may exercise all functions of the Corporation as owner of the Parliamentary precincts.
- (4) The Corporation is a statutory body representing the Crown.

It should also be noted that section 27 of the Act provides that a memorandum of understanding may be entered into between the Presiding Officers and Commissioner of Police regarding the exercise by police officers of functions in the Parliamentary precincts. The failure of police officers to comply with the memorandum of understanding does not of itself invalidate the actions of the police officer.

⁹³ Advice received from the Crown Solicitor re: Security Licences for Parliament House, dated 14 August 1998.

2.7 Immunity from compulsory attendance in court

By convention, members are exempted from jury service.⁹⁴ In New South Wales the practice has been that members are exempt from the duty of attending in court to give evidence so long as the House or a committee of the House is sitting. A member may attend to give evidence in a civil suit while the House is sitting if the House grants a leave of absence. Sections 10 and 15(2) of the *Evidence Act 1995* are relevant to this issue:

10 Parliamentary privilege preserved

- (1) This Act does not affect the law relating to the privileges of any Australian Parliament or any House of any Australian Parliament.
- (2) In particular, section 15(2) does not affect, and is in addition to, the law relating to such privileges.

15 Compellability: Sovereign and others

.....
(2) 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.

Where a member is required to appear in court while the House is sitting, the practice is for the Presiding Officer to write to the Chief Judge or other appropriate officer of the Court claiming the privilege of exemption. If the member wishes to appear and, depending on the circumstances of the particular case, the member may be granted leave of absence to attend, by vote of the House.

The view that the privilege of immunity from legal proceedings is for the Legislature as a whole and not for individual members has meant that the immunity from compulsory attendance in court has been the subject of debate. For instance, Justice Gibbs, acting as a Royal Commissioner, has argued that the functioning of the Legislature and parliamentary proceedings may not be necessarily hindered by the absence of one of its members or officers who had been subpoenaed during parliamentary sittings.⁹⁵

The serving of legal process on members of Parliament is given more detailed consideration in section 5.1 of Part Two.

2.8 Privileges that are not considered necessary for the functioning of the Parliament of New South Wales

2.8.1 Freedom from arrest

Members of the New South Wales Parliament do not have immunity from arrest or imprisonment for an indictable offence. However, due to the privileges enjoyed by

⁹⁴ This convention is given statutory prescription by virtue of Schedule 2 of the *Jury Act 1977* (NSW).

⁹⁵ Queensland Royal Commission into Certain Matters Relating to Members of the Police Force and the National Hotel, Petrie Bight, Brisbane, *Report of the Royal Commission appointed on certain matters relating to members of the Police Force and the National Hotel*, Petrie Bight, Brisbane, 1964, p. 185.

the House and by convention, the police inform the Speaker and President that they have a warrant for the arrest of a member and seek their permission to enter the premises.

In relation to arrest in civil cases there is doubt to what extent members of the New South Wales Parliament are immune. In 1894, in *Norton v Crick*,⁹⁶ it was held that members of the New South Wales Parliament could be arrested on writs of *capias ad satisfaciendum* at any time. Such a writ only applied where the judge was satisfied that a defendant was about to leave the colony without satisfying a judgment against the defendant. The reasoning of the court was that immunity in such cases did not fall within the scope of the inherent or implied powers of the House as it was not reasonably necessary to enable Parliament to function properly. In this case a member of the Legislative Assembly who had been arrested contended that he, in common with all other members of the Assembly, enjoyed the privilege of freedom from arrest similar to that enjoyed by the members of the House of Commons in England. Justice Innes and Justice Foster noted that:

*It is quite clear that the Legislature of this Colony does not enjoy all the privileges which the House of Commons, by virtue of ancient usage and prescription, does enjoy; nor can it be inferred from the possession of certain privileges of the House of Commons by virtue of that ancient usage and prescription that the like privileges belong to or are inherent in a Colonial Legislature.*⁹⁷

The court also considered whether the privilege of freedom from arrest was essential to the existence of such a body as the Legislative Assembly and the proper exercise of its functions. In its judgment, the court said that "...if no such privilege existed in England by *lex et consuetudo* of Parliament, the English Parliament would not under existing circumstances, and considering the present law of arrest, think that such a privilege was necessary in order to enable it duly to discharge its functions."⁹⁸

Professor Carney notes that this throws doubt on the need for such an immunity stating:

*...in Norton v Crick the court easily found that no immunity arose from being served with a writ of capias ad satisfaciendum which is granted only if the defendant is about to leave or abscond to a remote part of the colony without satisfying a judgment debt. Establishment of that ground clearly precluded any view that the immunity was necessary for the member to give service to the House.*⁹⁹

It should be noted that the judgement delivered in *Norton v Crick* differed from an opinion obtained from the Attorney General in 1875 regarding the privilege of freedom from arrest for members of Parliament. The Attorney was of the opinion that such a privilege existed "for a certain period before and after the meeting of Parliament, and even after the dissolution of Parliament, for a convenient and reasonable time for returning home."¹⁰⁰

The opinion noted that the judgments of the Privy Council in *Kielley v Carson*¹⁰¹ and *Fenton v Hampton*¹⁰² "clearly establish...that Colonial Legislatures do not possess

⁹⁶ (1894) 15 LR NSW 172.

⁹⁷ Taken from the *Judgment of the Supreme Court of New South Wales in Norton v Crick* – Extract from the *Sydney Morning Herald*, delivered 22 May 1894 – Ordered to be printed by the Legislative Assembly on 29 May 1894.

⁹⁸ *Ibid.*

⁹⁹ Carney, Gerard, *Members of Parliament: Law and Ethics*, 2000 p. 197.

¹⁰⁰ *Freedom of Members of Parliament from arrest*, Opinion of the Attorney General, ordered by the Legislative Assembly to be printed, 15 July, 1875, p. 2.

¹⁰¹ (1841-42) 4 Moo PC.

certain powers which the House of Commons enjoys by virtue of ancient usage and prescription, and because the *lex et consuetudo Parliamenti* which forms a part of the Common Law of the land, invested the Houses of Lords and Commons with many peculiar privileges.”¹⁰³ The Attorney General also noted that such authorities had deemed that such a privilege was considered “...necessary to the existence of a legislative body and to the proper exercise of the functions which it is intended to execute, and that these powers are granted by the very act of its establishment.”¹⁰⁴

The Attorney General concluded that the freedom from arrest while in attendance upon Parliament is a power which it is necessary for a deliberative Assembly to possess stating that “[i]f one member of the Assembly could be taken and imprisoned under a writ of *Ca. Sa.*, all the members might be so taken and imprisoned, and the business of Parliament would be effectually suspended.”¹⁰⁵

Professor Campbell notes that whilst members can be arrested on writs of *capias ad satisfaciendum* there may be other circumstances such as civil contempt of court, in which limited immunity from imprisonment might be permitted due to the question of underlying necessity.¹⁰⁶

2.8.2 Power to punish for contempts

Contempts are actions which obstruct or impede the House in the performance of its functions, or members or officers in the discharge of their duties, including misleading committees or interfering with witnesses. An action which obstructs the House may be defined as a contempt without being a breach of privilege. *Erskine May* defines contempts as:

*...any act or omission which obstructs or impedes either House of Parliament in the performance of its functions, or which obstructs or impedes any member or officer of such House in the discharge of his duty, or which has a tendency, directly or indirectly, to produce such results may be treated as a contempt even though there is no precedent of the offence.*¹⁰⁷

The Houses of the New South Wales Parliament have not been afforded power, by virtue of the *Constitution Act 1902* or the standing and sessional orders, to deal with members who commit contempts. Despite this, the Assembly has a long history of cases of alleged contempts, dating back to the 1850s. Standing orders 91 and 92 provide for members to declare a contempt or breach of privilege. However, the House can only deal with the contempt in a non-punitive way (i.e. the House cannot fine or imprison members). As previously noted, the House does however, have the power to admonish non-members for contempt and to order their removal from the Chamber for disturbing the proceedings.

The House is able to direct the Attorney General to prosecute contempt in the courts, where it is also punishable under the general law. Such a direction may be given whether or not the House takes action itself. Professor Campbell argues that in New

¹⁰² (1858) 11 Moo PC 347.

¹⁰³ *Freedom of Members of Parliament from arrest*, Opinion of the Attorney General, ordered by the Legislative Assembly to be printed, 15 July, 1875, p. 1.

¹⁰⁴ *Ibid*, p. 1.

¹⁰⁵ *Ibid*, p. 2.

¹⁰⁶ Campbell, Enid, *Parliamentary Privilege in Australia*, 1966, p. 59.

¹⁰⁷ *Erskine May's Treatise on the Law, Privileges, Proceedings and Usage of Parliament*, 23rd edition, edited by Sir William McKay KCB, p. 128.

South Wales this power derives from the principle of necessity as the Privy Council in *Kielley v Carson* held that colonial legislatures possessed the same power in this respect as the House of Commons.¹⁰⁸ Therefore, despite having no specific statutory provisions enabling the House to deal with contempts committed by members, colonial legislatures have been conferred with the power to deal with such contempts under the common law.

With regard to contempts committed outside Parliament, the Privy Council has held that there is no implied power for colonial legislatures to adjudicate upon or punish for such contempts. In *Kielley v Carson* the Privy Council specifically stated that whilst a House may have the power to punish for contempts committed under the common law that power does not extend to past misconduct:

*...such an Assembly has the right of protecting itself from all impediments to the due course of its proceedings. To the full extent of every measure which it may be really necessary to adopt, to secure the free exercise of their Legislative functions, they are justified in acting by the principle of the Common Law. But the power of punishing any one for past misconduct as a contempt of its authority, and adjudicating upon the fact of such contempt, and the measure of punishment as a judicial body, irresponsible to the party accused, whatever the real facts may be, is of a very different character, and by no means essentially necessary for the exercise of its functions by a local Legislature.*¹⁰⁹

This was also the case in *Fenton v Hampton*, where a member of the Legislative Council of Van Diemen's Land refused to appear before a committee to which he was summoned to give evidence regarding alleged abuses in the Convict Department. On failing to attend he was summoned to appear before the Bar of the House. When he failed to comply with this summons the Speaker (Mr Fenton) issued a warrant for the apprehension of Mr Hampton "to be held in the custody of the Serjeant-at-Arms during the pleasure of the Council." Mr Hampton was to be held in the custody of the Serjeant-at-Arms until the Governor of the Island prorogued the Council. Following the decision in *Kielley v Carson* the Privy Council noted that:

*The broad basis on which that case rests is, that the House of Assembly in Newfoundland does not possess, as a legal adjudication upon past misconduct, as a contempt of its authority, such alleged contempt having been committed out of the House. Unless, therefore, it can be shown that the Legislative Council of this Colony, a mixed statutory body, possesses powers which the Assembly of Newfoundland, a pure representative body, does not, or unless that case lays the ground for some solid distinction between the nature and character of the alleged contempt there and in the present instance, the decision of the Privy Council appears to me to be conclusive of the question at issue.*¹¹⁰

Similarly, in *Doyle v Falconer*¹¹¹ it was held that the Dominican House of Assembly did not have power to punish contempt though committed in its face and by one of its members. The Privy Council in making its decision referred to its earlier decision in *Fenton v Hampton*.

On 30 August 1955, Speaker Lamb made a statement to the House regarding the powers of the House to punish for contempts of Parliament. He noted that in New South Wales power has not been afforded to the House through the *Constitution Act*

¹⁰⁸ See Campbell, Enid, *Parliamentary Privilege in Australia*, 1966, p. 120.

¹⁰⁹ *Kielley v Carson* (1842) 63 at 88.

¹¹⁰ *Fenton v Hampton* (1858) 11 Moo PC 347: 14 ER 727 at 369.

¹¹¹ (1866) LR 1 PC 328.

1902 nor any other legislation to enable the House to deal with contempts. Speaker Lamb noted:

On 30th October, 1857, Mr Speaker Cooper in the course of a ruling on a complaint said, in effect, that Parliamentary Privilege was not affected unless the matter raised referred to proceedings in this House; to the conduct of any Member in this House in relation to any proceedings in this House; or to the conduct or language of any person (not being a Member of this House) in connection with any proceedings in this House. This statement of Privilege, based upon May's Parliamentary Practice and local precedent, has been the guiding principle of this Assembly since that date.

When, in 1842, the then Council directed the Attorney-General to prosecute (in the Courts of Law) an offender against the privileges of Parliament, the Chief Justice said "It is, however, one thing to admit unqualifiedly that such privilege (i.e. Freedom of Speech in the Legislature) exists, and another thing to hold, which we certainly will not, that to call in question the proceedings of a Legislature...is indictable." In other words, the situation was that, even though a breach of the Law of Parliament had been committed there was no penalty for the Contempt.

Over the years, Privy Council decisions and Opinions of eminent Counsel have followed that early judgment, i.e. until Parliament legislates, it has no power to punish breaches of contempts by fines or commitment.

The Speaker went on to state that:

It must be remembered that breaches of privilege and contempts may also be committed by members themselves. In this event the House may go so far as to expel an offending member. As concerns strangers, the Parliamentary Evidence Act gives to Parliament the power to summon witnesses to give evidence at the Bar of the House or before a Select Committee. Any person refusing to attend may be apprehended and retained in custody, or, if attending and refusing to answer any lawful question, may be gaoled for any period up to one calendar month. A witness wilfully making a false statement and knowing the same to be false is liable to penal servitude not exceeding five years.¹¹²

These specific powers to punish witnesses who refuse to answer lawful questions or wilfully make any false statement are provided in section 11 and 13 of the *Parliamentary Evidence Act 1901*.

What is considered to be a "lawful question" under the Act has not been the subject of judicial interpretation but would appear to mean a question "which calls for an answer according to law, one that the witness is compellable to answering according to the established usage of the law".¹¹³

Advice received on the matter has indicated that certain types of questions would fall outside what is considered to be a lawful question and that witnesses cannot be compelled to answer them. Such questions include those that require answers which:

- are not relevant to the committee's terms of reference, construed broadly;
- would tend to incriminate the witness¹¹⁴;
- require giving an opinion or inference;
- would be against the public interest (public interest immunity);

¹¹² Legislative Assembly Parliamentary Debates, 30 August 1955, pp. 93-4.

¹¹³ *Crafter v Kelly* (1941) SASR 237.

¹¹⁴ See comments by Brennan J in *Hammond v The Commonwealth of Australia and Ors* (1982) 56 ALJR 767 at 772.

- are prohibited by law, such as secrecy laws (does not include moral obligations to secrecy, such as that arising from professional oaths or ethical rules);
- would breach parliamentary privilege;
- would breach legal professional privilege;
- would reveal information for the detection of crime, certain matters relating to the judicial process (e.g. jury deliberations) or communication with a spouse; or
- requires giving a non-expert opinion or inference.¹¹⁵

Any objection to a question must be considered on a case by case basis and on its own merits. It is for a committee to decide, in the first instance, whether a question is lawful and must be answered, but such a decision would be reviewable by a court if the witness was detained for refusing to answer. This follows the reasoning of the High Court in *R v Richards; ex parte Fitzpatrick and Browne*¹¹⁶, where the court considered whether the House was acting within the jurisdiction conferred by statute when committing a person for contempt.

*Armstrong v Budd*¹¹⁷ held that expulsion of a member for committing contempt is permitted in New South Wales so long as it is a defensive and not a punitive action. Professor Carney notes that apart from fines and imprisonment, other measures which have been precluded as punitive include a member's exclusion from parliamentary accommodation¹¹⁸ or the withdrawal of other financial benefits.¹¹⁹

2.8.3 Power to order the arrest of a visitor

In 1870 the Legislative Assembly adopted a standing order to enable it to deal with persons, who were not members, who interrupted or obstructed the House, by providing that the Serjeant-at-Arms could take such persons into custody. It stated:

Any person, not being a Member, who wilfully or vexatiously shall interrupt the orderly conduct of the business of the House, or obstruct the approaches of the House, or occasion a disturbance within the precincts of the House, shall be, by the warrant of the Speaker, committed to the custody of the Serjeant-at-Arms, and shall, by the Serjeant-at-Arms, be detained in custody until discharged by an order of the House.

The current standing order is slightly different in that it does not empower the Speaker to issue a warrant for the arrest of a person who has disturbed or obstructed the proceedings of the House. Standing order 260 provides:

A person, not being a member who interrupts the orderly conduct of the business of the House, obstructs the approaches to the House, or causes a disturbance within the precincts of the House, may, by direction of the Speaker, be removed by the Serjeant-at-Arms.

The standing order which had been adopted in 1870 was considered to be unworkable due to a number of Privy Council decisions in relation to the powers and

¹¹⁵ Advice received from the Solicitor General re: the *Parliamentary Evidence Act*, dated 8 September 1983.

¹¹⁶ (1955) 92 CLR 157.

¹¹⁷ (1969) 71 SR (NSW) 386.

¹¹⁸ *Barnes v Purcell* (1946) QSR 87 as referred to in Gerard Carney, *Members of Parliament: Law and Ethics*, 2000, p. 192.

¹¹⁹ *R v Dickson; Ex parte Barnes* 1947 St R Qd 133 at 136-7 and 141 as referred to in Gerard Carney, *Members of Parliament: Law and Ethics*, 2000, p. 192.

privileges of colonial legislatures. Advice received in 1894 from counsel in relation to the standing order noted:

*...the question of the validity of the standing order...is really decided by the judgments in the cases before the Privy Council of *Kielley v Carson* and *Doyle v Falconer*. In these cases the Privy Council held that a Colonial Legislature has an inherent power to remove any obstruction offered to the deliberations or proper action of a legislative body during its sitting. Any Member therefore guilty of disorderly conduct in the House whilst sitting may be removed, excluded for a time, or possibly in an extreme case even expelled. This power is deemed to be inherent in every House of Colonial Legislature, being necessary for its self-preservation, and it may be exercised whether the obstruction comes from a Member or from a stranger. But these authorities point out the difference which exists between exercising such a power and inflicting punishment upon the offender. There is no power to inflict punishment inherent in a Colonial Legislature. It can only be conferred by an express enactment. A fortiori there is no power to punish in respect of contempts or misconduct committed beyond the walls of the Legislative Chamber.*¹²⁰

This advice goes on to note that the standing order in providing “that an offender may be committed to the custody of the Serjeant-at-Arms, and detained in custody until discharged by an order of the House, obviously aims at punishing the offence by an imprisonment, the duration of which depends on the pleasure of the House. The authorities we have mentioned are sufficient to show that this standing order is *ultra vires* unless it is legalised by some statute.” In coming to this conclusion counsel considered the provisions of the *Constitution Act 1855*, which authorised the preparing and adopting of such standing rules and orders as shall appear necessary for the orderly conduct of the Council and Assembly respectively. Counsel was of the view 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.”

The opinion was that “the Assembly can only authorise the removal of a stranger who creates a disturbance in the House, and neither the Speaker nor the Assembly can legally interfere with his liberty longer than may be necessary for that purpose. Should the power of dealing with offenders by imprisonment be considered necessary or desirable, it can only be conferred by statute.”¹²¹

The judgments delivered by the Privy Council on this issue have considered that Colonial Parliaments, unlike the Parliament at Westminster, are not considered to be a court of justice and therefore do not have the power to order the arrest of a stranger for actions made outside the House. For instance, in *Kielley v Carson* the Privy Council held that the Legislative Assembly of Newfoundland had no power to order the arrest of a stranger so that he might be punished for a libel on a member of the Assembly.¹²² In considering this matter, the Privy Council considered whether by law, the power of committing for contempt, not in the presence of the Assembly, is incident to every local legislature. Their Lordships were of the opinion that colonial legislatures did not have any other powers than those that are “...necessary to the

¹²⁰ Taken from *Punishment of Strangers for Contempt: Counsel's Opinion on the Validity of the 107th Standing Order respecting*, dated 27 November 1893, ordered by the Legislative Assembly to be printed, 30 January 1894.

¹²¹ *Ibid.*

¹²² *Kielley v Carson and others*, (1841-42) 4 Moo PC, pp. 83-4.

existence of such a body, and the proper exercise of the functions which it is intended to execute.”¹²³ Their Lordships went on to state that in their view:

*...such an Assembly has the right of protecting itself from all impediments to the due course of its proceeding. To the full extent of every measure which it may be really necessary to adopt, to secure the free exercise of their Legislative functions, they are justified in acting by the principle of the Common Law. But the power of punishing any one for past misconduct as a contempt of its authority, and adjudicating upon the fact of such contempt, and the measure of punishment as a judicial body, irresponsible to the party accused, whatever the real facts may be, is of a very different character, and by no means essentially necessary for the exercise of its functions by a local Legislature, whether representative or not. All these functions may be well performed without this extraordinary power, and with the aid of the ordinary tribunals to investigate and punish contemptuous insults and interruptions.*¹²⁴

In making this judgment, their Lordships, noted that it has been said that:

*...this power belongs to the House of Commons in England; and this, it is contended, affords an authority for holding that it belongs as a legal incident, by the Common Law, to an Assembly with analogous functions. But the reason why the House of Commons has this power, is not because it is a representative body with legislative functions, but by virtue of ancient usage and prescription; the *lex et consuetudo Parliamenti*, which forms a part of the Common Law of the land, and according to which the High Court of Parliament, before its division, and the Houses of Lords and Commons since, are invested with many peculiar privileges, that of punishing for contempt being one.*¹²⁵

They went on to argue:

*Nor can the power be said to be incident to the Legislative Assembly by analogy to the English Courts of Record which possess it. This Assembly is no Court of Record, nor has it any judicial functions whatever; and it is to be remarked, that all those bodies which possess the power of adjudication upon, and punishing in a summary manner, contempts of their authority, have judicial functions, and exercise this as incident to those which they possess, except only the House of Commons, whose authority, in this respect, rests upon ancient usage.*¹²⁶

¹²³ *Ibid*, p. 88.

¹²⁴ *Ibid*.

¹²⁵ *Ibid*, p. 89.

¹²⁶ *Ibid*, pp. 89-90.

Chapter 3 Such privileges as were imported by the adoption of the *Bill of Rights*

3.1 Statutory recognition of the freedom of speech for members of the Parliament of New South Wales

The most fundamental parliamentary privilege is the privilege of freedom of speech. In Australia, there is no restriction on what may be said by elected representatives speaking in Parliament. Freedom of political speech is considered essential in order to ensure that the Parliament can carry out its role of scrutinising the operation of the government of the day, and inquiring into matters of public concern. The statutory recognition of this privilege is founded in the *Bill of Rights 1688*. Article 9 provides:

The freedom of speech and debates or proceedings in Parlyament ought not to be impeached or questioned in any court or place out of Parlyament.

Apart from the absolute protection afforded to statements made in Parliament, other privileges which flow from the *Bill of Rights* include: the right to exclude strangers or visitors; the right to control publication of debates and proceedings; and the protection of witnesses etc. before the Parliament and its committees.¹

Article 9 is in force in New South Wales by operation of the *Imperial Acts Application Act 1969*.² Members are protected under this Act from prosecution for anything said during debate in the House or its committees. Despite this, in 1980 Justice McLelland expressed doubts about the applicability of Article 9 to the New South Wales Parliament in *Namoi Shire Council v Attorney General*. He stated that “art 9 of the *Bill of Rights* does not purport to apply to any legislature other than the Parliament at Westminster” and therefore, the supposed application of the article, does not extend to the Legislature of New South Wales.³

In making this point Justice McLelland argued that:

*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; (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....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 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.*⁴

It is unclear whether his Honour’s attention was directed to the adoption of the *Bill of Rights* in New South Wales by the *Imperial Acts Application Act 1969*. Subsequent cases have however held that Article 9 does apply in New South Wales.

¹ Joint Select Committee upon Parliamentary Privilege, *Parliamentary Privilege in New South Wales*, 1985, p. 10.

² See *Imperial Acts Application Act 1969*, second schedule, part 1, sec. 6.

³ *Namoi Shire Council v Attorney-General for New South Wales*, (1980) 2 NSWLR, 639 at 640.

⁴ *Ibid*, at 643.

For example, the effect of Article 9 of the *Bill of Rights* in relation to New South Wales was considered by the High Court in *Egan v Willis*⁵ with Justices Gaudron, Gummow and Hayne indicating that the intention of the *Imperial Acts Application Act 1969* was to ensure the constitutional norms prescribed by Article 9 would apply in New South Wales. There was however, some speculation by the judges as to the precise manner in which these norms would apply in New South Wales. They argued:

*...the evident intention was that there should be some limits upon the extent to which events happening in the New South Wales legislature may be considered in the courts. It may very well be that effect is to be given to that intention simply by reading the references in Art 9 to "court" and "parliament" as references to the courts and Parliament of the State. But not all other provisions of the Bill of Rights or other preserved Imperial Acts may admit of so ready a solution to the problems of how they are to be applied and it may be that more radical solutions may be required in such cases. These are questions that need not be addressed in this case.*⁶

Other judges in the case had similar views, with Justice McHugh noting that the *Bill of Rights*, which is in force in New South Wales, by virtue of the *Imperial Acts Application Act 1969*, merely confirms the common law⁷ and Justice Callinan noting that Article 9 of the *Bill of Rights* provided "...a clear indication that the proceedings of the Houses in New South Wales should not in general be subject to check or questioning in the Courts."⁸

3.2 What constitutes "proceedings in Parliament"?

Article 9 of the *Bill of Rights* provides protection for speeches, debates and proceedings of Parliament from being questioned in any place outside of the Parliament. Until recently, what constitutes "proceedings in Parliament" had not been defined in legislation in any jurisdiction in Australia or the United Kingdom and it was left to the courts to determine the exact extent of "proceedings". In 1987 the Federal Parliament enacted the *Parliamentary Privileges Act 1987* in order to alleviate some of the confusion as to what constitutes "proceedings in Parliament". This legislation was enacted following controversy about the precise extent of privilege attached to the House of Representatives and the Senate following two cases in the Supreme Court of New South Wales concerning Justice Murphy in 1985 and 1986. These cases interpreted and applied article 9 of the *Bill of Rights* in a manner unacceptable to the Parliament. One commentator noted that:

*the effect of both judgments in R v Murphy was that the prosecution and the defence made free use of the evidence given before the Senate Committees for their respective purposes...the prosecution and the defence made use of evidence given in camera (that is, not in public) before the Senate Committees, evidence which neither the committees nor the Senate had published or disclosed to them, and which, in the view of the Senate, they had no right even to possess.*⁹

The *Parliamentary Privileges Act 1987* does not directly affect the privileges of the New South Wales Parliament. Since the passage of the Act, Justice Loveday of the District Court has ruled that parliamentary privilege did not prevent the subpoenaing of evidence given *in camera* to a select committee of the Legislative Assembly to

⁵ 1998 HCA 71.

⁶ *Egan v Willis* (1998) HCA 71, at paragraph 23.

⁷ *Ibid*, at paragraph 69.

⁸ *Ibid*, at paragraph 180.

⁹ Odgers' *Australian Senate Practice*, 11th edition, Edited by Harry Evans, 2004, p. 36.

impeach the credit of a witness at a criminal trial.¹⁰ Nevertheless, a judge of the Federal Court has expressed the view that section 16(3) of the Act is declaratory of the law in Australia before its enactment¹¹ and such views influence interpretation by the courts.¹² The effect of the Commonwealth Act will be considered in more detail in section 3.4 of Part Two.

Determining the scope of what constitutes “proceedings in Parliament” clearly lies with the courts in the absence of legislation in New South Wales and not with either House. Carney argues that parliamentary proceedings covers:

...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.¹³ 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.¹⁴

Carney also notes that it is clear that members of Parliament are not protected by privilege for actions performed outside of Parliamentary proceedings, regardless of whether the action is conducted pursuant to the member's position as an elected representative. Of course the closer the activity is connected to “proceedings in Parliament” the more likely it is to be covered by parliamentary privilege. Reference is made to *Holding v Jennings*¹⁵ where it was held that the typing of a statement to be made by a member in Parliament is considered to be a “proceeding in Parliament”.¹⁶

On the issue of whether a tabled paper necessarily constitutes a “proceeding in Parliament”, a recent case in Australia held that such documents could be tendered in evidence as they are not considered to fall within the ambit of what constitutes a “proceeding in Parliament” and hence do not automatically attract parliamentary privilege. In April 2002, the Australian Capital Territory Supreme Court considered whether a report prepared pursuant to the *Inquiries Act 1991* (ACT) and submitted to the Chief Minister for tabling could be tendered as evidence in an action for defamation. In determining the issue Justice Crispin noted that:

The decisive question is...whether the copy of the report...falls within the description “proceedings in Parliament” as defined in subs 16(2) [of the Parliamentary Privileges Act 1987 (Cmth)] and that concept plainly extends to acts done for purposes of transacting the business of the Parliament including the preparation of documents for such purposes. However, the evidence does not establish that the report of the first defendant was prepared for any such purpose. On the contrary, it seems clear that the report was prepared in fulfilment of a statutory duty which the first defendant acquired upon accepting the appointment by the Executive pursuant to s. 5 of the Act.¹⁷

¹⁰ *Regina v Abraham Gilbert Saffron* unreported, District Court of New South Wales, 21 August 1987.

¹¹ *Amann Aviation Pty Ltd v Commonwealth of Australia* (1988) 19 FCR 223 at 231.

¹² See for instance, *NSW Australian Medical Association v Minister for Health and Community Services* (1992) 26 NSWLR 114 at 126.

¹³ In New South Wales Section 14A(7) of the *Constitution Act 1902* expressly confers parliamentary privilege to the Register of Pecuniary Interests.

¹⁴ Carney, Gerard, *Members of Parliament: Law and Ethics*, 2000, pp. 210-11.

¹⁵ (1979) VR 289.

¹⁶ *Ibid.*

¹⁷ *In the matter of the Board of Inquiry into Disability Services* (2002) ACTSC 28, 10 April 2002 at paragraph 21.

Justice Crispin went on to state that the handing of a report to a Minister who has a statutory requirement to table it in Parliament is not enough to make the actual report a “proceeding in Parliament”. He noted:

*Privilege may be attracted by the retention of a document for a relevant purpose, but that is because the retention for such a purpose is itself an act forming part of the proceedings. The privilege thereby created does not attach to the document and any copies for all purposes. It applies only to the words used and acts done in the course of, or for the purposes of or incidental to, the transaction of business of the Assembly including the retention of a document for a purpose of that kind....Furthermore, 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”.*¹⁸

Documents tabled in Parliament may receive qualified privilege in accordance with section 28 of the *Defamation Act 2005* if they are not considered to be a “proceeding in Parliament”. Section 28 provides a defence to the publication of a defamatory matter if the defendant proves that the matter was contained in a public document or a fair summary or extract from a public document. A public document includes any document published by a parliamentary body. In addition clause 8 of schedule 2 of the *Defamation Act 2005* includes in the definition of public documents, documents produced to certain parliamentary committees conducted in private. Further information on the privilege attached to tabled papers is discussed in section 4.2.2 of Part Two.

With regard to the publication outside the Chamber, of statements already made within the Chamber, a number of members have claimed that such statements are subject to parliamentary privilege. However, the courts in a number of Australian jurisdictions have not agreed. For instance in *Australian Broadcasting Corporation v Chatterton* a member of the House of Assembly of South Australia gave a television interview on the subject of a question that he had asked of the Premier in the House. Justice Prior held that the interview was not considered to be a “proceeding in Parliament”, although Justice Zelling AC left the question open in this case.¹⁹ Similarly, in Victoria the Supreme Court held that statements made by a Minister at a press conference regarding allegations made by him earlier in the House were not protected.²⁰ The repetition of statements already made in the House by members will be discussed further in section 3.10 of Part Two.

There have been a number of cases in which absolute privilege has been claimed in relation to proceedings in a Party caucus. In *Della Bosca v Arena*²¹ Justice Levine expressed the view that it was “arguable” whether the doctrine of absolute privilege in relation to proceedings in Parliament extended to proceedings of caucus.²² In doing so he noted that the law provides no binding authority in this area but referred to a number of cases which had considered the issue including *Rata v The Attorney-General* where it was held “that the Caucus as it had developed in New Zealand is

¹⁸ *Ibid*, at paragraph 22 and 23.

¹⁹ *Australian Broadcasting Corporation v Chatterton* (1986) 46 SASR 1 as taken from Michael Sexton SC, “Parliamentary Privilege, Defamation and Public Interest”, in *Law Society Journal*, June 2002, pp. 62-4.

²⁰ *Beitzel v Crabb* (1992) 2 VR 121 (per Hampel J) as taken from Michael Sexton SC, “Parliamentary Privilege, Defamation and Public Interest”, in *Law Society Journal*, June 2002, pp. 62-4.

²¹ (1999) NSWSC 1057, 27 October 1999.

²² *Ibid*, at paragraph 24.

an integral part of the Parliamentary process and that all matters transacted in caucus are inexplicably (sic – query ‘*inextricably*’) linked to Parliament and thus attracts the privilege.”²³ The Supreme Court of New South Wales was not required to rule on the matter as the issue was settled out of court. In contrast to the decision reached in New Zealand in *Rata v The Attorney-General* the Tasmanian Supreme Court has held that such meetings do not attract privilege.²⁴

It should be noted that parliamentary proceedings need to be valid in order to be protected by privilege. For instance, committee proceedings would only be considered to be a valid proceeding in Parliament if the committee has a quorum when meeting and was acting within its jurisdiction.²⁵ This was evident in *Criminal Justice Commission v Parliamentary Criminal Justice Commissioner*²⁶ where McPherson JA expressed the view that a committee inquiry may not be privileged if the inquiry is contrary to legislative provision as it may not be considered a valid proceeding in Parliament. He stated:

*The possibility that the court might one day have to pass judgment on the legitimacy of an inquiry or report by the Parliamentary Commissioner cannot be altogether discounted, if, for example, the Parliamentary Criminal Justice Committee purported under s. 118R(2)(c) to authorise the Parliamentary Commissioner to investigate an allegation of disclosure of information that was not “under the Act” to be treated as confidential, it would or might call for a decision whether or not the ensuing investigation constituted “proceedings in Parliament” that were insulated by art 9 of the Bill of Rights from being “questioned” in a court of law. Intrusion into a field of federal law that is subject to the Commonwealth Constitution may be another area in which such questions could arise. But none of these problems exist in the present case. The submission advanced by the applicants is that the Parliamentary Committee could not lawfully authorise, and the Commissioner could not lawfully act, in defiance of the common law requirement, said to be implicit in s. 118R, that the principles of procedural fairness must be observed. The short answer to that contention is that neither the Parliamentary Committee nor the Commissioner herself did or attempted any such thing. The requirements of procedural fairness were not contravened, and the applicants have no valid ground for complaining that they were. It follows that this Court, like others in Queensland, is precluded by art 9 of the Bill of Rights from questioning the validity or propriety of the Commissioner’s investigation and report.*²⁷

On a related note the New South Wales Crown Solicitor is of the opinion that any proceeding where members meet as a committee are considered to be proceedings of the committee regardless of whether statutory requirements such as a quorum or otherwise are met. The Crown Solicitor noted that whilst a lack of quorum may affect the validity of any decisions taken by a committee it does not mean that there are no proceedings and that such proceedings, given that they are proceedings of the committee, would attract parliamentary privilege.²⁸ Of course, this is a view that needs to be tested in court, particularly given the view expressed in *Criminal Justice Commission v Parliamentary Criminal Justice Commissioner* noted above.

²³ *Ibid*, at paragraph 23.

²⁴ See *R v Turnbull* (1958) Tas SR 80 (per Gibson J at 84).

²⁵ See *House of Representatives Practice*, 5th edition, p. 693.

²⁶ (2001) QCA 218.

²⁷ *Criminal Justice Commission v Parliamentary Criminal Justice Commissioner* (2001) QCA 218 at paragraph 25 (per McPherson JA).

²⁸ Advice received from the Crown Solicitor re: Private Briefings for Parliamentary Committees with Supervisory Role, dated 1 October 1998.

3.3 Judicial interpretation of “proceedings in Parliament”

The meaning of the phrase “proceedings in Parliament” has seldom been directly considered by the courts. However, the issue has arisen in a number of contexts.

The first time that the issue of what constitutes “proceedings in Parliament” was considered by a court of law was during the 1830s when, in the United Kingdom, the firm of Hansard was sued for defamation. Hansard, as printers of the House of Commons, had by order of the House printed a report that had been laid on the Table by the Inspector of prisons. The House of Commons contended that such publications would be protected under article 9. The court did not consider the authorisation of the House as a sufficient defence. Chief Justice Lord Denman observed “that the House’s direction to publish all parliamentary reports was no justification for Hansard or anyone else.”²⁹ In this instance Hansard was successful in pleading justification however, as the court had ruled that the authorised publishers of reports of Parliamentary proceedings were not protected by article 9, the issue of what was considered to be “proceedings in Parliament” was left open to debate.

In response to this judgment and following a committee inquiry regarding the publication of papers printed under an order of the House, the House of Commons in 1837 passed a number of resolutions which collectively declared that:

*the publication of parliamentary reports, votes and proceedings was an essential incident to the constitutional functions of Parliament; that the House had sole and exclusive jurisdiction to determine upon the existence and extent of its privileges; that to dispute those privileges by legal proceedings was a breach of privilege; and that for any court to presume to decide upon matters of privilege inconsistent with the determination of either House was contrary to the law of Parliament.*³⁰

Despite these resolutions another action in defamation was taken against Hansard in 1839. When the matter came before court in *Stockdale v Hansard*³¹ the court assumed the jurisdiction to determine to what extent parliamentary privilege existed and its scope. The court considered that an action of defamation could be pursued even in cases where the defamatory material was contained in documents that had been published pursuant to an order of the House or under the authority of the House.

Following this judgment the Sheriff of Middlesex executed the judgement against the firm of Hansard and in response to this action the House of Commons issued a warrant to arrest the Sheriff of Middlesex. The warrant, rather than specify what actions the Sheriff of Middlesex had made, only cited that the House had found the position holders guilty of contempt. In the *Case of the Sheriff of Middlesex*³² the Court of the Queen’s Bench, following the decision in *Stockdale v Hansard*, argued that judicial review was effectively prevented as the issue of whether a parliamentary

²⁹ *Stockdale v Hansard* (1836-37) 173 ER 322 as taken from *Erskine May’s Treatise on the Law, Privileges, Proceedings and Usage of Parliament*, 23rd edition, edited by Sir W R McKay KCB, pp. 184-5.

³⁰ See *Erskine May’s Treatise on the Law, Privileges, Proceedings and Usage of Parliament*, 23rd edition, edited by Sir W R McKay KCB, pp. 184-7.

³¹ (1839) 112 ER 1118.

³² *Sheriff of Middlesex* (1840) 113 ER 419.

privilege existed did not arise as it was considered to be within the power of the House to arrest a person adjudged by it to be guilty of contempt.³³

From these cases the principle emerged that a court only has the power to consider whether the House possesses the power to make an order (such as for an arrest warrant), not the desirability or merits of the order being given. This principle is explicit in Article 9 of the *Bill of Rights* in that the “proceedings in Parliament”, of which parliamentary privilege is just one aspect, cannot be impeached or questioned outside of the Parliament.

In 1957, the House of Commons made an important ruling on what it considered to be a “proceeding in Parliament” in relation to a defamation case brought against one of its members. It ruled that a letter from a member of Parliament to a Minister did not constitute a “proceeding in Parliament” and hence was not absolutely privileged. In 1957, Mr Strauss, a member of the House of Commons, wrote a letter of complaint regarding the London Electricity Board to the responsible Minister. The Minister informed Mr Strauss that as the matter complained of was one of day-to-day administration it was a matter for the board and that he would bring it to the chairman of the board’s attention. Correspondence then ensued between the board and Mr Strauss culminating in the board initiating defamation proceedings against the member. Mr Strauss informed the House of Commons that the actions taken by the board were calculated to impede him in the performance of his Parliamentary duties and constituted a breach of the privileges of the House. The matter was referred to the Privileges Committee which reported that the letter from Mr Strauss to the Minister fell within the ambit of “proceedings of Parliament” within the meaning of the *Bill of Rights 1688*. However, the House did not agree and in a narrow vote of 218 to 213 it resolved that the letter did not constitute a proceeding in Parliament. The matter was not considered in a court of law as the board decided not to proceed with its libel action against Mr Strauss.³⁴

The courts in Australia have, however, considered a similar issue. In November 1997, the majority of the Queensland Court of Appeal held in *O’Chee v Rowley* that “all those documents written by the Senator, comprising diary notes, file notes of attendances and conversations and letters, were documents within the ‘proceedings of Parliament’...having been prepared for the purpose of or incidental to the transaction of Senate business.”³⁵

On the issue of what constitutes “proceedings in Parliament” McPherson JA made the following remarks in relation to the *Parliamentary Privileges Act 1987* (Cmth):

*By s 16(2) of the 1987 Act proceedings in Parliament include the preparation of a document for the purposes of or incidental to the transacting of any business of a House. More generally, such proceedings include all acts done for such purposes, together with any acts that are incidental to them. Bringing documents into existence for such purposes; or, for those purposes, collecting or assembling them; or coming into possession of them, are therefore capable of amounting to “proceedings in Parliament.”*³⁶

³³ *Erskine May’s Treatise on the Law, Privileges, Proceedings and Usage of Parliament*, 23rd edition, edited by Sir W R McKay KCB, pp. 184-7.

³⁴ See S.A. De Smith, “Parliamentary Privilege and the Bill of Rights”, in *The Modern Law Review*, Volume 21, September 1958, No. 5, pp. 465-83.

³⁵ *O’Chee v Rowley* (1997) 150 ALR 199 at 208-9.

³⁶ *Ibid.*, at 215.

In a related case,³⁷ in April 2000 the Supreme Court of Queensland held that privilege is not automatically attached to correspondence received by a member of Parliament on matters of interest to the member and which the member had debated in the House.

Justice Jones concluded “that an informant in making a communication to a parliamentary representative is not regarded as participating in “proceedings in Parliament” and therefore the provisions of the *Parliamentary Privileges Act* do not apply.”³⁸ This is in contradiction to the Senate Committee of Privileges 67th Report which concluded that the *Parliamentary Privileges Act 1987* rendered the protection of parliamentary privilege available for some categories of “communications of information to senators by other persons.” This Report found that the communications by Mr Armstrong, a constituent, to Senator O’Chee, for which he (Mr Armstrong) is now being sued in defamation, were made for the purpose of Senator O’Chee using that information “in Senate proceedings”. The proceedings in question included a question asked in the Senate, a speech on the adjournment and a further question.³⁹

Legal advice on the judgment obtained by the Senate Committee of Privileges concluded that there were profound weaknesses in the judge’s reasoning and that His Honour’s conclusion on the ambit of parliamentary privilege under the Act was fatally flawed, and of no weight whatever as an authority. Further, it must be noted that the issue before the Supreme Court of Queensland was whether the proceedings should be stopped in their tracks as an abuse of process. Therefore, matters of parliamentary privilege were not determined. The advices were published as part of the 92nd Report of the Senate Committee of Privileges.

The committee sought the views of the Clerk of the Senate as to whether any further steps could be taken in relation to Mr Rowley’s action against Mr Armstrong, and also a new action against former Senator O’Chee, who, as a Senator, originally raised Mr Armstrong’s difficulties as a matter of privilege. In response the Clerk suggested that “the only feasible step” for the Senate to take in the matter would be if either of the actions actually came to trial. He observed:

*In that event counsel instructed for the Senate could seek leave to appear as amicus curiae to assist the court on the parliamentary privilege question and to make submissions on the appropriate application of parliamentary privilege principles and the relevant statutory provisions to the particular actions. This may result in appropriate findings by the court and reversal of Jones J’s unsatisfactory judgment.*⁴⁰

3.4 Admissibility of parliamentary proceedings in court

The purpose of Article 9 of the *Bill of Rights* is to ensure that members of Parliament are not liable for what they say in Parliament. However, it does not prohibit the use of *Hansard* or committee proceedings in court to establish something as fact, as an aid in the interpretation of statutes, or in determining whether legislation has been validly enacted.

³⁷ *Rowley v Armstrong* (2000) QSC 88.

³⁸ *Rowley v Armstrong* (2000) QSC 88 at paragraph 34.

³⁹ The Senate Standing Committee of Privileges, *92nd Report: Matters Arising from 67th Report of the Committee of Privileges*, June 2000, pp. 10 and 14.

⁴⁰ The Senate Committee of Privileges, *Matters arising from 67th Report of the Committee of Privileges (2)*, 94th Report, September 2000. The matter has not come to trial.

In the United Kingdom, it is clearly accepted that the proceedings of Parliament may be referred to for the purpose of proving, as a fact, that certain events occurred in the course of those proceedings. In *Church of Scientology of California v Johnston-Smith* Justice Browne held that extracts from *Hansard* could be read without infringing the privileges of the Parliament. The Attorney-General was invited to help the court in considering whether parliamentary privilege had been infringed. He submitted that “A reference could be made to the making of a speech as a matter of history such as the date on which it was made and who made it, but there could be no impeachment of the speech.”⁴¹

Justice Browne referred to the submission made by the Attorney-General, that *Hansard* could only be used for a limited purpose of proving fact and not for drawing inferences from it and noted that:

*...the general principle is quite clear...extracts from Hansard ...must not be used in any way which might involve questioning, in a wide sense, what was said in the House of Commons as recorded in Hansard.*⁴²

A similar approach has been taken in subsequent cases in Australian jurisdictions. In *Finnane v Australian Consolidated Press Ltd* Justice Needham noted that:

*The rationale of the rule...was that it was not open to the courts to question the conduct of any member of Parliament; certainly it was not open in the courts to make a member of Parliament in any way liable at law for what had been said in the House.*⁴³

He went on to argue that if however, “anything further were to be adventured, for example, comments on the material by counsel or, no doubt, by the court, that would be a matter in which it would be likely that the House would exercise its privileges and, if necessary, enforce the prohibition on breach of them.”⁴⁴

Justice Needham referred to the decision of Justice Browne in the *Scientology* case noting his conclusion that a court cannot use *Hansard* even for minimal use unless the consent of the House has been given. He also referred to the House of Representatives standing order which “prohibits any officer of the House, or shorthand writer employed to take minutes of evidence before it or at any committee, from giving evidence elsewhere in respect of any proceedings or examination of any witness, without special leave of the House.” He argued that although the standing order does not specifically cover the use of *Hansard* in court “...it certainly indicates an intention on the part of the Parliament to maintain its privilege of publication of its own debates.”⁴⁵ In the absence of a similar standing order in the New South Wales Legislative Assembly courts may take a different view in cases involving members of the Assembly.

In *Uren v John Fairfax & Sons Ltd* it was held by the New South Wales Supreme Court that the Commonwealth Parliament had waived its privileges in relation to the mere proof of *Hansard* in court given that the proceedings of the Parliament were

⁴¹ *Church of Scientology v Johnston-Smith* (1972) 1 QB 522, at 525.

⁴² *Church of Scientology v Johnston-Smith* (1972) 1 QB 522, at 531. See also *Munday v Askin* (1982) 2 NSWLR 369 at 373 (CA); and *Rost v Edwards* (1990) 2 WLR 1280.

⁴³ *Finnane v Australian Consolidated Press Ltd and others* (1978) 2 NSWLR 435 at 438.

⁴⁴ *Ibid*, at 438-9.

⁴⁵ *Ibid*, at 439.

broadcast and that copies of *Hansard* were sold freely. Justice Begg in accepting the submission of the defendant argued that the privileges of a House of Parliament are not infringed by seeking to prove that certain speeches had been made in the House so long as the proceedings were not used "...in any way to criticise them, nor to call them in question in these proceedings, but to prove them as facts upon which the defendant allege comments were made in the publication now sued upon by the plaintiff."⁴⁶

In *Mundey v Askin* objection was taken to the admission of *Hansard* in court proceedings. However, the Court of Appeal permitted *Hansard* to be tendered as evidence arguing that in this case "*Hansard* was tendered to prove, as a fact, that certain things had been said in the course of a debate in the Legislative Assembly. There was no question of any further examination of the circumstances in which the debate had taken place or the motives of the participants, or of anything else which might infringe the privilege of Parliament."⁴⁷

This view that *Hansard* could be tendered in court proceedings for the purposes of proving fact was expanded on by Justice Hunt in *Henning v Australian Consolidated Press Ltd* where he ruled that *Hansard* could be used in court so long as the motives and intentions of members of Parliament were not questioned stating:

*Parliamentary privilege is properly invoked to prevent any inquiry into the motives and intentions of Members of Parliament in relation to anything they said or did in Parliament. But that principle, as the Court of Appeal said in Mundey v Askin, has nothing to do with the case where all that the copy of Hansard was tendered to prove was the very fact which it proclaimed to the world, namely that a particular statement had been made by a particular Member in the House.*⁴⁸

The notion that proceedings in Parliament can be admitted into evidence so long as the motives, intentions and reasoning behind the proceedings are not questioned, was followed by Justice Hungerford in *New South Wales Branch of the Australian Medical Association v Minister for Health and Community Services*. In this case the Minister for Health tendered a Public Accounts Committee report to support and corroborate his evidence. The Australian Medical Association sought to attack the report so as to weaken and rebut the Minister's case. Justice Hungerford declared:

*...the tender of the PAC Report would inevitably result in a direct and critical challenge to the material contained in it as finalised by the committee. That would represent a challenge to the functions of the committee and the way in which it has performed those functions. Such a process would strike...at the whole basis for Parliamentary privilege as it has evolved, and would result in the Public Accounts Committee report being impeached and questioned contrary to article 9 of the Bill of Rights.*⁴⁹

This view was also expressed by the Privy Council in *Prebble v Television NZ Ltd* where it was held:

⁴⁶ *Uren v John Fairfax & Sons Ltd* (1979) 2 NSWLR 287, p. 289.

⁴⁷ *Mundey v Askin* (1982) 2 NSWLR 369, p. 373. See also *Comalco Limited v ABC* (1982) 50 ACTR 1 at p. 5, where Blackburn CJ permitted the tender of *Hansard* into evidence.

⁴⁸ *Henning v Australian Consolidated Press Ltd* (1982) 2 NSWLR 374, p. 375.

⁴⁹ *New South Wales Branch of the Australian Medical Association v Minister for Health and Community Services* (1992) 26 NSWLR 114, p. 128.

*...that parties to litigation, by whomsoever commenced, 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...*⁵⁰

In this case a former New Zealand Minister brought proceedings in defamation against a television station for airing a program which contained allegations about the Minister's conduct whilst in office. In defence the television station relied on the statements made by the Minister in the House of Representatives (NZ) in order to prove that his statements to the House were inconsistent with his conduct whilst Minister.

The Privy Council said that, in particular circumstances, the interests of justice would be served by requiring parliamentary privilege to be waived by a House or through a stay of proceedings, if the exclusion of evidence by reason of parliamentary privilege made it impossible for there to be a fair trial between the parties. It has been argued by one commentator that the approach of the Privy Council would be inconsistent with the implied freedom of political communication under the Constitution as determined by the High Court of Australia.⁵¹ (See section 3.11.1 of Part Two for further information on the implied freedom of political communication).

The New South Wales Supreme Court, in two judgments in relation to Justice Murphy in 1985 and 1986, took a somewhat different approach. In the first judgment, Justice Cantor proposed that the rationale of article 9 was to prevent harm being done to Parliament and its proceedings and to ensure that the substance of what a member said or did in the House would not be questioned or impeached outside of the Parliament. Justice Cantor agreed with the view expressed by Chief Justice Blackburn in *Comalco Ltd v ABC* stating that:

*...there is no rule of evidence that evidence of the proceedings in a Parliament is not admissible except with the consent of Parliament. The privilege of Parliament is upheld by a Court when it refuses to allow the substance of what was said in Parliament to be the subject of any submission or inference.*⁵²

He also considered the importance of the evidence to the court proceedings should be weighed against the privilege of freedom of speech. He argued that parliamentary privilege would not be breached by admitting into evidence what was said in a House of Parliament in order to establish what was said and that the requirements of the court for a full and fair trial need to be weighed against any claims for such privilege.⁵³

In the second judgment, Justice Hunt held that article 9 was restricted to preventing Parliamentary proceedings being the actual cause of a court action, but did not prevent evidence of those proceedings being used to support an action. He considered that article 9 of the *Bill of Rights* meant that:

...no court proceedings (or proceedings of a similar nature) having legal consequences against a member of parliament (or a witness before a parliamentary committee) are permitted which

⁵⁰ *Prebble v Television NZ Ltd* (1994) 3 NZLR 1 at 10.

⁵¹ *Prebble v Television New Zealand Ltd* (1995) 1 AC 321, as taken from Michael Sexton SC, "Parliamentary Privilege, Defamation and Public Interest", in *Law Society Journal*, June 2002, pp. 62-4.

⁵² See the unreported judgment of Cantor J. in *R v Murphy* delivered 5 June 1985, p. 5.

⁵³ See *Oggers' Australian Senate Practice*, 11th Edition, edited by Harry Evans, 2004, p. 37.

*by those legal consequences have the effect of preventing that member (or committee witness) exercising his freedom of speech in parliament (or before a committee) or of punishing him for having done so.*⁵⁴

Furthermore, Justice Hunt held that such evidence could be used, either in providing primary evidence of an offence or a civil wrong, or in providing a basis for attacking the evidence of a witness or a defendant in the court proceedings.

Carney argues that the approach adopted in the *Murphy* cases depends on a distinction being drawn between using Parliamentary statements to base a legal action and using them merely to support such an action. He goes on to argue that although maintaining this distinction appears feasible, this option subjects the motives of members to judicial scrutiny.⁵⁵ The Senate expressed similar concerns in that the judgment of Justice Hunt would permit the calling of members of Parliament, as well as other witnesses, to account in court for things said or done in parliamentary proceedings. Members of Parliament and/or witnesses would then be subject to attack and damage for their participation in Parliamentary proceedings, provided that such proceedings were not the formal cause of action.⁵⁶ As such, the *Parliamentary Privileges Act 1987* was introduced for the express purpose of ensuring that a similar judgment would not be delivered again.

Section 16 of the *Parliamentary Privileges Act 1987* (Cmth) deals with parliamentary privilege in court proceedings. It provides:

16. (1) For the avoidance of doubt, it is hereby declared and enacted that the provisions of article 9 of the Bill of Rights, 1688 apply in relation to the Parliament of the Commonwealth and, so as applying, are to be taken to have, in addition to any other operation, the effect of the subsequent provisions of this section.

(2) For the purposes of the provisions of article 9 of the Bill of Rights, 1688 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 the 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.
- (3)** 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 purposes of:
- (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.

⁵⁴ *R v Murphy* (1986) 5 NSWLR 18 at 38.

⁵⁵ Carney, Gerard, *Members of Parliament: Law and Ethics*, 2000, p. 237.

⁵⁶ *Odgers' Australian Senate Practice*, 11th edition, edited by Harry Evans, 2004, pp. 34-8.

(4) A court or tribunal shall not:

- (a) require to be produced, or admit to evidence, a document that has been prepared for the purpose of submission, and submitted, to a House or a committee and has been directed by a House or committee to be treated as evidence taken *in camera*, or admit evidence relating to such a document; or
- (b) admit evidence concerning any oral evidence taken by a House or a committee *in camera* or require to be produced or admit into evidence a document recording or reporting any such oral evidence, unless a House or a committee has published or authorised the publication of, that document or a report of that oral evidence.

(5) In relation to proceedings in a court or tribunal so far as they relate to:

- (a) a question arising under section 57 of the Constitution; or
- (b) the interpretation of an Act;

neither this section nor the Bill of Rights, 1688 shall be taken to prevent or restrict the admission in evidence of a record of proceedings in Parliament published by or with the authority of a House or a committee or the making of statements, submissions or comments based on that record.

(6) In relation to a prosecution for an offence against this Act or an Act establishing a committee, neither this section nor the Bill of Rights, 1688 shall be taken to prevent or restrict the admission of evidence, the asking of questions, or the making of statements, submissions or comments, in relation to proceedings in Parliament to which the offence relates.

(7) Without prejudice to the effect that article 9 of the Bill of Rights, 1688 had, on its true construction, before the commencement of this Act, this section does not affect proceedings in a court or a tribunal that commenced before the commencement of the Act.

Whilst, the *Parliamentary Privileges Act 1987* endeavours to resolve the position at the Commonwealth level, it of course does not do so at the State level.⁵⁷

The Supreme Court of South Australia in *Wright and Advertiser Newspapers Ltd v Lewis*⁵⁸ in 1990 followed the decision of Justice Hunt in *R v Murphy*. In this case a member of the South Australian House of Assembly initiated an action in defamation against the newspaper and also the author of a letter written to the editor of the newspaper and subsequently published by it. The letter in question was highly critical of the member for statements made in the House concerning the author of the letter (Mr Wright). Mr Wright argued that a defence of qualified privilege applied as he was responding to an attack made upon him by Mr Lewis. Mr Wright also accused Mr Lewis of making unfounded accusations and abusing his parliamentary privilege. Mr Lewis sought to have these particulars of the defence struck out on the basis that they required an examination of the statements made by him in parliament in order to determine the truthfulness or otherwise of these statements and would involve questioning the motives or intentions of him in making those statements.

The South Australian Full Court unanimously rejected the argument of Mr Lewis. Justice Olsson observed:

The express purpose of the Bill of Rights was to erect a protective shield of defence for Members of Parliament, so that they may discharge their duties without constant fear of action being taken against them. It was not enacted for the purpose of forging a sword of oppression, whereby individual members of Parliament could, at their initiative, prosecute proceedings for

⁵⁷ Legislation defining "proceedings of Parliament" has also been enacted in the Queensland, the Australian Capital Territory and the Northern Territory.

⁵⁸ *Wright and Advertiser Newspapers Ltd v Lewis* (1990) 53 SASR 416

*civil relief against citizens in a manner which denies those citizens access to the normal defences made available to them by the law.*⁵⁹

Despite the decision in *Wright and Advertiser Newspapers Ltd v Lewis*, the narrow interpretation of Article 9 by Justice Hunt in *R v Murphy* has been rejected by subsequent cases. For example, in *R v Jackson* Justice Carruthers, following the English authorities, disagreed with Justice Hunt by rejecting the tender of *Hansard* by the prosecution in a criminal trial. Following an attempt by the prosecution to inquire into the motives of a member of Parliament for having said certain things in Parliament, Justice Carruthers noted:

*[T]he prosecution sought to do far more than merely prove what Jackson said in the House. It sought in support of its case to establish that Jackson told lies in the House in relation to matters which were material issues in the trial....The prosecution sought to prove...that the sole motive for such alleged lies was a realisation of guilt by Jackson and a fear of the truth. If I were to have allowed the tender of Hansard for these purposes against Jackson this would necessarily have involved an inquiry into his motives and intentions in that which he said in the House. Such an inquiry would, in my view, contravene art 9.*⁶⁰

Given that the New South Wales Parliament has not enacted legislation defining its privileges, the current position in New South Wales arguably rests between the narrow interpretation of Article 9 by Justice Hunt in *R v Murphy* and the broad interpretation by Justice Carruthers in *R v Jackson*.

The scope of Article 9 has been the subject of recent developments in the United Kingdom courts. In 1993 in *Pepper v Hart* the House of Lords held that it may look at ministerial statements made in Parliament during the passage of a bill through Parliament when interpreting ambiguous statutes. In this case, it was held that *Hansard* could be used in order to understand the meaning behind certain provisions in legislation. The House of Lords said that:

*...having regard to the purposive approach to construction of legislation the courts had adopted in order to give effect to the true intention of the legislature, the rule prohibiting courts from referring to parliamentary material as an aid to statutory construction should, subject to any question of parliamentary privilege, be relaxed so as to permit reference to parliamentary materials where (a) the legislation was ambiguous or obscure or the literal meaning led to an absurdity, (b) the material relied on consisted of a statement by a minister or other promoter of the Bill which led to the enactment of the legislation together if necessary with such other parliamentary material as was necessary to understand such statements and their effect and (c) the statements relied on were clear.*⁶¹

With regard to parliamentary privilege the House of Lords argued that *Hansard* could be referred to in order to draw the meaning of the legislation without affecting parliamentary privilege so long as its use did not question what occurred in the House:

...the use of parliamentary material as a guide to the construction of ambiguous legislation would not amount to a 'questioning' of the freedom of speech or parliamentary debate provided counsel and the judge refrained from impugning or criticising the minister's statements or his reasoning, since the purpose of the courts in referring to parliamentary material would be to give effect to, rather than thwart through ignorance, the intentions of Parliament and not to

⁵⁹ *Wright and Advertiser Newspapers Ltd v Lewis* (1990) 53 SASR 416 at 448.

⁶⁰ *R v Jackson* (1987) 8 NSWLR 116, at 120.

⁶¹ *Pepper v Hart* (1993) 1 All ER 42 at 64-5. As taken from J. P. Joseph Maingot, QC, *Parliamentary Privilege in Canada*, Second Edition, 1997, p. 136.

question the processes by which such legislation was enacted or to criticise anything said by anyone in Parliament in the course of enacting it.⁶²

Whilst the House of Lords held in *Pepper v Hart* that *Hansard* could be referred to as an aid in the interpretation of ambiguous statutes a subsequent case, *Wilson and Others v Secretary of State for Trade and Industry*, is authority for the proposition that *Hansard* cannot be used to discover the reason why Parliament thought it necessary to enact a certain piece of legislation arguing that “the policy and objects of a statute must be determined by interpreting its language which alone represents Parliament’s intention.”⁶³ The reasoning behind this was that to delve into why a piece of legislation was enacted could result in questioning the proceedings of Parliament.⁶⁴

3.4.1. Judicial review of the legislative process

With regard to the passage of legislation by the Parliament, courts will intervene only in exceptional circumstances. This stance taken by the courts was evident in *Eastgate v Rozzoli* where it was held that “the power to issue injunctions and to make declarations in relation to the deliberative stages of proceedings in Parliament will virtually always be refused out of the necessity to permit Parliament to conclude its deliberations.”⁶⁵ A similar stance was taken by the High Court in *Clayton v Heffron*⁶⁶ where the court suggested that interfering with the legislative process, apart from declaring the validity of Acts resulting from that process, is outside its jurisdiction. The majority noted that, whilst concession was made to enable the validity of the law to be questioned, the court would have to inquire “into the lawfulness and regularity of the course pursued within the Parliament itself in the process of legislation and before its completion. It is an inquiry which according to the traditional view courts do not undertake. The process of law-making is one thing: the power to make the law as it has emerged from the process is another. It is the latter which the court must always have jurisdiction to examine and pronounce upon.”⁶⁷

Courts will however, intrude upon the law-making procedure if it can be shown that there will be no avenue available to challenge the bill once the law-making process has been completed and the bill enacted into law⁶⁸ or when a bill fails to comply with a mandatory manner and form of procedure. For example, in 1929 the New South Wales Parliament passed an amendment to the *Constitution Act 1902* which provided that any changes to the powers of the Legislative Council, including its abolition or dissolution, must be approved by the electors prior to receiving assent. In 1930 a bill was passed by both Houses to repeal this new section and, in addition, a bill to abolish the Council had also passed the Parliament. Neither bill was submitted

⁶² *Pepper v Hart* (1993) 1 All ER 42 at 67-9. As taken from J. P. Joseph Maingot, QC, *Parliamentary Privilege in Canada*, Second Edition, 1997, p. 136.

⁶³ See comments of Lord Nicholls of Birkenhead in *Wilson and Others v Secretary of State for Trade and Industry* (2003) UKHL 40 at paragraphs 51-4.

⁶⁴ See comments by Lord Hope of Craighead in *Wilson and Others v Secretary of State for Trade and Industry* (2003) UKHL 40 at paragraph 117.

⁶⁵ *Eastgate v Rozzoli* (1990) 20 NSWLR 188 at 199. See also *Bignold v Dickson & Ors* (1991) 23 NSWLR 683 at 703-4 where Kirby P noted that courts restrained from permitting injunctions in relation to preventing laws from receiving enactment due to the fact that the Legislature “...is entitled to complete the law-making process without unnecessary or premature intervention by a court.”

⁶⁶ (1960) 105 CLR 279.

⁶⁷ *Ibid.*, at 234-5.

⁶⁸ See comments by Priestley and Handley JJA in *Eastgate v Rozzoli* (1990) 20 NSWLR 188 at 204.

to the electors for their approval as required by the 1929 amendment. As such two members of the Legislative Council, on behalf of themselves and all other members of the Council, sought to prevent any steps by the President of the Council or the Ministers of the Crown to present the bill to the Governor for assent prior to the will of the electors being ascertained.⁶⁹ In this case, Justice Ferguson considered that the legislation at issue was invalid, stating:

When the Legislature of 1929, by a Bill passed through both Houses and assented to by His Majesty, enacted that a Bill for the repeal of s. 7A should not be presented to the Governor for His Majesty's assent until it had been approved by the electors, it intended to alter, and did alter the Constitution in that respect. It did what the Colonial Laws Validity Act expressly authorised it to do. It altered the powers or the procedure of the Legislature. It did it in the manner and form required by the law for the time being in force in the State. From that moment that provision has been part of the Constitution, and is the law of New South Wales to-day.

It may be altered, the Legislature has full power to alter it by repealing sub-s. (6). But that repeal to be effective, can, in my opinion, be brought about only in the manner prescribed by the law in force to-day, that is, by a bill which, after passing through both Houses, is approved by the electors before being presented for the Royal assent.⁷⁰

Similarly, in *Attorney General (WA) v Marquet*⁷¹ the High Court ruled that legislation which had not been passed by the Parliament of Western Australia in accordance with statutory provisions was invalid and could not receive assent. In this case, the Clerk of the Parliaments had withheld a bill in relation to the electoral laws in Western Australia as the bill had not been passed in accordance with statutory provisions which require such legislation to be passed by both Houses by an absolute majority of members.

Once it has been enacted courts have declared legislation invalid for non-compliance with House procedures. In *Victoria v The Commonwealth (Petroleum and Minerals Authority Case)*,⁷² the High Court ruled that an Act was invalid as it had not passed through the Commonwealth Parliament in accordance with the rules and procedures.⁷³

Given that there are times when parliamentary proceedings will be tendered as evidence in court proceedings, it is important to understand that the fact that a court of law is determining a matter which may have already been determined by the House does not undermine the House's authority so long as the matter is not related to the procedures of the House themselves, which is solely a matter for the House itself. In *Hamilton v Al Fayed* it was held that the authority of Parliament is not undermined by a court of law which covers the same ground that has been investigated by a parliamentary inquiry. Lord Woolf MR stated:

If a Parliamentary committee – or either House itself – reaches a distinct conclusion as to the merits of a question which does not itself touch Parliament's procedures, the courts in a later claim based on a common law cause of action arising out of the same facts may arrive at a

⁶⁹ *Trethowan and Anor. v Peden and Ors.* (1930) 31 SR (NSW) 183.

⁷⁰ *Trethowan and Anor. v Peden and Ors.* (1930) 31 SR (NSW) 183 at 211.

⁷¹ (2003) HCA 67.

⁷² *Victoria v The Commonwealth (PMA Case)* (1975) 134 CLR 81. See also *Cormack v Cope* (1974) 131 CLR 432.

⁷³ The High Court ruled that the passage of the *Petroleum and Minerals Authority Bill* through Parliament had not satisfied the provisions of section 57 of the Australian Constitution and accordingly was not a bill that could be voted on at the joint sitting held in 1974 and was not a valid law passed by the Parliament. See *House of Representatives Practice*, 5th edition, 2005, pp. 475-6 for further information.

result wholly at variance with the judgment of Parliament....It is not suggested that these circumstances undermine Parliament's authority.⁷⁴

3.5 Judicial review of parliamentary privilege

As has been previously noted, two seminal cases in the United Kingdom⁷⁵ during the 19th century set the standards regarding the judicial review of parliamentary privilege. They considered that the courts have jurisdiction to decide whether a particular parliamentary privilege exists at common law and its scope but that they cannot question or review the exercise of a privilege if it occurred within its scope.⁷⁶

The High Court in *R v Richards; Ex parte Fitzpatrick and Browne* in 1955 applied these principles in Australia. In this case the power of the Houses of the Federal Parliament to commit for contempt was considered. It was put that the power to punish for contempt was a judicial power and therefore could not be exercised by the Houses of the Federal Parliament. Justice Dixon, whilst noting that the power to punish for contempts was judicial in nature, argued that section 49 of the Australian Constitution was clear and unambiguous conferring all powers, privileges and immunities of the House of Commons both judicial and non-judicial on both Houses of the Federal Parliament and therefore such power could be exercised by the Houses of the Federal Parliament.⁷⁷ Justice Dixon also referred to the position established by the courts in the United Kingdom in relation to whether privileges adopted by the House could be questioned by the courts given the fact that they are considered to be a "proceeding in Parliament". He expressed the position thus:

*...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. The judgment of the House is expressed by its resolution and by the warrant of the Speaker. If the warrant specifies the ground of the commitment the court may, it would seem, determine whether it is sufficient in law as a ground to amount to a breach of privilege, but if the warrant is upon its face consistent with a breach of an acknowledged privilege it is conclusive and it is no objection that the breach of privilege is stated in general terms.*⁷⁸

Generally, parliamentary privilege becomes subject to judicial review on occasion such as when a House has made an order in relation to one of its members such as an order for the production of documents or an order suspending a member from the House. As the cases above show, a court may decide whether the House possesses the power to make that order by virtue of the fact that courts may determine whether a certain privilege exists and provided such orders fall within the privileges or powers of the House, a court may not inquire further.⁷⁹

Carney notes that the more specifically a House's privileges and powers are defined, the more intrusive judicial review becomes. For example, in *Egan v Willis*, where a member of the Legislative Council was suspended from the service of the House for failing to comply with an order for the production of papers, a number of different approaches were taken by the High Court depending on how the powers of the House were described. The majority (Gaudron, Gummow and Hayne) argued that

⁷⁴ *Hamilton v Al Fayed*, UK Court of Appeal, March 1999, paragraph 42.

⁷⁵ *Stockdale v Hansard* (1839) 112 ER 1118, and the *Case of the Sheriff of Middlesex* (1840) 113 ER 419.

⁷⁶ See Carney, Gerard, *Members of Parliament: Law and Ethics*, 2000, p. 170.

⁷⁷ *R v Richards; Ex parte Fitzpatrick and Browne* (1955) 92 CLR 157 at 162.

⁷⁸ *Ibid.*

⁷⁹ See Carney, Gerard, *Members of Parliament: Law and Ethics*, 2000, pp. 171-2.

the House had the power to order the production of Executive documents in a member's possession and that the member was liable to suspension from the House for non-compliance with any such order. However, Justice McHugh, dissenting, confined the scope of judicial review to the issue of whether the Legislative Council had the power to suspend a member for obstructing the business of the House. Justice McHugh was of the view that, given it was clear that the House had the power to suspend a member from its service, the resolution to suspend Mr Egan from the Legislative Council was beyond further judicial review.⁸⁰ He argued that:

*[I]t was for 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. Upon those questions, the resolution of the House was conclusive. There was no need, therefore, for the Court of Appeal to determine whether the functions of the Council were such that reasonable necessity entitled it to demand the production of papers. Indeed, I have real difficulty in seeing how the Court of Appeal had jurisdiction to determine the issue, an issue which after all concerns only the relationship between the House and one of its members and the internal administration of the business of the House.*⁸¹

Justice Kirby, in a separate judgment, arrived at the novel conclusion that:

*Notions of unreviewable parliamentary privilege and unaccountable determination of the boundaries of that privilege which may have been apt for the sovereign British Parliament must, in the Australian context, be adapted to the entitlement to constitutional review.*⁸²

One commentator has argued that this view:

*[C]ontended that overseas and colonial decisions alike must be adapted to the 'modern Australian context'. This was based on the federal character of the Australian polity and introduced the consideration that the British formulation of the relationship between the Parliament and the courts must be adapted to local conditions where there is an established 'entitlement to constitutional review'. The crux of this contention would seem to be that, just as such notions as parliamentary supremacy cannot survive in an unmodified state in a federation established under a written constitution, nor can the law of unreviewable parliamentary privilege.*⁸³

Essentially if this kind of approach is taken, it means that the balance of powers between the Parliament and the courts is weighted in favour of judicial review and that any perceived contest between parliamentary supremacy and the principle of the rule of law must be decided by judicial review.⁸⁴

Another matter that needs consideration is whether judicial review is dependent on the extent to which the House cites grounds or reasons for its action. The principle has developed that courts can determine to what extent a House of Parliament has the power to issue a particular order if the House cites the grounds on which it was based. A number of judicial decisions in the early 19th century highlight the reasoning behind this principle.

⁸⁰ *Ibid.*, p. 174.

⁸¹ *Willis v Egan* (1998) 73 ALJR 75 at 93.

⁸² *Ibid.*, at 109.

⁸³ Griffith, Gareth, *Egan v Willis & Cahill: The High Court Decision*, NSW Parliamentary Library Research Service, Briefing Paper No 1/99, pp. 7-8.

⁸⁴ *Ibid.*, p. 8.

In 1810 a member of the House of Commons was adjudged guilty of contempt for the publication of a “libellous and scandalous paper”. Speaker Abbott issued a warrant and in its execution the member’s house was entered by force. The member then initiated proceedings against the Speaker for trespass.⁸⁵ In the ensuing court case, *Burdett v Abbott*, it was held by Lord Ellenborough that if there was any reason to believe that the House of Commons had acted in excess of its jurisdiction in committing a person for contempt then the courts should inquire into the matter. He noted that if the House of Commons:

*...did not profess to commit for contempt, but for some matter appearing on the return, which could by no reasonable intendment be considered as a contempt of the Court [meaning the House of Commons] committing, but a ground of commitment palpably and evidently arbitrary, unjust, and contrary to every principle of positive law, or national justice; I say, that in the case of such a commitment...we must look at it and act upon it as justice may require from whatever Court it may profess to have proceeded.*⁸⁶

This view was expressed again in 1840 by Lord Denman in the *Case of the Sheriff of Middlesex* where he argued “if the particular facts are stated in the warrant and do not bear out the committal, the court should inquire into the warrant: if the warrant states a contempt in general terms, the court is bound by it.”⁸⁷

Given this principle, Professor Campbell argues that:

*[i]t must surely follow that if a member expelled from Parliament sues for trespass for any action taken to exclude him from the House, and if the resolution for his expulsion states the cause of expulsion, the court may determine whether or not the House has power to expel for that cause. On the other hand, if the court finds that the power to expel for that cause exists, it would probably decline to determine whether or not in the particular instance the member had given grounds for his expulsion.*⁸⁸

Whilst the New South Wales Legislative Assembly does not possess a general power to punish contempts, it can take action against its members of a non-punitive nature. If the House passes a resolution to take an action against a member, the court may consider whether the House has the power to take such action in the situation at hand.

It should be noted that any actions of a House of Parliament which fall outside its “proceedings” remain liable to judicial review. Carney notes that:

*While the preparation of draft bills or other documentation for tabling in a House may fall within that exception, the same cannot be said of the sale of liquor in the members’ refreshment bar, nor even the assault of a member by another member either inside or outside the chamber.*⁸⁹

Of course, all members of Parliament are liable for any criminal offence committed whether within the parliamentary precincts or otherwise.

⁸⁵ See *Ersine May’s Treatise on the Law, Privileges, Proceedings and Usage of Parliament*, 23rd edition, edited by Sir W R McKay KCB, p. 184.

⁸⁶ *Burdett v Abbott* (1811) 14 East 1 at 150, as taken from Campbell, Enid, *Parliamentary Privilege in Australia*, 1966, pp. 103-4. See also Carney, Gerard, *Members of Parliament: law and ethics*, 2000, pp. 175-6.

⁸⁷ *Sheriff of Middlesex* (1840) 113 ER 424-26 as taken from *Ersine May’s Treatise on the Law, Privileges, Proceedings and Usage of Parliament*, 22nd edition, edited by Sir Donald Limon KCB and W R McKay CB, p. 136.

⁸⁸ Campbell, Enid, *Parliamentary Privilege in Australia*, 1966, pp. 104.

⁸⁹ Carney, Gerard, *Members of Parliament: Law and Ethics*, 2000, p. 176.

3.6 Use of proceedings in “any other place out of Parliament”

Article 9 of the *Bill of Rights* precludes the questioning of parliamentary proceedings by courts or other bodies. As such, the immunity extends to any tribunal, including Royal Commissions, with the power to summon witnesses.⁹⁰ However, it has been argued that Article 9 should not be confined to just those persons or bodies having the power to examine witnesses on oath or it will enable executive interrogation by investigators such as police.⁹¹ On a related note advice given by a former British Attorney General in 1998 to the Chair of the Joint Committee on Parliamentary Privilege of the UK Parliament suggested that a non-statutory inquiry (i.e. one that is not established under statute such as the *Tribunals of Inquiry (Evidence) Act 1921* (UK) or the *Royal Commissions Act 1923* (NSW)) could include parliamentary proceedings in its investigations.⁹²

The actual meaning of what is considered to be a “place out of Parliament” has never been subject to a judicial interpretation despite the fact that most of Article 9 has been considered by courts throughout the past two centuries.⁹³

Allegations made in Parliament may be subject to official investigations. However, any such investigation is unable to refer to the statements made in the House as Article 9 prevents particular statements made in Parliament from being examined, including any inquiry as to their undisclosed sources of information. For example, allegations were made in the Senate regarding Crown leaseholds and a Royal Commission was established to inquire into the allegations. The Royal Commissioner observed that whilst an inquiry could be set up to inquire into any allegations made in the Parliament, members could not be compelled to answer any questions about it. He stated:

*Whatever a member's constituents may do or say to him for what he has said in Parliament it seems to me that he may not be compulsorily examined as to it by the Executive Government or by the Courts.*⁹⁴

In New South Wales concerns have arisen about parliamentary proceedings being questioned by the agencies conducting investigations regarding members. For instance, the Independent Commission Against Corruption (ICAC) may investigate members of Parliament for any alleged involvement in corrupt activities. Such investigative powers are conferred under legislation and include the power to obtain information, the power to obtain documents and the power to enter public premises.⁹⁵ The legislation provides the Commissioner of the ICAC or an authorised officer with the discretion as to whether they should exercise the powers conferred under the Act in the face of claims of privilege. The Act also ensures that where documents or statements made by persons are deemed to be privileged the ICAC can continue to conduct its investigations.⁹⁶ With regard to parliamentary privilege,

⁹⁰ The *Parliamentary Privileges Act 1987* (Cmth) applies the prohibition expressed in Article 9 to any court or tribunal (s.16(3)) and tribunal is defined as any person or body having power to examine witnesses on oath (s.3).

⁹¹ See Carney, Gerard, *Members of Parliament: Law and Ethics*, 2000, pp. 225-7.

⁹² Joint Committee on Parliamentary Privilege (UK Parliament), *Parliamentary Privilege*, Volume 3, p. 178, April 1999.

⁹³ See comments made by the Clerk of the House of Commons (UK) in his newsletter dated 16 December 2003, p. 2.

⁹⁴ As taken from Carney, Gerard, *Members of Parliament: Law and Ethics*, 2000, p. 226.

⁹⁵ See sections 21, 22 and 23 of the *Independent Commission Against Corruption Act 1988*.

⁹⁶ See sections 24 and 25 of the *Independent Commission Against Corruption Act 1988*.

section 122 of the Act confirms that the rights and privileges of Parliament are not affected by the legislation. It states:

Nothing in this 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.

The Crown Solicitor has argued that two matters are implied by section 122. First, that the Independent Commission Against Corruption was seen to be a “place out of Parliament” for purposes of Article 9, and second, that the prohibition referred to in Article 9 does not come into operation for the benefit of any individual member of a House of Parliament, but rather for the benefit of that House as a whole.⁹⁷ One consequence of the privilege being of the House as a whole rather than attached to individual members is that it is appropriate for the Speaker to vindicate that privilege so far as it concerns the Legislative Assembly, the Speaker being the representative of the House.

By virtue of the application of section 122 of the *Independent Commission Against Corruption Act 1988* and Article 9 of the *Bill of Rights* in New South Wales, parliamentary privilege could be claimed for those documents and statements in the possession of the ICAC which are integral to transacting business in the House or the “proceedings in Parliament.” See section 5.1.2 of Part Two for further information on the ICAC and the privilege attached to members’ documents.

A number of incidents are pertinent to the issue of “place out of Parliament”, particularly with regard to investigators such as police. In the United Kingdom in 1938 Mr Sandys, a member of the House of Commons, wrote a letter to the Secretary of State for War advising that he had received information relating to British defence preparations. Mr Sandys was questioned by the Attorney-General who threatened him with prosecution unless he revealed his sources of information. He was also summoned to appear before a military court of inquiry. Such actions were found to be a clear breach of privilege by the Select Committee on the *Official Secrets Act*.⁹⁸

In Australia, a similar incident arose in 1948 when Mr Fadden, a member of the House of Representatives and Leader of the Country Party, was interrogated by security officers in his Parliament House office as to his informants for a statement he had made in Parliament. Mr Fadden had quoted to the House what were supposedly confidential records of statements made by the Labor Prime Minister to the British Cabinet and to the executive committee of the Council for Scientific and Industrial Research. Following this disclosure, Commonwealth officers were directed to investigate the apparent leakage. In the course of their inquiries security officers called on Mr Fadden whilst in his office at Parliament House where he refused to answer questions unless in the presence of his secretary and representatives of the press. No questions were asked. Later Mr Fadden moved in the House that it was a breach of privilege for him to be “interrogated or sought to be interrogated by security police at the instigation of the Prime Minister and the Government in the precincts of Parliament and in his official room in respect of matters occurring in and arising out

⁹⁷ Crown Solicitor's Advice re: Outline of submissions on behalf of the Speaker of the Legislative Assembly concerning the Assembly's privileges, dated 2 July 1996.

⁹⁸ Carney, Gerard, *Members of Parliament: Law and Ethics*, 2000, pp. 226-7.

of the discharge of his public duties in the Federal Parliament". The motion was defeated along party lines.⁹⁹

An incident in the Senate in 2002 also touched on this issue when it was reported that the Government had requested the Communications Authority to inquire into whether Telstra had misled a Senate committee. The issue of whether the "proceedings of Parliament" could be questioned or impugned in any place outside of Parliament as prohibited by the *Bill of Rights* was considered. The Senate concluded that the issue of parliamentary privilege did not come into play as the Communications Authority was to inquire into whether particular claims made by witnesses appearing before a Senate committee had any foundation given that such claims were in contradiction to those previously given by Telstra to the committee. Accordingly, had the inquiry found that the claims were true the issue of whether Telstra had misled a Senate committee would have become a matter for the Senate.¹⁰⁰ This incident highlights the fact that investigative agencies such as police or crime agencies are able to cover the same ground as parliamentary inquiries so long as they do not question the "proceedings of Parliament".

It should be noted that the Senate Committee of Privileges has considered the issue of whether any place "out of Parliament" includes a committee inquiry being conducted by another Parliament. The committee had received a reference from the Senate to inquire into the unauthorised disclosure by members of the South Australian Parliament of a submission to the Joint Committee on the National Crime Authority. The committee noted that it could not compel members of another legislature to appear before it to answer questions and concluded that:

*It is clear that the disclosure of the document in the South Australian Parliament, protected as it was by parliamentary privilege, cannot be dealt with as either a contempt of the Senate or a criminal offence.*¹⁰¹

Accordingly, it is arguable that any disclosure in a House of Parliament of a document submitted in confidence to a committee of another Parliament cannot be punished.

3.7 The House's control over what a member says under parliamentary privilege

If a member abuses the privilege of free speech the only remedy is an action by the House. As Carney notes the absolute privilege afforded to statements made by members in the Parliament implies that "members remain accountable to their own House and hence to the electorate for what they say and do within the protection of this privilege."¹⁰² A recent example of a member being called to account in New South Wales occurred in 1997 when the Hon. Franca Arena MLC made certain allegations in the Legislative Council which involved imputations against the Premier, the Leader of the Opposition and others. Shortly after the making of these allegations the Legislative Council Standing Committee on Parliamentary Privilege

⁹⁹ See Campbell, Enid, *Parliamentary Privilege in Australia*, 1966, p. 43.

¹⁰⁰ Australian Senate, *Procedural Information Bulletin*, No. 165 for the sitting period 11-19 November 2002, 21 November 2002.

¹⁰¹ Senate Committee of Privileges, *Possible unauthorised disclosure of a submission to the Joint Committee on the National Crime Authority*, 54th Report, June 1995, p. 15.

¹⁰² Carney, Gerard, *Members of Parliament: Law and Ethics*, 2000, p. 207.

and Ethics received a reference to investigate matters relating to parliamentary freedom of speech and allegations made by the member.

The committee concluded that the conduct of the member, in the making of allegations in her speech, was conduct which fell below the standard the House is entitled to expect of a member, and brought the House into disrepute. The committee recommended that Mrs Arena be called on to withdraw the allegations made in her speech involving imputations and that she submit a written apology to the House.¹⁰³ On 1 July 1998 the Legislative Council passed a motion calling on Mrs Arena to provide a written apology to the House within 5 sitting days. The motion also provided that in the event she did not, she was to be suspended from the service of the House until she did so. The motion also specified how the apology was to be termed. It stated:

That the apology be in the following terms:

I hereby withdraw the allegations made in my speech to the House on 17 September 1997, which involved imputations against Mr Carr, Mr Collins, and Mr Justice Wood, of a criminal conspiracy to ensure that people in high places would not be named in the paedophile segment of the Report of the Royal Commission into the Police Service.

*I also hereby apologise to the House and to those people for making those imputations.*¹⁰⁴

On 16 September 1998 Mrs Arena made a statement of regret to the House which was not in the terms specified by the motion passed by the House. She argued that she could not make apologies for imputations of criminal conspiracy as she had never made such imputations and that such an apology would be misleading the House. Further, she argued that there is doubt over whether the House has the implied power to suspend a member from the service of the House until the tendering of an apology in terms specified by the House.¹⁰⁵ This was accepted by the House.

On 12 March 2002, Senator Heffernan, in a speech in the Senate during the Address in Reply debate, spoke of a High Court judge, and referred to the judge's alleged sexual activities and inappropriate use of Commonwealth cars. The Senator identified the judge by name in the closing remarks of his speech.¹⁰⁶ The following day, the Deputy President of the Senate made a statement concerning Senator Heffernan's remarks in which she said that she considered his remarks constituted references to a judicial officer, contrary to the Senate standing orders.¹⁰⁷ A motion was subsequently agreed to calling on the Senator to apologise to the Senate, the judge and the Chief Justice of the High Court of Australia for breaching the standing orders.¹⁰⁸ The President of the Senate reported a statement from the judge the following week which noted the wrong done to Parliament, the High Court and the people and that he accepted Senator Heffernan's apology.¹⁰⁹

¹⁰³ Legislative Council Standing Committee on Parliamentary Privilege and Ethics, *Report on Inquiry into the Conduct of the Honourable Franca Arena MLC*, June 1998, p. 86.

¹⁰⁴ Legislative Council of New South Wales, *Minutes of Proceedings*, 1 July 1998, entry no. 18.

¹⁰⁵ Legislative Council of New South Wales, *Parliamentary Debates*, 16 September 1998.

¹⁰⁶ Commonwealth of Australia, *Parliamentary Debates – Senate*, 12 March 2002, pp. 573-7.

¹⁰⁷ Commonwealth of Australia, *Parliamentary Debates – Senate*, 13 March 2002, pp. 664-5.

¹⁰⁸ Commonwealth of Australia, *Parliamentary Debates – Senate*, 14 March 2002, pp. 738-43.

¹⁰⁹ Commonwealth of Australia, *Parliamentary Debates – Senate*, 19 March 2002, pp. 967-8.

A similar incident occurred in the Legislative Assembly in 1994 when a member made allegations regarding people outside of Parliament that were unsubstantiated. In a ministerial statement made the following day both the Premier and Leader of the Opposition indicated that members must not abuse their freedom of speech and should only make damning allegations against people if such claims are able to be substantiated.¹¹⁰

The standing rules and orders also ensure that members exercise their freedom of speech in the House responsibly by restricting to some extent what members are able to say and the way they say it. In the Legislative Assembly members shall not:

- use offensive words against the Sovereign or the Governor, either House or its members, a member of the judiciary or a statute unless moving for its repeal (S.O. 72); or
- make imputations of improper motives and personal reflections on members of either House unless by substantive motion (S.O. 73).

Another general “rule” of debate, known as the “sub judice” doctrine, is that matters under adjudication by the courts should not be brought forward in debate in such a way as to prejudice court proceedings. However, the public interest may be held to prevail over this doctrine. Because the sub judice convention in New South Wales is not contained in a statute, standing orders or rule, the practice and precedents of the House, act as a guide to how the convention will be applied. (See section 11.12 of Part One for further information on the sub judice convention).

The final decision on whether an issue can be referred to in debate is at the discretion of the Chair, which is subject to the will of the House exercised through a motion of dissent. One example of how the matter may be approached occurred in 1997 when the Speaker read a letter from the then Attorney General advising that civil proceedings had been commenced on a subject and that to debate that matter would infringe the sub judice rule. The Speaker advised that he was obliged to read the advice but that it was for the House to make its own decisions and no ruling of sub judice was made.¹¹¹

Generally, the Chair, when deciding on whether a matter is “sub judice” takes into consideration the fact that the Parliament has the right to debate any matter and therefore restricting such debate must be done voluntarily. Furthermore, the Chair must be realistic and not automatically exclude discussion in the House on matters of public interest which have already been freely aired in the media, although a tougher line tends to be taken in relation to criminal matters before the courts. Some examples of sub judice decisions made by former Speaker Murray include:

- allowing a debate to continue because the subject matter was before a judge instead of a jury and therefore the likelihood of prejudice was little if any;¹¹² and
- a member was directed not to continue with a certain line of debate relating to a murder case.¹¹³

¹¹⁰ PD 02/12/1994, p. 6232.

¹¹¹ PD 16/04/1997, p. 7631.

¹¹² PD 16/05/1996, p. 1153.

¹¹³ PD 19/11/1997, p. 2139.

Whilst members' freedom of speech is guaranteed in the Chamber and in a committee hearing, if a member repeats a speech, which is defamatory in content, outside the House or committee, that member is liable for its content. In New South Wales some protection is afforded to reports of parliamentary proceedings under the *Defamation Act 2005*, but absolute protection applies only in restricted circumstances. For example, absolute protection does not attach to the publication of a speech otherwise than as part of the whole debate or proceedings of the House. (See section 3.10 of Part Two for more detailed consideration of the privilege attached to *Hansard* and the repetition of statements made in the House.)

As previously noted, a breach of privilege does not occur when courts admit *Hansard* into evidence for the purpose of proving facts but a breach may occur when an outside inquiry is established to inquire into the truth of allegations made by a member in the House. In cases where the truth of what a member has said in the House is questioned, parliamentary privilege may be waived by legislation, such as in the Franca Arena case. In this instance, the *Special Commissions of Inquiry Amendment Act 1997* was passed by the Parliament to enable an inquiry to be held into matters relating to parliamentary proceedings, but only when a House resolves by a majority of two-thirds to permit such inquiry. The legislation also provided that in passing a resolution to authorise the conduct of such an inquiry a House may also waive privilege to the extent specified. This did not prevent members of Parliament from being able to claim parliamentary privilege before a special commission. The bill expired six months after its enactment and new legislation waiving parliamentary privilege would need to be introduced should a House wish to establish an inquiry into certain proceedings in parliament.

3.8 Communications between members and Ministers

The reference to "proceedings in Parliament" in Article 9 necessarily implies that only those communications between members and Ministers which are closely related to parliamentary business are protected. Such communications include discussions relating to draft oral questions, motions etc. and any discussion on draft speeches to be made in the House. However, discussions between members in party or caucus meetings are unlikely to be protected.¹¹⁴

With regard to correspondence between members and Ministers on constituency matters, it has been argued that absolute privilege does not attach to such communications. In the United Kingdom, the House of Commons refused by a narrow vote of 218 to 213 to accept the report of its Privileges Committee that a letter written by a member to a Minister, which was critical of the London Electricity Board, was protected by parliamentary privilege.¹¹⁵

Carney notes that in 1984 the Commonwealth Joint Committee on Parliamentary Privilege suggested that absolute privilege should attach to any communication between a member and Minister given "the efficiency, discreteness and utility of such a communication when parliament is not sitting."¹¹⁶ However, no recommendation to this effect was eventually made by the Committee.

¹¹⁴ Carney, Gerard, *Members of Parliament: law and ethics*, 2000, p. 211.

¹¹⁵ *Ibid*, p. 212.

¹¹⁶ *Ibid*.

The Joint Select Committee upon Parliamentary Privilege in New South Wales also attempted to resolve this issue by recommending that absolute privilege should attach to communications between a member and a Minister and vice versa. The committee concluded that all other distributional circulation of such correspondence should be covered only by qualified privilege.¹¹⁷ These recommendations have not been adopted. It should be noted that in contrast, the Joint Committee on Parliamentary Privilege of the UK Parliament has recommended that communications between members and Ministers should not attract absolute privilege. In coming to this conclusion, the committee noted that extending absolute privilege to cover correspondence between members and Ministers would raise problems of principle and that common law provisions relating to qualified privilege in practice appear to enable members to carry out their functions effectively.¹¹⁸

With respect to the defence of qualified privilege, in cases where members communicate with Ministers on constituency matters, and the communication is for the purpose of enabling a member to carry out the member's duties, a defence of "qualified privilege" can be made so long as the communication was made in the absence of malice.¹¹⁹

It should also be noted that communications between members and Ministers within the parliamentary precincts are no different to other communications in that they are not privileged unless they are related to the "proceedings of the House". Privilege does not extend to activities merely because they occur within the precincts of the Parliament. This has been clearly established with the "Zircon affair" in the United Kingdom where a number of members claimed that their privilege of freedom of speech had been breached due to an order issued by the Speaker which prohibited the screening of a film because its screening was considered to be a threat to national security. The House of Commons Privileges Committee found that no breach of privilege had occurred. It also noted that the privilege of freedom of speech only applies to debates and proceedings in Parliament and not to activities occurring in the precincts.¹²⁰

3.9 Communications between constituents and members

It is argued that the parliamentary privilege afforded by Article 9 of the *Bill of Rights* should not extend to communications by correspondence with constituents and others as they are not "proceedings in Parliament". Carney notes that:

*[w]hile it may not seem unreasonable to regard the provision of information for the purpose of a parliamentary speech or debate to be incidental to the Parliamentary functions of a member, the wide ranging circumstances in which such information may be provided preclude absolute immunity attaching to such communications as a general rule. Distinctions might otherwise have to be drawn between information supplied to a member voluntarily or at the member's request, information which is relevant or irrelevant, and information which is actually used or not by the member.*¹²¹

¹¹⁷ Report of the Joint Select Committee upon Parliamentary Privilege entitled *Parliamentary Privilege in New South Wales*, 1985, pp. 109-10.

¹¹⁸ Joint Committee on Parliamentary Privilege UK Parliament, Volume 1, dated April 1999, paragraphs 107-9.

¹¹⁹ See the Joint Select Committee upon Parliamentary Privilege, *Parliamentary Privilege in New South Wales*, 1985 pp. 107-8.

¹²⁰ See Carney, Gerard, *Members of Parliament: Law and Ethics*, 2000, p. 213.

¹²¹ *Ibid*, p. 214.

Such communications may be covered by qualified privilege. Over recent years members have argued that they do not have to produce documents, records or correspondence subpoenaed by a court if those documents, records or correspondence in their possession were provided to them in their capacity as a member of Parliament. In support of this claim members have noted that:

- the New South Wales Joint Select Committee upon Parliamentary Privilege endorsed the conclusion of the House of Commons Select Committee on Parliamentary Privilege that letters from members to constituents enjoy qualified privilege; and
- there has been judicial recognition of qualified privilege in relation to a letter from a member of parliament on behalf of a constituent.¹²² This is despite the fact that nothing has been expressly enacted to define the extent of parliamentary privilege.

Whilst qualified privilege has been recognised for letters written by members in their capacity as a member of Parliament the status of correspondence from constituents to members is unclear. In the United Kingdom the House of Commons Select Committee on Parliamentary Privilege (1967) noted that letters from constituents to members or Ministers which are directly related to their parliamentary functions are afforded qualified privilege. The committee reported that:

*A wide field of communications connected with a Member's parliamentary functions, including letters written by electors to Members or Ministers about matters falling within the parliamentary functions of a member or the ministerial functions of a Minister already enjoy qualified privilege.*¹²³

However, in contrast, the New South Wales Joint Select Committee did not agree. It concluded that the correspondence between a member and a constituent attracted qualified privilege but that correspondence from a constituent to a member did not attract privilege. The committee also commented that problems associated with privilege can only be overcome by express enactment.¹²⁴

The extent of these problems is best illustrated by a number of examples. For instance, in 1987 a member of the Legislative Assembly was served with a subpoena on behalf of a firm of solicitors to produce documents, notes and records of discussions between himself, members of his staff and certain constituents, relating to a dispute between a firm of solicitors and the constituents. The member's response was to telephone the solicitors indicating that due to parliamentary privilege he was unable to hand over the file. The member also wrote to the presiding magistrate indicating that he believed that providing the documents would be a breach of privilege of the New South Wales Parliament.

In support of his argument, the member noted that the New South Wales Joint Select Committee upon Parliamentary Privilege had concluded that letters from members to constituents enjoy qualified privilege. On this point the member stated that:

...it is important to remember...that communications between a party and their solicitor or between the solicitor or counsel, whether oral or in writing, made during and with reference to judicial proceedings or in anticipation of such proceedings are confidential communications and

¹²² See comments made by Mr John Fahey MP, PD 03/03/1987, pp. 8952-4 and 8973-4 where it was noted that the courts in the UK have recognised qualified privilege in relation to a letter of a member of parliament on behalf of a constituent to the Law Society and to the Lord Chancellor complaining of a solicitor's conduct.

¹²³ As taken from paper prepared by G. H. Cooksley, Clerk of the Legislative Assembly 1984 to 1990, dated April 1987, p. 14.

¹²⁴ Joint Select Committee upon Parliamentary Privilege, *Parliamentary Privilege in New South Wales*, 1985, pp. 105-10.

*thus privileged. The privilege extends to documents which, without contemplation of litigation, come into existence in order to enable a person to obtain legal advice. The Courts¹²⁵ have recognised qualified privilege in relation to a letter of a member of Parliament on behalf of a constituent to the Law Society and to the Lord Chancellor complaining of a solicitor's conduct.*¹²⁶

The member went on to argue that the privileges of the New South Wales Legislative Assembly include the right of confidentiality of communication between member and constituent. The Solicitor General when approached for advice¹²⁷ indicated that no such privilege exists in New South Wales, as the mere fact that a constituent communicates confidentially with his or her local member does not make that communication a "proceeding in Parliament." The Solicitor General further argued that even if information were intended for use in Parliament that would not be sufficient to warrant privilege.

The Solicitor General conceded that "the communication is privileged for the law of defamation, thereby protecting the parties in the absence of malice, but it is not subject to parliamentary privilege...this means that notes of a communication between a constituent and a member can generally be subpoenaed." The Solicitor General did however note that "it might be otherwise if that communication related to a specific matter under consideration in Parliament."

The Solicitor General also advised that "public interest immunity" or "Crown Privilege" could apply to particular types of communications in exceptional cases. The argument for a parliamentary privilege based on public interest immunity is based on Article 9 of the *Bill of Rights* and rests on the assumption that "there is a high public interest in Members of Parliament having a full and free right to raise in Parliament any matters of public concern." The point here is that such a right can only be effective if there is a free flow of information to members. Constituents should not have to fear legal action against them for making comments in good faith about local issues, including comments on individuals, to their local member of Parliament.

In response to the member's claim the Speaker stated that "while he accepted the utmost need for confidentiality between members and constituent, he was not sure that privilege applied to representations made by members on behalf of constituents". However, the Speaker allowed the member to move a motion at the conclusion of formal business:

*That this House reasserts its privileges of representation of constituents by members, including the right of confidentiality of communication between member and constituent, as propounded in the Report of the Select Committee on Parliamentary Privilege of the House of Commons.*¹²⁸

The motion was negatived and the House did not therefore view the issue of the subpoena as a breach of privilege.¹²⁹

¹²⁵ It was held in *Beach and anor. v Freeson*, (1972) 2 All ER 854, that qualified privilege is attached to communications between a member of Parliament and a person or body that has an interest in receiving that information so long as the communication is not actuated by malice. See *May*, p. 153.

¹²⁶ PD 03/03/1987, pp. 8952-4 and 8973-4.

¹²⁷ Advice received from the Solicitor General re: Matter of parliamentary privilege raised by Mr Fahey MP, dated 25 March 1987.

¹²⁸ VP 03/03/1987, p. 583-4.

¹²⁹ VP 03/03/1987, p. 587; VP 26/03/1987, p. 626; and VP 3/03/1987, p. 635.

In another instance in 1994 a member of the Legislative Assembly raised a question of privilege in the House, arising from a subpoena for the production of documents issued to him out of the Supreme Court in defamation proceedings. The Speaker reserved his ruling and advice was sought from the Crown Solicitor as to:

Whether the issue of a subpoena for production received by a Member of the New South Wales Parliament which asks for documents etc. relating to questions raised in Parliament by that Member and also for documents provided to State and Federal Police by that Member constitutes a breach of the Member's privilege in that:

(1) the material, received from the public (not necessarily a constituent), is privileged in the manner of legal professional privilege; and/or

(2) public knowledge that a Member can be forced to deliver up such documents will undermine public faith in bringing such material to the notice of Members of Parliament thus creating an impediment to Members in the carriage of their duties.

The Crown Solicitor advised¹³⁰ that this case was very similar to the one noted above and thus that the documents which were being subpoenaed did not enjoy absolute privilege but rather qualified privilege. The Crown Solicitor also advised that the material received from a member of the public is not privileged in the manner of legal professional privilege, as the relevant privilege in focus here is the qualified privilege afforded by defamation law to a person supplying information to a member in connection with the member's role as a parliamentarian.

The second issue raised in this case is whether public knowledge that a member could be forced to deliver up documents supplied to the member from an informant would undermine public faith in bringing the material to the notice of members, thus creating an impediment to members in the carriage of their duties. This argument had been raised in *R v Grassby*¹³¹ where it was rejected by the presiding judge.

The Crown Solicitor also noted that "there may be an issue as to whether the enforcement against a Member of an obligation to part with material supplied to the Member by an informant infringes parliamentary privilege where the member has used or intends to use the material in debate." The Crown Solicitor's view was "that it is perhaps conceivable that circumstances could arise where the Member needed to retain the originals of the material in order to make some point in debate, but it would seem likely that in most cases both the Member's needs and those of the administration of justice in the courts could be served by the member retaining copies."

Following consideration of the matter of privilege raised by the member, the Speaker ruled "that the wording of the subpoena was commonly used by solicitors and not especially directed to the honourable member" and therefore there was no prima facie breach of parliamentary privilege. The Speaker also informed the House that the subpoena in question had been withdrawn.¹³²

The matter was re-visited again in October 1994 when documents held by a member of the Legislative Council were proposed to be given to the defence in *Police v*

¹³⁰ Advice received from the Crown Solicitor re: Claim by Mr P. Whelan MP of breach of privilege, dated 29 April 1994.

¹³¹ (1991) 55 A Crim R 419

¹³² VP 20/04/1994, p. 183; and VP 03/05/1994, p. 206.

Dyers.¹³³ In this case the magistrate examined certain documents held by the member and it was held that such material attracted the protection of both parliamentary privilege and public interest immunity and need not be disclosed to the defence. In coming to this decision the magistrate commented that there were competing claims – the rights of the defence to inspect all relevant material balanced by the need to protect the names and addresses of persons providing information to parliamentarians in order to promote free speech in Parliament. The documents were released to the Crown Solicitor who was acting on the member's behalf.

Despite the decision of the magistrate in *Police v Dyers*, there have been a number of court cases in Australia which have held that communications between constituents and members are not afforded protection.¹³⁴ Of note is the case of Senator O'Chee who claimed that communications made to members by a constituent should be regarded as "proceedings in Parliament" if they are integral to business in the House. Senator O'Chee was sued for defamation in respect of a radio interview he gave on the subject of commercial fishing of marlin in protected fields in North Queensland.

The Senator had asked a question in the Senate on the issue prior to the interview and following the interview made a speech in the House. The majority of the Queensland Court of Appeal held the traditional view that "no parliamentary privilege attaches to communications between informants and members in circumstances where the member is asked to raise a matter in Parliament. No privilege arose whether the member actively sought the document to raise in Parliament or whether it was simply provided in the hope that it would be raised there."¹³⁵ One commentator has noted that the decision brought down in this case offers a solution as to what type of communications between members and constituents should be afforded privilege by providing that only those communications which are acted on by the member for the purpose of transacting business in the House are afforded privilege¹³⁶ and that such protection may even extend to all communications with members until the member makes a decision on what action to take.¹³⁷ In this case, McPherson JA argued that:

*It is not, I think, possible for an outsider to manufacture Parliamentary privilege for a document by the artifice of planting the document upon a Parliamentarian. The privilege is not attracted to a document by s. 16(2) until at earliest the Parliamentary member or his or her agent does some act with respect to it for purposes of transacting business in the House. Junk mail does not, merely by its being delivered, attract privilege of Parliament. That being so, the question again is whether it can properly be said that creating, preparing or bringing those documents into existence were "acts" done for purposes of or incidental to the transacting of Senate business.*¹³⁸

However, despite this view, in April 2000 the Queensland Supreme Court held in *Rowley v Armstrong* that privilege is not automatically attached to correspondence received by a member of Parliament on matters of interest to the member and which

¹³³ Bankstown Local Court, 24 and 25 October 1994.

¹³⁴ See *R v Rule* (1937) 2 KB 375; *Rivlin v Bilainkin* (1935) 1 QB 485; *R v Grassby* (1992) 55 A Crim R 419 at 428-9.

¹³⁵ See Carney, Gerard, *Members of Parliament: Law and Ethics*, 2000, pp. 215-7.

¹³⁶ *Ibid*, pp. 218-9.

¹³⁷ Carney, Gerard, "The Power of Privilege" in *About the House*, June 2004, pp. 28-30.

¹³⁸ *O'Chee v Rowley* (1997) 150 ALR 199 at 209. See also *Erglis v Buckley & Ors* (2005) QSC 25 where it was held that parliamentary privilege attached from the time a letter had been solicited from a Minister to when it was received, but that any subsequent publication was not protected.

the member had debated in the House.¹³⁹ As previously mentioned, the decision in *Rowley v Armstrong* was at odds with the view expressed by the Senate Committee of Privileges which argued that the decision was flawed and should hold no weight as an authority. However, it does throw doubt as to whether in future courts will agree with the opinion expressed by McPherson JA in *O'Chee v Rowley*.

3.10 Repetition of statements made in the House by members outside of the House

If a member makes a speech in the House which is defamatory in content and then repeats that statement outside the House such statements are unlikely to attract privilege and would leave the member open to libel action. A number of cases in the United Kingdom during the 18th and 19th centuries determined that parliamentary privilege did not attach to statements made in the House which were then repeated or republished outside the House. In 1794 it was held in *R v Lord Abingdon* that Lord Abingdon, in circulating a full copy of a speech he had already delivered in the House of Lords to the press, was liable when charged with criminal libel. The fact he had already made those remarks in the House was not considered to be a defence as it was republished in a medium that did not attract absolute privilege. It was determined in this case that privilege attached only for publication of the whole of the debate and not just a particular member's speech.¹⁴⁰ Similarly, in 1813, in *R v Creevey*, a member of the House of Commons, Mr Creevey, was found guilty of libel for sending a corrected version of a speech he had made in the House to the editor of a newspaper for publication. The corrected speech was not subject to parliamentary privilege.¹⁴¹

3.10.1 Privilege attaching to the republication of Hansard

Today, in New South Wales, a defence of qualified privilege attaches to any republication of a speech made in Parliament so long as there is no improper motive or malice involved. The republication of parliamentary proceedings receives qualified privilege under section 29 of the *Defamation Act 2005*, which provides:

- (1) It is a defence to the publication of defamatory matter if the defendant proves that the matter was, or was contained in, a fair report of any proceedings of public concern.¹⁴²
- (2) It is a defence to the publication of defamatory matter if the defendant proves that:
 - (a) the matter was, or was contained in, an earlier published report of proceedings of public concern, and
 - (b) the matter was, or was contained in, a fair copy of, a fair summary of, or a fair extract from, the earlier published report, and
 - (c) the defendant had no knowledge that would reasonably make the defendant aware that the earlier published report was not fair.
- (3) A defence established under subsection (1) or (2) is defeated if, and only if, the plaintiff proves that the defamatory matters was not published honestly for the information of the public or the advancement of education.

This means that there is a defence against any claim of defamation arising from the publication of a *Hansard* extract if it is a fair extract made in good faith for public information or the advancement of education. To be fair, an extract or summary

¹³⁹ *Rowley v Armstrong* (2000) QSC 88.

¹⁴⁰ Joint Select Committee on Parliamentary Privilege, *Parliamentary Privilege in New South Wales*, 1985, pp. 83-5.

¹⁴¹ See also May, Thomas Erskine, Sir, *Erskine May's Treatise on the Law, Privileges, Proceedings and Usage of Parliament*, 23rd Edition, edited by Sir W.R. McKay, KCB, p. 99 footnote 2.

¹⁴² Proceedings of public concern includes any proceedings in public of a parliamentary body.

should properly reflect the proceeding. It is possible that an extract of a complete speech which did not include a reply that was made or was otherwise out of context might not be considered fair. There is also a body of law in relation to what constitutes “good faith” and its defeat by malice. Members have been advised to seek legal advice in relation to the publication of truncated extracts of debates.

Speakers’ rulings have suggested that proof copies of *Hansard* may not be considered to be protected by absolute privilege.¹⁴³ However, amendments made to the defamation laws with the enactment of the *Defamation Act 2005* have made it clear that any publication of the debates and proceedings of the House, whether proof copies or not, are absolutely privileged.¹⁴⁴ Furthermore, any statement made in the House by members which is then republished on the Internet should also attract qualified privilege.

Of course, privilege is only qualified for the publication by members or other persons of the proceedings of Parliament. The proceedings themselves and their official publications receive absolute privilege.

The qualified privilege attaching to the republication of *Hansard* or reports of parliamentary proceedings was clearly illustrated by the judgment in *Commonwealth Bank v Malouf*¹⁴⁵ in 1996. On 12 November 1996 a member made a private members’ statement which detailed a long running dispute between Mr Malouf and the Commonwealth Bank. The statement also contained allegations against the bank and a former bank officer. The Commonwealth Bank sought an order preventing Mr Malouf from carrying out his intention to republish, in whole or in part, the extract of *Hansard*.

The Commonwealth Bank successfully obtained the order it was seeking. In granting its application the New South Wales Supreme Court made a clear distinction between the absolute privilege attached to statements made by members of Parliament within the House and the qualified privilege available to a publisher of a report of the proceedings of Parliament under common law and the Defamation Act. Justice Levine noted that a defence of qualified privilege could attach to the publication of a report of proceedings of Parliament but that such a defence would be lost if it was shown that the publication was not in good faith for public information or the advancement of education.¹⁴⁶

The court found that during the course of the proceedings, counsel for Mr Malouf had withdrawn the allegations of fraud and misconduct against the Bank. Consequently, Mr Malouf’s proposed republication of *Hansard* was intended to put improper pressure on the Bank and would be “actuated by malice, improper motive and lack of good faith.”¹⁴⁷ As such, the Commonwealth Bank was entitled to the protection of the order restraining Mr Malouf from publishing the extract of *Hansard*.

3.10.2 Parliamentary privilege and affirmation of statements made in the House

Whilst qualified privilege attaches to the publication of *Hansard* in certain situations, it has been held that the adoption by a member outside the House of statements made in the House constitutes a publication of the statements made in the House for

¹⁴³ See rulings of Speaker Kelly, PD 17/11/1976, p. 3054 and PD 08/03/1978, pp. 12626 and 12628.

¹⁴⁴ See section 27 of the *Defamation Act 2005*.

¹⁴⁵ *Commonwealth Bank of Australia v Gregory John Malouf & Davridge Pty Ltd*, Supreme Court of New South Wales, No. 21362 of 1996, 10 December 1996.

¹⁴⁶ *Ibid*, at p. 12.

¹⁴⁷ *Ibid*, at p. 10.

the purposes of the law of defamation even if the actual statement is not repeated.¹⁴⁸ Qualified privilege may still apply in such cases if it can be proved that the repetition of comments made in the House were justified and fair and were not made with malicious intent.¹⁴⁹

Generally, whether or not what a member says is privileged will depend on what the member has said outside of the House. This will involve determining what constitutes “repetition” and also the extent to which reference may be made to a protected statement to establish the meaning of an unprotected statement.

With regard to what is considered to be a repetition of statements made in the House, advice received from the Crown Solicitor has indicated that members who are asked whether they used specific words in the House and say that they did and no more, are said to have not adopted the words said in the House. However, should a member reiterate their position by using words such as “I stand by what I said in the House” or “I do not resile from what I said in the House”, the member will be said to have adopted those words.¹⁵⁰

Along similar lines, should a member use words outside the Parliament to the effect that the statements he or she made in the House are supported by evidence, the member could be said to have adopted the statements and can be held liable for them. In such cases, the remarks which are made outside the House may, on their own, be meaningless and it is only when reference is made to the preceding parliamentary remarks that a member can be held liable for defamation.¹⁵¹

This issue of whether a member had adopted statements made in the House was considered in *Australian Broadcasting Corporation v Chatterton*.¹⁵² In this case, Mr Chatterton, a Government member in the Legislative Council of South Australia took libel action against the Australian Broadcasting Commission (ABC) and an Opposition member of the Council, Mr Chapman, for comments made by Mr Chapman inside the House and repeated outside and for the televising of the comments on the ABC. The statements related to an application to the South Australian Department of Agriculture for drought relief by a company in which Mr Chatterton was financially involved at the time when he was also the Minister for Agriculture.

Mr Chapman in his defence denied the words were defamatory, and claimed absolute privilege, fair comment and qualified privilege. He also argued that the words spoken in Parliament could not be used to support a cause of action in respect of something said outside Parliament. The ABC denied the words were defamatory and claimed qualified privilege and fair comment. In coming to a decision the judges could not agree as to whether words spoken in Parliament may be used to explain and construe words spoken outside Parliament. Zelling ACJ argued that:

First, what was said by the appellant Chapman in Parliament was absolutely privileged and could not be a ground for proceedings in court....Further what was said in the House could not

¹⁴⁸ See *Beitzel v Crabb* (1992) 2 VR 121 at 128; and *Buchanan v Jennings* (2001) 3 NZLR 71.

¹⁴⁹ See *Jennings v Buchanan* (New Zealand) [2004] UKPC 36 (14 July 2004) at paragraph 20.

¹⁵⁰ Advice received from the Crown Solicitor re: Repetition by members of statements made by them in the House, dated 10 September 2001.

¹⁵¹ See comments of Davies J in *Laurence v Katter* (1996) 141 ALR 447 at 490.

¹⁵² (1986) 46 SASR 1.

*be used for the purpose of supporting a cause of action for something done outside the House.*¹⁵³

In contrast, Justice Prior argued that legal consequences could only arise from comments made outside of Parliament even if what was said in Parliament itself was used as evidence to explain what was said outside. He noted:

*What was said in Parliament was repeated, expanded upon, and sought to be justified in an arena not enjoying Parliament's privileges. I would not uphold the absolute privilege claimed nor would I prevent what was said in Parliament being used to explain what was said outside.*¹⁵⁴

In this case, the privilege matter was not required to be determined by the court. However, since then, courts have overwhelmingly held that statements made in Parliament can be submitted as evidence in libel action for comments made outside of the House. For instance, in 1992 in *Beitzel v Crabb*¹⁵⁵, Mr Crabb, a member of the Victorian Legislative Assembly was sued for defamation in relation to comments made in the House and subsequently repeated. Mr Crabb had insinuated in a speech to the House that Mr Beitzel was dishonest in his business dealings. Mr Crabb stated later during a radio interview and also at a press conference held the same day that he stood by what he had said in Parliament. The Victorian Supreme Court held that the member's speech in Parliament could be used to demonstrate the libel, as it was held that Mr Crabb, having indicated in the radio interview and at the press conference that he stood by what he said in Parliament, could be taken to have repeated and adopted his parliamentary speech. The court did not reach a decision as the action was settled following the court's decision to permit *Hansard* into evidence.

Similarly, in *Laurence v Katter* a member of the Commonwealth Parliament was sued in defamation for saying outside Parliament (on national radio and television) that his allegedly defamatory statements made in Parliament were "backed up with the hardest of hard evidence." The case proceeded on the basis that what is impeached or questioned in such an action are not the statements made in the House but the statements made out of the House, which incorporate those made in the House. Justice Davies observed:

*No impropriety is alleged against the first defendant in respect of what he said in parliament. What is alleged against him in the statement of claim is that what he said outside parliament was false and defamatory of the plaintiff. It is true that proof that what the first defendant said outside parliament was false will also prove that what he said in parliament was false. But that is because he incorporated the latter in his statements outside parliament. The privilege of Art 9 applies to the statements in parliament but not to the statements made out of parliament even though they incorporated by reference the statements made in parliament.*¹⁵⁶

One commentator has noted that in this instance two of the judges on the Queensland Court of Appeal appear to have concluded that section 16 of the *Parliamentary Privileges Act 1987* (Cmth) should be either read down or found invalid in order to allow a statement in the House of Representatives to be used to

¹⁵³ *Ibid*, at 18 (per Zelling ACJ).

¹⁵⁴ *Ibid*, at 35-6 (per Prior J).

¹⁵⁵ (1992) 2 VR 121.

¹⁵⁶ *Laurence v Katter* (1996) 141 ALR 447 at 490.

support an action for defamation. It is argued that the judgment is somewhat incoherent and should not be followed.¹⁵⁷ It should be noted that the case was settled on appeal.

Another instance of a member being held liable for comments related to parliamentary proceedings occurred recently in New Zealand when a chair of a subcommittee established by a select committee of the House of Representatives made remarks regarding a witness following the tabling of a report of the committee. The chair claimed that the witness had made conflicting statements during the committee's inquiry and the witness initiated defamation proceedings.

The defamation action was settled. However, a number of the issues, which were considered by the New Zealand Privileges Committee are important for future cases regarding privilege in Westminster systems of government.

Ms Mackey, the chair of the subcommittee, claimed that "in making the statements she was acting pursuant to standing order 238 (which permits the chairperson of a subcommittee, with the agreement of the subcommittee, to make a public statement to inform the public of the nature of the subcommittee's consideration)."¹⁵⁸ The Privileges Committee did not accept this view as it argued that at the time Ms Mackey made the statement the subcommittee no longer existed. The Privileges Committee also considered that as Ms Mackey was not the chair of the committee under which the subcommittee was established, she could not make a statement under standing order 238 and that "as her statement was made *after* the committee had reported to the House, standing order 238 would not have applied to a chairperson's statement in any event." The Privileges Committee went on to argue:

*...the standing order is an exception to the rule that the proceedings of a select committee are confidential to the committee until it reports to the House. It permits the chairperson (with the committee's agreement) to inform the public of the nature of the committee's consideration of a matter. But after the committee has reported back to the House every member is free to comment on the nature of the committee's consideration of the matter (except for secret evidence); the chairperson is in no special position. Consequently, a statement made after a committee has reported is not made under standing order 238.*¹⁵⁹

The Privileges Committee also noted that:

*...Mr Stonhill did acknowledge...that if Janet Mackey sought to defend the action on the ground that what she had said outside the House was true – that is, that Mr Stonhill's written and oral evidence to the subcommittee was contradictory – the subcommittee proceedings would become relevant. It seems to us that in those circumstances the court would inevitably have been invited to compare two parliamentary statements and to draw an inference that they were compatible or incompatible. We do not consider that it is permissible for any court to make such a judgment on parliamentary statements. That is a matter for the sole judgment of the House itself.*¹⁶⁰

Another New Zealand case is relevant to this discussion. In *Buchanan v Jennings*¹⁶¹ the New Zealand High Court found that impugned remarks made outside the House

¹⁵⁷ See *Odgers' Australian Senate Practice*, 11th Edition, edited by Harry Evans, 2004, p. 43.

¹⁵⁸ See the New Zealand House of Representatives, *Report of the Privileges Committee on the Question of Privilege referred on 14 February 2001 relating to Stonhill v Mackey*, 2001, p. 3.

¹⁵⁹ *Ibid.*

¹⁶⁰ *Ibid.*, pp. 5-6.

¹⁶¹ *Buchanan v Jennings* (2001) 3 NZLR 71.

were not protected by parliamentary privilege and were defamatory. The matter was appealed to the Court of Appeal and subsequently the Privy Council¹⁶² where the decision of the High Court was upheld.

The case arose from a speech made in Parliament by Mr Jennings, a member of Parliament, which attacked an employee of a public entity (Mr Buchanan), for alleged improper conduct. In a subsequent interview with a newspaper, Mr Jennings said that he did not resile from his claim about the official. The member also wrote to the newspaper correcting a report on the matter. Mr Buchanan issued proceedings in defamation claiming that by his statement and letter to the newspaper Mr Jennings had adopted and repeated outside the House the attack he had made inside the House.

In coming to a decision the High Court accepted that a line must be crossed before remarks made outside the House can import previous parliamentary statements. The court was of the view that in this case the member had crossed that line arguing that “the exchanges outside the House in which the member engaged were largely initiated by the member himself and that he had ‘effectively’ repeated outside the House what he had said in the House.” Mr Jennings was held liable and \$50,000 in damages was awarded against him.¹⁶³

The concern in regard to cases such as *Buchanan v Jennings* is where courts are drawing the line as to when a parliamentary remark has been repeated and adopted. Courts have held that by saying “I stand by what I said in Parliament” or “I do not resile from what I said in Parliament” etc. members have imported or adopted what was said in Parliament.

In the New Zealand cases it has been argued that what is being sued upon is what was said outside the House. What was said inside the House is being used only as purely factual material to demonstrate what it was that the member was actually saying in the remarks made to the newspaper reporter or radio interviewer.

Whilst, it is clear that *Hansard* can be tendered as evidence to prove facts, the judgment in *Buchanan v Jennings* has been heavily criticised for contravening Article 9 of the *Bill of Rights* by allowing the *Hansard* record to be admissible in court proceedings and then impeaching it. It has been argued that “parliamentary material cannot be used in a way that will cause a court to make a judgment on the conduct of Parliament or of individuals involved in the parliamentary process. The parliamentary material that is sought to introduce must speak for itself otherwise it is inadmissible.”¹⁶⁴ As such it is put that “the Courts should acknowledge that an action such as *Buchanan* grounded on a parliamentary statement is a direct attack (an impeachment) of Parliamentary proceedings and thus members’ freedom of speech.”¹⁶⁵

It has also been argued that the decision in *Buchanan v Jennings* erodes the freedom of speech provided by Article 9 by suggesting that its operation depends upon a judicial determination that freedom of speech may be impaired in particular

¹⁶² *Jennings v Buchanan* (New Zealand) [2004] UKPC 36 (14 July 2004).

¹⁶³ See paper prepared by David McGee QC, Clerk of the House of Representatives, New Zealand for the 32nd Conference of Presiding Officers and Clerks entitled *Members of Parliament and Defamation*, July 2001.

¹⁶⁴ See comments by David McGee, Clerk of the New Zealand House of Representatives, in “The scope of parliamentary privilege”, *The New Zealand Law Journal*, March 2004, pp. 84-8.

¹⁶⁵ *Ibid*, p. 87.

instances.¹⁶⁶

Interestingly, the Court of Appeal and the Privy Council judgments both noted the importance of the fact that the statement made by Mr Jennings outside the House occurred after the one made in the Parliament. This is because it has been held that if comments made in the House had followed comments made outside the House then comments made in the House under parliamentary privilege would be inadmissible. This principle stems from the decision in *Peters v Cushing*¹⁶⁷ where a member of the New Zealand House of Representatives made comments in a television interview about a person without naming or identifying the person. The person was subsequently named in the House of Representatives following considerable public interest. In this case it was held that the cause of action could not succeed without relying on the naming of the person in the House which was deemed impermissible.

This view has also been criticised for being “much too formulaic a view of article 9 and reduces the relationship between Parliament and Courts to mechanical application of the supposed rule...If proceedings in Parliament are questioned or impeached then that is contrary to article 9 regardless of the sequence in which linked events occur.”¹⁶⁸ The New Zealand Privileges Committee has recommended that the laws in relation to defamation and members of parliament be amended to ensure that no liability (civil or criminal) can be incurred by merely affirming or endorsing words written or spoken in Parliament if it is necessary to use the parliamentary statement to establish such liability.¹⁶⁹ As of May 2007 legislation has not been introduced to give effect to this recommendation.¹⁷⁰

3.11 Effect of the freedom of speech in defamation proceedings

Whilst legal consequences often flow from comments made by members outside of Parliament a defence of qualified privilege could be argued by members in certain situations where they have repeated defamatory comments outside of the House. First, there are a number of statutory provisions which could be used as a defence. Section 25 of the *Defamation Act 2005* can be drawn on as a defence in defamation if any imputation complained of is a matter of substantial truth.

Section 24 of the Act provides a common law defence whereby publications are protected if made on occasions of qualified privilege – i.e. an occasion where the person who makes the communication has an interest or a duty, legal, social or moral, to make it to the person to whom it is made, and the person to whom it is made has a corresponding interest or duty to receive it.¹⁷¹ The publication must serve the legitimate purpose of the privileged occasion and not some ulterior motive.

¹⁶⁶ *Ibid*, p. 88 where McGee argues that the decision in *Buchanan v Jennings* means that “...article 9 [is] dependent on a case by case judicial assessment of the impact of the use of parliamentary material on freedom of speech” and that “for Courts to substitute their own assessment would be destructive of freedom of speech in Parliament, for one could never know in advance if it would apply.”

¹⁶⁷ [1999] NZAR 241.

¹⁶⁸ McGee, David, “The scope of parliamentary privilege”, *The New Zealand Law Journal*, March 2004, pp. 87-8.

¹⁶⁹ See the Report of the Privileges Committee, *Question of privilege referred 21 July 1998 concerning Buchanan v Jennings*, May 2005.

¹⁷⁰ Other jurisdictions have also recommended that privileges legislation be amended to ensure that parliamentary proceedings cannot be used to establish what was “effectively” but not actually said outside of Parliament. See the Western Australia Legislative Assembly Procedure and Privileges Committee, *Effective Repetition: Decision in Buchanan v Jennings*, Report No. 3, April 2006.

¹⁷¹ For example, see *Adam v Ward* (1917) AC 309 at 334 per Lord Atkinson.

Section 30(1) of the *Defamation Act 2005* provides a statutory defence of qualified privilege. It states:

- (1) There is a defence of qualified privilege for the publication of defamatory matter to a person (the recipient) if the defendant proves that:
 - (a) the recipient has an interest or apparent interest in having information on some subject, and
 - (b) the matter is published to the recipient in the course of giving to the recipient information on that subject, and
 - (c) the conduct of the defendant in publishing that matter is reasonable in the circumstances.

Section 30(3) of the Act defines what is considered reasonable in the circumstances. It sets out the factors that a court may take into account when determining whether a publisher has acted reasonably. It provides:

In determining for the purposes of subsection (1) whether the conduct of the defendant in publishing matter about a person is reasonable in the circumstances, a court may take into account:

- (a) the extent to which the matter published is of public interest, and,
- (b) the extent to which the matter published relates to the performance of the public functions or activities of the person, and
- (c) the seriousness of any defamatory imputation carried by the matter published, and
- (d) the extent to which the matter published distinguishes between suspicions, allegations and proven facts, and
- (e) whether it was in the public interest in the circumstances for the matter published to be published expeditiously, and
- (f) the nature of the business environment in which the defendant operates, and (g) the sources of the information in the matter published and the integrity of those sources, and
- (h) whether the matter published contained the substance of the person's side of the story and, if not, whether a reasonable attempt was made by the defendant to obtain and publish a response from the person, and
- (i) any other steps taken to verify the information in the matter published, and
- (j) any other circumstances that the court considers relevant.

Advice received from the Crown Solicitor also indicates that whether material was "reasonably" published or not will depend on such things as:

- the manner and extent of the publication;
- the extent of the inquiry made as to the truth of the facts;
- the degree of care exercised; and
- any knowledge that a misleading impression was likely to be conveyed.¹⁷²

Section 30 overcomes the restrictions of the duty/interest requirement at common law and focuses attention on reasonableness in all the circumstances. It has been argued by the New South Wales Law Reform Commission that the meaning of "reasonableness" in this context was authoritatively established by the Court of Appeal in *Morgan v John Fairfax & Sons Ltd.*¹⁷³ where the court said that:

...in circumstances where a publisher intends to convey an imputation that is found to be conveyed, the defendant must establish that it believed in the truth of that imputation; but where a defendant did not intend to convey any imputation which was in fact so conveyed, the defendant must establish that its conduct was nevertheless reasonable in relation to each imputation it did not intend to convey but which was in fact conveyed. Reasonableness in the

¹⁷² Advice received from the Crown Solicitor re: Repetition by members of statements made by them in the House, dated 10 September 2001.

¹⁷³ (1991) 23 NSWLR 374.

*latter case requires the court to take into account whether the defendant held a belief in the truth of the matter published, but it is not the sole factor considered by the court.*¹⁷⁴

There is also a common law and statutory defence for a fair report. *Wason v Walter* provided for a common law defence for reports of parliamentary proceedings so long as the reports were fair and the publication had not been actuated by malice. Section 29 of the *Defamation Act 2005* provides a defence for the publication of defamatory matter if the defendant proves that the matter was or was contained in, a fair report of any proceedings of public concern, which includes any proceedings in public of a parliamentary body. This defence is defeated if it is shown that the publication complained of was not published honestly for public information or the advancement of education (s. 29(3)).

Second, there are a number of precedents set by cases such as *Theophanous v Herald & Weekly Times Ltd*¹⁷⁵ and, *Lange v Australian Broadcasting Corporation*¹⁷⁶ which have widened the extent of communications which are protected by qualified privilege based on the freedom of political communication implied in the Australian Constitution.

3.11.1 Implied freedom of political communication and parliamentary privilege

The High Court of Australia first recognised an implied guarantee of communication on political matters in the Constitution in the early 1990s.¹⁷⁷ With regard to defamation, it has been established that the implied freedom of political communication in the Australian Constitution covers discussion of the conduct, policies or fitness for office of government members, political parties, public bodies, public officers and those seeking public office. In *Theophanous v Herald & Weekly Times Ltd* it was held by the majority that:

There is implied in the Commonwealth Constitution a freedom to publish material:

(a) discussing government and political matters;

(b) of and concerning members of the Parliament of the Commonwealth of Australia which relates to the performance of their duties as members of the Parliament or parliamentary committees; and

*(c) in relation to the suitability of persons for office as members of the Parliament.*¹⁷⁸

The majority (Mason CJ, Toohey and Gaudron JJ.) also argued that any defence to an action in defamation based on the implied freedom of communication in the Constitution was subject to certain conditions. They held that such a defence was available even if the material published was proved to be false so long as the material was published in the course of political discussion, that the defendant was unaware of the falsity and did not publish recklessly, and that the publication was reasonable in the circumstances. They said:

...if a defendant publishes false and defamatory matter about a plaintiff, the defendant should be liable in damages unless it can establish that it was unaware of the falsity, that it did not publish recklessly (i.e. not caring whether the matter was true or false), and that the publication was reasonable in the sense described. These requirements will redress the balance and give

¹⁷⁴ New South Wales Law Reform Commission, *Report 75: Defamation*, September 1995, p. 159.

¹⁷⁵ (1994) 182 CLR 104.

¹⁷⁶ (1997) 189 CLR 520.

¹⁷⁷ The High Court first recognised a constitutional freedom of political communication in *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106 and *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1.

¹⁷⁸ *Theophanous v Herald and Weekly Times Ltd* (1994) 182 CLR 104 at 140.

*the publisher protection, consistently with the implied freedom, whether or not the material is accurate.*¹⁷⁹

The case of *Stephens v West Australian Newspapers Ltd* related the freedom of communication defence to members of State parliaments. In this case, Thomas Stephens and five other members of the Legislative Council of Western Australia, who were members of the Standing Committee on Government Agencies, took an action in defamation against West Australian Newspapers Ltd for publishing assertions made by another member of the Council that the members had gone on an overseas trip without the knowledge of Parliament and that the trip was a “junket of mammoth proportions.”¹⁸⁰

In *Lange v Australian Broadcasting Corporation* the High Court revisited its decision in *Theophanous* and *Stephens* and held that qualified privilege attaches to statements made to the general public about matters of government, and specifically to political discussion which is discussion that, by developing and encouraging views upon government, bears upon the function of electors in a representative democracy.¹⁸¹ The High Court held that:

*...the Commonwealth Constitution protects that freedom of communication between the people concerning political or government matters which enables the people to exercise a free and informed choice as electors.*¹⁸²

As with *Stephens* the High Court considered that the extended category of qualified privilege embraced discussion of government or politics not only at a Federal level but also at a State or Territory level, and even at a local government level, whether or not it bore directly on matters at a Federal level. The judgment also recognised that the extension of qualified privilege could go beyond what was required for the law of defamation to be compatible with the freedom of communication required by the Constitution. It was held in this case that “by reason of matters of geography, history and constitutional and trading arrangements, the discussion of matters concerning New Zealand may often affect or throw light on government or political matters in Australia.”¹⁸³

When considering the case the High Court made it clear that it was only examining the defamation law in New South Wales, arguing that even without the common law extension of the implied freedom of political speech in the Australian Constitution that:

...[the provisions] of the Defamation Act ensures that the New South Wales law of defamation does not place an undue burden on communications falling within the protection of the Constitution. That is because [it] protects matter published to any person where the recipient had an interest or apparent interest in having information on a subject, the matter was

¹⁷⁹ *Ibid*, at 137 (per Mason CJ, Toohey and Gaudron JJ).

¹⁸⁰ *Stephens v West Australian Newspapers Limited* (1994) 182 CLR 211 at 212-3.

¹⁸¹ See also *Roberts v Bass* (2002) HCA 57 for further discussion on qualified privilege and the implied freedom of political communication. In particular, see comments by Gaudron, McHugh and Gummow JJ at paragraphs 107 and 110 where it is noted that publishing material which is liable to do damage to a political candidate is protected by the Constitution's freedom of political communication so long as the purpose of publishing the material is not foreign to the occasion that gives qualified privilege to such publications (i.e. expressing views about a candidate for election) regardless of how irrational the reasoning might be.

¹⁸² *Lange v Australian Broadcasting Corporation* (1997) CLR 520 at 520.

¹⁸³ Butler, Dr Des, “Constitutional protection for defamatory communications concerning government and political matters”, in *The Queensland Lawyer*, Volume 18, October 1997, pp. 39-42.

*published in the course of giving information on that subject to the recipient, and the conduct of the publisher in publishing the matter was reasonable in the circumstances.*¹⁸⁴

In 2005 the Australian States and Territories enacted uniform defamation legislation aimed at ensuring that defamation law is applied consistently in Australian jurisdictions. This uniform legislation removed the codified provisions in place in Queensland and Tasmania and accordingly the comments made by the High Court in *Lange* are arguably applicable to all Australian jurisdictions.

It was also held in *Lange* that “a publisher relying on that category of qualified privilege to protect a publication that would otherwise have been held to have been made to too wide an audience must establish that its conduct in making the publication was reasonable in all the circumstances.”¹⁸⁵

In regard to what is considered to be “reasonable” the High Court argued that the making of a publication is only considered to be reasonable if it fulfils certain conditions stating:

*...as a general rule, a defendant's conduct in publishing material giving rise to defamatory imputation will not be reasonable unless the defendant had reasonable grounds for believing that the imputation was true, took proper steps, so far as they were reasonably open, to verify the accuracy of the material and did not believe the imputation to be untrue. Furthermore, the defendant's conduct will not be reasonable unless the defendant has sought a response from the person defamed and published the response made (if any) except in cases where the seeking or publication of a response was not practicable or it was unnecessary to give the plaintiff an opportunity to respond.*¹⁸⁶

In *Lange v Australian Broadcasting Corporation* the High Court also rejected the proposition that a right to free speech could be implied in the Constitution. It was held that the relevant sections of the Constitution do not confer personal rights on individuals but that it precludes the curtailment of the freedom of communication between the people of the Commonwealth concerning political or government matters, which enables the people to exercise a free and informed choice as electors.¹⁸⁷ In other words, the freedom of political communication is not absolute but limited to what is necessary for the effective operation of representative and responsible government provided for by the Federal Constitution.

The idea that “communications” which are defamatory in nature can only be published in “reasonable circumstances” was also considered by the New Zealand Court of Appeal in *Lange v Atkinson*. In this case, the former Prime Minister of New Zealand (Mr Lange) sued the author and publisher of a magazine article which discussed his performance as a politician and Prime Minister. The New Zealand Court of Appeal concluded:

(1) The defence of qualified privilege may be available in respect of a statement which is published generally.

(2) The nature of New Zealand's democracy means that the wider public may have a

¹⁸⁴ *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 575. The High Court was referring to s.22 of the Defamation Act 1974 that was replaced by s.30 of the Defamation Act 2005 as of 1 January 2006.

¹⁸⁵ *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 521.

¹⁸⁶ *Ibid*, at 574.

¹⁸⁷ See comment by Butler, Dr Des, “Constitutional protection for defamatory communications concerning government and political matters” in *The Queensland Lawyer*, Volume 18, October 1997, pp. 39-42.

proper interest in respect of generally published statements which directly concern the functioning of representative and responsible government, including statements about the performance or possible future performance of specific individuals in elected public office.

(3) In particular, a proper interest does not exist in respect of statements made about the actions and qualities of those currently or formerly elected to Parliament and those with immediate aspirations to such office, so far as those actions and qualities directly affect or affected their capacity (including their personal ability and willingness) to meet their public responsibilities.

(4) The determination of the matters which bear on that capacity will depend on a consideration of what is properly a matter of public concern rather than of private concern.

(5) The width of the identified public concern justifies the extent of the publication.

(As appears from para (3) above this judgment is limited to those elected or seeking election to Parliament.)¹⁸⁸

Concerns about this judgment have been widely expressed. In particular, it is argued that the decision condones careless inaccuracy as it “left it open to journalists to publish untrue ‘facts’ about politicians, provided they have no ill will, and provided they have not taken ‘improper advantage of the occasion of publication.’”¹⁸⁹ Justice Tipping whilst agreeing with this view, expressed his concern about publishing untrue facts without some sort of reasonableness requirement. He noted:

*It could be seen as rather ironical that whereas almost all sectors of society, and all other occupations and professions, have duties to take reasonable care, and are accountable in one form or another if they are careless, the news media whose power is not responsibly used, are not liable in negligence, and what is more, can claim qualified privilege even if they are negligent. (at 477)*¹⁹⁰

The result of the decision in *Lange v Atkinson* was a significant change in the common law defamation in New Zealand and a reduction in the protection available to members under defamation law.¹⁹¹

It should be noted that since *Lange v Australian Broadcasting Corporation* there has been a clear trend towards narrowing the coverage of the freedom of political communication defence in Australia. For example, in *Levy v Victoria* the finding of the High Court departed from an earlier majority position that the defence would generally cover discussion of State political matters.¹⁹² Furthermore, the House of Lords has been critical of *Lange v Australian Broadcasting Corporation* decision. For instance, in the case of *Reynolds v Times Newspaper Ltd & others* Lord Cooke commented that he could see “no good reason why politicians should be subjected to a greater risk than other leading citizens, or for that matter any other persons, of

¹⁸⁸ Burrows, John F, *Defamation and Politicians*, in Tort Law Review, March 1999, pp. 8-13.

¹⁸⁹ *Ibid.*

¹⁹⁰ As taken from Burrows, John F, *Defamation and Politicians*, in Tort Law Review, March 1999, pp. 8-13.

¹⁹¹ See the paper prepared by Allan Bracegirdle, Office of the Clerk of the House of Representatives, New Zealand entitled *Members of Parliament and Defamation: The Courts Raise the Bar*, for the Australasian Study of Parliament Group Annual Conference, October 2002.

¹⁹² For further examples see article by Stone, Adrienne, entitled “Rights, Personal Rights and Freedoms: The Nature of the Freedom of Political Communication”, in Melbourne University Law Review, Vol. 13 2001, available from <http://www.austlii.edu.au/au/journals/MULR/2001/13.html> accessed 24 January 2003.

false allegations of fact in the media”¹⁹³ just because they have been published “reasonably”. In coming to this conclusion Lord Cooke noted that:

*The whole purpose of defamation law is to enable a plaintiff to clear his or her name. The privilege required for reasonable freedom of speech does run counter to that purpose in some cases. A major expansion of the privilege, such as may have been achieved in Australia, shifts the focus of political defamation to the conduct of the defendant. In practice it may leave a politician plaintiff without redress. His or her private life may be immune from the extended privilege, but otherwise the opportunity of a public clearing of name may be virtually gone. If the Australian solution has disadvantages, they may lie in this change of focus and in the singling out of politicians as acceptable targets of falsehood.*¹⁹⁴

In this case, Mr Reynolds, the former Prime Minister of Ireland, initiated an action in defamation against a newspaper which had published comment on the events surrounding his resignation.

There is no clear precedent in relation to the extent to which the implied freedom of political communication operates as a restriction on the scope and exercise of parliamentary privilege and as such is subject to judicial review on a case by case basis.¹⁹⁵ For instance, in *Laurence v Katter*, when a member of the Commonwealth Parliament was sued for defamation in respect of what he had said on radio and television, which it was alleged adopted and reaffirmed what the member had said in the House, the majority of the Supreme Court of Queensland – Court of Appeal (Pincus and Davies JJA) were of the opinion that s. 16(3) of the *Parliamentary Privileges Act 1987* (Cmth), which prohibits the use of proceedings in Parliament in court for the purpose of questioning or drawing inferences from them and so on, did not infringe upon the freedom of political communication. Pincus JA argued that s. 16(3) was invalid in relation to defamation suits noting that s. 16(3) of the Act “can interfere with the freedom to attack or analyse what happens in Parliament by distorting, to the point of absurdity, the way in which defamation suits relating to that subject must be conducted.” He went on to add that if s. 16(3) of the Act was valid it “would prevent examination in court of the truth or fairness of most criticism of activity in Parliament.”¹⁹⁶

Davies JA was of a similar view but argued that s. 16(3) was valid but only in those cases where the court concludes that the freedom of proceedings in Parliament would in some way be impaired arguing that the law “would permit freedom of discussion of proceedings in Parliament including in court proceedings, except where that would impeach or question the freedom of speech or debates in parliamentary proceedings.”¹⁹⁷

However, in contrast, Fitzgerald P noted that s. 16(3) of the *Parliamentary Privileges Act 1987* (Cmth) plainly prohibits proving, stating, submitting or commenting that statements made by members of Parliament in the House were false, and that this provision should not be read down to accommodate the freedom of political communication implied in the Constitution. He said:

¹⁹³ *Reynolds v Times Newspapers Limited and Others*, available at <http://www.publications.parliament.uk/pa/ld199899/ldjudgmt/d991028/rev01.htm> at paragraph 116 (per Lord Cooke of Thorndon).

¹⁹⁴ *Ibid*, at paragraph 118 (per Lord Cooke of Thorndon).

¹⁹⁵ See Carney, Gerard, *Members of Parliament: Law and Ethics*, 2000, pp. 197-9.

¹⁹⁶ *Laurence v Katter and Another* (1996) 141 ALR 447 at 486.

¹⁹⁷ *Ibid*, at 490.

*Leaving aside any question concerning whether freedom of political discourse is correctly regarded as an individual right, its existence has been implied into the Commonwealth Constitution because it is seen as necessary to the effective working of our representative democracy. Parliamentary privilege and immunity are other aspects of the same fundamental public interest. The reconciliation of those competing considerations is committed to the Commonwealth Parliament by s. 49 of the Constitution. As will be seen, Richards provides a strong authority for giving the "very plain words of s. 49" their natural meaning. While an implied constitutional freedom of political discourse had not been identified at the time when Richards was decided, it would be contrary to the entire tenor of that decision to invalidate s. 16 of the Parliamentary Privileges Act by reference to such a constitutional implication, or to require it to be read down to accommodate such an implication.*¹⁹⁸

His Honour also referred to *John Fairfax Publications Pty Ltd v Doe*¹⁹⁹ where it was held that s. 16 of the *Parliamentary Privileges Act 1987* does not offend an implied constitutional freedom of political discourse.²⁰⁰

A similar approach to Fitzgerald P was taken by the Full Court of the South Australian Supreme Court in *Rann v Olsen*²⁰¹ when it held that the absolute privilege afforded to proceedings of Parliament cannot be brought into question by courts due to an implied freedom of political communication. In coming to this conclusion the court determined that s. 16(3) of the *Parliamentary Privileges Act 1987* (Cmth) imposes a necessary restriction on freedom of political communication in that it is reasonably appropriate and adapted to freedom of speech in Parliament.²⁰² The Full Court did, however, concede that s. 16(3) inhibits freedom of political communication in that it can make it impossible for a defendant to a defamation action to establish defences to the action if the subject of the defamation suit was a reference to "proceedings in Parliament."²⁰³

The New South Wales Court of Appeal in *Arena v Nader* considered whether the implied freedom operated as a restriction on the power of the Parliament to enact laws with respect to parliamentary privilege. Mrs Arena contended that the *Special Commissions of Inquiry Amendment Act 1997* had the effect of contravening the implied guarantee of freedom of political discussion. The court said that:

*...it does not in any event seem to us that political discussion is impaired by the 1997 Act. It has given each House of Parliament the power to waive parliamentary privilege in one sense but even when a House does waive parliamentary privilege in that sense the waiver declaration "does not operate to waive parliamentary privilege to the extent that it can be asserted by a member...in relation to anything said or done by the member in parliamentary proceedings". This seems to us quite plainly to mean that the immunity of a member conferred by parliamentary privilege remains untouched by the 1997 Act.*²⁰⁴

The court did concede that members might be deterred from exercising their freedom of speech in a House of Parliament given that their statements can be subjected to executive inquiry and criticism. However, it was argued that "[t]he

¹⁹⁸ *Laurence v Katter and Another* (1996) 141 ALR 447 at 453.

¹⁹⁹ (1995) 130 ALR 488.

²⁰⁰ *Laurence v Katter and Another* (1996) 141 ALR 447 at 453.

²⁰¹ (2000) SASC 83.

²⁰² See comments by Doyle CJ at paragraphs 185-8 who wrote the leading judgement on this point.

²⁰³ See comments by Doyle CJ at paragraphs 223 and 224 where he sums up the view of the majority.

²⁰⁴ *Arena v Nader and Another* (1997) 42 NSWLR 427 at 434.

possibility of responsible criticism, no matter what its source, cannot in our opinion be regarded as any impediment to free speech.”²⁰⁵

It is argued that any determination that the constitutional right to freedom of political communication has been violated must take into consideration “whether the exercise of a privilege has burdened the freedom of political communication and whether this can be justified as a proportionate response to protect some other public interest.”²⁰⁶ Furthermore, the implied freedom of political communication necessarily prevents any statutory erosion of the freedom of speech as provided for in the *Bill of Rights 1688* unless it is justified as being in the public interest.²⁰⁷

3.12 Right of reply

The freedom of speech afforded to members of Parliament may leave citizens vulnerable to allegations being raised about them in Parliament. In order to ensure that the public has a mechanism by which they can publicly defend themselves against such allegations, the Legislative Assembly has adopted a citizen’s right of reply. The procedure, first introduced in 1996, enables persons and corporations subject to allegations in the House to seek to have a response to those allegations published in *Hansard*.

The citizen’s right of reply does not affect members’ freedom of speech in Parliament and they still have full and absolute parliamentary privilege for what they say in the House. The right of reply gives a citizen or corporation, subject to allegations under that privilege, an opportunity to have a response to those allegations published in the record of the forum in which they were made. For further information see Chapter 29 of Part One.

²⁰⁵ *Ibid*, at 435.

²⁰⁶ Carney, Gerard, *Members of Parliament: Law and Ethics*, 2000, p. 199.

²⁰⁷ *Ibid*.

Chapter 4 Privilege conferred by legislation and related matters

4.1 Defamation Act 2005

In 2005, all States and Territories in Australia enacted uniform defamation legislation to ensure that defamation law is applied consistently across Australian jurisdictions. The legislation ensures that the link between parliamentary privilege, freedom of speech and parliamentary proceedings is maintained.

Section 27 of the *Defamation Act 2005* extends parliamentary privilege by providing that all documents/debates connected with the “proceedings of the House”, including submissions to committees or papers tabled during committee proceedings, enjoy absolute privilege. It provides that there is a defence of absolute privilege for any defamatory matter that “... is published in the course of the proceedings of a parliamentary body”. The position both within the United Kingdom and New South Wales would seem to be that absolute privilege does not attach to the publication of a speech otherwise than as part of the whole debate or proceedings of the House.

In addition, section 27(2)(c) extends the defence of absolute privilege to the publication of “matter” that would be subject to absolute privilege under the corresponding law of another jurisdiction. This reciprocity provision ensures that the absolute privilege attached to parliamentary proceedings in New South Wales is maintained if a defamation case arises in another Australian State or Territory. It should be noted that beyond defamation matters the broader parliamentary privilege powers exercised by a House of Parliament are limited in their application to the borders of the relevant state or nation.

Despite the uniform legislation, provisions of the *Defamation Act 2005* are still open to judicial interpretation. In particular, the provisions regarding the publication of “matters” in the course of parliamentary proceedings are very broad and not exhaustive.

As already noted in section 3.11, provisions of the *Defamation Act 2005* also provide a defence of qualified privilege in certain situations. For example, section 28 of the *Defamation Act 2005* provides a defence for defamatory material published in a public document. A public document is defined to include “any report or paper published by a parliamentary body, or a record of votes, debates or other proceedings relating to a parliamentary body.”¹

The new defamation laws also provide for a choice of law. Section 11 ensures that if there are multiple publications of defamatory matter across Australian jurisdictions that the substantive law of the jurisdiction in which the most harm has been occasioned by the publication will apply.

There are a number of difficulties with the *Defamation Act 2005* with regard to privilege for members of Parliament. For example, protection is not afforded to communications between members and Ministers, nor to correspondence received by committees and passed on to other investigatory bodies such as the Independent

¹ This defence is defeated if it is proved that the matter was not published honestly for the information of the public or the advancement of education.

Commission Against Corruption and the Ombudsman. In respect of this second issue, in New South Wales parliamentary committees use the hearings mechanism to afford such correspondence protection. With regard to communications between members and Ministers, in the House of Commons in 1958, when a member was threatened with libel action in respect of a letter to a Minister, the House of Commons decided that the letter was not a proceeding in parliament, and thus not absolutely privileged.² The issue of whether absolute privilege should be afforded to all communications between members and Ministers was a subject considered by the United Kingdom Joint Committee on Parliamentary Privilege, which reported in 1999.³ The committee concluded that absolute privilege should not extend this far, arguing that the protection afforded by article 9 of the *Bill of Rights* “should remain confined to the core activities of Parliament, unless pressing need is shown for an extension.”⁴

It should be noted that in 1984-85 the New South Wales Joint Select Committee upon Parliamentary Privilege argued that, in the context of the law of defamation, “proceedings in parliament” appeared to cover the formal transaction of business in both Houses and committees, and also everything said and done by a member in the exercise of their functions as a member of the House or a member of a committee. However, given the absence of legislation defining the extent of “proceedings in Parliament”, in New South Wales it is determined by the courts on a case by case basis.

4.2 Such privileges as conferred by other Acts

Privilege is also conferred by other statutes such as the *Parliamentary Evidence Act 1901*, the *Parliamentary Papers (Supplementary Provisions) Act 1975*, and the legislation establishing the statutory committees of the Parliament.

4.2.1 The Parliamentary Evidence Act 1901

The *Parliamentary Evidence Act 1901* provides protection for any defamatory words spoken by a witness while giving evidence before a committee or the House.⁵ As previously noted, the Act provides the House and its committees with the power to summon persons. The summons must specify the date, time and place for compliance and witnesses are entitled to their reasonable expenses for appearing before the House or a committee.⁶ For further information see Chapter 27 of Part One.

4.2.2 Tabled papers and the Parliamentary Papers (Supplementary Provisions) Act 1912

The publication of papers presented to Parliament is subject to the protection of absolute privilege under the *Defamation Act 2005*⁷ and to clarify the law, the *Parliamentary Papers (Supplementary Provisions) Act 1975* gives authority to either House, a joint sitting or a committee to publish any documents laid before it or any

² See the Joint Select Committee upon Parliamentary Privilege, *Parliamentary Privilege in New South Wales*, 1985, p. 11. (Reference to *Strauss* case in the UK).

³ Report of the Joint Parliamentary Committee on Parliamentary Privilege (UK), dated 9 April 1999.

⁴ Campbell, Enid, *Parliamentary Privilege*, 2003, pp. 42 and 44.

⁵ Section 12 of the *Parliamentary Evidence Act 1901*.

⁶ Section 6 of the *Parliamentary Evidence Act 1901*.

⁷ See section 27 of the *Defamation Act 2005*.

evidence given before it. The status of documents tabled but not ordered to be printed is a vexed one as there is no definition in the *Parliamentary Papers (Supplementary Provisions) Act* of “publish” although it seems to be limited to printing. Under Article 9 of the *Bill of Rights*, absolute privilege arguably attaches to the action of tabling as being “a proceeding in Parliament”.

This position has not been the subject of any parliamentary or court inquiry in New South Wales. However, it was considered by the Australian Senate in relation to documents tabled by a senator, which had been supplied to the Senator by a non-member. The Senate’s Privileges Committee concluded that these documents had a privileged status.⁸

The issue of whether a document is protected when it has been tabled but also publicly released or provided to other persons was considered *In the matter of the Board of Inquiry into Disability Services*.⁹ Crispin J held that whilst the copy of a document tabled in parliament would be protected as a proceeding in Parliament this protection did not extend to other copies of the document if it had not been prepared for the purposes of transacting the business of the Parliament.¹⁰

Members (except as committee chairs) do not have power to table documents. In very unusual circumstances however, leave may be granted for members to table documents. For example, on 17 November 1998, during the second reading debate on a bill, a member referring to an “internal memorandum” was directed by the Acting Speaker to identify the document. A Minister raised a point of order that the member had identified two people alleged to have been the subject of the memo and that “it is clear from the content and the way it has been written that it is not a memo”. The Minister then requested that it be tabled and the document was subsequently tabled. This action ensured that the document was considered a “proceeding in Parliament”. However, as it was not ordered to be printed it was not covered by the provisions of the *Parliamentary Papers (Supplementary Provisions) Act 1975*.

Members sometimes will refer to a particular document during the course of debate and for the interest and convenience of members may “leave it on the Table”. This is not tabling and the document has no official status and rulings have been made that it is not the Speaker’s duty to state whether a document placed upon the Table is privileged or not.¹¹ The types of “papers” which have been laid upon the Table for the information of members include not only papers but also digital images¹² and compact disks.¹³ Laying “papers” on the Table is considered to be part of parliamentary proceedings. However, as with papers tabled in the House but not ordered to be printed they are not covered by the *Parliamentary Papers (Supplementary Provisions) Act 1975*.

There are provisions in legislation such as the *Independent Commission Against Corruption Act 1988*, which allow reports to be presented to the Speaker when the

⁸ Senate Committee of Privileges, Report No. 72 – *Possible Improper Action Against a Person*, June 1998.

⁹ (2002) ACTSC 28. This case is also cited as *Szwarcbord v Gallop* (2002) 167 FLR 262.

¹⁰ *Ibid* at paragraph 22 and 23.

¹¹ PD 05/12/1967, pp. 4091-2.

¹² PD 29/11/2000, p. 11199.

¹³ PD 28/02/2001, p. 12113.

House is not sitting. The report is deemed to be tabled and the Speaker authorises it to be made public. Similarly, under the annual reporting legislation, annual reports may be presented to the Clerk out of session and similarly deemed to be tabled and published.

With regard to reports presented to Parliament it has been argued that parliamentary privilege attaches to the reports and any documents used to produce them if reporting to Parliament is the agency's primary role regardless of the document being tabled in Parliament. For example, the Commonwealth Auditor-General's Office notified the Senate in November 2002 that it would be claiming, in a pending court case, that parliamentary privilege attached to working documents associated with audit reports and that such documents were immune from the discovery process because they were produced for the purpose of a "proceeding in Parliament", namely, the submission of audit reports to Parliament. The Senate has argued that such a claim is well founded as "unlike other bodies which only incidentally have their reports presented to Parliament, the Audit Office has reporting to Parliament as its essential purpose."¹⁴

As already noted a defence of qualified privilege would most probably apply to tabled papers even if absolute privilege does not in accordance with section 28 of the *Defamation Act 2005*, which provides a defence for defamatory material published in a public document. A public document is defined to include "any report or paper published by a parliamentary body, or a record of votes, debates or other proceedings relating to a parliamentary body."

In addition, section 24 of the *Defamation Act 2005* provides a common law defence of qualified privilege if a document is published on an occasion where the person who makes the communication has an interest or a duty, legal, social or moral, to make it and the person to whom it is made has a corresponding interest or duty to receive it. Arguably documents tabled by a member in Parliament would be such an occasion.

4.2.3 Other legislation

Legislation which establishes statutory committees also confers privileges on members of Parliament by empowering committees to take evidence as part of their inquiry process, by enabling them to take action against people who fail to attend as a witness to any committee inquiry or wilfully provide false evidence and enabling the Chair, or their representative to table papers of the committee in the House.¹⁵

¹⁴ Australian Senate, *Procedural Information Bulletin*, No. 165 for the sitting period 11-19 November 2002, 21 November 2002.

¹⁵ See for example, Part 4 of the *Public Finance and Audit Act 1983* which establishes the Public Accounts Committee and Part 7 of the *Independent Commission Against Corruption Act 1988* which establishes the Joint Committee upon the Independent Commission Against Corruption.

Chapter 5 Other matters

5.1 The serving of legal process upon a member of Parliament when within the parliamentary precincts

Members of Parliament have no explicit immunity against compulsory processes for the disclosure of information such as subpoenae and orders for the discovery of documents. However, traditionally, practice has dictated that legal process should not be served upon any member while they are on the parliamentary premises or within the precincts unless permission has been given. *Erskine May* notes that “serving or executing civil or criminal process within the precincts of either House while the House is sitting without obtaining the leave of the House is a contempt.”¹ As such, the Presiding Officers should be notified of any legal process to be served within the parliamentary precincts such as a subpoena or search warrant. The purpose of this privilege is the paramount right of the Parliament to request the attendance of its members when the House is sitting.² However, it has been held by some authorities that this is not required as a matter of law.³

The Memorandum of Understanding between the Presiding Officers and the Police Commissioner under section 27 of the *Parliamentary Precincts Act 1997* states that police will not execute any process, such as search warrants, without prior consultation with the Presiding Officers or their delegates. While the Act requires that the memorandum be complied with as far as is practicable, breach of the memorandum does not itself invalidate the action of a police officer.

It should also be noted that given the New South Wales Parliament does not have the power to punish for contempt, it is doubtful whether the service of process on the precincts affects its legal validity as there is little action that can be taken in response to such service.

5.1.1 Subpoenae

A number of instances have occurred in New South Wales regarding the service of a subpoena upon members of Parliament.

On 18 November 1920, a matter of privilege was brought before the House by a member regarding the service of a subpoena upon him to appear as a witness before a Royal Commission into the adequacy of salaries of members and Ministers of the Crown. The subpoena was not served on him within the parliamentary precincts. However, other members had been served with similar subpoenae within the precincts. A motion was moved by the member that the service of the subpoena requiring the compulsory attendance at the Commission under threat of punishment constituted a grave breach of privilege. The motion was negated on division.⁴

¹ May, Thomas Erskine, Sir, *Erskine May's Treatise on the Law, Privileges, Proceedings and Usage of Parliament*, 23rd Edition, edited by Sir William McKay, KCB, p. 142.

² The precincts of Parliament House are established by law. See section 6 and Schedule 1 of the *Parliamentary Precincts Act 1997*.

³ See *House of Representatives Practice*, 5th edition, p. 718: eg: *Comalco Limited v Australian Broadcasting Corporation* (1982) 50 ACTR 1.

⁴ VP 18/11/1920, p. 141 and PD 18/11/1920, pp. 2567-93.

In 1948, Speaker Lamb received a subpoena at Parliament House to attend Central Police Court to give evidence in a civil case. The subpoena had been transmitted by post but considerable doubt was expressed whether the method of “service” chosen constituted a valid service of the subpoena and consideration was given by the Speaker to whether or not the action amounted to a breach of the privileges of Parliament.

The Crown Solicitor expressed the view that, although the privileges of members of Parliament in relation to the service of legal process was not defined by legislation, there was an undeniable parliamentary tradition in New South Wales which recognised that it would be an unwise proceeding to choose the parliamentary premises as the place for the service upon a member of any legal process.

The Crown Solicitor advised that:

- (1) the attention of the firm of Solicitors should be drawn to the fact that they had purported to serve the subpoena upon the Speaker at Parliament House by transmitting it by post, and that if this action constituted service, it might be necessary to consider whether it amounted to a breach of the privileges of Parliament; and
- (2) the subpoena should be returned to the Solicitors with an intimation that the Speaker was prepared to give an undertaking to attend the Court on the appointed day.⁵

This advice was followed and the subpoena returned.⁶

An example of legal service being served on a member within the parliamentary precincts occurred recently in New Zealand. In this case legal service was served on a member of Parliament within the grounds after he had given his concurrence. The Speaker had also been informed before the legal process was served on the member and had approved it going ahead as the member had agreed to accept it.⁷

5.1.2 Search warrants

Just as there is no immunity for members of Parliament who are served with a subpoena for the production of documents, or to attend court whilst the House is not sitting there is no immunity against an order for the discovery of documents or a search warrant. However, the use of material seized in such a manner before a court or tribunal is limited to those documents to which parliamentary privilege is not attached. A number of incidents in Australian jurisdictions are relevant to this discussion.

In December 1998, the Deputy President of the Senate requested the Senate Committee of Privileges to consider the matter of the execution of search warrants in senators’ offices and a suggestion that the Presiding Officers seek an agreement with the Attorney-General to govern the execution of search warrants. This request stemmed from concerns about the ability of police to execute search warrants in

⁵ Advice received from the Crown Solicitor re: Service of a subpoena upon a member of Parliament when on the Parliamentary premises, dated 28 September 1948. See also PD 20/10/1948, p. 37 where the Speaker made a statement on the service of legal process within the precincts.

⁶ See “Service of process within the precincts of Parliament: Answers to questionnaire” in *The Table*, Vol. 32, 1963, pp. 57-8.

⁷ See Speaker’s Ruling, *New Zealand Parliamentary Debates*, 27 February 2001, pp. 7912-3.

senators' offices and to seize documents without regard to information that may be protected by parliamentary privilege.⁸

Following receipt of this request the committee asked the Clerk of the Senate to comment on the issue. In doing so, the Clerk drew attention to recent developments in relation to search warrants and parliamentary privilege. In his comments to the committee, the Clerk expressed a number of concerns about the execution of search warrants within the parliamentary precincts and claims for parliamentary privilege. He argued: "The execution of a search warrant means that documents immediately fall into the hands of those seeking them" and that "in the absence of some process whereby the question of parliamentary privilege can be raised, the recipient of a warrant has no opportunity to raise the question of whether material should be produced to those seeking it."⁹

The Clerk referred to a recent case where search warrants had been issued in relation to the home and electorate office of a senator and that the Australian Federal Police "suggested that, as part of the procedure for the search under warrant, any material the senator claimed to be protected by parliamentary privilege should be sealed and delivered to a court until the claim of parliamentary privilege could be determined."¹⁰

The search warrant referred to by the Clerk was in relation to Senator Crane, whose offices and home were subject to a search under warrant issued under the *Crimes Act 1914* (Cmth). The warrants were executed in relation to an investigation into payments made in respect of charter flights taken by Senator Crane between 1995 and 1998. Initially, Senator Crane challenged the validity of the warrants and claimed parliamentary privilege in respect of the documents seized. The challenge to the validity of the warrants was dropped but Senator Crane continued with his claim for parliamentary privilege and also a declaration as to his entitlement to the payments made in relation to the charter services used.¹¹

In the ensuing court case *Crane v Gething*, the Federal Court held that in cases such as this, where the search warrants were used to obtain documents as an "aid of a lawful administrative investigation"¹² and not as evidence in a trial, it was a matter for the Senate, rather than the court, to determine whether certain documents were protected by privilege. Justice French commented:

*While the law of parliamentary privilege may properly be applied by the court in judicial proceedings where the privilege impacts on the exercise of the court's jurisdiction and powers, it is not, in the ordinary course, for the courts to decide questions of privilege as between the executive and parliament in litigation between the subject and the executive.*¹³

The reasoning behind Justice French's thinking was the fact that the execution of the search warrants was an action of the Executive and not an action that had arisen from judicial proceedings. However, if the search warrants had been executed in

⁸ The Senate Committee of Privileges, *75th Report: Execution of Search Warrants in Senators' Offices*, March 1999, p. 1.

⁹ See Appendix B of the Senate Committee of Privileges, *75th Report: Execution of Search Warrants in Senator's Offices*, March 1999.

¹⁰ *Ibid*, Appendix B, p. 3.

¹¹ See introductory remarks made by Justice French in *Crane v Gething* (2000) FCA 45.

¹² *Ibid*, at 748.

¹³ *Ibid*, at 747.

order to obtain documents which would then be tendered as evidence in trial in relation to a criminal charge it would be a different matter and the courts would sit in judgment as to whether documents were privileged.¹⁴

The decision of Justice French was contrary to a submission made by the Senate which argued that documents that were considered to be closely connected with the proceedings in the Senate were protected from seizure by virtue of parliamentary privilege and that a court could determine whether particular documents were so protected. In relation to this issue the view has been expressed that Justice French's decision is unlikely to be regarded as authoritative.¹⁵

Nevertheless, the Senate, following the decision of Justice French, subsequently put in place a special process to determine whether material seized in the search which gave rise to this case was protected by parliamentary privilege and to ensure that such material was returned to the senator without going into the possession of the police.¹⁶

Enid Campbell notes that the decision of Justice French in *Crane v Gething* leaves open questions regarding "the extent to which statutory powers to grant search and seizure warrants, and authority conferred by such warrants, may be constrained by laws about parliamentary privileges." She argues that recourse needs to be made to the general law regarding powers of search and seizure noting that the High Court has determined that documents, obtained under warrants issued under the *Crimes Act 1914* (Cmth) but protected by professional legal privilege or the public interest immunity cannot be tendered as evidence in court proceedings and that the same should apply to documents to which parliamentary privilege attaches.¹⁷

In November 2001, the issue again arose following the execution of a search warrant in the Queensland office of One Nation Senator Len Harris. Senator Harris was unable to raise the matter in the Senate at the time due to the November general election. However, the Clerk of the Senate wrote to the Commissioner of the Queensland Police Service raising the issue that some of the material seized from Senator Harris' office may be immune from seizure by virtue of parliamentary privilege and suggested that the Queensland police should seal the material seized under warrant "until such time as the court or the Senate determines the legality of the seizure of the material."¹⁸

On 14 February 2002, the Senate, on the motion of Senator Harris, referred the matter to the Privileges Committee to determine, amongst other things "whether any breaches of the immunities of the Senate or contempts were involved in the search and seizure, and continued possession, by the Queensland police of material from the office of Senator Harris, and if so what remedies should be applied."¹⁹

¹⁴ See Enid Campbell, *Parliamentary Privilege*, 2003, pp. 35-8.

¹⁵ *Odgers' Australian Senate Practice*, 11th edition, 2004, p. 46.

¹⁶ See comments of the President of the Senate on 14/2/2002, pp. 317-9. See also *Odgers' Australian Senate Practice*, 11th edition, 2004, p. 46.

¹⁷ Enid Campbell, *Parliamentary Privilege*, 2003, p. 38.

¹⁸ The Senate Committee of Privileges 105th Report, *Execution of Search Warrants in Senators' Offices – Senator Harris*, June 2002, pp. 1-3.

¹⁹ *Ibid*, p. 1.

The committee came to the conclusion that following the correspondence from the Clerk of the Senate to the Commissioner of the Queensland Police Service about the potential privilege implications of the seizure of material from Senator Harris' office that the Queensland police had fulfilled their obligations in respect of parliamentary privilege by inviting Senator Harris and his solicitors to claim parliamentary privilege in relation to the documents seized and that no breach of privilege or contempt had been committed.²⁰

Following this report, Senator Harris continued to maintain that parliamentary privilege was attached to documents contained on computer hard drives that were in the possession of the Queensland Police Service. As such, the Queensland Police Solicitor requested that the Senate Committee of Privileges determine the question of parliamentary privilege claimed by Senator Harris. The committee agreed to undertake this course of action on 12 December 2002 and after obtaining permission from the Senate, appointed an independent counsel to evaluate the material in question.²¹ The independent counsel came to the conclusion that all of the documents in question were outside the terms of the warrant and as such the question of whether any were privileged and therefore immune from seizure did not need to be determined.²²

The committee did, however, express a similar view to that of the submission of the Senate in relation to *Crane v Gething* that the courts are the appropriate body to determine whether parliamentary privilege exists in relation to documents seized, noting that "the Senate is effectively performing a function which should be performed by the courts."²³ The committee went on to argue that:

*The decision in Crane v Gething is not the appropriate response to the issue of determining the application of the law of parliamentary privilege to documents seized by police under warrant...[and that] it should be for the courts to apply the law of parliamentary privilege and to make such determinations, as the courts do with any other law.*²⁴

Despite this view, the Senate Committee of Privileges was conscious of the need to introduce procedures in relation to the execution of search warrants in the premises of senators to ensure that material which is covered by parliamentary privilege is appropriately protected. The committee reiterated a previous recommendation that guidelines be established between the Presiding Officers and the Australian Federal Police and that such guidelines also apply to police forces in all the States and Territories in Australia.²⁵ A Memorandum of Understanding and the Australian Federal Police Guidelines governing the execution of search warrants in the premises of senators and members were tabled and debated in the Senate on 9 March 2005. These documents had been agreed to by the Presiding Officers, the Attorney-General and the Minister for Justice and Customs and "provide that any executions of search warrants in the premises of senators and members are to be carried out in such a way as to allow claims to be made that documents are immune

²⁰ *Ibid*, pp. 8-10.

²¹ Senate Committee of Privileges 114th Report, *Execution of Search Warrants in Senators' Offices – Senator Harris: Matters Arising from the 105th Report of the Committee of Privileges*, August 2003, pp. 2-4.

²² *Ibid*, p. 8.

²³ *Ibid*, p. 9.

²⁴ *Ibid*.

²⁵ *Ibid*, p. 10.

from seizure by virtue of parliamentary privilege and to allow such claims to be determined by the House concerned...”²⁶

The execution of search warrants in members’ offices and whether this could possibly be a breach of parliamentary privilege has also been an issue in New South Wales. In October 2003, the Independent Commission Against Corruption seized material from the office of a member of the Legislative Council after executing a search warrant. Concerns were raised by the member and also by counsel advising the Clerk that the seizure of certain material, namely the hard drives and laptop computers, may be unlawful and in breach of parliamentary privilege. Following correspondence between the President of the Legislative Council and the Commission on this matter, the ICAC returned the material in question to the Clerk to hold until the matter of whether the seizure was lawful or not was resolved.²⁷ The matter was then referred to the Legislative Council Standing Committee on Parliamentary Privilege and Ethics for consideration.²⁸

The committee concluded that the ICAC had breached the immunities of the House by executing the search warrant on the Parliament House office of the member and recommended that all material seized from the member’s office be returned to the President and that once returned they would remain in the possession of the Clerk until the issue of parliamentary privilege was determined.²⁹ A resolution was subsequently passed by the House to this effect. The resolution specified that the member was to identify what documents were considered to be a “proceeding in Parliament” and set out a number of criteria as to what was considered to be a “proceeding of Parliament” to provide guidance.³⁰

The Commissioner of the ICAC in response to this resolution noted that she disagreed with the finding of the committee that the immunities of the Legislative Council were breached by the execution of the search warrant and referred to the opinion of Justice French in *Crane v Gething* “that the issue and execution of a search warrant does not infringe section 16 of the *Parliamentary Privileges Act 1987* (Cmth) which reflects Article 9 of the *Bill of Rights*.”³¹ The commissioner did, however, agree to abide by the resolution to ensure that the integrity of the investigation was in no way compromised.

There is little doubt that the Legislative Council committee was correct in determining that “Article 9 applies so as to prevent the seizure of a document under search warrant, where, as a natural consequence of the seizure, a questioning or impeaching of proceedings in Parliament within the meaning of Article 9 necessarily results.”³² It should be noted in relation to this incident that, due to the application of section 122 of the *Independent Commission Against Corruption Act 1988* (which provides that “Nothing in this Act shall be taken to affect the rights and privileges of

²⁶ Department of the Senate Procedural Information Bulletin, No. 189, for the sitting period 7 – 17 March 2005, pp. 1-2. See also the Senate Parliamentary Debates, 9 March 2005, pp. 91 – 92.

²⁷ See comments by the President of the Legislative Council, PD 14/10/2003, p. 3671.

²⁸ PD 15/10/2003, pp. 3790-5.

²⁹ Legislative Council Standing Committee on Parliamentary Privilege and Ethics, *Parliamentary Privilege and the Seizure of Documents by ICAC*, December 2003, pp. x and xi.

³⁰ See resolution of the Legislative Council, PD 04/12/2003, p. 5853.

³¹ See PD 05/12/2003, p. 6020 where the President of the Legislative Council communicated to the House the response of the ICAC to the resolution of the House passed on 04/12/2003.

³² Legislative Council Standing Committee on Parliamentary Privilege and Ethics, *Parliamentary Privilege and the Seizure of Documents by ICAC*, December 2003, p. 36.

It should be noted, because parliamentary privilege is in place for the benefit of the House as a whole and not for the benefit of any individual member, it is appropriate for the Presiding Officer of the relevant House to uphold the privileges so far as it concerns their House. Given this, the Speaker, as representative of the House, is responsible for ensuring that members, whose offices have been subject to a search warrant, are adequately protected in terms of parliamentary privilege.³⁵

Historically, the Legislative Assembly has dealt with privilege matters on the floor of the House. However, since December 2003 members have only been able to raise in the House a matter of privilege or contempt suddenly arising in relation to the proceedings then before the House (S.O. 91). Other matters of privilege that members might wish to raise must be raised in accordance with standing order 92, as amended by sessional order, which provides:

[illegible]

³⁵ The role of the Presiding Officers in relation to the execution of search warrants was recently seen in British Columbia, where the approval of the Speaker was sought prior to the execution of a search warrant on offices located within the Parliament building. See the *Table Review: Newsletter of the Association of Clerks-at-the-Table in Canada*, Winter 2004, pp. 9-10.

Matters of privilege suddenly arising are also dealt with in accordance with the standing orders. Standing order 79 provides that a member may interrupt another member in order to raise a matter of privilege or contempt "suddenly arising" relating to proceedings then before the House. The member may then, under the provisions of standing order 91, as amended by sessional order, address the House for a maximum of 10 minutes in order to satisfy the Speaker that: the matter is one suddenly arising and should be dealt with at the earliest opportunity; that there is a prima facie case; and that the member has a prepared notice of motion. The Speaker may determine the matter before the expiration of the 10 minutes. If so satisfied, the Speaker will rule that the matter should proceed forthwith or on the next sitting day during the time for Business with Precedence. The member raising the matter must move a motion seeking either: the declaration of the House that a contempt or breach of privilege has occurred; or the referral of the matter by the House to the Standing Committee on Parliamentary Privilege and Ethics for consideration.

Speakers' rulings indicate that for a matter to be accorded precedence as one of privilege:

The Chair must be satisfied that the member's privilege has been breached by disobedience of general orders or rules of the House, disobedience of particular orders, indignities offered to the character or proceedings of the Parliament, assaults or insults upon members or reflection upon their character, or interference with officers of the House in the discharge of their duties.³⁶

Under the former committee of the whole procedure if a matter of privilege was raised in committee the Chairman left the Chair and informed the Speaker but made no further report. After the matter of privilege was dealt with by the House, proceedings in committee of the whole resumed where they had been interrupted. If a matter of privilege or contempt is raised during the consideration in detail stage the matter must be dealt with by the House before the proceedings in the consideration in detail stage continue.

Matters of privilege not suddenly arising that are not referred by the Speaker to the Standing Committee on Parliamentary Privilege and Ethics for consideration are able to be raised by way of a notice of motion in accordance with standing order 92(5), which provides that "if the Speaker decides that the matter should not be the subject of a notice of referral, a member is not prevented from giving a notice of motion in relation to the matter. Such notice shall not have precedence."

5.2.1 Contempt and breaches of privilege

Contempt of the Parliament is ancillary to privilege and to constitute a contempt an act or omission must obstruct or impede the House (or a committee of the House), a member or an officer in the discharge of a duty.

Disrespect to the House collectively has been described as "the original and fundamental form of breach of privilege". It includes libels on the House at large, upon the Presiding Officers and upon parliamentary committees. Proceedings against a member or officer of either House in the courts for their conduct in

³⁶ Ruling given by Speaker Murray 8 April 1998, *Legislative Assembly Parliamentary Debates*, 8 April 1998, p. 3874.

obedience to the orders of Parliament are further instances of alleged breaches of privilege.

The acts which historically constitute breaches of privilege are many and are dealt with exhaustively in *May*³⁷. A breach of privilege has been constituted by such acts as: disrespect to any member of the House, as such, by a person not being a member; disrespect to the House collectively, whether committed by a member or any other person; disobedience to orders of the House; and interference with its procedure, with its officers in the execution of their duty, or with witnesses in respect of evidence given before the House or a committee of the House. Disrespect to a member includes attempts to threaten or intimidate that member, or any libel concerning their conduct in the House.

In 1857, Speaker Cooper, in the course of a ruling on a complaint said, in effect, that parliamentary privilege was not affected unless the matter raised referred to proceedings in the House; to the conduct of any member in the House; or to the conduct of any person, not being a member, in connection with any proceedings in the House.³⁸

Members often rise claiming that the privileges of the House have been breached by a member deliberately misleading the House. However, it has become accepted practice in New South Wales that whether something said in the House is misleading or truthful does not establish a matter of privilege.³⁹ Whilst it is not considered to be a matter of privilege, deliberately misleading the House may be considered to be a contempt of Parliament. *May* notes that the House of Commons in the United Kingdom "...may treat the making of a deliberately misleading statement as a contempt."⁴⁰ Reference is made to the Profumo case where a British Cabinet Minister, John Profumo, knowingly made a statement to the House of Commons which was later proved conclusively to be untrue. Profumo admitted to having deliberately set out to mislead the House and he was found guilty of contempt. Given this case, it seems to have become accepted practice in Westminster style parliaments that unless it is proved that a member deliberately mislead the House, no action will be taken against the member.⁴¹

5.2.2 Issues raised as a matter of privilege 1991-2006

The table below lists recent privilege issues raised and the outcome in the House. Entries marked * indicate that the matter was accepted as one of privilege by the Speaker.

1991

Issue	Outcome
A member rose on a matter of privilege claiming that his privilege had been breached due to the fact that the Premier had been interrupted whilst giving a financial statement pursuant to sessional orders and that information concerning the impact of the statement	No prima facie case established – the statement had been interrupted pursuant to sessional orders to enable private members' statements to proceed.

³⁷ See *May*, 23rd edition, 2004, pp. 75 ff.

³⁸ VP 30/10/1857, p. 127.

³⁹ See ruling of Speaker Rozzoli, PD 26/10/1994, p. 4678.

⁴⁰ *May*, p. 132.

⁴¹ See Legislative Assembly of Ontario, Votes and Proceedings, No. 21, 17 June 2002 and information concerning the National Assembly of Quebec in *Table Review: Newsletter of the Association of Clerks-at-the-Table in Canada*, Fall 2003, p. 5.

was heard on the television and radio prior to the Premier concluding the speech in the House. ⁴²	
* Member threatened and assaulted as a result of actions taken by him in regard to information received as a member of Parliament. ⁴³	Speaker ruled that a prima facie case established as the matter concerned the privileges of the Parliament – Question put and passed: “That this House: (1) views with grave concern the actions of certain persons in assaulting and threatening the honourable member for Londonderry; (2) reaffirms the principle that any action which attempts to obstruct or impede a member in properly carrying out his or her duties as a member constitutes a contempt of this House; and (3) calls upon the responsible authorities to fully investigate, as a matter of the greatest urgency, the matters raised by the honourable member.”
* Member alleged fraudulent press releases and a letter circulating in his name and containing views he did not represent. ⁴⁴	Speaker ruled that a prima facie case established and ordered that the motion be given precedence on the next sitting day. That same day, the member made a personal explanation to the House during which he noted that he could not prove beyond reasonable doubt that the letter in question was a forgery. A censure motion was moved the next sitting day on the member for misleading the House. The motion was negatived on division with the Speaker making a casting vote.

1992

Issue	Outcome
*Petition requesting that parliamentary privilege be waived to enable solicitors and counsel for the AMA to examine and comment on a PAC report in judicial proceedings. ⁴⁵	The House declined to waive privilege and passed the following motion: “That in response to the petition of Dr Stuart Boland, President of New South Wales Branch of the AMA, presented to the House on Friday 6 March 1992, this House – (1) Declines to waive such Parliamentary Privilege as would preclude the Solicitors and Counsel for the AMA from examining and commenting upon the PAC Report on Payments to Visiting Medical Officers, No. 45 – June 1989, in proceedings currently before the Honourable Justice Hungerford Q.C. (2) Re-affirms article 9 of the <i>Bill of Rights</i> 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’. (3) Re-affirms the Parliamentary Privilege attaching to the reports, minutes of proceedings and evidence of all Committees of this Parliament.”
Member claimed his privilege had been prejudiced by the Speaker’s decision not to permit television and audio recording of the day’s session. ⁴⁶	Speaker ruled that the standing orders of the House do not authorise television and audio recording.

⁴² PD 02/07/1991, pp. 58-9.⁴³ VP 12/09/1991, pp. 145-7.⁴⁴ PD 24/10/1991, pp. 3356-9; and pp. 3445-7; PD 29/10/1991, pp. 3574-624 and pp. 3630-54⁴⁵ VP 06/03/1992, p. 105 and VP 10/03/1992, p. 122⁴⁶ VP 28/04/1992, p. 243.

Member raised as a matter of privilege the large number of reports tabled together in the House – he argued that his privilege had been infringed as the reports had not been made available during recent estimates committees hearings. ⁴⁷	No point of privilege. Speaker ruled that the Chair has no authority to direct Ministers when they should table papers and that it is a matter for the substance of the law rather than a matter of privilege, in that, the law requires certain papers to be tabled by a particular date and that the schedule for tabling of papers would need to be amended to effect any change.
Notice of motion held over pending ruling from the Chair. A member raised a matter of privilege asking the Speaker if he intended to rule out a motion that involved a proposed action by the Government. ⁴⁸	No point of privilege – Speaker ruled that such remarks could be construed as intimidatory of the Chair.
Member raised as a matter of privilege that some answers to questions on the joint estimates committees Q & A paper had not been answered by the due date. ⁴⁹	No point of privilege. Minister replied that all answers had been submitted but had not been included in the proof copy. The Speaker confirmed that the answers would be in the corrected copy.

1993

Issue	Outcome
Member rose on a matter of privilege that his role as an MP had been infringed by a pamphlet being circulated in a Federal electorate. ⁵⁰	No prima facie case established. Speaker ruled that the member should have made a personal explanation and thought that he had done so.
Member rose on a matter of privilege claiming an incomplete and incorrect answer was provided by a Minister on the Questions & Answers paper. ⁵¹	No point of privilege. Speaker ruled that the matter was not one of privilege and that there were other procedures of the House available to pursue the matter.
* Member rose on a matter of privilege concerning legal proceedings taken against her in relation to the administration of FANMAC. ⁵²	Prima facie case of breach of privilege established as the legal proceedings implied a threat to a member in the carrying out of the member's duties. Motion agreed to by the House.
Question on notice not fully answered. ⁵³	No point of privilege – Speaker ruled that the matter, if anything, is a point of order about the way questions are answered. He also ruled that as the standing orders do not specify the way in which Ministers are required to answer questions and as such any point of order raised would not be upheld.
Questions on the Questions & Answers paper ⁵⁴	No point of privilege – Speaker ruled that it is a matter of order not privilege and that the Chair has no power over the way questions are answered.
Member rose on a matter of privilege claiming that a member had accused him of lying. ⁵⁵	No point of privilege – the Speaker ruled that the House would accept the Minister's statement as a personal explanation.
* Police intimidation over allegations raised by a member in good faith. ⁵⁶	Prima facie case of breach of privilege established. No debate or vote taken on the motion.

1994

Issue	Outcome
Member rose on a matter of privilege and quoted from a letter from a firm of lawyers acting on behalf of another member concerning a subpoena for the	No prima facie case established. The Speaker considered that the words used in the letter were commonly used by solicitors and were not particularly

⁴⁷ PD 17/11/1992, p. 8986.⁴⁸ PD 25/11/1992, p. 9896.⁴⁹ PD 27/11/1992, p. 10453.⁵⁰ PD 04/03/1993, p. 376.⁵¹ PD 31/03/1993, p. 1038.⁵² PD 27/04/1993, pp. 1597-1600.⁵³ PD 12/05/1993, p. 1991.⁵⁴ PD 13/05/1993, p. 2076.⁵⁵ PD 14/09/1993, p. 3078.⁵⁶ PD 11/11/1993, p. 5289.

production of documents. The member claimed that the service of a subpoena was intimidatory, threatening and attempted to silence him in the continuation of his role as an MP. ⁵⁷	directed at the member.
A member of Parliament was being escorted to and from the Chamber by parliamentary security staff. Another member claimed that this was a breach of his privilege as he claimed that security staff were blocking access to the dining room and level 11 offices. The member argued that his privilege had been affected as he felt intimidated and threatened by the posting of a security guard outside the Chamber and the dining room and also impeded his access to certain parts of the parliamentary precincts. ⁵⁸	No prima facie case established. Speaker noted that the right of privilege principally attaches to members' right to the freedom of speech – the Speaker commented that he had seen no evidence of any member being inhibited in what he or she wished to say. The Speaker also noted that the role of Parliamentary Security "is to maintain the proper security of the Parliament and to perform certain other duties". The Speaker stated that he would investigate the matter to ensure that the action taken was correct and proper and in accordance with the maintenance of parliamentary security.
Statement in the House was misleading or untrue. ⁵⁹	No point of privilege. Speaker stated: "Whether something said in the House is misleading or truthful does not establish a matter of privilege. It should not even be the basis of a point of order. Other forms of the House can be used to make counter allegations."

1995

Issue	Outcome
Member precluded from proper carriage of electoral duties through the breakdown of working relationship with electorate office staff and the threats of the union lodging a complaint with the Anti-Discrimination Board. ⁶⁰	No prima facie case established. Motion asserting breach of privilege negated on division.

1996

Issue	Outcome
Following the removal of a member from the Chamber a matter of privilege was raised that the Speaker had no right to require member to be returned to the House in order to be named. ⁶¹	The Speaker ruled that it is not the practice of the House to compel the return of a member and noted that force was not used. ⁶²
Need to clarify whether the Opposition parties were in coalition. ⁶³	Speaker ruled that it was not a matter of privilege. In doing so he referred to a ruling of Speaker Ellis which stated: "For the Chair to be satisfied that a prima facie case of breach of privilege has been established, one of the following elements should be involved in such a breach: disobedience to general orders or rules of either House; disobedience to particular orders; indignities offered to the character of proceedings of Parliament; assaults or insults upon members or reflections upon their character or conduct in Parliament; or

⁵⁷ PD 20/04/1994, p. 1448; PD 03/05/1994, p. 1735.

⁵⁸ PD 13/05/1994, pp. 2620-1.

⁵⁹ PD 26/10/1994, p. 4678.

⁶⁰ VP 24/05/95, p. 50; VP 25/05/95, p. 67; VP 01/06/95, pp. 105-6.

⁶¹ PD 22/05/96, p. 1372.

⁶² PD 27/06/96, p. 3821.

⁶³ PD17/09/96, 4155-6; PD 18/09/96, p. 4292.

	interference with officers of the House in the discharge of their duties. The Chair must determine also whether the matter complained of could be said fairly and reasonably to be capable of interfering with members in the performance of their duties." He also noted that the matter was based on matters relating to internal party arrangements which do not fully impinge on the privilege of any member of this House.
Speaker failed to protect privileges of members by not requiring Minister to withdraw allegation that two members were "protectors of paedophiles". ⁶⁴	Speaker ruled that it was not a matter of privilege but for personal explanation.
Intimidated by another member. ⁶⁵	Member raised as a matter of privilege that a member from the opposite side of the Chamber had threatened her in an intimidating manner. The member in question had already been removed from the Chamber on the Speaker's order. A point of order was raised that a matter of privilege must be one suddenly arising, that there be a prima facie case, that the member have a prepared notice of motion, and that the matter proceed forthwith. The Speaker said that the member had 10 minutes in which to establish her case and asked if the member wished to pursue the matter further. The member did not proceed.

1997

Issue	Outcome
Threat of defamation proceedings if matter repeated outside the House. ⁶⁶	No prima facie case established as the Speaker ruled it did not preclude the member from freedom of speech in raising matters in the House.

1998

Issue	Outcome
Use of telephoto lenses in the Chamber. ⁶⁷	Speaker said he would discuss the matter privately.
Potential security threat to members and staff of possible union demonstrations at Parliament House. ⁶⁸	The Speaker ruled that there was no privilege involved as a claim of privilege must relate to an actual event not one that is foreseen. In this instance no member had been obstructed in their duties when the claim of breach of privilege was made.
Ministers' use of correspondence sent to them by members. ⁶⁹	No prima facie case established. The Speaker referred to the report of the Joint Select Committee on Parliamentary Privilege which concluded that

⁶⁴ PD 17/10/1996, pp. 5045-6; PD 22/10/1996, pp. 5147-8.

⁶⁵ PD 14/11/1996, p. 6057.

⁶⁶ VP 20/11/1997, p. 293; VP 25/11/1997, pp. 308-9.

⁶⁷ PD 08/04/1998, p. 3874.

⁶⁸ VP 08/04/1998, p. 489.

⁶⁹ VP 29/04/1998, p. 513.

	members' correspondence was not privileged.
Alleged error in <i>Hansard</i> proofs. ⁷⁰	Speaker referred the matter to the Editor of Debates.
A motion for urgent consideration condemned four members but the standing orders would prevent all those members having an opportunity to speak in response. ⁷¹	Speaker ruled that any vote of the House to proceed with the motion overcame any problem.
Circulation of member's misdirected e-mail. ⁷²	It was implied that the Speaker had misdirected a member's email that had been received by a member of his staff. Speaker ruled that no prima facie case established and that should a member wish to attack the Chair that they must do so by way of substantive motion.

2000

Issue	Outcome
Comments made by the Premier during Question Time concerning an Opposition chat line. ⁷³	No prima facie case established as the Speaker ruled that the matter complained of did not impair the member's authority or his ability to perform his duties.
Question on notice had not been answered in the time allowed. ⁷⁴	No point of privilege – the Speaker undertook to draw the matter to the attention of the relevant Minister.
Inability of the Opposition to respond to significant matters when the Government makes statements during Question Time rather than by making ministerial statements. ⁷⁵	No point of privilege - Speaker ruled the matter out of order.
Media release issued by the Premier which distorted the circumstances leading to a member's removal from the Chamber and thereby represented that the removal was orchestrated. ⁷⁶	No prima facie case established as the Speaker did not consider that the member's authority, immunity or dignity had been affected.
A Minister had trivialised Question Time by denying members the right to ask questions under standing order 135 in that the Minister had responded with a simple "yes" to a question and provided no details. ⁷⁷	No point of privilege involved as the Speaker cannot order a Minister to answer a question without notice in a particular way.

2001

Issue	Outcome
Speaker had failed to uphold the standing orders particularly S.O. 105 (consideration of a point of order) and S.O. 138 (answer relevant). ⁷⁸	After hearing the member's arguments as to why his privilege had been affected the Speaker ruled that no prima facie case of privilege was established.

⁷⁰ PD 28/05/1998, p. 5426.

⁷¹ PD 04/06/1998, p. 5828.

⁷² PD 24/09/1998, p. 8035.

⁷³ VP 06/04/2000, p. 373.

⁷⁴ PD 09/06/2000, p. 6990.

⁷⁵ PD 29/06/2000, p. 7879.

⁷⁶ VP 10/08/2000, p. 709.

⁷⁷ VP 30/11/2000, p. 985.

⁷⁸ PD 08/03/2001, p. 12493. The Member also foreshadowed a censure motion against the Speaker when raising the point of order.

The failure of the Minister for Health to answer a question on notice satisfactorily. ⁷⁹	No prima facie case established. The Speaker ruled: "Under the standing orders the Chair is entitled to exercise a degree of control over the content of questions that are directed to Ministers. However, the Chair has no control over the content of Ministers' answers. If a printed answer is presented, that is acceptable under the standing orders. If the argument put forward by the honourable member for North Shore was accepted, the Chair would spend all day and all night checking the veracity of every answer provided by Ministers."
Member had been placed on three calls to order by the Speaker which had hampered their ability to take a point of order during Question Time. ⁸⁰	No prima facie case established. The Speaker noted that in ruling on a matter of privilege he must decide whether the matter complained of could fairly and reasonably be said to be capable of interfering with the performance of his duty as a member. The Speaker ruled that as the member had been able to address the House that the rulings of the Chair had not interfered with the performance of his duty.
The recording of the attendance of members during the sitting in the <i>Votes and Proceedings</i> . ⁸¹	Speaker did not make a ruling. However, it was agreed that attendance would not be recorded in the <i>Votes and Proceedings</i> .
The presence of a stranger in the House. ⁸²	The Speaker reserved his decision as to whether a prima facie case had been established and later advised the House that he had accepted the apology of the stranger and that no further action would be taken.
Members of the public had been denied access to the public gallery during Question Time due to the blockade of the Parliament by members of a construction union. ⁸³	Speaker ruled that there was no point of privilege.
Electorate office security and accessing of computers in the electorate office by an unauthorised person. ⁸⁴	Speaker ruled that the matter, although serious, did not satisfy the criteria for a breach of privilege. He undertook to have the matter investigated.
Premier breaching standing orders 104 and 105 (raising points of order) and the Speaker's complicity in the Premier's actions. ⁸⁵	Speaker warned the member not to reflect on the Chair and drew the attention of the House to a ruling of Speaker Rozzoli in 1993 that "The content or relevance of a Minister's answer to a question on notice is not a matter of privilege". The Speaker ruled that a prima facie case had not been established.

⁷⁹ PD 05/04/2001, p. 13339.

⁸⁰ PD 10/04/2001, p. 13459.

⁸¹ PD 01/06/2001, pp. 14243 and 14247.

⁸² PD 20/06/2001, p. 14884; PD 25/06/2001, p. 15174.

⁸³ PD 19/06/2001, pp. 14765-6.

⁸⁴ PD 26/06/2001, p. 15351.

⁸⁵ PD 08/11/2001, pp. 18294-7.

2002

Issue	Outcome
A member rose on a matter of privilege relating to interruptions during debate due to the Leader of the House raising points of order.	Speaker ruled that no prima facie case had been established as the member had not established how his privileges had been breached. ⁸⁶
A member rose on a matter of privilege relating to security in Parliament House following an incident in the public gallery which disrupted proceedings.	Speaker did not accept the matter of privilege and outlined recent security initiatives taken at Parliament House. ⁸⁷
A member rose on a matter of privilege relating to security in Parliament following an incident where a member of the public gained entry to the Bar and was then escorted from the Chamber.	The Speaker did not rule on the matter but noted that he had received a verbal report of the incident. ⁸⁸

2003

Issue	Outcome
A member rose on a point of order that his privilege as a member of the House had been affected due to the Liberal/National Coalition members not being given the call during the debate on a matter of public importance.	The Acting Speaker ruled that a matter of privilege could not be raised as a point of order and a matter of privilege could only be raised when there is no other business before the House. The matter was not raised again. ⁸⁹
A member raised as a matter of privilege the removal of a member from the Chamber by the Deputy Serjeant-at-Arms arguing that standing order 288 requires the ejection to be carried out by the Serjeant-at-Arms, who was not in the Chamber at the time.	The Acting Speaker ruled that no prima facie case had been established and reminded members that the Serjeant-at-Arms is also the Clerk-Assistant (Procedure) who has duties at the Table. The Acting Speaker also informed the House that the Deputy Serjeant-at-Arms acts under the delegation of the Serjeant-at-Arms and that accordingly he had requested the Deputy to escort the member from the House. ⁹⁰
A member rose on a matter of privilege that the Premier had failed to provide an answer to a question without notice which he said he would seek and report back to the House.	The Speaker ruled that no prima facie case had been established and advised the member that whether a Minister chose to respond to a question without notice does not give rise to a breach of privilege. The Speaker also went on to note that the fact a Minister has given an undertaking to provide a response and failed to do so does not infringe in any way on the privileges or rights of the members who asked the question. ⁹¹
A member rose on a matter of privilege that the conduct of a representative of the Department of Local Government prevented her from speaking at a public meeting in her electorate.	The Speaker ruled that no prima facie case of a breach of privilege had been established and noted that he had come to this conclusion on the basis that the actions complained of had not prevented the member from exercising her freedom of speech in the House, had not prevented her from attending the service of the House and were not an impairment of the member in relation to her duties in connection with the proceedings of the House. The Speaker did, however, note that the issues raised by the member were serious and that such actions may even be considered a contempt of the House. ⁹²
A member rose on a matter of privilege that members have an undoubted right and privilege to receive answers from Ministers for their correspondence on behalf of constituents noting that whilst the constituents	The Speaker ruled that no prima facies breach of privilege had been established but concurred that it is important for members to be able to obtain answers to correspondence from Ministers but that it is not a

⁸⁶ PD 11/04/2002, p. 1449.⁸⁷ VP 20/11/2002, p. 637.⁸⁸ VP 21/11/2002, p. 647.⁸⁹ PD 25/06/2003, p. 2149.⁹⁰ PD 03/07/2003, p. 2848.⁹¹ PD 04/09/2003, pp. 3208-9.⁹² PD 14/10/2003, pp. 3746-7; PD 16/10/2003, p. 4081.

in question had received a response that he had not received any. The member argued that both the constituent and the member are entitled to a response from the Executive Government.	breach of privilege for a Minister to respond directly to a constituent and not through the member who raised the issue. ⁹³
A member rose on a matter of privilege that it is the fundamental right of members to receive accurate and truthful answers from Ministers to questions on notice and drew the attention of the House to an answer he had received.	The Speaker ruled that no prima facie case of privilege was involved noting that in the past he and his predecessors had ruled that the Chair cannot direct a Minister how to answer a question, whether it be a question on notice or a question without notice. ⁹⁴
A member rose on a matter of privilege that he had been advised by a Minister, to which he had asked a question with notice, that another Minister was responsible for the area concerned and that when he had directed the question to the other Minister that he had been informed that the original Minister who was asked the question was in fact the appropriate Minister.	The Speaker reminded the member that the Chair cannot direct a Minister how to answer a question or whether the question should be answered. The Speaker did note that although it was not a matter of privilege that matters relating to the answering of questions can be taken up by members with the Ministers concerned. ⁹⁵
A member rose on a matter of privilege that when the Speaker indicated that his motion would be re-worded on the basis that it contained debate he had inferred that the motion was not accurate and as such that his privileges had been abused.	The Speaker did not rule on the matter of privilege but advised the member that he had not intended to imply that the notice of motion given was in any way inaccurate but that as the motion was longwinded and, in the view of the Chair, contained matters of debate the member was to re-word the motion. ⁹⁶

2004

Issue	Outcome
A member rose on a matter of privilege that the standing orders had been applied to members of the Opposition and members of the Government unequally and accordingly that his privileges had been subjugated.	The Speaker ruled that it was not a matter of privilege and warned the member that he should not reflect on the Chair in the way that he had. ⁹⁷
A member rose on a matter of privilege that there was a discrepancy between the video and the <i>Hansard</i> record of an answer given by a Minister to a question without notice given the day before.	The Speaker reserved his ruling until later in the sitting when he stated that he had examined the video and the <i>Hansard</i> report, and directed that, on this occasion, the <i>Hansard</i> report should reflect the video record. ⁹⁸
The Leader of the Opposition sought to raise a matter of privilege that the Premier had claimed that Opposition members of a Legislative Council committee had voted against a motion, arguing there had been no vote. The Leader of the House rose on a point of order arguing that the Leader of the Opposition's privilege as a member of the Legislative Assembly was not affected by a vote by members on a Legislative Council committee.	The Speaker agreed with the Leader of the House and advised that the standing orders provide for members who believe they have been misrepresented in some way to take a point of privilege at the time the matter to which the objection is taken is raised. He also informed the House that should members wish to take issue with the actions of other members, there are other ways under the standing orders in which it can be done. ⁹⁹

2005

Issue	Outcome
A member rose on a matter of privilege in relation to a notice of motion standing in his name on the business paper. He noted that there was a discrepancy with the numbering of his motion on the business paper as shown on the Parliament's website and on the program for the day. He also noted that a paragraph was missing from his motion. ¹⁰⁰	The Speaker noted that he had referred the matter to the Clerk for investigation and that he did not regard it as a matter of privilege. The Speaker did however note if there had been an error in the recording of the motion, an explanation would be provided to the member and the error corrected.

⁹³ PD 29/10/2003, pp. 4372-3.⁹⁴ PD 13/11/2003, pp. 4988-9.⁹⁵ PD 18/11/2003, p. 5133.⁹⁶ PD 02/12/2003, p. 5589.⁹⁷ PD 26/02/2004, p. 6721.⁹⁸ PD 17/03/2004, pp. 7454-5 and pp. 7472-3.⁹⁹ PD 31/08/2004, p. 10515.¹⁰⁰ PD 30/11/2005, p. 20367.

A member rose on a matter of privilege in relation to a question on notice submitted by him that had been rewritten by the Clerks. ¹⁰¹	The Speaker noted that questions on notice may be corrected by the Clerks to assist members and that it is often done in consultation with the member who has submitted the question. The Speaker advised the member that if he was unhappy with the way the question had been recorded he should discuss it with the Clerks and arrive at a version with which he is happy and that complies with the standing orders.
A member wrote to the Speaker raising a matter of privilege in relation to attempts by a development group to silence him by prohibiting the use of any part or parts of the contract in any statement made in Parliament and attempts to deny constituents the right to provide information to their local member. ¹⁰²	The Speaker advised the member that while the matter raised was serious and may constitute a contempt of the House. However, as the matter had been resolved (with the member making a statement in the House) nothing would be gained from having the Privileges Committee examine the matter.

2006

Issue	Outcome
A member rose on a matter of privilege in relation to private members' statements. He noted that sessional orders had been adopted to allow members from either side of the House to make statements on matters affecting their electorates but that that privilege had been taken away that afternoon due to the suspension of standing and sessional orders. ¹⁰³	The Speaker ruled that there was no point of privilege.
A member rose on a matter of privilege in relation to threats of violence that had been made against female members of the Liberal Party and The Nationals of the NSW Parliament by a Government member in the Legislative Council and that the Premier had refused to answer a question on the matter. ¹⁰⁴	The Speaker ruled that, whilst the comments made in the other House may have been inappropriate, such remarks do not form the basis for a claim of breach of privilege. The Speaker ruled that a prima facie breach of privilege had not occurred and that to make a privilege issue out of every alleged insult or reflection made about a member in the House or the Legislative Council would arguably in turn threaten a member's right to freedom of speech.
Following the conclusion of questions without notice a member rose on a matter of privilege that the Leader of the House had impugned the reputation of many Opposition members in his response to a question. ¹⁰⁵	The Speaker noted that the Minister's remarks were made in a general sense and that there was no issue of privilege.
A member rose on a matter of privilege that the <i>Hansard</i> record of the previous day's proceedings did not reflect what was said by a Minister. ¹⁰⁶	After consideration of the matter the Speaker ruled that it was not one of privilege noting that in the editing of <i>Hansard</i> obvious mistakes are corrected and redundancies removed and that the matter raised related to an obvious error that had been corrected.

5.3 Executive interference in the Parliament

This area of parliamentary privilege has received a fair deal of attention in recent times. Concerns have arisen regarding claims of privilege made by the Executive and in relation to the Executive Government impinging on the work of the Parliament, particularly the work of parliamentary committees. Some of the concerns are in regard to witnesses refusing to answer questions on the basis of statutory secrecy provisions and also when there is alleged interference by the Executive Government with witnesses due to appear before parliamentary committees. Another area of concern is the power of the Parliament to summon ministerial staff before a House or

¹⁰¹ PD 30/11/2005, p. 20367.

¹⁰² This was the first occasion since the House had passed a resolution in December 2003 that a member had raised a matter of privilege not suddenly arising.

¹⁰³ PD 07/03/2006, p. 21118.

¹⁰⁴ PD 03/05/2006, pp. 22522-4 & 22546.

¹⁰⁵ PD 21/09/2006, p. 2123.

¹⁰⁶ PD 18/10/2006, p. 2908 and PD 19/10/2006, pp. 3067-8.

one of its committees. This is an area in which there are few court rulings and legal advice on the matter has been conflicting.

5.3.1 Claims of privilege made by the Executive

Throughout the 1990s there was a long-running dispute in New South Wales between the Executive Government and the Legislative Council revolving around that House's power to order the production of documents. As previously noted, the High Court has held that the Council has the power to order the production of documents and that it also has the capacity to take action against any failure to comply with an order, so long as the action taken is non-punitive in nature. However, the capacity of a House to enforce the production of documents can still be impinged upon when the Executive makes claims of privilege on the documents, which it is entitled to do despite the decision of the Court of Appeal in *Egan v Chadwick*.¹⁰⁷

As previously noted, in this case the Court of Appeal held that it is reasonably necessary for the performance of the functions of the Legislative Council to compel the Executive to produce documents in respect of which a claim of legal professional privilege or public interest immunity is made. This is because such a power may be reasonably necessary for the exercise of its legislative function and its role in scrutinising the Government of the day. However, the majority of the Court of Appeal held that the power was limited in the case of cabinet documents in that it is not reasonably necessary for the proper functions of the Legislative Council to call for documents the production of which would be inconsistent with responsible government. As such there are still some limitations as to what the Executive has to disclose to the Legislature.

One commentator has noted that it is likely that courts will interpret the restriction on Cabinet documents and the steps that governments may take to claim immunity for sensitive documents on a case by case basis.¹⁰⁸

5.3.2 Statutory secrecy provisions

Executive privilege issues can also arise during committee inquiries particularly when the Government asserts that certain statutory provisions prohibit the disclosure of information by witnesses giving evidence before a committee. During Legislative Council committee hearings into the budget estimates in August 2000 a number of witnesses from the Casino Control Authority declined to answer certain questions on the basis of advice received from the Crown Solicitor that such disclosure would be in breach of section 148 of the *Casino Control Act 1992* which provides that it is a criminal offence to divulge information acquired in the exercise of functions under the Act.¹⁰⁹

The committee was able to proceed with the inquiry but the matter was not resolved. As such, advice on the matter was sought by the Council from Mr Bret Walker SC. In his advice he noted that the words of section 148 "are not apt to deprive the Council or the Committee of its pre-existing power, both at common law and under the *Parliamentary Evidence Act 1901*, to enquire into public affairs as Members see fit."

¹⁰⁷ (1999) 46 NSWLR 563.

¹⁰⁸ See Griffith, Gareth, *Egan v Chadwick and Other Recent Developments in the Powers of Elected Upper Houses*, New South Wales Parliamentary Library, Briefing Paper 15/99, August 1999.

¹⁰⁹ General Purpose Standing Committee No. 4, *Budget Estimates 2000-2001*, Vol. 2, Report No. 5, August 2000, pp. 32-3.

Mr Walker argued that for legislation to override the power of a committee to conduct inquiries it must contain an express reference to the Houses including its committees or “a statutory scheme that would be rendered fatally defective unless its application to the Houses were implied.”¹¹⁰ However, as the matter is yet to be decided in law there is no legal precedent to confirm this view. Similar difficulties have arisen when committees attempt to obtain confidential documents from witnesses¹¹¹ as noted in section 2.4 of Part Two.

5.3.3 Interference with witnesses appearing before parliamentary inquiries

Concerns have also arisen around the issue of attempted interference by the Executive Government with witnesses appearing before parliamentary inquiries. In May 2002, the Senate Committee on Privileges received a reference from the Senate to inquire into such an allegation. In particular the committee was asked to investigate “whether there was any attempted or actual interference with a witness before the committee in respect of the witness’ evidence”.¹¹²

By way of background, in October 2001 the then Minister for Defence, the Hon. Peter Reith MP, asserted that he had documentary proof that asylum seekers were throwing their children overboard in their attempt to reach Australian shores. The following day, major newspapers published photographs purporting to show this. It was subsequently revealed that the photographs published on 11 October related to the rescue of asylum seekers from their sinking vessel on 8 October 2001 rather than to the alleged “children overboard” incident on 7 October 2001. The issue of whether the Government knew at the time that the photographs did not show what they purported to show became the focus of an inquiry by the Select Committee into a Certain Maritime Incident, which was established on 13 February 2002.

The Senate Committee of Privileges heard that the head of the task force set up to coordinate Defence input to the Maritime Incident Inquiry, prepared a minute to the Minister for Defence indicating that there may have been an attempt to influence a member of the Australian Defence Forces who had been invited to appear before the committee. The minute noted that “the extent of the alleged attempt was not to suggest to the Defence Force member that he present evidence untruthfully, but to consider that he omit relevant facts from his evidence.”¹¹³ The committee found that there may have been an improper attempt to influence a witness but it was strenuously denied by the parties concerned. The Privileges Committee reported that it could not proceed any further with the matter as it was not in a position to “second-guess the plain words of these two witnesses, or reach speculative conclusions on the actions or motives of any other person or persons involved.”¹¹⁴ As such the committee did not find that there was any interference with a witness. However, if it had it would have constituted a contempt of the House.¹¹⁵

¹¹⁰ See paper prepared by John Evans, Clerk of the Parliaments, Parliament of New South Wales, for the Australasian Study of Parliament Group annual conference, October 2002 entitled *Orders for papers and executive privilege: committee inquiries and statutory secrecy provisions*.

¹¹¹ The legislation establishing the Public Accounts Committee is silent on the issue of ordering documents and the Audit Office has obtained a Crown Solicitor advising that indicates the Committee does not have the power to require a person to produce a document.

¹¹² Senate Hansard, 16 May 2002, p. 1695.

¹¹³ Senate Committee of Privileges, *Possible Improper Interference with a Witness before the Senate Select Committee on a Certain Maritime Incident*, 106th Report, August 2002, p. 7.

¹¹⁴ *Ibid*, p. 13.

¹¹⁵ *Ibid*, p. 14.

5.3.4 Immunity for former members and ministerial Staff

Ministerial staff and government advisers have at times claimed they cannot be compelled to give evidence before parliamentary inquiries. A recent case occurred in the Federal Parliament during a Senate committee's consideration of the conduct of a former Minister for Defence in his handling of the "children overboard" affair whilst Minister for Defence. Parliamentary convention and practice prohibits one House or its committees calling a member of the other House as a witness without that member's agreement. In this case the issue was whether a former member of one House could be compelled to give evidence before a committee of the other House. Another issue also arose - the power of parliamentary inquiries to obtain evidence from ministerial staff. These issues have not been tested by a court of law and there are different opinions on the matter.

On the issue of whether the immunity for current members of Houses of Parliament from being compelled to appear before parliamentary inquiries extends to when they are no longer a member of Parliament, Professor Lindell argued in advice given to the Clerk of the House of Representatives that:

*...there are strong and persuasive reasons for recognising that the rationale which supports the probable immunity of current members is wide enough to sustain the continuation of any such immunity after the retirement of the Ministers from Parliament in respect of matters which were relevant to their conduct as Ministers.*¹¹⁶

The basis of this advice was that the independence of each House of Parliament to control its own proceedings and to be the sole judge of the conduct of its own members could be undermined if the other House could simply put that principle aside until the retirement of the member in question. In support of this argument, Professor Lindell noted a number of parliamentary conventions of a similar nature, for example, the power and ability of either House to protect witnesses who appear before parliamentary committees does not cease to operate after the examination of the witness has been completed.¹¹⁷ In the absence of direct judicial or parliamentary authority there can be no certainty that a court will uphold the immunity extending to former members and Ministers.

By extension, it is argued that if former members of Parliament cannot be compelled to provide evidence to a parliamentary committee that such immunity may even extend to both current and former ministerial staff. Professor Lindell argued that a reasonable case could be made that the immunity should extend to ministerial staff and advisers due to the fact that Ministers are unable to conduct their roles in modern government without personal staff and advisers and that the work of the staff is directly related to the role of the member of Parliament. Professor Lindell noted that the issue is a contentious one as the possibility that ministerial staff may be immune from appearing to give evidence before parliamentary committees both whilst working for a Minister and also once they have left that position poses serious implications for the effectiveness of committee inquiries.¹¹⁸

¹¹⁶ Advice provided by Professor Geoffrey Lindell regarding the obligation of former Ministers (and their ministerial staff) to answer questions at an inquiry conducted by parliamentary committees, p. 6.

¹¹⁷ *Ibid*, p. 7.

¹¹⁸ *Ibid*, p. 9.

The alternate view has also been expressed that former members and Ministers can be compelled to give evidence before a parliamentary inquiry and that ministerial staff have no immunity from compulsory attendance to give evidence or produce documents to any such inquiry. This view is based on the argument that members are only exempt from being questioned by a House to which he/she was not a member if the activities in question occurred in the course of parliamentary proceedings. The Clerk of the Senate put it this way:

*There is...no basis for the suggestion recently made that former ministers of the House of Representatives may not be summoned by a Senate committee. The immunities having parliamentary recognition, of proceedings and serving members, simply do not add together to make the different and hitherto unheard-of immunity of former ministers.*¹¹⁹

The Clerk of the Senate received advice from Bret Walker SC, who expressed the view that former Ministers, who are no longer members of either House of Parliament, can be subpoenaed to give evidence before a parliamentary inquiry simply because of the fact that they are no longer members and parliamentary convention holds that only members are exempt from being compelled to give evidence. In support of this Mr Walker argues that:

*I have never seen it suggested that former members of the Executive government trail with them, forever, until they die, a personal protective immunity from investigation by the Houses of Parliament of their official conduct, and thus an immunity specifically from compulsory attendance to give evidence in relation to such an investigation.*¹²⁰

This view, however, fails to consider the fact that former Ministers should remain accountable to the House to which they were a member even if the activities in question happened after the Parliament has been dissolved and the Government is in a caretaker position. Nor, as Professor Lindell points out, does it address the functional need for the immunity to continue to operate after a member ceases to be a member if the immunity is to be effective.¹²¹

In relation to ministerial staff, the Senate Finance and Public Administration References Committee specifically considered this issue in October 2003. Whilst the Committee came to the conclusion that ministerial staff have no immunity from appearing before a parliamentary committee, it was conscious of the fact that this view had developed amongst ministerial staff due to the fact that the Parliament had been reluctant to engage in legal battles to compel ministerial staff to attend.¹²² The committee recommended, in the interest of preserving ministerial responsibility and maximising accountability and transparency of Government, that guidelines be developed by the Government in consultation with the Parliament to provide a framework in relation to the appearance of ministerial staff before parliamentary committees and that ministerial staff should appear before parliamentary committees in the following situations:

¹¹⁹ See paper prepared by Harry Evans, Clerk of the Senate, for the Annual ASPG Conference, October 2002 entitled *The Parliamentary Power of Inquiry: Any Limitations?*

¹²⁰ Opinion provided to the Clerk of the Senate by Mr Bret Walker SC.

¹²¹ Advice provided by Professor Geoffrey Lindell regarding the obligation of former Ministers (and their ministerial staff) to answer questions at an inquiry conducted by parliamentary committees, p. 7.

¹²² The Senate Finance and Public Administration References Committee, *Staff employed under the Members of Parliament (Staff) Act 1984*, October 2003, pp. 26-7.

- A Minister has renounced, or distanced him or herself from a staff member's action;
- A Minister has refused to appear to answer questions regarding the conduct of a member of their staff;
- Critical or important information or instructions have emanated from a Minister's office but not from the Minister;
- Critical or important information or instructions have been received by a Minister's office but not communicated to the Minister; or
- A Government program is administered to a significant extent by staff of Government members.¹²³

Professor Campbell presents a similar view. She argues that under the system of responsible government and ministerial accountability ministerial staff must be accountable to the Parliament. She comments:

*Australian constitutional arrangements are ones under which ministers are expected to be responsible and accountable to parliaments. They are also arrangements under which a certain supremacy is accorded to parliamentary institutions over executive arms of government. Those principles must surely be undermined if the parliamentary arms of government are, effectively, precluded from inquiring into conduct which has preceded ministerial actions.*¹²⁴

The issue of whether ministerial staff can be called before parliamentary committees also arose in Victoria in 2002, when a select committee of the Legislative Council subpoenaed a number of Legislative Assembly Ministers and certain members of their personal staffs. The Legislative Assembly did not grant consent to permit the Ministers to appear before the committee and the Attorney General argued that ministerial advisers are "engaged to advise ministers in their political and not their executive capacity" and that the protection afforded to Ministers "should not be able to be circumvented by the summoning of ministerial advisers".¹²⁵ None of the staff gave evidence to the inquiry.¹²⁶ In relation to the difficulty of gaining evidence from the Executive Government Dr Ken Coghill, a former Speaker of the Victorian Legislative Assembly, notes that:

*the Victorian Parliament actually denies its committees significant powers to compel the disclosure of information held by the executive. It has issued guidelines that absolve public servants of any obligation to provide certain types of information concerning communications involving members of the executive and other matters, including those "which could give rise to a claim of immunity."*¹²⁷

The issue was also raised in the United Kingdom when the Transport, Local Government and the Regions Committee asserted the power of the House of Commons to compel ministerial advisers to appear before its committees. In this case, the committee wished to examine Lord Brit, an adviser to the Prime Minister, who was also a member of the House of Lords. It was argued by the Prime Minister's office that ministerial advisers should not be compelled to give evidence as it would undermine the system of cabinet government. The committee did not agree but did

¹²³ *Ibid*, p. 40.

¹²⁴ Campbell, *Parliamentary Privilege*, 2003, p. 175.

¹²⁵ Victorian Parliament, *Parliamentary Debates*, 20 March 2002, pp. 373-405.

¹²⁶ See paper prepared by Ken Coghill, Co-Director, Parliamentary Studies Unit, Monash University and former Speaker of the Legislative Assembly of Victoria, for the Annual ASPG Conference, October 2002 entitled *Privileges Claimed by the Executive: Have We Learned Anything?*

¹²⁷ *Ibid*.

not pursue the matter because Lord Brit was a member of the House of Lords. The committee did however, make a number of comments on how this convention could undermine the effectiveness of committee inquiries:

[t]he Prime Minister's advisers should be accountable to departmental select committees...It should be for the House of Commons committees themselves to decide who should or should not give evidence to them, not the Prime Minister, his Department or advisers. Of course, committees in most circumstances can do this by summoning witnesses to appear.

*Unfortunately, this is not possible because Lord Brit, like so many of the Prime Minister's advisers, is a Member of the other House. He is therefore able to take advantage of the ancient convention established in quite different circumstances, that he will not be summoned to appear before a Commons' Committee. We recommend that this convention be modified to ensure that the Prime Minister's or other Minister's advisers do not abuse it to evade scrutiny.*¹²⁸

On a related note, on 14 January 2003 in a decision brought down by the Supreme Court of Prince Edward Island, Canada, it was held that employees of a Government department are not immune from being compelled to appear before a parliamentary committee to give evidence and to produce documents.¹²⁹ By way of background, in April 2001, the Standing Committee on Agriculture of the Legislative Assembly of Prince Edward Island received a reference from the House to examine the outbreak of a fungal disease which affects potatoes and became known as the "potato wart crisis". In the conduct of its investigation, the committee extended an invitation to the Canadian Food Inspection Agency (CFIA) to send representatives before the committee. The invitation was declined and subsequently two summonses were issued requiring employees of CFIA to attend. The employees did not comply and initiated judicial proceedings to have their summonses quashed.¹³⁰

In support of their argument the CFIA employees said that the committee was conducting an inquiry into the operation of a federal agency and that such an inquiry is outside the jurisdiction of the Legislative Assembly of the province. This argument was dismissed by the judge as being premature with the judge arguing that "just because the witnesses sought to be summoned happen to be employees of a federal agency does not necessarily mean the Committee is conducting an inquiry into that federal agency."¹³¹

The CFIA employees also argued that they were exempt from being summoned to give evidence before a parliamentary committee on the basis of "Crown immunity from discovery". This was also dismissed by the Judge who noted:

The Committee in the present case is exercising its inherent power to compel the attendance of witnesses which flows from the constitutional authority of the Legislative Assembly itself. I am not so sure the work of the Committee is so much in the nature of a discovery, as it is a response to the resolution of the Legislative Assembly itself to make full inquiry into a crisis in the Prince Edward Island potato industry so as to seek ways in which such a crisis may be

¹²⁸ See the Fourth Report of the Transport, Local Government and the Regions Committee entitled *The attendance of Lord Brit at the Transport, Local Government and the Regions Committee*, March 2002.

¹²⁹ See the decision from the Trial Division of the Supreme Court of Prince Edward Island in *AG Canada v MacPhee and Ors*, 2003 PESCTD 06, 14 January 2003.

¹³⁰ *Ibid*, paragraphs 1 to 10.

¹³¹ *Ibid*, paragraph 15 (per Cheverie J).

*averted in future. For these reasons, I conclude the witnesses should not be exempt from the summonses.*¹³²

As such, whilst a court of law in New South Wales has not ruled on whether ministerial staff can be compelled to provide evidence before a parliamentary committee, the decision in *AG Canada v McPhee*, that Government employees must comply with a subpoena for their attendance before a parliamentary committee, provides some guidance as to what powers a parliamentary inquiry in the Westminster system has in relation to the calling of departmental and Government witnesses.

5.4 Abrogation or waiver of parliamentary privilege

The accepted position with regard to the waiver of privilege is that neither a member nor a House has the capacity to waive the freedom expressed in Article 9 of the *Bill of Rights* because it is a statutory provision. Privilege can only be waived by express legislation. Enid Campbell notes:

*There is surprisingly little judicial authority on the question whether any of the immunities conferred by Article 9 of the Bill of Rights, or any of its requirements, can be waived. Houses of Parliament have generally taken the view that Article 9 cannot be waived, principally because it is contained in a statute. No one, it has been argued, has authority to dispense with the application of statutes unless there is clear statutory provision to enable dispensations to be granted.*¹³³

In New South Wales there have been a number of incidents concerning the waiving of privilege. In 1973, the Clerk of the Legislative Assembly was summoned to produce a number of documents to the Royal Commission appointed to inquire and report on allegations of organised crime in clubs. When the matter was reported to the House, a resolution was passed enabling the Clerk to give papers tabled in the House to the Royal Commission. The resolution also gave the commissioner control over the documents and enabled members to appear as witnesses.¹³⁴

In 1994, the Legislative Assembly agreed to a resolution to release *in camera* evidence taken before the Joint Select Committee upon Police Administration to a Royal Commission inquiring into the New South Wales Police Service. The resolution provided that the evidence was to be released on condition, agreed to in writing to the Presiding Officers, that it be treated as highly confidential and not published. Furthermore, the resolution provided that the *in camera* evidence could only be used for intelligence and investigative purposes, including derivative use.¹³⁵

In 1995, the Legislative Assembly passed a resolution to authorise the release of *in camera* evidence of the Select Committee upon Prostitution following a request from the Royal Commission into the New South Wales Police Service. The resolution provided:

¹³² *Ibid*, paragraph 37 (per Cheverie J).

¹³³ Campbell, Enid, *Parliamentary Privilege*, 2003, p. 125.

¹³⁴ VP 21/08/1973, pp. 39-41.

¹³⁵ PD 30/11/1994, p. 6039; PD 01/12/1994, p. 6118; PD 02/12/1994, p. 6288.

That this House grants leave to officers assisting the Royal Commission into the New South Wales Police Service to inspect the *in camera* evidence taken before the Select Committee upon Prostitution on condition that –

- (1) the evidence is inspected at Parliament House;
- (2) any information obtained be used by the Royal Commission to pursue appropriate further inquiry without revealing to any other person other than the Royal Commissioner and officers of the Royal Commission, the contents of the *in camera* evidence, and its contents not made public; and
- (3) before adducing into evidence of the Royal Commission any evidence taken before the Select Committee upon Prostitution, the Royal Commissioner, his Honour Justice Wood QC, seek leave of the Legislative Assembly.¹³⁶

In April the following year, a resolution in similar terms was passed by the Legislative Assembly enabling access to *in camera* evidence taken before the Committee on the Independent Commission Against Corruption.¹³⁷

In November 1996, the Speaker informed the House that the Royal Commissioner sought leave to make public the fact that certain evidence was given before the Select Committee upon Prostitution and to tender the transcript of the committee with the exception of certain words. The Speaker subsequently sought the advice of the Crown Solicitor regarding the potential breach of Article 9 of the *Bill of Rights*, whereby evidence taken before the select committee could be brought into question.

The Speaker noted that this matter was of deep concern from the perspective of the operation of committees appointed by the Parliament. He argued that for committees to operate effectively, witnesses who give evidence *in camera* must be assured of continuing confidentiality of that evidence unless the House itself resolves to make it public for its own purposes in special circumstances.

The Speaker advised the House that the Crown Solicitor was of the opinion that from the material available to him and from responses from the Royal Commission, the action proposed by the Commission would breach Article 9 of the *Bill of Rights*. The Speaker also noted that parliamentary convention and law prevented the House from granting a waiver to this privilege other than to adduce the material into evidence purely for the purpose of establishing the fact that the evidence was given. The Speaker also advised the House that it was a matter for the House to determine what action, if any, it wished to take.

The House then passed the following resolution:

*That this House, being of the opinion that to grant leave to the Royal Commission into the New South Wales Police Service for any evidence taken before the Select Committee upon Prostitution to be adduced into evidence before the Royal Commission has real potential to breach Article 9 of the Bill of Rights, and as the House has no authority to waive its privilege in this regard, declines to grant leave as requested.*¹³⁸

As noted, parliamentary privilege can be waived by passing appropriate legislation. In 1997, following allegations made by the Hon. Franca Arena MLC in the Legislative Council an amendment was made to the *Special Commissions of Inquiry Act 1983*

¹³⁶ VP 26/10/1995, pp. 361-2.

¹³⁷ VP 17/04/1996, p. 32.

¹³⁸ PD 27/11/1996, pp. 6738-9.

which provided that a House of Parliament may, by way of resolution, declare that parliamentary privilege is waived in connection with a special commission to an extent declared in the resolution. The Act also empowered each House to waive parliamentary privilege except for privileges enjoyed by the member individually. This provision is no longer in law as the amendment specified it would expire six months after it commenced.

Mrs Arena challenged the validity of this waiver of privilege and commenced legal proceedings to have the legislation declared invalid. She also made claims about the ineffectiveness of the establishment of the inquiry. The Court of Appeal in *Arena v Nader* held that the legislation did not waive the parliamentary privilege of a member but that it authorised the member to give evidence to such an inquiry if the member voluntarily chose to do so. As such, the Act was not invalid. In making its decision the Court of Appeal referred to the decision of the Supreme Court of Western Australia in *Royal Commission into the use of Executive Power; R v Parry, Saxon and Smith*¹³⁹ where Chief Justice Malcolm stated:

*It is correct...that the privileges, immunities and powers may be exercised by individual members of the Parliament. The specific privileges conferred by Article 9 of the Bill of Rights are conferred upon the institution of Parliament as a whole and not on the individual members. In my opinion, while it seems to be the case that individual members may invoke privilege, it is wrong to imply that it is a personal privilege, but rather it is an attribute of their office and of the Parliament as a whole to allow them to perform freely the functions expected of them by the electors.*¹⁴⁰

The Court of Appeal in adopting this approach argued:

*...it seems to us that the parliamentary privilege spoken of in s33D(1) is that of the House as an institution, and that spoken of in s33D(3)(a) is the privilege that a member is entitled to invoke as an attribute of office. We see nothing incongruous in a House of Parliament being able to waive the former privilege, and thus permitting an external inquiry into statements made inside the House while at the same time the statute operates not to waive a member's privilege.*¹⁴¹

Legislation was introduced to the South Australian Parliament but not passed, which enabled parliamentary privilege to be waived. The *Parliamentary Privilege (Special Temporary Abrogation) Bill 2005* was introduced following claims by a member of the South Australian Parliament that he and his assistants held documents/evidence of criminal sexual misconduct by another member of Parliament and others. The legislation proposed to temporarily remove the protections afforded to any allegations made in parliamentary proceedings and associated documents that related to criminal sexual misconduct by enabling material to be adduced as evidence in any legal proceedings.¹⁴²

Parliamentary privilege can also be waived under defamation laws in the United Kingdom. In 1996 the United Kingdom Parliament passed legislation to enable a person to "waive the protection of parliamentary privilege in so far as it protected that person."¹⁴³ This essentially means that a member can waive privilege as though it

¹³⁹ Supreme Court of Western Australia, Full Court, 1 May 1997, unreported.

¹⁴⁰ *Arena v Nader and Another*, 1997, 42 NSWLR 427 at 437.

¹⁴¹ *Ibid.*

¹⁴² See the second reading speech on the bill in Hansard, South Australian House of Assembly, Monday 4 April 2005, p. 2061 ff.

¹⁴³ See *Odgers*, 11th edition, 2004, p. 72.

was a personal immunity but that the protection of members against legal liability for what they have said in the House remains. In *Hamilton v Al Fayed*¹⁴⁴ it was held on appeal by the House of Lords, that the provision (section 13 of the Defamation Act 1996 (UK)), permitted the questioning in defamation proceedings of evidence given to parliamentary committees without it being regarded as infringing the autonomous jurisdiction of Parliament.

In this case, a former member of the House of Commons waived his parliamentary privilege for what he had said in parliament under section 13 and commenced libel proceedings after the defendant had alleged that the former member had accepted payments as reward for asking questions in Parliament when a member. Mr Al Fayed argued that since both the Committee on Standards and Privileges and the Parliamentary Commissioner for Standards had already investigated the allegations, the trial would breach parliamentary privilege. Lord Browne-Wilkinson argued that “parliamentary privilege prevented the court from entertaining any evidence, cross-examination or submissions which challenged the veracity or propriety of anything done in the course of parliamentary proceedings. If parliamentary privilege had applied in the present case, the evidence produced to the parliamentary committee could not have been challenged, making a fair trial impossible.”¹⁴⁵ The House of Lords dismissed Mr Al Fayed’s appeal.

Reynolds v Times Newspaper Ltd & others is a similar case where a member initiated defamation proceedings against the newspaper. Mr Reynolds, who was the Prime Minister of Ireland had resigned and the *Times* newspaper had published comment on the events surrounding his resignation in both the British mainland edition and the Irish edition of the *Sunday Times*. On appeal the Privy Council accepted that by instituting and prosecuting his libel action Mr Reynolds had waived his immunity under the Irish constitution in respect of proceedings in the Dáil. His ability to do so was not questioned.¹⁴⁶

Section 13 of the *Defamation Act 1996* (UK) has been heavily criticised by the Joint Committee on Parliamentary Privilege in the United Kingdom Parliament. In its 1999 report, the committee argued that the provision is fundamentally flawed in that it undermines the basis of privilege noting that:

*freedom of speech is the privilege of the House as a whole and not of the individual member in his own right, although an individual member can assert and rely on it.*¹⁴⁷

The committee went on to note that:

*application of the new provision could also be impracticable in complicated cases; for example, where two members, or a member and a non-member, are closely involved in the same action and one waives privilege and the other does not. Section 13 is also anomalous: it is available only in defamation proceedings. No similar waiver is available for any criminal action, or any other form of civil action.*¹⁴⁸

¹⁴⁴ *Hamilton v Al Fayed* (2000) 2 All ER (House of Lords, 23 March 2000).

¹⁴⁵ *Ibid.*

¹⁴⁶ See House of Lords Judgements, *Reynolds v Times Newspapers Limited and Others*, 28 October 1999, available from <http://www.hrothgar.co.uk/WebCases/hol/reports/01/25.htm>

¹⁴⁷ Joint Committee on Parliamentary Privilege of the UK Parliament, Report Volume 1, dated April 1999, paragraph 68.

¹⁴⁸ *Ibid.*

The committee has recommended that section 13 be repealed and replaced by a provision that empowers “each House to waive article 9 for the purpose of any court proceeding, whether relating to defamation or to any other matter, where the words spoken or the acts done in proceedings in Parliament would not expose the speaker of the words or the doer of the acts to any legal liability.”¹⁴⁹ To date, this has not occurred.

There has also been a proposal in the United Kingdom to provide a statutory basis for allowing parliamentary privilege to be abrogated in corruption cases. In March 2003, a draft Government Corruption Bill was published for pre-legislative scrutiny. The provisions of the proposed legislation specifically provide for the prohibition on the questioning of proceedings in Parliament to be over-ridden in corruption cases by permitting anything said in the House or a committee to be tendered as evidence if relevant to a charge of corruption, whether it involves a member of Parliament or not. A joint select committee established to consider the draft bill was highly critical of the over-ride clause and recommended that the proposed legislation be amended to allow the proceedings of Parliament to be questioned in corruption cases only where the member is the defendant. The committee also recommended that those words or actions of a member that are admissible should also be admissible to the same extent for or against all co-defendants in respect of corruption offences based on the same facts.¹⁵⁰ The committee expressed the view that a more appropriate approach would be for a Parliamentary Privilege Bill to be introduced, which would include such matters.¹⁵¹

In response to this point, the Government, whilst appreciating the concerns of the committee, noted that “a balance must be found between the desirability of lessening any evidential bar to prosecution which might lead to a guilty person going unpunished, and the need to ensure that there is no impediment to the freedom of speech in Parliament.” The Government expressed the view that there is not necessarily a conflict between these two ends arguing that “in the particular case of corruption, the ability to use parliamentary proceedings in evidence might be a factor which enhances the freedom of speech, by making sure that a person does not speak in Parliament as a result of a corrupt bargain.”¹⁵² The draft bill was never introduced.

In relation to the committee's recommendation that a Parliamentary Privileges Bill should be introduced which could cover this issue, the Government noted in 2003 that discussions were taking place between officials in the Cabinet Office and the House authorities on the provisions of such a bill.¹⁵³ To date, legislation putting parliamentary privilege on a statutory basis is yet to be introduced.

¹⁴⁹ *Ibid*, paragraph 89.

¹⁵⁰ Report of the House of Lords and House of Commons Joint Committee on the Draft Corruption Bill, Session 2002 – 03, HL Paper 157, HC 705, pp. 37-46.

¹⁵¹ *Ibid*, p. 40.

¹⁵² The Government Reply to the Report from the Joint Committee on the Draft Corruption Bill, December 2003, p. 8.

¹⁵³ *Ibid*, p. 7.

Appendix A Explanation of the Routine of Business

Standing Order 97 provides for the following routine of business:

Tuesdays

The Speaker takes the Chair at 1.00 p.m.

1. PRAYER and ACKNOWLEDGEMENT OF THE TRADITIONAL OWNERS OF THE LAND
2. GENERAL BUSINESS NOTICES OF MOTIONS AND PRIVATE MEMBERS' STATEMENTS
"Are there any notices of motions for General Business?"
(After all notices for General Business (General Notices) have been given)
"There being no further notices, private members' statements will now be proceeded with. I call the Member for ..."
(Note at the conclusion of each statement a Minister/Parliamentary Secretary may reply)
(Note no question is to be put for private members' statements and no divisions or quorums may be called)
3. THE SPEAKER RESUMES THE CHAIR AT 2.15 P.M.
4. MINISTERIAL STATEMENTS
"Are there any ministerial statements?"
(Note the Leader of the Opposition or depute may respond for the equivalent time)
5. NOTICES OF MOTIONS (other than General Notices)
"Are there any Notices of Motions for Government Business?"
(Ministers usually seek the call in accordance with their seniority)
"Are there any Notices of Motions for private members' bills?"
"Are there any Notices of Motions for business which takes precedence" (S.O. 118)
6. NOTICES OF MOTIONS TO BE ACCORDED PRIORITY
"Are there any notices of motions that Members will seek to be accorded priority over other business before the House?"
(Note—the notices are treated in the same way as other notices of motions—they must be read and an original handed up in writing, signed by the member. No more than two notices can be accepted at any one sitting of the House.)
If two notices are received—"There being two notices the issue of whether a motion will be accorded priority will be determined later in the sitting."
7. QUESTION TIME
"Are there any questions?"
(The first call is given to the Leader of the Opposition and Question Time proceeds for 45 minutes or for the time taken to answer 10 questions whichever is the longer period.)
8. MINISTERIAL STATEMENTS
"Are there any ministerial statements?"
9. PAPERS
"Do Ministers have papers to lay upon the Table?"
(Papers are usually tabled by Ministers in order of their seniority.)

The Speaker and the Clerk also report any papers that have been received outside the House.

10. COMMITTEE REPORTS – TABLING OF REPORTS AND NOTIFICATION OF INQUIRIES

“Are there any referrals or reports from committees?”

11. PETITIONS

(The Clerk will report to the House whether petitions have been received and if so that the details will be published in *Hansard* and in the *Votes and Proceedings*.)

12. ANNOUNCEMENT OF MATTER OF PUBLIC IMPORTANCE

If received by the Speaker before 12.00 noon and if determined by the Speaker to be in order, the Speaker says—

“I have received a matter of public importance under the signature of the member for ... on”

“The matter will be considered at a later time.”

The Speaker determines the matter is one of public importance. If more than one, the Speaker determines which one should proceed.

13. PLACING OR DISPOSAL OF BUSINESS

“Does any member wish to postpone, withdraw or discharge any business standing in their name on the Business Paper.”

(The Speaker will call any member who seeks the call to withdraw or postpone a notice of motion or postpone, discharge or withdraw an order of the day.)

14. MOTION ACCORDED PRIORITY

If more than one notice has been given—

“I call the member for....to give reasons why the member’s motion should have priority over other business of the House.”

(The member may speak for up to five minutes.)

Repeat if another member has given a notice.

The question is put on the first notice—

“The question is—That the motion of the member for...be accorded priority.”

(If this is agreed to, the member moves the motion, if not the question is proposed for the second notice.)

(If only one notice has been given the House must still decide whether the motion should have priority over other business of the House.)

15. BUSINESS WITH PRECEDENCE

As per the business paper.

Clerk to announce the matter.

16. GOVERNMENT BUSINESS AT 4.30 P.M. (or earlier if other Business is completed)

As per the business paper.

If a notice of motion—call the Clerk to announce the matter.

If an order of the day—call upon the Clerk to announce the next item of business.

17. MATTERS OF PUBLIC IMPORTANCE

Speaker calls the Member who submitted the matter.

The discussion proceeds.

(Note no question is put at the conclusion of the discussion)

18. ADJOURNMENT AT 7.30 P.M. (or at the conclusion of the Matter of Public Importance if earlier.)

Wednesdays

The Speaker takes the Chair at 10.00 a.m.

1. PRAYER and ACKNOWLEDGEMENT OF THE TRADITIONAL OWNERS OF THE LAND
2. GENERAL BUSINESS NOTICES OF MOTIONS
3. GOVERNMENT BUSINESS

As per the business paper.

Clerk to announce the matter.

(The Speaker will leave the Chair at 1.30 p.m. for lunch.)

4. At 2.15 p.m.—Speaker takes the Chair.

AS PER ROUTINE FOR TUESDAYS EXCEPT THAT MEMBERS ARE ABLE TO GIVE NOTICE OF ANY MOTIONS THAT WILL BE THE SUBJECT OF A MOTION TO RE-ORDER LATER IN THE SITTING PRIOR TO QUESTION TIME AND MEMBERS ARE AFFORDED AN OPPORTUNITY TO RE-ORDER GENERAL BUSINESS ORDERS OF THE DAY (FOR BILLS) AND GENERAL BUSINESS (NOTICES OF MOTIONS) TO BE ACCORDED PRECEDENCE FOR THE FOLLOWING DAY AFTER THE ANNOUNCEMENT OF THE MATTER OF PUBLIC IMPORTANCE

“Does any Member wish to move a motion to re-order an Order of the Day for tomorrow for the resumption of the debate on their bill?”

Two private members may seek the call to move that the member’s order of the day be granted precedence on the following day.

“The question is – That the Order of the Day for the bill standing in the name of the member for... have precedence on ...”

If agreed to, the second motion does not proceed.

“Are there any motions to re-order General Business – Notices of Motions?”

Two private members may seek the call to move that the member’s notice of motion be granted precedence on the following day.

“The question is – That the Notice of Motion standing in the name of the member for... have precedence on ...”

If agreed to, the second motion does not proceed.

5. PRIVATE MEMBERS’ STATEMENTS AT 5.45 P.M.

(Note no question is to be put for private members’ statements and no divisions or quorums may be called)

6. MATTER OF PUBLIC IMPORTANCE AT 7.00 P.M.

7. ADJOURNMENT AT 7.30 P.M. (or at the conclusion of the Matter of Public Importance if earlier)

Thursdays

The Speaker takes the Chair at 10.00 a.m.

1. PRAYER and ACKNOWLEDGEMENT OF THE TRADITIONAL OWNERS OF THE LAND
 2. GENERAL BUSINESS NOTICES OF MOTIONS
 3. GOVERNMENT BUSINESS
(until 11.45 a.m.)
As per the business paper.
Clerk to announce the next item of business.
 4. GENERAL BUSINESS—NOTICES OF MOTIONS/ORDERS OF THE DAY (NOT FOR BILLS)
(until no later than 1.30 p.m.)
As per the business paper.
Clerk to announce the next item of business.
 5. At 2.15 p.m. the Speaker resumes the Chair.
AS PER ROUTINE FOR TUESDAYS EXCEPT THAT GENERAL BUSINESS ORDERS OF THE DAY FOR BILLS ARE CONSIDERED AT 4.30 P.M. AND PRIVATE MEMBERS' STATEMENTS ARE CALLED ON AT 5.30 P.M. OR EARLIER IF OTHER BUSINESS IS COMPLETED
 6. ADJOURNMENT AT 6.30 P.M. (or at the conclusion of private members' statements if earlier)
-

Fridays

Speaker takes the Chair at 10.00 a.m.

No quorums may be called and any divisions called are deferred and set down as orders of the day for the next sitting day and determined after questions without notice.

1. PRAYER and ACKNOWLEDGEMENT OF THE TRADITIONAL OWNERS OF THE LAND
 2. NOTICES OF MOTIONS FOR GOVERNMENT BUSINESS AND GENERAL BUSINESS
 3. PETITIONS
 4. GENERAL BUSINESS – NOTICES OF MOTIONS (FOR BILLS)
(until [no later than] 10.30 a.m.)
As per the business paper.
Clerk to announce the next item of business.
 5. GOVERNMENT BUSINESS – from 10.30 a.m. or earlier if other business completed
 6. COMMITTEE REPORTS
As per the business paper (between 1.00 p.m. and 1.30 p.m. or earlier if other business is completed)
“The question is – That the House take note of the report”.
 7. PRIVATE MEMBERS' STATEMENTS AT 1.30 P.M. or earlier if other business completed
 8. ADJOURNMENT
Automatic after private members' statements.
-

The routine of business has been varied by sessional order for the current Parliament to provide for the following routine:

Tuesdays

The Speaker takes the Chair at 12.00 noon

1. PRAYER and ACKNOWLEDGEMENT OF THE TRADITIONAL OWNERS OF THE LAND
2. GENERAL BUSINESS NOTICES OF MOTIONS

“Are there any notices of motions for General Business?”

(After all notices for General Business (General Notices) have been given)
3. PRIVATE MEMBERS’ STATEMENTS

“Private members’ statements will now be proceeded with. I call the Member for ...”

(Note at the conclusion of each statement a Minister/Parliamentary Secretary may reply)

(Note no question is to be put for private members’ statements and no divisions or quorums may be called. The Speaker leaves the Chair at 1.30 p.m.)
4. THE SPEAKER RESUMES THE CHAIR AT 2.15 P.M.
5. MINISTERIAL STATEMENTS

“Are there any ministerial statements?”

(Note the Leader of the Opposition or depute may respond for the equivalent time)
6. NOTICES OF MOTIONS (other than General Notices)

“Are there any Notices of Motions for Government Business?”

(Ministers usually seek the call in accordance with their seniority)

“Are there any Notices of Motions for private members’ bills?”

“Are there any Notices of Motions for business which takes precedence” (S.O. 118)
7. NOTICES OF MOTIONS TO BE ACCORDED PRIORITY

“Are there any notices of motions that Members will seek to be accorded priority over other business before the House?”

(Note—the notices are treated in the same way as other notices of motions—they must be read and an original handed up in writing, signed by the member. No more than two notices can be accepted at any one sitting of the House.)

If two notices are received—“There being two notices the issue of whether a motion will be accorded priority will be determined later in the sitting.”
8. QUESTION TIME

“Are there any questions?”

(The first call is given to the Leader of the Opposition and Question Time proceeds for 45 minutes or for the time taken to answer 10 questions whichever is the longer period.)
9. MINISTERIAL STATEMENTS

“Are there any ministerial statements?”
10. PAPERS

“Do Ministers have papers to lay upon the Table?”

(Papers are usually tabled by Ministers in order of their seniority.)

The Speaker and the Clerk also report any papers that have been received outside the House.

11. COMMITTEE REPORTS – TABLING OF REPORTS AND NOTIFICATION OF INQUIRIES

“Are there any referrals or reports from committees?”

12. PETITIONS

(The Clerk will report to the House whether petitions have been received and, if so, that the details will be published in *Hansard* and in the *Votes and Proceedings*.)

13. ANNOUNCEMENT OF MATTER OF PUBLIC IMPORTANCE

If received by the Speaker before 12.00 noon and if determined by the Speaker to be in order, the Speaker says—

“I have received a matter of public importance under the signature of the member for ... on”

“The matter will be considered at a later time.”

The Speaker determines the matter is one of public importance. If more than one, the Speaker determines which one should proceed.

14. PLACING OR DISPOSAL OF BUSINESS

“Does any member wish to postpone, withdraw or discharge any business standing in their name on the Business Paper.”

(The Speaker will call any member who seeks the call to withdraw or postpone a notice of motion or postpone, discharge or withdraw an order of the day.)

15. MOTION ACCORDED PRIORITY

If more than one notice has been given—

“I call the member for....to give reasons why the member’s motion should have priority over other business of the House.”

(The member may speak for up to five minutes.)

Repeat if another member has given a notice.

The question is put on the first notice—

“The question is—That the motion of the member for...be accorded priority.”

(If this is agreed to, the member moves the motion, if not the question is proposed for the second notice.)

(If only one notice has been given the House must still decide whether the motion should have priority over other business of the House.)

16. BUSINESS WITH PRECEDENCE

As per the Business Paper.

Clerk to announce the matter.

16. GOVERNMENT BUSINESS AT 4.00 P.M. (or earlier if other business is completed)

As per the Business Paper.

If a notice of motion—call the Clerk to announce the matter.

If an order of the day—call upon the Clerk to announce the next item of business.

18. PRIVATE MEMBERS' STATEMENTS AT 7.00 P.M.

19. MATTER OF PUBLIC IMPORTANCE
Speaker calls the Member who submitted the matter.

The discussion proceeds.

(Note no question is put at the conclusion of the discussion)
 20. ADJOURNMENT AT 7.45 P.M. (or at the conclusion of the matter of public importance if earlier.)
-

Wednesdays

The Speaker takes the Chair at 10.00 a.m.

1. PRAYER and ACKNOWLEDGEMENT OF THE TRADITIONAL OWNERS OF THE LAND
2. GENERAL BUSINESS NOTICES OF MOTIONS
3. GOVERNMENT BUSINESS UNTIL 1.15 P.M.

As per the Business Paper.
Clerk to announce the matter.
4. COMMUNITY RECOGNITION STATEMENTS UNTIL 1.30 P.M.

(The Speaker will leave the Chair at 1.30 p.m. for lunch.)
5. At 2.15 p.m.—Speaker takes the Chair.

AS PER ROUTINE FOR TUESDAYS EXCEPT THAT MEMBERS ARE AFFORDED AN OPPORTUNITY TO RE-ORDER GENERAL BUSINESS ORDERS OF THE DAY (FOR BILLS) AND GENERAL BUSINESS (NOTICES OF MOTIONS) TO BE ACCORDED PRECEDENCE FOR THE FOLLOWING DAY AFTER THE ANNOUNCEMENT OF THE MATTER OF PUBLIC IMPORTANCE

“Does any Member wish to move a motion to re-order an Order of the Day for tomorrow for the resumption of the debate on their bill?”

Two private members may seek the call to move that the member’s order of the day be granted precedence on the following day.

“The question is – That the Order of the Day for the bill standing in the name of the member for... have precedence on ...”

If agreed to, the second motion does not proceed.

“Are there any motions to re-order General Business – Notices of Motions?”

Two private members may seek the call to move that the member’s notice of motion be granted precedence on the following day.

“The question is – That the Notice of Motion standing in the name of the member for... have precedence on ...”

If agreed to, the second motion does not proceed.
6. GOVERNMENT BUSINESS AT 4.00 P.M.

As per the Business Paper.
Clerk to announce the matter.
(The Speaker will leave the Chair at 6.30 p.m. for dinner.)

7. At 7.00 p.m. the Speaker resumes the Chair.
8. PRIVATE MEMBERS' STATEMENTS
9. GOVERNMENT BUSINESS CONCLUDING AT 9.45 P.M.
10. MATTER OF PUBLIC IMPORTANCE
11. ADJOURNMENT AT 10.00 P.M. (or at the conclusion of the matter of public importance if earlier)

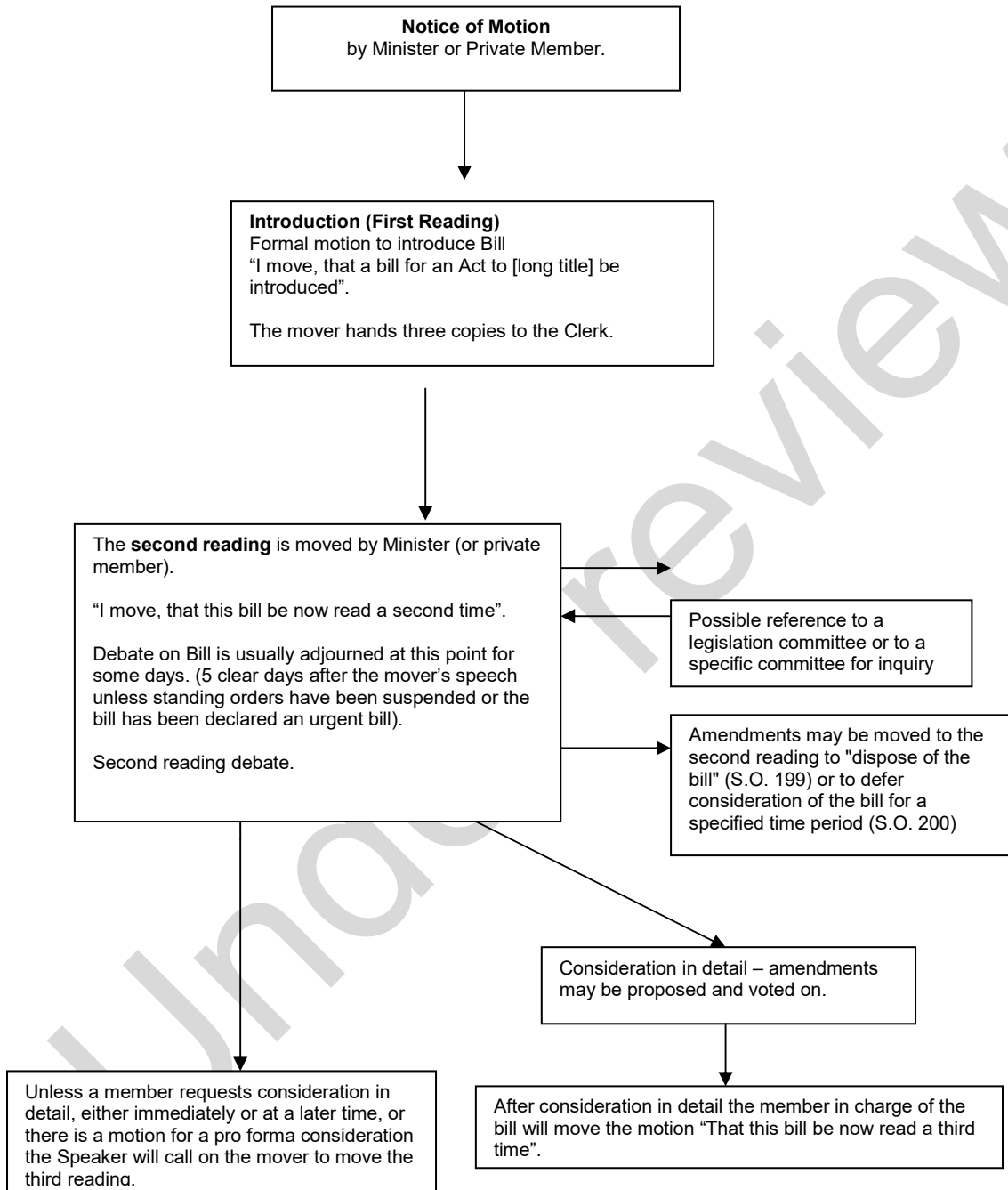
Thursdays

The Speaker takes the Chair at 10.00 a.m.

1. PRAYER and ACKNOWLEDGEMENT OF THE TRADITIONAL OWNERS OF THE LAND
2. GENERAL BUSINESS NOTICES OF MOTIONS
3. GENERAL BUSINESS – NOTICES OF MOTIONS (FOR BILLS)
(until [no later than] 10.30 a.m.)
As per the Business Paper.
Clerk to announce the next item of business.
4. GENERAL BUSINESS ORDERS OF THE DAY FOR BILLS
5. GENERAL BUSINESS NOTICES OF MOTIONS OR ORDER OF THE DAY (NOT BEING BILLS)
(until no later than 1.00 p.m.)
As per the Business Paper.
Clerk to announce the next item of business.
6. COMMITTEE REPORTS
As per the Business Paper (between 1.00 p.m. and 1.30 p.m. or earlier if other business is completed)
“The question is – That the House take note of the report”.
7. At 2.15 p.m. the Speaker resumes the Chair.
AS PER ROUTINE FOR THE FIRST DAY EXCEPT NO MOTIONS ARE ACCORDED PRIORITY
8. GOVERNMENT BUSINESS
9. BUSINESS OF THE HOUSE – PETITIONS AT 4.30 P.M.
Speaker calls any Member who seeks the call to speak on a petition that has been signed by 10,000 or more persons (NB: the member who lodged the petition does not have to speak.)
The discussion proceeds.
(Note no question is put at the conclusion of the discussion)
10. COMMUNITY RECOGNITION STATEMENTS
11. PRIVATE MEMBERS' STATEMENTS
12. ADJOURNMENT AT THE CONCLUSION OF PRIVATE MEMBERS' STATEMENTS

Appendix B Passage of legislation

Bills may be introduced in either the Legislative Assembly or the Legislative Council but must be considered by each House in turn. The following sets out the steps for the passage of legislation through the Legislative Assembly.



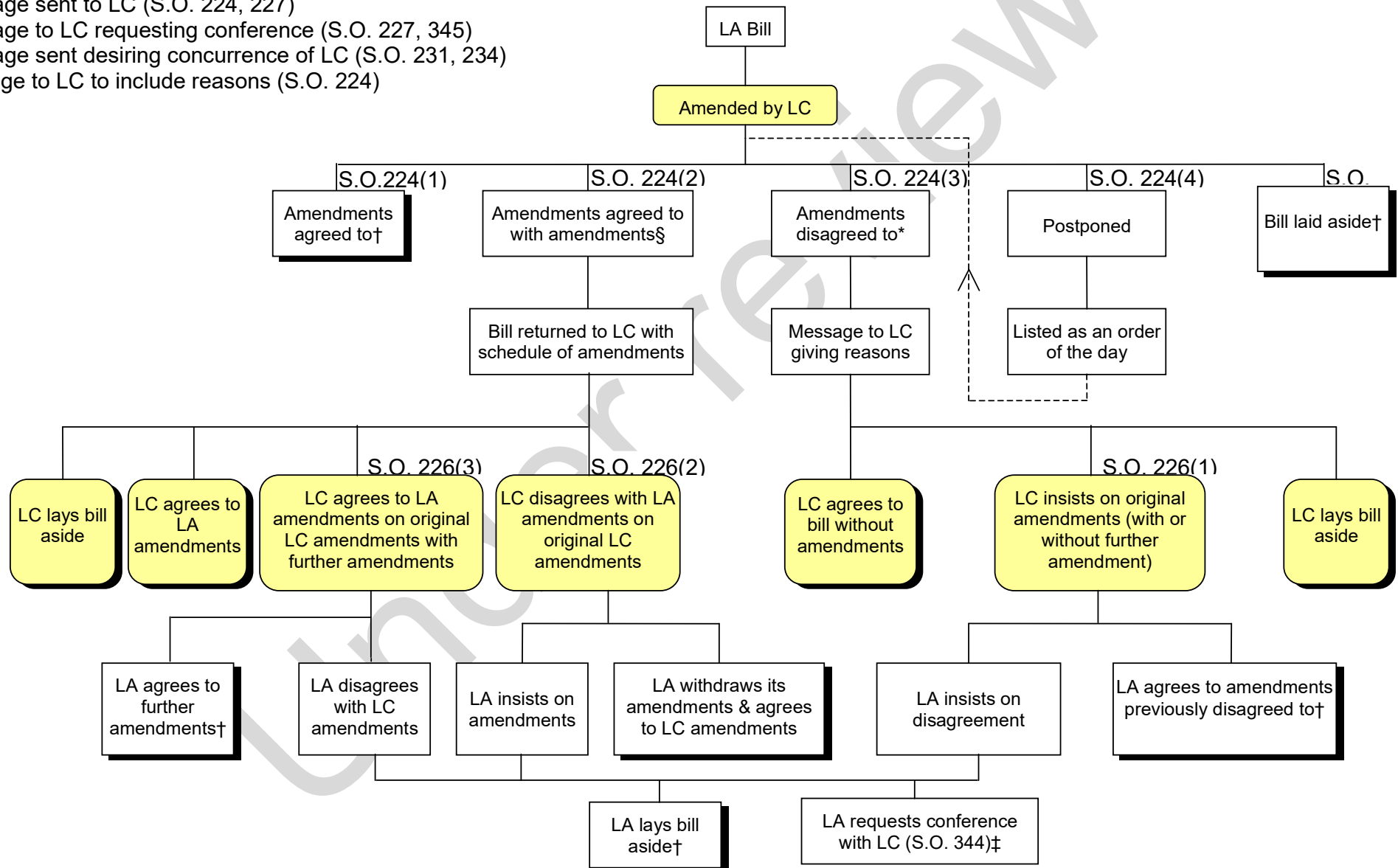
Appendix C Council Amendments to an Assembly Bill

† Message sent to LC (S.O. 224, 227)

‡ Message to LC requesting conference (S.O. 227, 345)

§ Message sent desiring concurrence of LC (S.O. 231, 234)

* Message to LC to include reasons (S.O. 224)

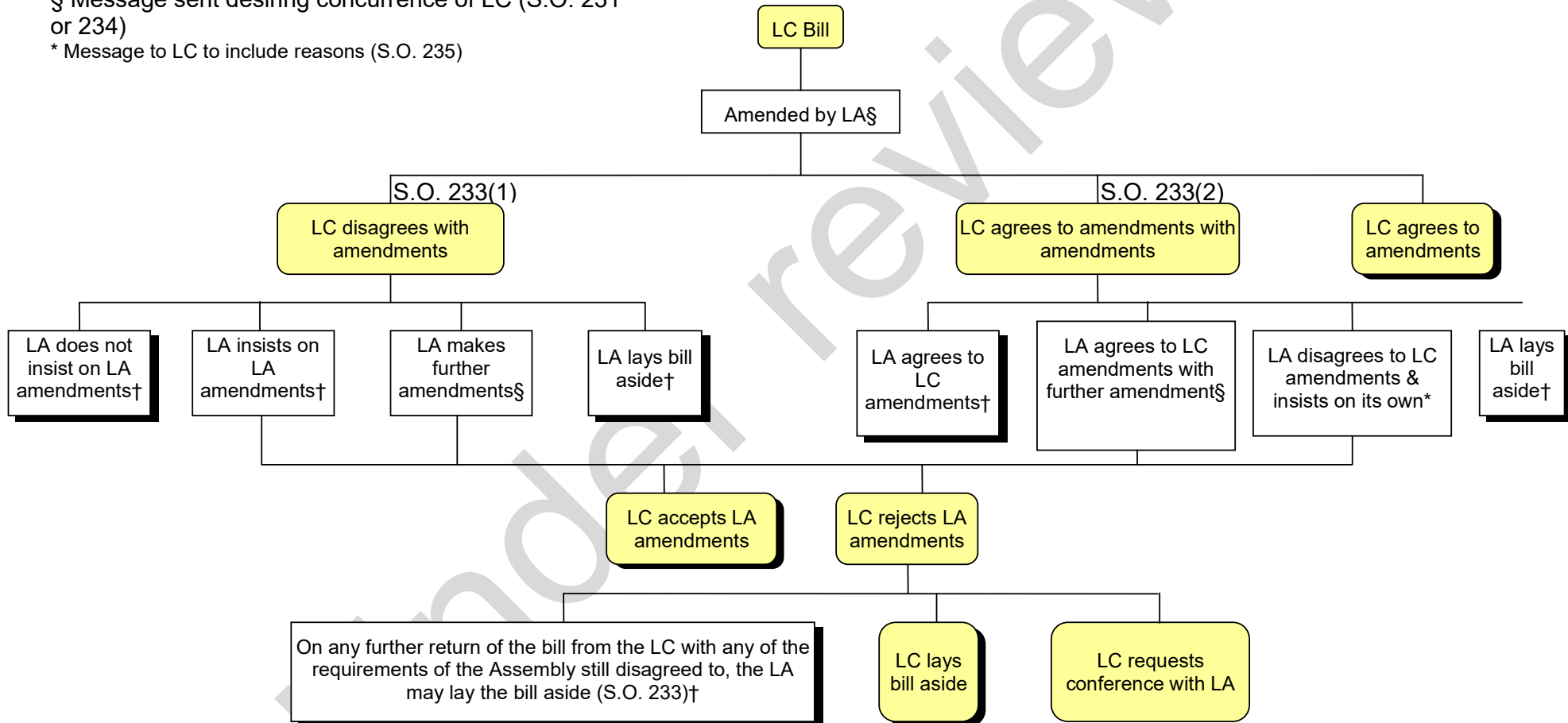


Appendix D Assembly Amendments to a Council Bill

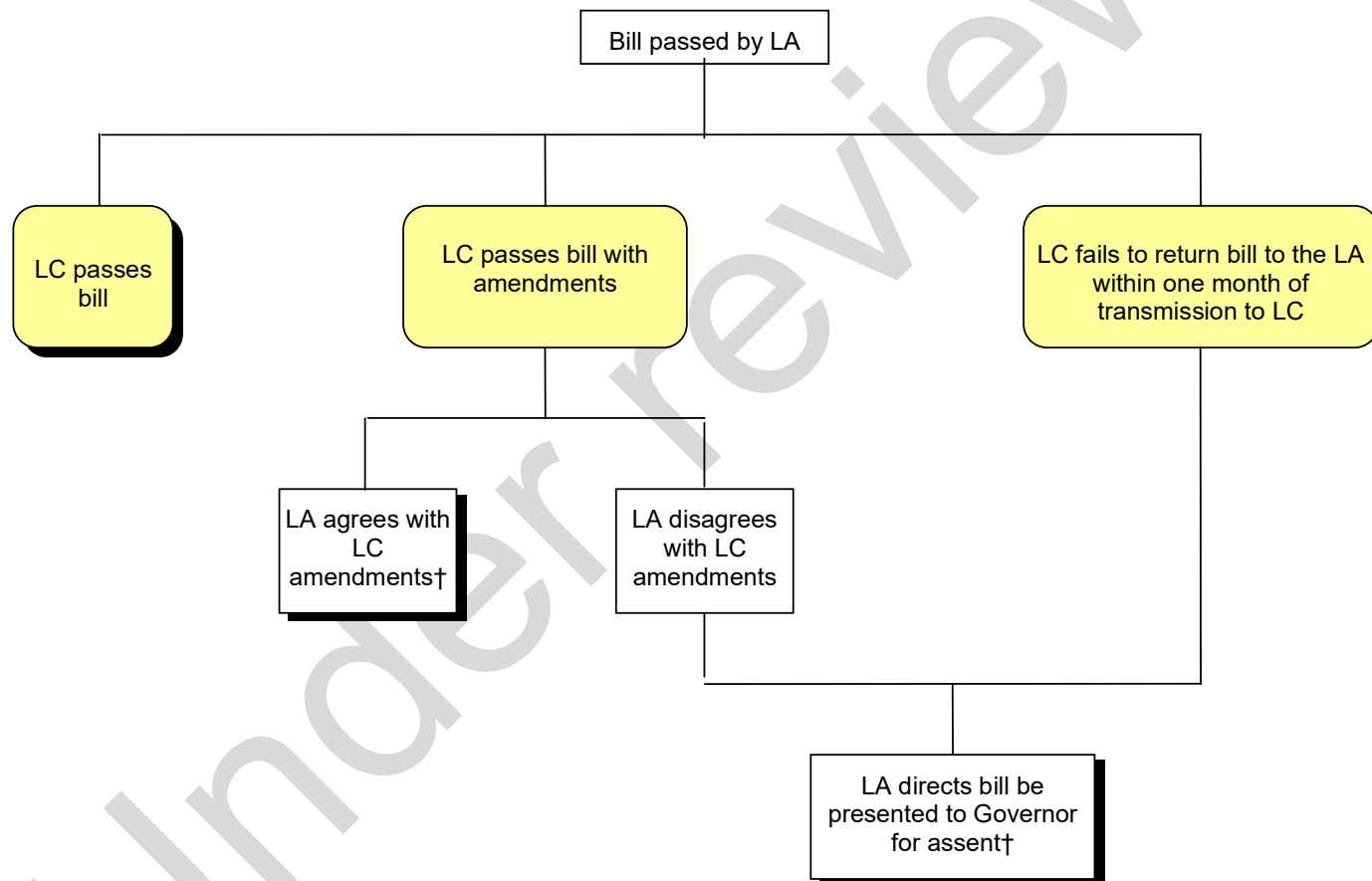
† Message sent to LC (S.O. 234 or 227)

§ Message sent desiring concurrence of LC (S.O. 231 or 234)

* Message to LC to include reasons (S.O. 235)

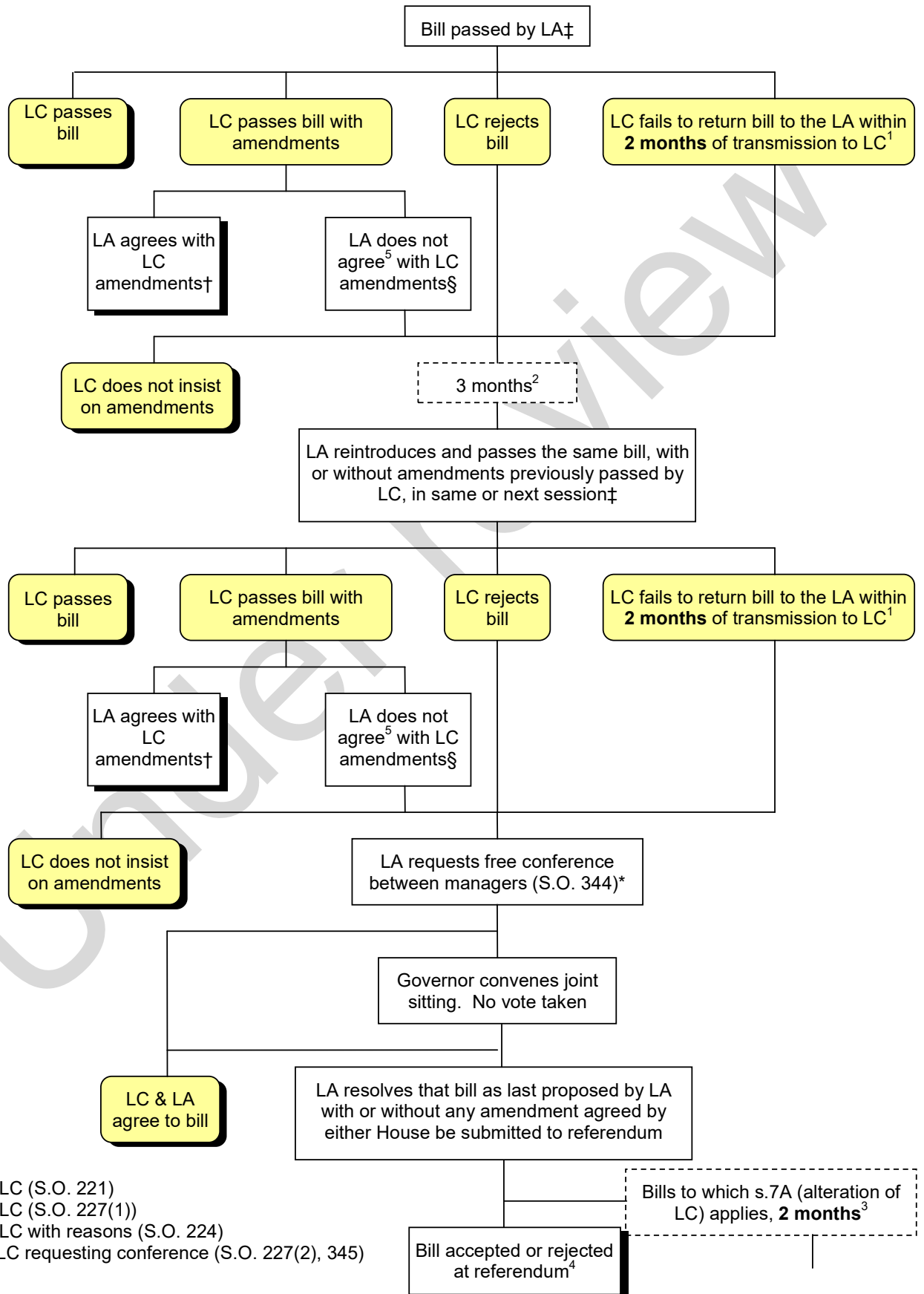


Appendix E Bills Appropriating Revenue or Moneys for the Ordinary Annual Services of the Government
Section 5A *Constitution Act 1902*



† Message sent to LC (S.O. 227)

Appendix F Legislative Assembly Bills other than those Appropriating Revenue or Moneys for the Ordinary Annual Services of the Government
Section 5B *Constitution Act 1902*



‡ Message to LC (S.O. 221)

† Message to LC (S.O. 227(1))

§ Message to LC with reasons (S.O. 224)

* Message to LC requesting conference (S.O. 227(2), 345)

NOTES ON SECTION 5B BILLS

- ¹ Constitution Act 1902 s. 5B(4). This period commences when the Clerk of the Legislative Assembly delivers the bill and the message to a member or one of the Clerks-at-the-Table of the Legislative Council while the House is sitting, or to the Clerk or President of the Legislative Council when the House is not sitting. Prorogation during the two month-period prevents the Legislative Council being taken to have failed to pass a bill under s. 5B(4).
- ² Constitution Act 1902 s. 5B(1). This period commences when the Legislative Assembly disagrees with the Legislative Council amendments, the Legislative Assembly rejects the bill, or when the Legislative Assembly has failed to pass the bill after the elapse of two months under s. 5B(4).
- ³ Constitution Act 1902 s. 5B(5)(c). For bills to which s. 7A (bills altering the powers of the Legislative Council) applies, two months must elapse from the time the Legislative Assembly passes a resolution calling for the referendum before the referendum is held. The referendum must be held during the life of the Parliament. Paragraph 5B(5)(c) does not provide for a referendum on the day of a general election.
- ⁴ A referendum, other than for bills to which s. 7A applies, shall be held at any time during the life of the Parliament or at the next general election (s. 5B(2)).
- ⁵ Passing amendments with further amendments would not constitute agreement under s. 5B.

Appendix G Qualification and Disqualification of Members of Parliament

Qualification of members

Every person enrolled to vote in any electoral district is qualified to be a candidate for any seat in the Legislative Assembly or Legislative Council unless otherwise disqualified. (ss. 79(1) & 81B(1) *Parliamentary Electorates and Elections Act 1912*.)

Any person who has attained the age of 18 and is either an Australian citizen or was enrolled as an elector in Australia as a British subject prior to 26 January 1984 is entitled to enrolment.¹ A person is not entitled to vote at an election unless that person's real place of living was for some time within three months of the election within the subdivision for which the person is enrolled (s. 20).

A person may not be on the roll if they: (a) are, because of unsound mind, incapable of understanding the nature and significance of enrolment and voting; (b) are serving a prison sentence of 12 months or more; or (c) are the holder of a temporary entry permit or are a prohibited immigrant (s. 21).

Disqualification

A person is disqualified from being a member of the Assembly or of the Council if that person—

is a member of the other House (s. 13C *Constitution Act 1902*),

holds or benefits from a contract with the public service, with certain exceptions (s. 13),

holds an office of profit under the Crown or has a pension from the Crown (s. 13B),² or

is a member of the Commonwealth Parliament (ss. 79(7) & 81E *Parliamentary Electorates and Elections Act 1912*

A member's seat is vacated if the member—

fails to attend the House for one entire session, unless excused (s 13A(a) *Constitution Act 1902*),

makes any declaration or acknowledgment of allegiance to any foreign prince or power, or does any act whereby the member may become entitled to the rights of a subject or citizen of any foreign state or power (s. 13A(b)),³

becomes bankrupt or takes the benefit of any law for the relief of bankrupt or insolvent debtors (s. 13A(c)),

becomes a public defaulter (s. 13A(d)), or

is convicted of an infamous crime, or of an offence punishable by imprisonment for life or for a term of 5 years or more (s. 13A(e)).

In relation to what is considered to be an infamous crime, in 1940 the Court of Disputed Returns argued that an "infamous crime" depended upon the nature of the crime committed rather than the

¹ People who were not Australian citizens but who were enrolled as at 26 January 1984 on the basis of being a British subject were not removed from the roll. British subjects not enrolled at that date must become Australian citizens to enrol to vote.

² This disqualification provision was enacted in 1978 and was amended in 1980 to specify that members could hold or accept an office of profit under the Crown "in respect of which the member is not entitled to any remuneration, except either fees payable to him, as a member of a body, in respect of his attendance at meetings of that body or an allowance for reasonable expenses incurred or to be incurred in carrying out the duties of the office, or both those fees and such an allowance." The amendment also permitted appointment to boards of the Federal Government "or other sovereign jurisdictions", and introduced the provision that allowed transgressing members an opportunity to resign from the prohibited office before his seat was vacated. The explanatory notes to the amending bill mention that when the need arises the Standing Orders and Procedure Committee would need to draw up appropriate standing rules and orders to cover the giving of notice of a member holding a prohibited office of profit so that the seven sitting day period could commence within which the matter could be resolved prior to the resolution that the seat be vacated.

³ The holding of dual citizenship does not prevent a person from becoming a member of the Parliament of New South Wales. The provision applies in relation to persons who are already members of Parliament and subsequently take action to obtain foreign citizenship or establish a foreign allegiance. This differs from the provision in s. 44(i) of the Commonwealth Constitution that provides that a person is incapable of becoming a member of the Commonwealth Parliament if they are a citizen of a foreign power. In relation to the Commonwealth Parliament it has been held that the taking out of Australian citizenship, by people with dual nationality, is not enough to renounce a foreign nationality. Rather there must be some evidence that reasonable steps have been taken to renounce the foreign citizenship. See *Sue v Hill* (1999) 199 CLR 462.

terms of the offence and whether it is “contrary to the faith credit and trust of mankind”.⁴

The effect of the disqualifications providing for a member’s seat to be vacated should not be confused with the operation of the comparable part of s. 44 of the Commonwealth Constitution which provides that any person affected by the disqualifications “shall be incapable of being chosen or of sitting” giving rise to the circumstance where the Court of Disputed Returns has declared void the election of candidates successful at Federal elections.

A report on its inquiry into section 13A of the *Constitution Act 1902* by the Joint Committee on the Independent Commission Against Corruption recommended changes to the disqualification provisions in the Constitution Act including that s. 13A(e) be amended by the deletion of the reference to treason and that a member be disqualified on the imposition of a sentence of one year’s imprisonment.⁵ The *Crimes Legislation Amendment (Sentencing) Act 1999* enacted amendments to s. 13A(e) of the *Constitution Act 1902* removing the reference to treason and amending the disqualification provisions to provide that a person is disqualified from being a member if they are convicted of an infamous crime or an offence punishable by imprisonment for life or for a term of 5 years or more. Other recommendations in the report relating to the qualification and disqualification of members have not been adopted.

In June 2000 the *Constitution Amendment Act 2000* was passed to make provision for a member convicted of certain offences to lodge an appeal within a prescribed period and not have their seat vacated.⁶ This amendment had its origins in an Independent Commission Against Corruption report on the circumstances surrounding the payment of a parliamentary pension to Mr P.M. Smiles (April 1996) which found that until the appellate procedure was complete it cannot be known whether there has been a conviction.⁷

Under section 19AA of the *Parliamentary Contributory Superannuation Act 1971* any person who ceases to be a member while proceedings for a serious offence are pending against them will have their entitlement to receive a pension suspended. If the former member is not convicted the suspension to the entitlement is lifted. However, if the person is found guilty of a serious offence they will no longer be eligible for a parliamentary pension although the former member will be entitled to have their personal contributions refunded.

⁴ See comments by Maxwell J in re *Reference by the Legislative Council (NSW) In re Trautwein* (1940) 40 SR (NSW) 371 at 380.

⁵ Report presented 11/5/99, VP 11/05/1999, p. 16.

⁶ At the time that the bill was introduced a member of the Legislative Council (the Hon. Doug Moppett) was to come before the courts.

⁷ Legislative Council PD, 07/06/2000, p. 6688.