

CHAPTER 21

RELATIONS BETWEEN THE HOUSES

The Houses of the New South Wales Parliament are constituted as separate and sovereign institutions. However, under the bicameral parliamentary system, effective relations between the two Houses are vital to the operations of government, particularly as the two Houses must reach agreement on proposed legislation before it can become law. The two Houses must also reach agreement on a range of other issues. Accordingly, the two Houses frequently need to communicate with one another.

Communication between the Council and the Assembly may be by message, by conference or by committees conferring together (SO 123).¹ The most common of these methods of communication is by message. Where a disagreement cannot be resolved through messages, a conference – either an ordinary conference or a free conference – may be conducted, although the holding of conferences has largely fallen into disuse since 1927. The Houses may also conduct joint sittings and joint meetings, although not as a mechanism to resolve disagreements.

INDEPENDENT HOUSES OF PARLIAMENT

The Council and the Assembly are independent Houses of the New South Wales Parliament. Under the *Constitution Act 1902*, the Council is a continuing body, although it can be prorogued and its business suspended before a periodic Council election, whereas the Assembly is dissolved for a general election every four years, unless dissolved sooner under certain circumstances. The Act also confers different powers on the two Houses in respect of money bills, and provides for different methods of election and terms of service of members.

The Houses are also distinct in their operation. Each has complete autonomy, subject to constitutional constraints, in regard to procedures, consideration of business, questions of privilege and contempt, the delivery of services to members and the administration of finances and staffing.

1 Joint meetings between committees are discussed in more detail in Chapter 19 (Committees).

As independent Houses, the Council and Assembly make their own decisions without regard to the opinion of the other House. In the Council, President Johnson ruled in 2000 that the House takes no carriage of what happens in the other place.²

The rules for communication between the Houses, which reflect their independence, are dealt with below.

MESSAGES

Messages have developed as the most simple, direct and commonly used means by which the two Houses communicate with each other. Messages between the Houses are regularly used to forward bills and amendments to bills, to request the attendance of a member of the other House before a committee, to advise of the appointment of joint committees and committee members, to request conferences and to transmit resolutions for agreement. At any time when there is no business under discussion, a motion may be moved without notice that a resolution of the House be communicated by message to the Assembly (SO 125).

The practice of delivering messages derives from the procedure used to communicate between the House of Lords and the House of Commons.³ The House of Representatives and the Senate also use this mode of communication.⁴

Before 1922, the standing orders provided for the President to appoint members to convey messages to the Assembly, such members then reporting back to the House that the message had been duly conveyed. In 1922, the standing orders were amended to allow the President to appoint a member or one of the Clerks to convey a message, which could be received by two or more of the Assembly members, or by a Clerk if the Assembly was sitting. Under the current standing orders in force since 2004, messages are conveyed to the Assembly by one of the Clerks (SO 124). In practice, it is usually the Usher of the Black Rod who delivers messages to the Assembly.

A message from the Council to the Assembly must be in writing and signed by the President or Deputy President (SO 124). The subject matter of a message and to whom it is delivered in the Assembly are recorded in a message book maintained by the Clerks. Every message is also recorded in the Minutes, together with any answer given (SO 127).

When the House is sitting, messages from the Assembly are received by one of the Clerks in the House. The Clerk in turn informs the President who reports the message as soon as practicable without interrupting any business before the

2 Ruling: Johnson (Deputy), *LC Debates* (13/4/2000) 4667.

3 McKay W (ed), *Erskine May's Treatise on The Law, Privileges, Proceedings and Usage of Parliament*, 23rd edn, LexisNexis, UK, 2004, pp 629-630.

4 Evans H (ed), *Odgers' Australian Senate Practice*, 11th edn, Department of the Senate, Canberra, 2004, p 536.

House (SO 126(1) and 126(2)). If any action is necessary on receipt of a message, a future day must be fixed for its consideration (SO 126(3)). Occasionally, where it is necessary to deal with an issue on the same day, a message may be considered forthwith by leave.⁵

Messages received when the House is not sitting are received by the Clerk and reported the next sitting day.

The majority of disagreements between the Houses are resolved through the exchange of messages. For instance, messages in relation to the appointment of a joint committee may be exchanged repeatedly before an agreement is reached.⁶

More detail on messages relating specifically to the provisions of bills is provided in Chapter 12 (The Legislative Process).

CONFERENCES

Where messages have failed to resolve a disagreement between the Houses, a conference provides an occasion for members, appointed as managers to represent their House, to communicate directly with one another in an attempt to seek a resolution of the disagreement. A conference can be convened on a bill or any other matter.

Conferences are conducted under the provisions of standing orders 128 to 134 and 153.

Requests for conferences

All communication between the Houses regarding a request for a conference must be by message. Either House can send a message to the other House requesting a conference on a bill or any other matter, with the exception of a message requesting a free conference under the provisions of section 5B of the *Constitution Act 1902*, which may only be initiated by the Assembly. When the Assembly requests a free conference under section 5B, the Council must agree to it without delay and appoint the time and place for holding the free conference (SO 133(2)).

When requesting a conference – either an ordinary conference or a free conference – a message from the Council to the Assembly must contain a statement of the general objects of the conference (SO 128(2)). A conference may not be requested by the Council on the subject of a bill or motion before the Assembly (SO 128(4)),

5 For example, on 21 June 2007, the House granted leave for a motion to allow for the consideration of the Legislative Assembly's messages relating to the Joint Standing Committee on Road Safety, the Legislation Review Committee and the Committee on the Independent Commission Against Corruption, *in globo*, forthwith, *LC Minutes* (21/6/2007) 157.

6 See, for example, the messages concerning the appointment and membership of the Joint Standing Committee on Electoral Matters in 2007, *LC Minutes* (21/6/2007) 154-155, (26-27/6/2007) 173-174, (27/6/2007) 184, (28/6/2007) 199.

the rationale being that a conference should be held only if the Council is notified of a disagreement between the Houses over a measure.⁷ There have, however, been very few requests for a conference initiated by the Council.⁸ One such request was refused.⁹

In most instances, conferences have been initiated at the request of the Assembly following an impasse over the provisions of a bill. The Council has agreed to all but two requests by the Assembly for a free conference in relation to the provisions of a bill. The Council declined the requests for a free conference on the Crown Lands Bill 1898 and the Constitution Amendment (Legislative Council Abolition) Bill 1960.¹⁰

There is no requirement in the standing orders for a disagreement to have been established before a conference can be requested, aside from conferences held under section 5B of the *Constitution Act 1902*.

Managers

The motion requesting a conference must contain the names of the members proposed to be the managers representing the Council at the conference (SO 129(1)). The number of members must be not fewer than five at an ordinary conference and 10 at a free conference (SO 128(3)). The number of managers to represent the Council at a conference requested by the Assembly must be the same as the number of Assembly managers (SO 129(3)). If the House requires, the managers may be selected by ballot (SO 129(2)).

Managers are usually composed of members supporting the principal object of the conference.¹¹ For example, during one of the free conferences held on the Saint Andrew's College Bill 1867, the President called the names of the members appointed as managers for the Council for the conference. The Hon Edward Deas Thomson objected on the basis that he did not support the provisions of the bill, arguing that, according to *Erskine May*:

[I]t is not customary nor consistent with the principles of a conference to appoint any Members as Managers unless their opinions coincide with the objects for which the Conference is held.¹²

7 *Odgers*, 11th edn, p 539.

8 See the requests for a free conference into the proposed separation of the northern districts of New South Wales to form the colony of Queensland (1856), the request for a conference on Australian Federation (1857), and the request for a second free conference on the Lands Act Amendment Bill 1875. These requests are discussed later in this chapter.

9 The Assembly refused the request for a free conference into the proposed separation of the northern districts.

10 See *LC Minutes* (7/7/1898) 48; (7/4/1960) 213-215.

11 Ruling: Murray, *LC Minutes* (14/11/1867) 101.

12 *LC Minutes* (14/11/1867) 101.

The President upheld the point of order, with the result that the House replaced Mr Thomson with the Hon John Blaxland as a Council manager for the conference. The conference that then took place appears to have done so in contravention of the standing orders, since the Council was represented by one less manager than the Assembly.¹³

There is precedent for the House to give instructions to its managers. In 1927 the Council agreed to the Assembly's request for a free conference on the Industrial Arbitration (Living Wage Declaration) Bill, which included an instruction from the Council to the managers to consider family endowments in relation to the bill.¹⁴

There are several instances where a member has failed to answer to their name being called to act as a manager on behalf of the Council, in which case another member has been appointed in their place.¹⁵

Time and place

The Council appoints the time and place for holding a conference requested by the Assembly. In turn, when the Council requests a conference, it must agree, by message, to the time and place appointed by the Assembly (SO 131).

During a conference the sitting of the Council must be suspended (SO 130). In complying with this requirement, the practice is for the President to leave the Chair until a fixed time. When the House resumes, if the managers have not yet returned, the President once again leaves the Chair until a later agreed time. The procedure of resuming and suspending business can occur over a series of days until such time as the managers conclude their business at the free conference and return to the House.¹⁶

According to precedence, at the time agreed for a conference, the Clerk, by direction of the President, calls over the names of the managers appointed to act on behalf of the Council, who then proceeded to the conference. However, on three occasions, on the President reporting that the Assembly had agreed to the time and place appointed by the Council for a conference, the managers were required to proceed directly to the conference without any further business intervening, as the time appointed for the conference had arrived.¹⁷

13 *LC Minutes* (14/11/1867) 101.

14 *LC Minutes* (11/3/1927) 147.

15 See, for example, the free conference on the Crown Lands Act Amendment Bill, *LC Minutes* (7/10/1891) 103; and the free conference on the Hunter District Water and Sewage Act Amendment Bill, *LC Minutes* (20/10/1897) 161.

16 See, for example, the Constitution and Parliamentary Electorates and Elections (Amendment) Bill in 1978, *LC Minutes* (31/1/1978) 768.

17 See the Gas Bill 1912, *LC Minutes* (2/12/1912) 154; the Fair Rents Bill 1915-16, *LC Minutes* (16/12/1915) 230; and the Industrial Arbitration (Living Wage Declaration) Bill, *LC Minutes* (11/3/1927) 147.

By convention, the managers attending a conference are attended by the Usher of the Black Rod, although there has never been a provision in the standing orders for the attendance of an officer of the House. The attendance of an officer of the House is necessary, however, to assist in the preparation of the report of the managers to the House.

On occasion, the time and place of a conference has been the cause of some debate. For example, in 1899, the motion that the conference on the Australasian Federation Enabling Bill be held forthwith was amended and the conference time set for a later day.¹⁸ Similarly, the motion that the conference on the Constitution and Parliamentary Electorates and Elections (Amendment) Bill 1978 be held in the 'Public Works Committee Room' was amended, substituting a Council committee room.¹⁹

There is no restriction on the number of conferences that may be held on a matter, although it was ruled in 1875 in relation to the Lands Acts Amendment Bill that once there had been a free conference on a bill it was not usual to convene subsequently an ordinary conference on the same bill. On that occasion, a second free conference was convened at the request of the Council after the first had been convened at the request of the Assembly.²⁰

In 1978, the managers to the free conference on the Constitutional and Parliamentary Electorates and Elections (Amendment) Bill met a number of times over three days before the report of the managers was tabled and adopted in the House. Indeed, as discussed in Appendix 2, even after the report was adopted, the managers were given leave by the House to continue to meet with the managers for the Assembly to work on the bill.²¹

Ordinary conferences

At ordinary conferences communications between the managers of the Council and the Assembly must be in writing (SO 132).

There must be no less than five members appointed to be managers at an ordinary conference, but the number of managers must be the same as the number of managers representing the Assembly (SO 128(3) and 129(3)).

There has only been one ordinary conference convened since 1856. In August 1857, the Council established a select committee on 'the expediency of establishing a Federal Legislature'.²² The Committee tabled its report in October 1857, in which it was recommended that delegates of all the colonies assemble to frame a plan for federation.²³ In November 1857, the Council forwarded a message to the

18 *LC Minutes* (23/8/1899) 32.

19 *LC Minutes* (25/1/1978) 752-753.

20 *LC Minutes* (6/8/1875) 159-160.

21 *LC Minutes* (31/1/1978-7/2/1978) 768-770.

22 *LC Minutes* (19/8/1857) 7.

23 *LC Minutes* (20/10/1857) 13.

Assembly requesting that a conference be held to obtain its concurrence in a Joint Address to the Governor General on the matter. The message included the names of five managers for the Council.²⁴ According to former standing order 175 in force at the time, a request for a conference was taken to mean an ordinary conference, unless a free conference was specifically requested. The Assembly agreed to the Council's request, appointing its members and the time and place for the conference to take place. The conference convened on 9 December 1857, business of the Council being suspended for the duration of the managers' absence. On their return, the Council managers reported that the Assembly managers had agreed to present the draft of the Joint Address to their Speaker, together with the request for the Assembly's concurrence.²⁵

Free conferences

A free conference of managers is distinct from an ordinary conference in that managers are at liberty to confer freely with the managers for the Assembly both orally and in writing (SO 133(2)). Free conferences are intended to allow members to confer without any restrictions or limitations in order that negotiation and compromise may lead to a settlement.

The number of managers for a free conference must be not less than 10, but must consist of the same number as the Assembly (SO 128(3) and 129(3)).

While free conferences have up until now been conducted in relation to disagreement over bills (see Chapter 12, *The Legislative Process*), free conferences may also be conducted in relation to other matters. While such a free conference has never occurred, there are two instances where free conferences on a matter other than a bill have been proposed.

In December 1856, the Council proposed a free conference in order to obtain the concurrence of the Assembly in an Address to Her Majesty and to the two Houses of the Imperial Parliament in relation to the proposed separation of the northern districts of New South Wales to form the colony of Queensland, which Her Majesty's Government desired and which the Council and the Assembly opposed. In consideration of the Council's message, the Speaker ruled that the message was informal as it was in contravention of the Assembly standing orders.²⁶ The free conference did not go ahead as a result.

More recently, on 29 October 1996, the Standing Committee upon Parliamentary Privilege tabled its report into the Establishment of a Draft Code of Conduct for Members. The Committee recommended that a free conference be convened to consider a single Code of Conduct for all members of the Parliament.²⁷ Later that

²⁴ *LC Minutes* (13/11/1857) 22.

²⁵ *LC Minutes* (9/12/1857) 34-35.

²⁶ *Sydney Morning Herald*, 31 December 1856, p 5.

²⁷ Standing Committee upon Parliamentary Privilege, *Report on inquiry into the establishment of a draft code of conduct for Members*, Report No 3, October 1996, p 60.

day the Treasurer and Leader of the Government in the Council, the Hon Michael Egan, moved that the House take note of the report.²⁸ In the event, however, the order of the day for resumption of the debate remained on the Notice Paper until the end of the session, without being debated further.

Proceedings during conferences

Aside from the rule that only written communication is permitted at an ordinary conference, there are no standing rules or orders regulating the conduct of managers during a conference. Also, as no record of the proceedings of a conference is taken, there is scant information available on the conduct of past conferences.

However, following the free conference convened on the Constitution and Parliamentary Electorates and Elections (Amendment) Bill in 1978, the Clerk of the Parliaments, Mr Les Jeckeln, described the proceedings from the unofficial records kept by the Black Rod:²⁹

The first meeting of Managers was to take place on Tuesday, 31st January 1978, at 2.15 pm. The Council met at 2 pm and all its Managers were present. Business of the House was then suspended and the Managers proceeded to the Council Committee Room to receive the Assembly Managers. As the last Free Conference had taken place 50 years earlier – in the 1926-27 Session – no officer from either House had experience in the arrangements essential to such a conference and only the scantiest of guidance was available from past records.

Prior to the first meeting a small but important matter required to be decided: the layout of the room for the purpose of the conference. A long narrow table was placed down the centre of the room to permit the ten Managers from one House to sit opposite the Managers from the other House. As this would have brought the representatives within an arm's length of each other the room was re-arranged in favour of the Managers being seated at each end of the room in 'U' formations. The Premier sat in front of and acted as spokesman for the Assembly Managers and Sir John Fuller sat in front of and spoke for the Council Managers.

The room was not the most comfortable in the premises; and the fact that Managers quickly discarded their coats was due not to the fervour with which they might support their points of view but to the sticky conditions of a humid January and the lack of air conditioning.

... The first meeting of the Managers took place as planned. Council Managers were attended by the Usher of the Black Rod and Assembly Managers by the Serjeant-at-Arms. No official record of proceedings was kept.

28 *LC Minutes* (29/10/1996) 401.

29 See Evans J, Usher of the Black Rod, 'Constitution and Parliamentary Electorates and Elections (Amendment) Bill: Record of proceedings of Free Conference of managers and associated documents', 1978.

The conference proceeded over a period of three days during which the points of difference and areas of compromise were considered. It is understood that the conference was conducted with decorum, the Premier, the Hon Neville Wran, and the Leader of the Opposition in the Council, the Hon Sir John Fuller, doing the great bulk of negotiating with very little participation from other managers.³⁰

Reports of managers

At the conclusion of a conference the managers for the Council are required to report in writing on the outcome of the proceedings to the House as soon as practicable (SO 134). The report is read to the House by one of the managers. The standing orders do not prescribe the form or content of a report. Where agreement has been reached, the managers' report should detail the agreement. In the case of a conference to consider a bill, a report might include amendments agreed to, amendments no longer insisted upon, and any further amendments proposed to the bill.³¹

On tabling the report of the managers it is usual for it to be considered in committee of the whole. However, the committee of the whole is not bound by the agreement reported by the managers.

Conferences in other Parliaments

The distinction made in New South Wales between ordinary and free conferences does not exist in some other parliaments. For example, proceedings of a conference in the Commonwealth Parliament commence with an exchange of written reasons or resolutions before managers can confer freely.³² In Western Australia managers are at liberty to confer freely at the outset and there is no provision for written exchange of reasons.³³

Conferences are considered obsolete in the Westminster Parliament, although it remains possible for either House to request a conference. The last free conference between the House of Lords and the House of Commons was in 1836, its immediate predecessor in 1740, and the last ordinary conference was held in 1860. According to *Erskine May*:

Conferences between the Houses are now obsolete, since their main function, that of providing an occasion for communicating reasons for disagreement to amendments to bills, has been taken over by the modern practice of sending messages.³⁴

30 'Reform of the Legislative Council of New South Wales', *The Table*, Vol XLVII, 1979, pp 81-82.

31 See, for example, the agreement reached on the Constitution and Parliamentary Electorates and Elections (Amendment) Bill in 1978, *LC Minutes* (31/1/1978) 768-770.

32 Senate standing order 160.

33 Legislative Council of Western Australia standing order 401.

34 *Erskine May*, 23rd edn, p 715.

In the Commonwealth Parliament there have only been two conferences and these were in connection with disagreements between the Houses on amendments to bills.³⁵ According to *Odgers*:

The main reason for conferences falling into disuse is the rigidity of ministerial control over the House of Representatives. It is more efficient for senators involved with legislation to negotiate directly with the ministers who control what the House does with the legislation.³⁶

SEEKING INFORMATION ON THE PROCEEDINGS OF THE OTHER HOUSE

Where a House wishes to be acquainted with the proceedings of the other House in relation to the passage of a bill or any other matter, the official Votes and Proceedings or Minutes of Proceedings should be taken as evidence.³⁷ If it is further desired to inquire of the other House as to its progress on a matter, beyond that disclosed in the records of votes and proceedings, the proper procedure is for a select committee to be appointed to inspect the journals and other records.

This convention was the subject of a dispute between the Houses in 1879 when the Assembly sought, by message, to be informed of the steps taken by the Council on the report of its managers following the conduct of a free conference on the Parliamentary Powers and Privileges Bill.

On 9 April 1879, the Council agreed to a request from the Assembly for a free conference over amendments insisted on by the Council to the Parliamentary Powers and Privileges Bill.³⁸ The free conference was held and the report of the managers was set down for consideration in committee of the whole on the same day the following week.³⁹ The following week, on 17 April 1879, the motion that the President leave the chair and the House resolve itself into committee of the whole to consider the report of the manager of the free conference was negatived on division.⁴⁰

Subsequently, on 29 April 1879, a message was received from the Assembly requesting that it 'be informed of the steps taken by the Council on the report of its Managers of the said Conference'. The message was set down for consideration in committee of the whole for the next sitting day.⁴¹ When the order of the day relating to the Assembly's message was called, the motion for the President to leave the Chair and the House to resolve itself into a committee of the whole was amended to appoint a select committee

35 *Odgers*, 11th edn, p 537.

36 *Ibid*, p 540.

37 Ruling: Lackey, *LC Debates* (5/7/1888) 6104; Hay, *LC Debates* (2/5/1894) 2747.

38 *LC Minutes* (9/4/1879) 166.

39 *LC Minutes* (10/4/1879) 169.

40 *LC Minutes* (17/4/1879) 174.

41 *LC Minutes* (29/4/1879) 192.

to search the Journals of both Houses of the Imperial Parliament, and also the Records of both Houses of our Legislature, to ascertain and report on the Practice of Parliament in reference to sending Messages from one House to the other requesting information as to their Votes and Proceedings.⁴²

Later that same day, the report from the conference of managers, which had lapsed when the motion for the House to resolve itself into committee of the whole had been negatived, was restored to the Notice Paper.⁴³

The select committee's report on the practice of requesting information from the other House was tabled on 13 May 1879⁴⁴ and adopted by the House on division the following day.⁴⁵ The committee reported that it had found no evidence of a House sending a message to another House requesting information as to its proceedings. During subsequent debate on this matter, several members claimed that the independence and integrity of the Houses were at issue.⁴⁶

A message was subsequently forwarded to the Assembly indicating that this manner of obtaining information on proceedings in the House was not in accordance with parliamentary practice:

[T]he Legislative Council having been led to infer from the Report of 'its committee' that the Message from the Legislative Assembly of the 24th of last month does not seem to be in accordance with the mode sanctioned by Parliamentary usages of obtaining information with reference to any Bill while it is pending in the Legislative Council, requests that this answer to the Assembly's Message, which is now made out of the Council's unfeigned respect for the Assembly, may not be drawn into a precedent.⁴⁷

On 20 May 1879, the order of the day for consideration of the managers' report on the free conference concerning the Parliamentary Powers and Privileges Bill was discharged from the Notice Paper.⁴⁸

JOINT SITTINGS

Joint sittings of the two Houses are usually held to elect members to fill vacancies in the Council under section 22D of the *Constitution Act 1902* and to fill vacancies in the representation of the State of New South Wales in the Senate under section 15 of the Commonwealth Constitution. This is discussed in more detail in Chapter 8 (Conduct of Proceedings).

42 *LC Minutes* (6/5/1879) 199.

43 *LC Minutes* (6/5/1879) 200.

44 *LC Minutes* (13/5/1879) 207.

45 *LC Minutes* (14/5/1879) 220.

46 *Sydney Morning Herald*, 7 May 1879, pp 2-3.

47 *LC Minutes* (14/5/1879) 220-221.

48 *LC Minutes* (20/5/1879) 227.

RELATIONS BETWEEN THE HOUSES

In addition, joint sittings may be held for the resolution of disagreement between the Houses over bills under section 5B of the Act. A joint sitting under section 5B has been convened on only one occasion, on 7 April 1960, on the Constitution Amendment (Legislative Council Abolition) Bill 1959. This is discussed in more detail in Chapter 2 (The New South Wales Legislative Council).